Appeal No. UKEAT/0027/16/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 6 December 2016

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MISS J SINGH — APPELLANT

PENNINE CARE NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS JULIE McKENZIE SINGH (The Appellant in Person)
For the Respondent	MS LENA AMARTEY (of Counsel) Instructed by: Hempsons Solicitors 16th Floor City Tower Piccadilly Plaza Manchester M1 4BT

SUMMARY

FLEXIBLE WORKING

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The reasons given by the Tribunal for rejecting part of the Claimant's claim, that refusal of her request for flexible working was based on incorrect facts, were adequate.

THE HONOURABLE MR JUSTICE KERR

1. This is an appeal by the Claimant by permission of Slade J. Only a single ground of appeal was found by her to be arguable: that the Employment Tribunal's reasons for rejecting the part of the Claimant's claim, that refusal of her request for flexible working was based on incorrect facts, were inadequate. The Decision of the Employment Tribunal sitting in Manchester was given by Employment Judge Pitt, sitting with Mrs Clark and Mr Cunningham, after hearings in January and July 2015. The Decision was dated 4 September 2015 and was sent to the parties on 9 September 2015.

2. The background facts were briefly as follows. I take the following from the Tribunal's findings of fact at paragraphs 6 and following of the Decision. The Respondent is an NHS Trust that provides care for patients with mental health problems making the transition from a hospital to independent living. The Claimant was and is a Nursing Assistant, who worked at the Respondent's premises, which were residential.

3. It is agreed that the minimum staff levels were as follows: four members of staff on duty during the day, of which at least two had to be registered mental health nurses; and three members of staff during the night, of which at least one had to be a registered mental health nurse. The evidence from the Respondent was that those levels were the minimum needed to achieve safety for both patients and staff.

4. The Claimant submitted an application for flexible working on 24 May 2014. She had for the previous seven or eight years been working on the night shift. Until she made her application, that arrangement had suited her because it enabled her to care for her child during

A the day, while her parents were able to care for the child during the evenings. Unfortunately, the ill health of her parents then made that no longer possible; hence her application for flexible working.

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5. Omitting various matters that are not relevant to this appeal, the application for flexible working was refused, and continued to be refused, during a process that the Tribunal found to be an appeal. That appeal, as it is right to call it, was determined finally as set out in a letter C dated 12 September 2013, signed by Ms Lindsey Baucutt, the Manager of the unit, who had been in post since about May 2013. In that letter she set out the nature of the request for flexible working, which comprised a request for day shifts. She gave three reasons for refusing D the request.

6. The first was "Burden of Additional Costs". She explained in the letter that it would E cost the Respondent money to bring in bank or agency workers if the required safe staffing levels on the unit were to be maintained.

7. The second reason was "Detrimental Effect on Ability to Provide Service and F Detrimental Impact on the Quality of the Service". Under that heading, she said that if she were to agree to the request on certain occasions, that would leave the unit short staffed. Again, she explained that activities carried out outside the unit would become impossible to facilitate, G because staffing levels would become unsafe and that would have a bad impact on service users and the Respondents' ability to implement individual care plans.

8. The third and final reason she gave was "Inability to Reorganise Work Amongst H Existing Staff". Under that heading, she referred to employees who were already working

under flexible arrangements. She explained that some agreement had been reached for certain staff to resume normal working; but that there were two Nursing Assistants who had been doing night shifts on a long-term basis:

> **"… purely because this has been the only way that I can cover the shifts. They have no agreement to work long term nights and to agree to your request would mean that they could never come off nights."**

9. She concluded the letter by saying that despite the refusal of the request, she would nevertheless attempt to accommodate flexible working arrangements on an ad hoc basis wherever possible. The letter was handed to the Claimant at a meeting the same day.

10. In her ET1 bringing her claim before the Tribunal, the Claimant relied on various causes of action, none of which is relevant to the present appeal, apart from her claim that rejection of her request for flexible working was based on incorrect facts. The way in which her claim was advanced in the grounds of her application was not very clear, and that is not a criticism of her; she was at the time unrepresented and is unrepresented before me today.

