Appeal No. UKEAT/0074/20/LA(V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 10 November 2020
Judgment handed down on
27 November 2020

Before

THE HONOURABLE MR JUSTICE BOURNE

(SITTING ALONE)

BERKELEY CATERING LIMITED — APPELLANT

MRS JEANNETTE JACKSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR SAM NEAMAN (of Counsel) Instructed by: Simons Muirhead & Burton 87-91 Newman St London W1T 3EY
For the Respondent	MS KATHERINE ANDERSON (of Counsel) Instructed by: Chadwick Lawrence Solicitors LLP Paragon Point Paragon Business Village Wakefield West Yorkshire WF1 2DF

A **SUMMARY**

UNFAIR DISMISSAL & REDUNDANCY

B An Employment Tribunal erred in holding that there was no "genuine redundancy" where the employer had arranged matters so that its Director took over the Claimant's duties in addition to his own duties, because those facts established a redundancy situation under section 139(1)(b) ERA, applying **Safeway Stores Plc v Burrell** [1997] ICR 523 EAT.

C

There was no error in the Tribunal's rejection of the employer's alternative case of some other substantial reason, holding that if there was a business reorganisation it was not the employer's

D true reason for dismissing the Claimant.

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THE HONOURABLE MR JUSTICE BOURNE

Introduction

1. The Appellant ("Berkeley") appeals against the judgment of the Employment Tribunal ("ET") sent to the parties on 6 December 2019, deciding that the Claimant ("Mrs Jackson") had been unfairly dismissed.

2. The background facts are set out in the judgment of Employment Judge Nash ("the EJ").

3. Berkeley is a company which provides catering and event management services. Mrs Jackson was first employed by it on 28 March 2013 as Commercial Director. On 4 January 2016 she was promoted to the post of Managing Director ("MD"), taking over that role from Mr Amit Patel. Mr Patel was the owner of the company and the son of its founders. Nine other managers reported to the MD. The EJ referred to a diagram of Berkeley's business structure "showing the claimant as Managing Director with Mr Patel, in effect, off to one side on the same level – as owner of the business".

4. From around 2017 Mr Patel increased the time that he spent in the business. Mrs Jackson's case was that he started to exclude her from activities and to disparage her. He "agreed frankly in oral evidence that he had undermined the Claimant and disparaged her to her reports". There were differences of opinion about her remuneration. On 8 March 2018, at a meeting which was ostensibly to discuss her pay, Mr Patel told Mrs Jackson that he intended to take over from her as MD. There were emails between him and HR, stating that he would "come in as CEO five days per week on a lower salary and the role would not be attractive to the Claimant". On 12 March 2018 Mr Patel announced that he was taking control of management decision-making and operation, with the title of CEO, and that the MD role would be redundant.

5. Berkeley sent Mrs Jackson an "at risk of redundancy" letter on 15 March 2018. At a meeting on 10 April 2018, Mr Patel told her that there was no suitable alternative work for her.

6. There was to be a final redundancy meeting on 19 April 2008 to consider suitable alternative work, including a "new creative role", but the latter did not eventuate and the meeting did not take place. On that date Berkeley confirmed that Mrs Jackson was made redundant and gave her notice. She asked about an appeal but none was arranged. On Berkeley's pleaded case termination took effect on 28 May 2018. On Mrs Jackson's pleaded case it took effect on 19 April 2018. Berkeley paid her a statutory redundancy payment.

7. Mrs Jackson issued a claim for unfair dismissal. The particulars of claim recited that Mr Patel "removed the Claimant from her position by placing himself as CEO within the company", denied that there was any diminished requirement within the company in respect of her role, stated that she was undermined by Mr Patel before being removed and denied that there was any redundancy. In the alternative Mrs Jackson contended that there was no fair redundancy procedure and that a new role of Events Director which was offered to a new recruit on 12 April 2018 would have been suitable for her. The particulars concluded:

> **"32. The Claimant submits that the Respondent acted in bad faith in dismissing the Claimant and without following a genuine process by considering the Claimant for the position of 'Events Director', or any other suitable position within the company.**
>
> **33. The Respondent was not genuine, nor candid about the redundancy situation, nor did the Respondent follow a fair procedure."**

8. In response, Berkeley identified the reason for dismissal as (1) redundancy, or alternatively (2) some other substantial reason ("SOSR") consisting of a business reorganisation.

