Appeal No. UKEAT/0003/11/CEA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 27 May 2011

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

BARONESS DRAKE OF SHENE

SIR ALISTAIR GRAHAM KBE

GARSIDE AND LAYCOCK LTD APPELLANT

MR T G BOOTH RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR STEFAN BROCHWICZ-LEWINSKI (of Counsel) Instructed by: Messrs Napthens LLP Solicitors 7 Winckley Square Preston PR1 3JD
For Respondent	Written Submissions

SUMMARY

UNFAIR DISMISAL - Reason for dismissal including substantial other reason

Employment Tribunal considered reasonableness/fairness of employer's decision to dismiss for "some other substantial reason" by reference to principles of law derived from **Catamaran v Williams** when that case had actually decided the reverse; and by asking whether it was reasonable for the employee to accept lesser terms offered to him and avoid dismissal, rather than whether it was reasonable for the employer to dismiss. Appeal upheld.

Observations upon the considerations that may apply where a Tribunal is considering dismissals for a failure to accept wage-cutting proposals inspired by economic downturn in the business

THE HONOURABLE MR JUSTICE LANGSTAFF

Introduction

1. Garside and Laycock were a company that provided building and maintenance services to public sector clients, providing low-value maintenance, minor works and higher-value project work. It thus seems likely that the business was labour intensive. In 2009 it was undergoing trading difficulties. As the Manchester Employment Tribunal, against whose decision Garside and Laycock appeal, were to find, their predicted sales in the year 2008-2009 had dropped from the previous year. The gross profit was low; to maintain the work at least a two per cent profit needed to be demonstrated. A consequence was that the employer decided to ask its employees to accept a reduction in pay. What was proposed was a reduction of five per cent. The Respondent employee was only one of two members of the workforce who ultimately refused to accept such a cut to his pay packet. He was dismissed on 5 October 2009 from his job as a welding maintenance worker which he had held for the previous seven years. The dismissal was to take effect from 25 December 2009. It was that dismissal which was found on 20 October 2010 to be unfair by Manchester Employment Tribunal, (Employment Judge O'Hara together with Mrs Garcia and Mr Rawcliffe). The Tribunal's reasons were written out eight days later.

The underlying facts

2. The underlying facts are set out in what Mr Brochwicz-Lewinski, for the Appellant, has invited us to say is a relatively comprehensive fact-finding exercise. In summary, taken from the Employment Tribunal reasons, they are as follows. The employer had a "number of meetings" at which all staff were addressed by management, telling them of "high-level" business forecasts and predictions. After those meetings, at a time in April 2009 the employees were asked to indicate on a written slip whether, in order to avoid possible further

redundancies, they would accept a pay reduction of five per cent with effect from the May 2009 payroll. The letter asked that the employees agreed to accept a majority vote of 51 per cent or more; it sought 100 per cent agreement, and insisted that abstentions would be counted as a vote in favour of the change. A substantial majority of the employees voted in favour (77); 7 abstained; 4 voted no. Of those four, two were already subject to disciplinary hearings in respect of gross misconduct, for which they were subsequently dismissed. The Tribunal made no finding, although it had evidence before it, we are told, that, of the remaining two, one subsequently accepted the pay cut. If that is so, it left the Respondent as the only employee who held out for his previous pay level. It was unilaterally imposed upon him.

3. He had meetings with Mr Garside (they were three in number, identified by the Tribunal). One was in or before July 2009; the next on 5 October 2009, the date of his dismissal, where he was offered a new contract which gave him the option of either having the new terms and conditions offered to all staff or to maintaining the terms and conditions save as to pay which he had inherited from a previous employer, presumably under TUPE, and which included the possibility of bonuses which the old contract did not, but the Claimant was not prepared to accept. That offer was repeated to him on 7 October 2009. He appealed against the decision to dismiss him for failing to accept the pay cut. During the appeal hearing he was offered a review of his pay levels after six months, but he rejected that too. Ultimately, therefore, he was dismissed.