11. The issues were therefore clarified through a process of case management in the run-up to the hearing. During a period when the Claimant was briefly represented, Further and Better Particulars of her claim were filed, which included at paragraph 9:

> **"9. The Claimant claims that the Respondent failed to follow the correct procedure and that the reason for refusal of her application for flexible working are [sic] factually incorrect."**

I interject that the Claimant succeeded in the first of those contentions and was awarded compensation in respect of it. As to the second contention - that the reasons for refusal of her application for flexible working were factually incorrect - that is the matter that has given rise to this appeal.

12. Before me today, the Claimant's main points were that it was unjust to have refused her request for flexible working because: (1) the night shifts could, she said, be accommodated by other workers covering the night shifts she had previously worked; (2) it was therefore not correct that granting her request would create unacceptable cost from the scarce budget available for agency or bank workers to cover absences; (3) that budget was not for use to cover absence caused by flexible working, only to cover absences caused by other reasons such as sickness; and (4) that it was unfair that others had had their requests for flexible working granted ahead of her, and those others had no children and therefore no child care issues of the type she faced.

13. As the case was put before the Tribunal below, to judge from the documents, it was the first of those contentions that was the predominant one: that it to say, the contention that the night shifts that the Claimant no longer wished to work could be accommodated by other workers covering those shifts using the existing complement of available staff. The second issue, that of cost, would logically stand or fall with the first, for if extra workers were needed over and above the available complement of permanent staff that would cost money, whereas if they were not needed it would not cost any money.,

14. At the Employment Tribunal, the Claimant produced a witness statement to which various documents were attached, including rotas issued by the Respondent that the Claimant had annotated and relied upon to support her case that the night shifts she wished to relinquish could be covered by others. At the Tribunal hearing, Ms Amartey, counsel for the Respondent appearing then and now, very properly referred the Tribunal to **Commotion Ltd v Rutty** [2006] ICR 290, a decision of this Appeal Tribunal presided over by HHJ Burke QC sitting with lay members.

15. That case makes clear that it is not for the Employment Tribunal to judge the reasonableness of an employer's refusal to provide flexible working; but that the Employment Tribunal needs to investigate the facts on which a decision to refuse is based, in order to determine whether the decision is based on incorrect facts; see in particular paragraph 38 of HHJ Burke QC's judgment, where he said this:

> **"38. In order for the tribunal to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the tribunal is entitled to inquire into what would have been the effect of granting the application: could it have been coped with without disruption; what did other staff feel about it; could they make up the time; and matters of that type. We do not propose to go exhaustively through the matters at which a tribunal might wish to look, but if the tribunal were to look at such matters in order to test whether the assertion made by the employer was factually correct, that would not be any misuse of its powers and it would not be committing an error of law."**

16. In the present case the Tribunal decided, so far as relevant to this appeal, that the claim in respect of refusal of flexible working failed and was dismissed. On that issue the Tribunal, under the heading "Discussion and Conclusions" and the subheading "Section 80H **Employment Rights Act 1996** - The Decision to Reject the Application", said this:

> **"22. In relation to this matter we heard evidence from Ms Baucutt about the staffing levels within the unit that she managed at the time the application was made. In particular we heard evidence of difficulties in budgeting for that, and having sufficient cover to ensure a safe place of work for her staff as well as for the patients. Her evidence was clear and cogent. She was referred on numerous occasions to the shift patterns. However, the claimant was unable to produce any evidence, either through her cross examination of Ms Baucutt or herself, that the decision to reject the flexible working was based on the incorrect facts. In particular the Tribunal rely upon the letter of 12 September which sets out the initial consideration as to the detrimental effect and the inability to reorganise the work amongst the existing staff. In addition we were referred to a briefing paper, "Review of Flexible Working Contracts", which set out the nature of the issues for the Trust in relation to the flexible working.**
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> **23. The claimant did produce a substantial number of rotas to establish that the information upon which the decision was made was incorrect, but failed to establish that the decision was made on incorrect facts. Therefore, the claim under section 80H fails."**