9. In advance of the hearing on 22 August 2019, the parties agreed the following list of issues:

(i) Was there a genuine redundancy situation in respect of the Claimant's position as Managing Director?

(ii) If so, was the decision to dismiss by reason of redundancy reasonable? In particular, was there consultation, including an appeal, and consideration of suitable alternative work?

(iii) If there were any procedural flaws, should there be any Polkey deduction?

(iv) If there was no genuine redundancy situation, was there some other substantial reason for justifying dismissal? The Respondent relied upon a business re-organisation.

(v) If so, was the dismissal procedurally unfair?

(vi) If there was any procedural unfairness, should there be any Polkey deduction.

(vii) Sanction, did the decision to dismiss the Claimant come within a range of reasonable responses to the substantial reason for dismissal?

10. The EJ ruled that, as a matter of law and fact, there was no redundancy, and also that there was no business reorganisation constituting some other substantial reason for dismissal. On that basis she did not go on to consider questions of procedural fairness or the overall reasonableness of dismissal, or whether compensation for unfair dismissal should be reduced or eliminated for the reasons identified in **Polkey v AE Dayton Services Ltd** [1988] AC 344.

11. This appeal takes issue with those two findings, of no redundancy and no business reorganisation constituting SOSR.

Redundancy

12. There being no contention that the employer ceased or intended to cease carrying on all or part of its business, the relevant part of section 139(1) of the **Employment Rights Act 1998** ("**ERA**") provides:

> **"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –**
>
> **…**
>
> **the fact that the requirements of that business –**
>
> **for employees to carry out work of a particular kind, or**
>
> **for employees to carry out work of a particular kind in the place where the employee was employed by the employer**
>
> **have ceased or diminished or are expected to cease or diminish."**

13. The ET directed itself by reference to **Safeway Stores Plc v Burrell** [1997] ICR 523 EAT, in which Judge Peter Clark discussed the meaning of redundancy as defined in identical terms by the legislation which preceded section 139. He emphasized that the question for a tribunal is not whether there has been a diminution in the work requiring to be done. It is the different question of whether there has been a diminution in the number of employees required to do the work. Referring to **Carry All Motors Ltd v Pennington** [1980] ICR 806 he stated that where "one employee was now doing the work formerly done by two, the statutory test of redundancy had been satisfied", even where the amount of work to be done was unchanged. As EJ Nash put it in the present case, "it is only necessary that an employer needs fewer workers, irrespective of whether the amount of work which needs to done [sic] has diminished".

14. The EJ therefore asked herself whether the requirements of the business for employees to carry on work of a particular kind (as MD) had diminished. She decided that they had not, for these reasons:

> **"47. … according to his witness statement, Mr Patel had decided that 'the business would operate more effectively if I was to take on the MD role'. Mr Patel was, in effect, putting more time into his business. Having previously reduced his role, following his marriage he increased his role in the business. There was no diminishing need for an MD role. The role of MD continued with Mr Patel fulfilling it. He had started to do some of the role before he informed the Claimant of the stated redundancy. He did more of the role during the stated consultation process.**
>
> **48. The need for what might be described as a Managing Director function was not diminishing. An external HR Consultant suggested that, such was the burden on the MD role including nine reports, that it would be advantageous to recruit an Operations Director in addition. This indicated that the MD role was overloaded rather than there being a diminishing need for it.**
>
> **49. The Respondent's case was that Mr Patel took over only part of the Claimant's role thus, it is understood by the Tribunal, indicating that there was a diminishing need for the MD role, because other staff were taking over various functions.**
>
> **50. However, the evidence showed that Mr Patel, as he frankly told the Tribunal, was deliberately cutting the Claimant out of the business and undermining her as MD. He also frankly admitted that this was happening without her being informed.**
>
> **51. This was not, accordingly, a situation where there was a diminishing need for an MD, or an MD function, because the duties were being filled by other staff. In contrast, this was a deliberate and undenied attempt to undermine the person who was fulfilling the role of MD at the material time by the person who was about to take over.**
>
> **52. In addition, there was no evidence that there was a general diminishing need for senior staff in the Respondent's business. Mr Patel became MD, and the respondent took on an Events Director at this time resulting in additional senior management capacity in the business.**
>
> **53. In addition, there was no good evidence of a financial need to cut costs in the business. There had been £1.2m increase in sales during the Claimant's employment. Mr Patel accepted that there had been no reduction in head count or business outgoings at the time of the redundancy. Although, there was a suggestion in an email that this was going to happen, the Tribunal had no sight of a business structure post-dismissal to show any reduction in head count or any documents showing a reduction in outgoings. As such evidence would have been within the respondent's control, the Tribunal drew an adverse inference from the lack of such evidence. The Tribunal found on the balance of probabilities on the evidence before it that there was no material reduction in outgoings or head count at the time of the dismissal."**

15. Mr Neaman, representing Berkeley in this Tribunal (but who did not appear below), contends that the EJ strayed into the error identified in **Safeway** of asking whether there was a diminution in the amount of relevant work i.e. the "MD function", instead of asking whether there was a diminution in the employer's requirement for employees to do that work.