The Tribunal's Decision

4. The Tribunal decided against that background that the employer here had to establish "some other substantial reason" as a ground for dismissal, and it had done so (paragraph 10). It then turned to determine the question of whether dismissal was or was not reasonable. What

the Tribunal had in mind, and given the familiarity of section 98 had no need to set out in terms, were the statutory requirements. Section 98(1) provides:

> **"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
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> **(a) the reason [...] for the dismissal and**
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> **(b) that it is either a reason falling within subsection (2) 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 being common ground that the employee did not fall within any of the categories set out in 98(2), the employer had to show (the burden of proof being on the employer) that there was here some "other substantial reason of a kind such as to justify the dismissal of an employee …".

5. Section 98(4) provides that:

> **"[...]where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
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> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
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> **(b) shall be determined in accordance with the equity and the substantial merits of the case."**

6. The Tribunal embarked on this second question under section 98(4) by saying that it sought to balance the relative advantages and disadvantages of the reduction in pay and the imposition of new terms and conditions. Reliance had been placed before it by a solicitor then appearing for Garside and Laycock upon the decision in **Catamaran Cruisers Ltd v Williams and Others** [1994] IRLR 386. This Tribunal said this of that case:

> **"The Tribunal noted the facts in that case as described in the Employment Tribunal's judgment:**
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> > **'We think that the summary which we have made in this paragraph represents the way in which a tribunal should look at the matter in that only one of the things which a tribunal must consider is a comparison of the new terms with the old. It must also consider why the employer is proposing the changes and, if the employers' financial situation is so desperate that the only way of saving his business is to propose stringent reductions in pay and conditions, differing from those which the employees have previously enjoyed, then it is possible that a dismissal for refusing to accept those stringent terms and conditions could be regarded as fair.'**
> >
> > **See paragraph 20 of the EAT judgment**
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> **Mr Boyle did not submit that the facts of this case were comparable. There was no suggestion that the respondent would be unable to save the business unless this pay cut was accepted. On the contrary, Mr Garside told the Tribunal that they had made a 'pleasing profit' in the year end. Mr Reader** [another witness called by the company] **said in evidence that the respondent had not achieved the savings they had hoped to and would be making further redundancies. This seemed to suggest an inconsistency on the issue between the respondent's witnesses. However, on either view, the respondent could not be said to be 'desperate'."**

7. The Tribunal further returned to the **Catamaran** decision at paragraph 13, where it said:

> **"[...] the EAT held that the Tribunal must also examine the employer's motives for the changes and satisfy itself that they are not sought to be imposed for arbitrary reasons. The Tribunal considered that whilst the evidence of the respondent did not show that their attempt to impose the pay cut could be described as arbitrary, it did find that it lacked cogency."**

8. Then it added this:

> **"The process by which they sought to engage in what they described as consultation was open to criticism. The respondent opposed the pay cut after it had engaged in a poor attempt at consultation. The fact that employees were required to sign the voting paper and that abstentions were treated as a yes vote rendered the process less than effective as a form of consultation. The Tribunal considered that the respondent had closed its mind to any other option than imposing a pay cut. Although both witnesses referred to short time working and redundancies, they were unclear as to how many employees had been dismissed by reason of redundancy and neither gave any evidence of short time working."**
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> **14. In fact the respondent has not replaced the claimant and is using outside contractors to do the work which he did. Balancing the advantages and disadvantages of a pay cut and the refusal to accept it, the Tribunal concluded that it was reasonable for the Claimant to seek to maintain terms and conditions which he had enjoyed for many years and in particular not to agree to a significant reduction in pay in favour of an uncertain bonus scheme."**

9. It was for those reasons it found the dismissal to be "fair." It meant "unfair," and that was subsequently remedied by a Certificate of Correction.

10. It is plain to us that those self-directions contain at least three reasons why the decision of this Employment Tribunal cannot stand. They may not be the only reasons. First, the effect of the decision is to suggest that the Tribunal regarded the test which it should apply was to ask whether the employer was in a situation so desperate that the only way of saving the business was to propose stringent reductions in pay and conditions. For that approach it relied upon the **Catamaran** case. We cannot understand how the Tribunal came to regard **Catamaran** as having established that proposition. True it is that the Judgment of the Employment Appeal Tribunal contains the passage which the Tribunal cited in full. However, it did that only to point out that that passage contained an erroneous statement of law.