17. The reference to the letter of 12 September was, of course, a reference to the letter of that date that I have already mentioned. The reference to a briefing paper was, as was explained to me at the hearing, to a one-and-a-half-page document produced by Ms Baucutt, not dated, entitled, as the Tribunal stated, "Review of Flexible Working Contracts". That briefing

paper comprised a summary of the 24-hours-a-day shift pattern and the staffing establishment needed to fill it.

18. The briefing paper then set out "the problem" and in it, Ms Baucutt went on to explain that a disproportionate burden was falling on a small number of nursing assistants who had been working on night shifts for long periods, such that it was having a detrimental impact upon their health. The issue was, according to Ms Baucutt's document, under review. She did not in her document propound a specific solution to the problem.

19. What Slade J said when granting permission to appeal on the single ground that remains was as follows:

> **"… It is arguable that paras 22 and 23 of the reasons do not make findings on the facts on which the [Respondent] based their conclusions that the granting the request [sic] would have a deleterious effect on their ability to provide a service etc (para 11) and whether those were correct. It is arguable that the ET should have considered and dealt with the [Claimant's] contention that shifts could have been arranged to accommodate her request."**

20. The Claimant's submissions before me today were to the effect that the decision to refuse flexible working was unfair and amounted to what she called "bullying and harassment", a phrase she repeated several times when addressing me. It was difficult to get her to focus on the real issue, that of the adequacy or otherwise of the Tribunal's reasoning. The Claimant did and does, however, understand that an employer is not bound in law to accept a request for flexible working. What the employer must do, among other things, is base any refusal of such a request on correct facts. So, I have to consider the adequacy of the Tribunal's reasoning in the paragraphs I have cited.

21. Ms Amartey, in her skeleton argument and oral submissions, contended that the reasoning was adequate. In the context of a person present at the Employment Tribunal and

with knowledge of the underlying issues and documents, the reasoning was, she submitted, intelligible such that the Claimant knew why she had lost that part of the claim. Ms Amartey referred me to a passage in the well-known decision of the Court of Appeal in **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409, heard with other appeals, in particular in the judgment of the court delivered by Phillips LJ at paragraph 89. The purpose of referring me to that paragraph was to make the point that it is permissible for a decision maker such as this Tribunal to refer to, and adopt, reasoning in a different document outside the decision itself. I accept that proposition.

22. Ms Amartey also referred me to **Post Office v Lewis** [1997] EWCA Civ 1467, in the judgment of Henry LJ at the fourth page of the transcript. I found that authority less helpful, since it was essentially a perversity challenge; but Ms Amartey pointed out that in that part of the judgment Henry LJ was making the point that it was permissible for the Tribunal not to have dealt with a specific defence advanced by the employee in a misconduct case, when it was obvious from a reading of the decision in its context that the Tribunal had addressed its mind to that issue.

23. I have considered the documents and submissions with care. The Tribunal's reasoning is very brief and would have benefited from being more fully set out. That is not to say that it needs to be discursive or florid. In the end, I have come to the conclusion that the Tribunal's reasons are just adequate. In particular, I take account of the following:

(1) The Tribunal referred at paragraph 22 to the evidence of Ms Baucutt. She was the responsible manager and the decision maker who refused the Claimant's request.

(2) The Tribunal stated the gist of her evidence at paragraph 22 of its Decision, namely that the issue was the difficulty in achieving adequate staff cover and the cost involved in bringing in outside workers.

(3) The Tribunal stated that her evidence was "clear and cogent" and therefore manifestly accepted it.

(4) It follows that the Tribunal accepted the existence of the difficulties to which Ms Baucutt had alluded in her evidence, concerning the levels of staffing and budget for staff, and the need for sufficient cover at night to secure a safe environment; the minimum staffing levels necessary to achieve that having been set out earlier in its Decision.