16. Further or in the alternative Mr Neaman contends that the EJ erred by having regard to four irrelevant factors, demonstrating a failure to focus on the correct question under section 139(1)(b):

i. The lack of a general need for senior staff, evidenced by the recruitment of an Events Director (judgment paragraph 52).

ii. Whether there was an overall reduction in headcount or business outgoings (judgment paragraph 53).

iii. The question of whether Berkeley had shown a need to cut costs in the business (judgment paragraph 53).

iv. The finding that Mr Patel deliberately cut Mrs Jackson out of the business (judgment paragraphs 50-51).

17. Ms Anderson, representing Mrs Jackson, argues that phrases used by the EJ such as "the MD role" and "an MD function" merely reflected the way in which Berkeley had put its case, i.e. Berkeley had contended that the relevant work had diminished and the EJ simply rejected that contention.

18. As to the alleged taking into account of irrelevant matters, Ms Anderson ripostes:

i. The relevance of the recruitment of an Events Director was its inconsistency with Mr Patel's claim to have taken full control of decision making and operation.

ii. Since Mr Patel on 10 April 2018 had told Mrs Jackson that he intended to cut costs, the ET was entitled to draw an adverse inference from the lack of evidence that Berkeley had reduced head count or outgoings.

iii. See b above.

iv. The deliberate exclusion of Mrs Jackson was relevant to the question of whether there was a genuine redundancy situation or one which had been engineered and was not the real reason for the dismissal.

19. Ms Anderson further submits that even where there is a redundancy situation, it is still for the employer to prove that redundancy was the reason for the dismissal. In this case, she points out, the EJ found that Mr Patel deliberately undermined Mrs Jackson, suggesting that the true reason for dismissal was personal to her and was not redundancy, even if a redundancy situation existed.

20. In my judgment the EJ did stray into error. In particular, the undermining of Mrs Jackson was not relevant to the question of whether a redundancy situation existed. It seems to me that the EJ may have been distracted by the question having been framed as whether there was a "genuine" redundancy situation (see 9(i) above). A redundancy situation under section 139(1)(b) either exists or it does not. It is open to an employer to organise its affairs so that its requirement for employees to carry out particular work diminishes. If that occurs, the motive of the employer is irrelevant to the question of whether the redundancy situation exists.

21. What, then, was meant by "genuine"? One possible interpretation is that a redundancy was "genuine" if in fact it was the reason for a dismissal, and was not genuine if there was a different reason. However, that was not how the issue was framed, and the list of issues did not include any question of whether, if there was a redundancy, it was the real reason for dismissal.

22. Of course, that does not mean that an employer's motive and its conduct towards the individual employee are not relevant to the claim for unfair dismissal. First, even where a

redundancy situation exists, it does not necessarily follow that the redundancy was the reason for the dismissal. See, for example, **Timex Corporation v Thomson** [1981] IRLR 522 EAT, where it was held that an actual redundancy situation was or could have been a mere pretext for getting rid of an employee whom the employer wished to dismiss. Second, even if the employer proves that the reason was a potentially fair reason such as redundancy, section 98(4) ERA requires the tribunal to decide "whether in the circumstances … the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee". A claim may succeed on the basis of substantive and/or procedural unfairness.

23. In the present case it seems to me that there was an elision of matters relevant to the question of whether there was a redundancy situation, and matters relevant to the potential further question of whether redundancy was the reason for dismissal and perhaps the question of whether the employer in all the circumstances acted reasonably.

24. Applying **Safeway**, the findings set out in paragraphs 47-49 of the ET's judgment show that there was a redundancy situation. Berkeley arranged its affairs so that Mr Patel, with or without other existing employees, absorbed the work of the MD, whatever his reasons for doing so. There was therefore a diminution in the requirement of the business for employees to carry out work of that kind and accordingly a redundancy situation.

