Appeal No. UKEAT/0138/15/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 August 2015

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MRS J BOAM APPELLANT

SOUTH STAFFORDSHIRE & SHROPSHIRE HEALTHCARE NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JONATHAN NEWMAN (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS HILARY WINSTONE (of Counsel) Instructed by: Capsticks Solicitors LLP 35 Newhall Street Birmingham B3 3PU

SUMMARY

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

The Appellant complained that the Employment Tribunal had failed to identify, refer to or evaluate the evidence in relation to a particular finding of fact. It was accepted that there was evidence to support the finding and that it was not perverse. In the circumstances of the case, neither **Meek** nor Rule 62(4) required the evidence to be referred to and evaluated.

In any event, in fact the Employment Tribunal had explained the basis of the finding in the course of the Reasons, albeit in a somewhat obscure way.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal against a Decision of the Birmingham Employment Tribunal (Employment Judge Lloyd and members) sent out on 14 August 2014 dismissing an unfair dismissal claim brought by the Claimant, Mrs Boam, against the Respondent, South Staffordshire & Shropshire Healthcare NHS Foundation Trust. I should say immediately that the Reasons sent out on 14 August 2014 are not a model of their sort. They are somewhat lacking in analysis, place rather too much reliance on psychology and do not tell the story very clearly.

2. The Claimant worked for the Respondent NHS Trust from 19 August 1986 until her dismissal for redundancy on the basis of voluntary retirement terms, which was effective from 21 April 2013. She claimed in her ET1, dated 13 May 2013, that she had been unfairly dismissed, and one of the grounds of unfairness relied on was that the Respondents had failed to offer her an opportunity for two vacancies, for which she was suitably qualified and experienced, that came up during the redundancy process. In their final submissions the Respondent said in answer to that point, amongst other things, that she had raised it for the first time in her ET1 and, fatally to her claim, that she emphatically did not want to be redeployed (paragraph 10). The paragraph goes on to say that the Respondent could not force her to cooperate. Mrs Wain, who was one of the witnesses for the Respondent, was absolutely clear that the Claimant had shortly after being informed that her role was at risk shrugged off the requirement to fill in redeployment forms on the basis that all she wanted was the best financial package to leave the business. The only obvious relevant finding on this part of the case was at paragraph 10.9 of the Reasons, where the Tribunal said this:

> **"10.9. Once her redundancy was defined, the rest we think was entirely the product of the claimant's voluntary future planning. We accept she quickly set aside any desire to remain in the Trusts [sic] employment and sought a new future with the best financial cushion she could obtain. We think the Trust helped her in that aim by co-operating with her to secure voluntary early retirement. We believe that the respondent's policies and procedures and the manner in which they were applied to the claimant are beyond criticism."**

3. Mr Newman, who has argued the appeal for the Claimant with great skill and tenacity on a pro bono basis, for which the Tribunal is grateful, accepts that the finding in paragraph 10.9 was sufficient to dispose of the point about alternative work. He also accepts that there was evidence to support the findings of fact in paragraph 10.9, and he does not suggest that they were perverse. The sole ground of appeal allowed by HHJ David Richardson on 13 May 2015 is as follows:

> **"In respect to the issue of suitable alternative employment, the Employment Tribunal erred in law by failing to identify and/or reference the evidence before it upon which it founded its conclusions set out in paragraph 10.9 of the Reasons and/or failed to provide any or any adequate evaluation of such evidence within the body of the Reasons."**

4. Mr Newman relies on the well-known case of **Meek v City of Birmingham District Council** [1987] IRLR 250. He refers me to paragraph 8 of the decision of Bingham LJ in that case, where he said this:

> **"8. It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."**

I am not at all sure that that paragraph in the **Meek** decision requires a reference to evidence or its evaluation in support of a finding of fact and certainly not in every case. What is required, both by **Meek** and now by Rule 62(5) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, is an identification of the issues that the Tribunal has determined, the findings of fact in relation to those issues, a concise identification of the

relevant law and a statement of how that law has been applied to those findings in order to decide the issues. I also note Rule 62(4), which says:

> **"(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short."**

5. I was referred, in addition to **Meek**, to a case called **Faulkner v University of Manchester** [2011] EWCA Civ 592, which made its way to the Court of Appeal. In that case an appeal succeeded on the basis that the Reasons were inadequate, but it is instructive to note paragraph 11 of the Judgment of Sullivan LJ, where he says this:

> **"11. I should emphasise that the flaw in the ET's judgment is a structural one. It is not simply a matter of detail that it does not for example refer to the evidence of a particular witness or that it does not refer to a particular document; it is that it fails to set out even on a summary basis what the respondent's contentions were and why those points being made on behalf of the respondent were not being accepted. In summary as Elias LJ indicates the case for the employers was never properly identified. As a result of that failing it was simply never engaged with."**

It does not seem to me, looking in particular at that paragraph, that a recital of evidence and its evaluation is necessary in relation to every finding of fact. If that conclusion is right, then, given Mr Newman's acceptance that there was evidence to support the finding of fact at paragraph 10.9 and his acceptance that it was not a perverse finding, I do not think this appeal is really arguable at all.

6. But in any event, in my judgment, there is within the Reasons an explanation, albeit obscure, for the finding. First, at paragraph 10.1 the Tribunal say:

> **"10.1. We generally preferred the evidence of the respondent to that of the claimant."**

Crucial to the Respondent's case was the evidence of Ms Wain, to which I have referred, who gives very clear evidence in a witness statement, which I will not recite, to support the proposition that the Claimant quickly set aside any desire to remain in the Trust's employment and sought a new future with the best financial cushion she could obtain.

7. Further, I was referred by Ms Winstone, who appeared for the Respondent below, to three paragraphs earlier in the Reasons: paragraphs 7.10, 7.11 and 7.12. They are badly worded and not a model of clarity, but I accept that what they are suggesting is that, when it was put to the Claimant that she had not in fact sought to secure alternative employment with the Trust because she had decided she was better off taking a lump sum of compensation to help her out of her financial difficulties, she had assented to that proposition. That, really, is the only way to sensibly read paragraph 7.11. In paragraph 7.12 there is also a statement by the Tribunal that the Claimant:

> **"7.12. … knew deep down that if she wanted to continue her employment with the Trust she would have to have a higher visible profile and a much more justifiable and measurable role. …"**

That sentence, read against the background that the Tribunal set out of the way that the Claimant operated in her previous role, although it is not expressly stated, is clearly intended to provide an additional reason why the Tribunal accepted that she decided she did not want to stay working in some other role at the Respondent Trust.

8. The high point of the Claimant's case as presented by Mr Newman was one email, that I was shown, that was sent by the Claimant to Ms Wain and another lady, Belinda Lucas, on 27 February 2013 - that is, in the middle of the redundancy process - where she said this:

> **"In my research I understand that as leaving the Trust is not of my doing, indeed my preferred option would be to continue working for at least another five years at my current pay grade or above, the option of early retirement is without actuarial reduction, my membership being on the basis of the 1995 regulations. Am I correct in this regard because this is only reason I can think of for such a dramatic difference?"**

Mr Newman focused on the words:

> **"… my preferred option would be to continue working for at least another five years at my current pay grade or above …"**

Although on the face of it those words might appear to contradict the Respondent's position and the finding at paragraph 10.9, it seems to me that seen in context it is fairly clear that they do not necessarily indicate that at that stage the Claimant actually wanted alternative employment; rather, she was simply bolstering up her case in relation to the amount she should receive by way of compensation for early retirement. In any event, it is perfectly clear that there is no need for a Tribunal to refer to every single document or every piece of evidence.

9. In the circumstances, unsatisfactory though the Reasons were, I do not think that the appeal succeeds, and I therefore dismiss it.