11. It may have been that the Tribunal whose decision here we are reviewing was misled by the opening words of the next paragraph in **Catamaran** (paragraph 21), which began, "that is a clear statement of the principle of law to be applied [...]" when it is plain once the decision is read as a whole that this Tribunal was saying that was the Tribunal's clear self-direction, which was plainly wrong. In paragraph 19 of the **Catamaran** decision, this is said by Tudor Evans LJ for the Tribunal:

> **"[...] neither *Richmond Precision Engineering Ltd v Pearce* [1985] IRLR 179 nor *St John of God (Care Services) Ltd v Brooks* [1992] IRLR 546 supports the proposition stated in paragraph 8 of the decision, that if the new terms of a contract of employment are much less favourable to the employee than the terms of the old contract, then the employee is not unreasonable in refusing to accept them and his dismissal will be unfair unless the business reasons are so pressing that it is vital for the survival of the employers' business that the new terms be accepted. We have been referred to a number of other authorities on the question of the need for business re-organisation and none of them supports this proposition: see, for example, *Hollister v National Farmers' Union* [1979] IRLR 238 CA and *D R Ellis v Brighton Co-operative Society Ltd* [1976] IRLR 419 EAT. We do not accept as a valid proposition of law that an employer may only offer terms which are less or much less favourable than those which pre-existed if the very survival of his business depends upon acceptance of the terms. In *Genower v Ealing, Hammersmith & Hounslow Area Heath Authority* [1980] IRLR 297 in paragraph 18 at page 299, Slynn J (as he then was) observed:**
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> > **'It is perfectly plain on the decision of the Court of Appeal in *Hollister* which is followed by this Tribunal in *Bowater Containers Ltd v McCormack* [1980] IRLR 50 that a re-organisation or re-structuring of a business may well be a reason which**

falls within section 57(1)(b) [the statutory predecessor of what is now section 98(1)]**. Indeed, it may be that, if, to quote from the Court of Appeal Judgment, "a sound good business reason is shown," this may constitute "a substantial reason" within the meaning of the section, even if the alternative to taking the course they propose is not that the business may come to a standstill, but is merely that there would be some serious effect upon the business."'**

12. It is thus clear that this Tribunal selected from **Catamaran** not the principle that was adopted on appeal but the very principle that was rejected. It appears to have analysed the facts in the light of that approach. That was plainly and obviously wrong.

13. Matters however do not stop there. In paragraph 14 the Tribunal assessed the reasonableness of the decision by asking what it was reasonable for the Claimant to do; that is simply the reverse of the statutory question that ought to be asked. Section 98(4) is to be answered by asking whether in the circumstances:

> **"[...] the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee."**

14. The focus of the Tribunal's attention is thus required to be on the reasoning and reasonableness of the employer and not upon what it is reasonable or unreasonable for the Claimant to do. It may well be, and we would generally hope and expect, that the decision of an employer, in order to be reasonable, will take account of whether the employee himself affected by the decision regards it as reasonable or unreasonable; but that is very different from saying that the decision depends upon what the employee thinks is reasonable or unreasonable. That very point is clear in the authorities. Thus, in **Chubb Fire Security Ltd v Harper** [1983] IRLR 311 the Employment Appeal Tribunal, Balcombe J presiding, dealt with the question that arose when an Industrial Tribunal had considered whether it was reasonable for an employee to decline the new terms of a contract. The Tribunal's judgment had said:

"If it was reasonable for him to decline these terms then obviously it would have been unreasonable for the employers to dismiss him for such refusal."

15. The Judgment of Balcombe J makes it clear that that was a wrong approach. He stated:

"We must respectfully disagree with that conclusion. It may be perfectly reasonable for an employee to decline to work extra overtime having regard for his family commitments, yet from the employer's point of view having regard to his business commitments, it may be perfectly reasonable to require an employee to work overtime. [...] We agree with the comment [...] in 'Harvey on Industrial Relations in Employment Law' [...] 'it does not follow that if one party is acting reasonably the other is acting unreasonably.'"