(5) The Tribunal then, at paragraph 22, referred to the Claimant's evidence and her case on the issue of "shift patterns" to which Ms Baucutt had been referred in the course of giving her evidence, and about which the Claimant had herself given evidence.

(6) It is clear that the Tribunal was there referring to the Claimant's contention that her request for flexible working could be accommodated within the existing staff complement, contrary to Ms Baucutt's evidence.

(7) The Tribunal then, at paragraph 22, referred back to and stated that they "rely upon", i.e. they adopted and accepted, the reasoning in the letter of 12 September 2013.

(8) That letter, as I have said, gave three linked reasons for rejecting the request for flexible working and contained explanatory material supporting each of those three linked reasons.

(9) Although the Claimant has difficulty understanding this, it was not for the Employment Tribunal to agree or disagree with whether that was fair or not, only with whether it was in any way based on "incorrect facts".

(10) The last of the three reasons, that of inability to reorganise work amongst existing staff, was what the Claimant was saying that the Respondent had got factually wrong. She said that as a matter of fact, the day shifts and night shifts could be covered using existing staff without bringing in agency or bank staff.

(11) The Tribunal referred to the briefing paper, and although the Tribunal would have done better to say what it derived from that paper rather than merely to refer to it, it is clear when one reads the briefing paper that it alluded to the same staffing problems as those about which Ms Baucutt had given evidence, which evidence the Tribunal had plainly accepted.

(12) As the Tribunal noted at paragraph 23 of its Decision, the Claimant had produced rotas in support of her contrary case. It is a pity that the Tribunal did not clearly identify those rotas and what they purported to show, and why they failed to do so in more detail; but I am not suggesting that the greater level of detail that would have been desirable, should have extended to a minute and lengthy analysis of numerous documents. One has to deduce which rotas were referred to.

(13) It seems tolerably clear, as Ms Amartey submitted, that what was being referred to there were the rotas relied upon by the Claimant, both those attached to her witness statement, which she had annotated, and another rota that she had set out in tabular form in a letter I have not yet mentioned, dated 23 September 2013, sent in response to Ms Baucutt's letter of 12 September refusing her request for flexible working.

(14) The rotas attached to the Claimant's witness statement had been annotated by her, as I have said, and it is clear that they were used at the hearing before the Tribunal to make her case.

(15) The Tribunal then stated at paragraph 23 that the Claimant's attempt to establish "that the information upon which the decision was made was incorrect" failed and that the claim therefore failed.

24. In the light of that, the issue is whether, in Slade J's words, the Employment Tribunal dealt adequately with "the [Claimant's] contention that shifts could have been arranged to accommodate her request". I have come to the conclusion that they did. It is true that they did not descend into the detail of why the Claimant's reliance on the rotas would not lead to the shifts being covered, but it was clear from the letter of 12 September 2013 that the Tribunal accepted Ms Baucutt's proposition that she, Ms Baucutt, was unable to devise a system with existing staff that would provide the minimum night staff cover or qualified and unqualified nursing staff.

25. In my judgment, the Tribunal did just enough to acquaint the Claimant with why she had lost the argument and why she had failed to show an incorrect factual basis for the decision to refuse her request. There is therefore no need to consider Ms Amartey's alternative submission that the procedure derived from **Burns v Royal Mail Group plc** [2004] ICR 1103 and **Barke v SEETEC Business Technology Centre Ltd** [2005] EWCA Civ 578 - remitting the matter back for clarification or amplification of reasons - should be followed.

26. I do appreciate and sympathise with the sense of injustice that the Claimant feels after having worked night shifts for nearly eight years and then suffering a domestic crisis through

A the inability of her parents to continue looking after her child while she was working. But I do not have the power to determine this appeal in a way that would help the Claimant address what she perceives as that injustice. I can only deal with the one arguable ground of appeal, which, for the reasons I have given, does not succeed. The appeal is therefore dismissed.

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