25. I can understand why the EJ inquired whether there was a diminished need for "senior staff". If in fact a new Events Director had taken over at least some of the MD's work, or had taken over some of Mr Patel's work which freed him to take over the MD's work, that could have founded an argument that there was no diminution in the requirement of the business for employees to carry out work at a senior level (though the employer might then rely on business

reorganisation). However, the EJ's findings of fact do not contradict Berkeley's case that Mrs Jackson's duties were absorbed by existing staff, thereby proving the relevant diminution. The findings might have been relevant to the overall reasonableness question if the ET had proceeded to answer it, but they were not an answer to the redundancy question.

26. Similarly, findings about headcount and cost-cutting could have been relevant to reasonableness but were not relevant to the redundancy question.

27. Nor was the finding about the undermining of Mrs Jackson at work an answer to Berkeley's contention that there was a redundancy situation, as I have explained at paragraph 20 above. That too potentially had more to do with the question of overall reasonableness.

28. For these reasons the ruling that there was no redundancy cannot be upheld, and Ground 1 of the appeal therefore succeeds.

Business reorganisation

29. Section 98(1) **ERA** provides that in determining whether a dismissal is fair, it is for the employer to show the reason for the dismissal and that it is either a reason specified in subsection (2) (e.g. redundancy) or "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". It is not uncommon for employers to rely on a business reorganisation as a reason falling within the residual SOSR category.

30. It has been said that an employer wishing to show that a reorganisation constitutes a substantial reason for a dismissal must demonstrate that it has discernible advantages to the

business, though it is not necessary to show the "quantum of improvement": **Kerry Foods Ltd v Lynch** [2005] IRLR 680, EAT per Judge Peter Clark, paragraph 14.

31. In the present case, the EJ found that there was no reorganisation which could have been a reason for dismissal:

> **"58. The Tribunal sought to identify the re-organisation. The Tribunal had not accepted the Respondent's case that there was a restructuring in May 2017, for the reasons set out above. This left the re-organisation, such as it was, of Mr Patel taking over the Claimant's role as MD. The MD role remained –filled by Mr Patel. There was no wider re-organisation, save for the appointment of an Events Manager and there was no suggestion that this position would take over some of the MD's duties. In the view of the Tribunal, this was the difficulty for the Respondent in arguing that there was a re-organisation."**

32. The EJ went on to find a lack of business reasons for any re-organisation (judgment paragraph 59), a lack of documents relating to it (paragraph 61) and no evidence for a reduction in headcount (paragraph 63). She rejected allegations by Berkeley of poor performance by Mrs Jackson, finding that these were created to undermine her and justify the dismissal (paragraph 67). The reason for dismissal related to the Claimant as an individual and was not a business restructure (paragraphs 74-75).

33. Mr Neaman argues that this was erroneous in law because "Mr Patel taking over the Claimant's role as MD" was in itself sufficient to amount to a business reorganisation. He says that the EJ erred by considering the rationale for the reorganisation (which may go to reasonableness but not to the existence of a reorganisation), the lack of documentation (because the reorganisation in the form of Mr Patel becoming MD clearly happened, whether documented or not), the lack of a clear structure after the reorganisation (Mr Neaman says this consisted simply of Mr Patel replacing Mrs Jackson) and the lack of clear advantages to the new structure (irrelevant to the existence of a reorganisation).

34. In response, Ms Anderson argues that the EJ did not make a finding that the replacement of Mrs Jackson by Mr Patel could not constitute a reorganisation, but more simply rejected the assertion that such a reorganisation could amount to a "substantial reason" for dismissal such as could satisfy section 98(2) **ERA**.

35. In my judgment, Ms Anderson's interpretation is correct. The EJ clearly rejected Berkeley's case on the facts, finding that it dismissed Mrs Jackson for personal reasons and not because that dismissal was necessitated by a business reorganisation, whether or not the changes which took place amounted to a business reorganisation.

36. I therefore would not have allowed the appeal on ground 2.

Conclusion

37. For the reasons given in respect of ground 1 above, the appeal is allowed.

38. The surviving issues must be remitted to the ET. However, it is necessary to decide what precisely to remit, and to whom it should be remitted.

39. As I have said, on the facts as found there was a redundancy situation. I see no reason why those facts should be retried. I therefore exercise this Tribunal's power under section 35 of the **Employment Tribunals Act 1996** to make a declaration which could have been made by the ET, that there was a redundancy because there was a diminution in Berkeley's requirement for employees to do work of the kind done by Mrs Jackson, that work being done by Mr Patel in addition to his own work.