16. Put simply, the focus in paragraph 14 of the Manchester Tribunal's reasoning was on the wrong party.

17. In paragraph 13, the Tribunal use the expression "cogency"; one of the reasons it gave for rejecting the employer's approach here as reasonable was that it lacked cogency. We simply do not understand what the Tribunal meant. 'Cogency' to us, in accordance with its definition in the Oxford English Dictionary, "is that which has a convincing quality about it, or which is of logical or persuasive force." There is nothing lacking of cogency, understood in that sense, about a business facing what the Tribunal accepted were trading difficulties seeking to reduce its costs, and nothing that would suggest that it was inherently unreasonable to seek to ensure that all members of the workforce were on the same pay scales and that one man did not stand out by being paid more purely because he had refused to accept a cut that all others around him were prepared to have.

18. It has been pointed out to us by Mr Brochwicz-Lewinski that there is a further opacity in the reasoning in paragraph 12. There the Respondent employer below touched upon that which

we have just mentioned: the disadvantage of having only one person on terms and conditions different from other staff. But the Tribunal commented:

> **"This referred to the old contracts which the respondent had inherited. The Tribunal considered that if it allowed this argument it would have the effect of undermining the protection afforded by the Transfer of Undertakings (Protection of Employment) Regulations 2006."**

19. It was pointed out to us by counsel (we think, with force) that since the Tribunal had earlier found that the employer was prepared to permit the employee to retain his old terms and conditions save as to pay, or, if he wished, to have the new terms and conditions, there was nothing that might be said to have the effect of undermining any protection afforded by TUPE; nor can we easily understand the reference to the Tribunal's linking the comment to old contracts which the Respondent had inherited. On the face of it, it may be much more that it had in mind the point made in particular by Lord Johnston in **Grampian Country Food Group Ltd v McNally** [2004] EATS/0035/04, where he noted that a Tribunal decision might have to reflect the fact that only one of the workforce had not accepted a new regime and that it must:

> **"[...] be a relevant factor in assessing the reasonableness of the dismissal, that it was necessary to prevent one man continuing to work on the old system which could have led to discontent among the employees, and disrupt industrial harmony."**

Conclusion

20. Such are the mistakes that we have no hesitation in concluding that this appeal must succeed. The substantial argument before us has been what the consequence should be. It is argued by the successful Appellant company that we are in the same position as was the Tribunal, having before us all the relevant facts, and therefore should reach our own decision upon those facts. Mr Brochwicz-Lewinski asks us, effectively, to say that it would be perverse

not to do so. His reasons are the Tribunal was prepared to accept the employer's reason for dismissal as a substantial reason, within s.98. It could not be said there had been no consultation; there had been meetings, a number of them, prior to the vote. A vote of the type conducted by the employer here was not a measure that many employers went so far as to conduct. The vote was overwhelming; even after that, there were three meetings with the Claimant prior to or around the time he was given notice of dismissal, followed by an appeal as to which there was no criticism by an otherwise critical Tribunal, thus showing that he had been fully consulted. Counsel rhetorically suggested that it could not be said that the approach of offering the possibility of a review of the terms as to pay after six months was inherently unreasonable. This employer, he would argue on the facts, went out of its way to accommodate the reluctance of the Claimant to accede to the pay cut. He argues that there really is here no fact undiscovered by the Tribunal that would be capable of affecting the ineluctable conclusion from those basic facts that this was a case in which a dismissal for the identified reason was fair.

21. We see that this argument has much to be said for it. It may well be that considerations like it ultimately persuade a Tribunal of their correctness, but we have come to the conclusion that the second, though secondary, option presented by Mr Brochwicz-Lewinski in his skeleton should be adopted; namely, to remit this case to a Tribunal for rehearing. Our reasons are these. First, so comprehensive was the error of the Employment Tribunal here, compounded as to the approach to be taken, that we see it may well not have had a focus or interest in establishing those facts which might otherwise relate to the reasonableness of the dismissal. The central fault arising in paragraph 11 was compounded by the other errors which we have identified as clear, or which we think counsel might be justified in asserting. We thus have no real

confidence that we have placed before us a decision which is careful as to the facts, upon which any decision we made would have to be based.

22. The submission made by counsel that there realistically could not be any facts of sufficient weight to cause a reasonable Tribunal, properly directed, to conclude that the dismissal was anything other than fair deserves respect. However, we return to the questions the Tribunal would have to ask. Here, the new Tribunal must begin by accepting that the employer has already discharged the burden of proof in showing that there was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position that the employee held. On a casual reading, it might seem that that answers much of the question to be posed under section 98(4): that of fairness. But it is right to point out that "some other substantial reason" is identified not in terms of a specific reason which justifies dismissal but as being of a kind (or, if you like, category or class, but 'kind' is the statutory word) as to justify the dismissal of *an* employee; in other words, it is a broad category of case. To identify that there is a substantial reason falling within 98(1)(b) does not therefore answer the question whether it is reasonable or unreasonable for the employer to dismiss a given employee for that reason.

23. In respect of that section 98(4) question, an Employment Tribunal must look at the circumstances as identified by (4)(a); but it also has to determine the question, "in accordance with equity." That word may have a particular force in circumstances where for instance an employer proposes cuts in the wages of the workforce. It may be highly relevant to a decision as to fairness for a Tribunal to consider upon whom of the workforce those cuts would fall. Here it may well be that they fell across the workforce as a whole, but, speaking more generally, there may be situations in which management proposes a cut to the pay of those who

are not in management, but retains the pay of those who are in management as it has always been. A Tribunal would have to consider whether equity, with its implied sense of fair dealing in order to meet a combined challenge of reduced trading profits, would be served by dismissals of those refuseniks not in management in such a case. Similarly, reasonableness will depend much upon the procedural aspects of a decision. That often requires a close focus upon the nature of those proceedings and how appropriate they were. It might involve issues as to the extent to which the workforce were or were not persuaded by reasons which were not good and proper reasons for adopting a common approach in favour of cuts, when otherwise they might not have done so.

24. All these are theoretical considerations; we do not say they necessarily apply to the present case. We do note that within the Tribunal's decision there is no reference to other cost-saving measures which the employer might have taken. It is pointed out by the lay members in particular that when facing straitened economic circumstances an employer would almost certainly wish normally to reduce costs in a number of different ways as part of an overall cost-saving package. Here there is no finding as to that. It might well be that, had the Tribunal properly considered all the facts placed before it, it would have come to such a finding, but we cannot say necessarily that it would, or that in the process of reaching such a finding there might not have been questions to be asked and answered. Our difficulty is simply that we cannot be sure here that this Tribunal, having come to the conclusion it did, and displaying its firm view (as counsel rightly describes it) as to the unfairness of the conduct of the employer, had not closed its mind to looking at the question of reasonableness as it should have done, and therefore may not have determined all the facts that might be relevant.

25. It is a further consideration, not without force, that the employee himself has neither been before us nor has been represented before us. The case was listed; he raised an objection to the date for this hearing, indicating that it is on the last possible date in May, which he had tried to exclude. He was prevented by reasons of his own therefore from attending the hearing. He did not ask for an adjournment, but in his absence and the absence of any representation on his behalf we again lack the necessary confidence that we feel in these circumstances we should have if we were to determine this case for ourselves.

26. Whilst acknowledging therefore the force of the submissions made to us, in the event we feel unable to accede to them; we adopt the second and secondary course urged upon us. A consequence of our allowing the appeal is therefore that this case will be remitted to a fresh Tribunal for rehearing. We are urged by counsel that this should be a Tribunal different from the O'Hara Tribunal which heard the case before us; we agree. There is a real risk, it seems to us, that that Tribunal would, because of the way in which it analysed the matter below, not be in a position to come to a truly uninfluenced decision on the merits of the case properly instructed in law. The new Tribunal will be, we are pleased to recognise, unlikely to require much by way of time; the Tribunal whose decision is appealed to us took one day. The new Tribunal will begin on the basis that some other substantial reason has been established; the only issue is whether, in the light of that particular reason, it was or was not fair to dismiss the employee, having regard to all the circumstances, equity and the substantial merits of the case.

27. To that extent, this appeal is allowed, with gratitude for counsel's eloquent, cogent and persuasive submissions.