40. Mr Neaman in argument accepted that if the redundancy is established, there is no need for Berkeley to mount an alternative case of SOSR. The issues relating to that limb of the case therefore fall away.

41. It seems to me that it therefore remains for the ET to decide:

i. Was the redundancy situation the reason for the Claimant's dismissal?

ii. If so, was the decision to dismiss by reason of redundancy reasonable, both substantively and procedurally?

iii. If dismissal was unreasonable for procedural reasons, should there be any **Polkey** deduction?

iv. If the dismissal was unfair (having regard to i-iii), what remedy should be awarded?

42. As to question i, I have asked myself first what was the significance, if any, of that question not appearing in the agreed list of issues in the ET. In short, I do not think that either party, by omitting it, was accepting what the answer to it would be. For Mrs Jackson in particular to accept that any "genuine" redundancy was in fact the reason would have been, in my view, inconsistent with her case on SOSR which the EJ tried and upheld.

43. Second, I have asked myself whether question i has already been answered by EJ Nash in her rejection of Berkeley's case as to SOSR, for example at paragraph 74 where she said that "the reasons for dismissal related to the Claimant as an individual, rather than to the role she held", and whether that finding should be left undisturbed.

44. As to that, I apply the law as stated in **Jafri v Lincoln College** [2014] IRLR 544 per Laws LJ at [21]:

> **"If … the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been."**

45. It is at least possible that the EJ, if she had recognised that there was a redundancy and that a redundancy situation can be brought about by an employer arranging its affairs in a particular way, would have arrived at a different conclusion. Accordingly question i will be remitted.

46. It is not obvious whether to remit the case to the same EJ or to a different one.

47. Ms Anderson points out that the EJ's findings of fact can survive my decision on the existence of a redundancy situation, i.e. the legal consequence of the found facts. She argues that Berkeley should not have a second bite of the cherry by attempting to persuade a new tribunal that its reasons for dismissal were not those identified by EJ Nash, and that it would not be proportionate to start anew with a different EJ.

48. Mr Neaman, on the other hand, submits that in view of the error identified by ground 1, his client cannot be confident in the ET's handling of the remaining issues. The "second bite of the cherry" is an unavoidable consequence of remitting any case. A re-hearing of what was a one-day case, he says, is not disproportionate.

49. In **Sinclair Roche & Temperley v Heard** (which was approved by the Court of Appeal in **Barke v SEETEC Business Technology Centre Ltd** [2005] IRLR 633), Burton J at [46] identified a list of six factors potentially relevant to this decision. I have considered these and do

not think it necessary to reproduce the list. In my judgment the factor carrying the greatest weight in the present case is:

> **"46.5 *Second bite.* There must be a very careful consideration of what Lord Phillips in English (at paragraph 24) called 'A second bite at the cherry'. If the tribunal has already made up its mind, on the face of it, in relation to all the matters before it, it may well be a difficult if not impossible task to change it: and in any event there must be the very real risk of an appearance of pre-judgment or bias if that is what a tribunal is asked to do. There must be a very real and very human desire to attempt to reach the same result, if only on the basis of the natural wish to say 'I told you so'. Once again the appellate tribunal would only send the matter back if it had confidence that, with guidance, the tribunal, because there were matters which it had not, or had not yet, considered at the time it apparently reached a conclusion, would be prepared to look fully at such further matters, and thus be willing or enabled to come to a different conclusion, if so advised."**

50. I do not doubt the ET's professionalism (the sixth of Burton J's factors), but in my view, having regard to the findings already made, it would be unrealistic and unfair to ask EJ Nash to return to the question of the reason for dismissal as if for the first time. The case is of sufficient value to make it proportionate for a further hearing (for two days, to include remedy if needed) to take place.

51. This will be frustrating for Mrs Jackson, who obtained findings of fact in her favour, but I bear in mind that those were based in significant part on Mr Patel's evidence, for example his frank admission recorded by EJ Nash at paragraph 50 of "deliberately cutting the Claimant out of the business and undermining her as MD". At a remitted hearing, cross examination will no doubt highlight any departures from the evidence given below, as recorded by the parties' notes or as noted in this judgment or in the reasons given by EJ Nash.

52. The case will therefore be remitted for a differently constituted ET to decide the questions listed at paragraph 41 above.