Appeal No. UKEAT/0032/16/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 October 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR W SCOTT APPELLANT

EC MARITIME PCC LIMITED (DEBARRED) RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR KEVIN McNERNEY (of Counsel) Instructed by: Taylor Bracewell Fountain Precinct Balm Green Sheffield South Yorkshire S1 2JA
For the Respondent	Respondent debarred from taking part in this appeal

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Unfair dismissal - fairness of dismissal - ***Employment Rights Act 1996****, section 98(4)*

The Claimant, a maritime security officer, was dismissed for some other substantial reason, namely pressure for his removal for working for a specific client. The ET did not consider the Respondent - a protected cell company under Guernsey law - had acted unfairly in the circumstances and did not consider its failure to look for alternative work for the Claimant within other cells rendered the dismissal unfair given that there was no evidence of other employment opportunities and the Respondent would not generally look for alternatives in different cells. The Claimant appealed: (1) against the ET's failure to find the lack of investigation of alternative employment in other cells of the Respondent unfair; alternatively, (2) against the ET's approach to the question of fairness more generally. Having failed to enter a Respondent's Answer or to respond to the EAT's correspondence, the Respondent was debarred from participating in the appeal.

Held: allowing the appeal and remitting the case for hearing afresh by a different ET.

The ET's conclusion on alternative employment was not dependent upon the Respondent's argument as to the inability to look at other cells within the company but was founded upon its finding that there was no evidence of alternative work available at the time. That was a permissible finding and the appeal would not, therefore, be allowed on the issue of alternative employment.

As for the approach to the question of fairness more generally, however, whilst it was entitled to allow that the range of reasonable responses might have included a decision not to investigate further (either with the client or the Appellant himself), the ET needed to make a

finding that this was, indeed, what the Respondent had determined, not what the ET itself considered to be the case (and see per Lord Bridge in **Polkey v A E Dayton Services Ltd** [1988] ICR 142). Given that the Respondent had in fact told the Appellant that it would investigate matters further, it was hard to see how the ET could have come to the conclusion that it did. In the circumstances, the decision was unsafe; the appeal would be allowed and the matter remitted to a freshly constituted ET for re-hearing.

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HER HONOUR JUDGE EADY QC

Introduction

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1. I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the Southampton Employment Tribunal (Employment Judge Gardiner sitting alone on 29 July 2015; "the ET"), by which the Claimant's complaint of unfair dismissal was dismissed. The Claimant appeals from that ruling, pursuant to permission granted by HHJ David Richardson, on two grounds: whether the ET erred (1) in concluding that the Respondent's failure to look for alternative work in other cells of the Respondent did not render the dismissal unfair; and/or (2) in failing to apply the legal test of fairness to the procedure adopted by the Respondent or reached a perverse conclusion in finding a fair dismissal.

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2. Mr McNerney represented the Claimant before the ET, as he does today. The Respondent was represented below by its Managing Director but has been debarred from participating in this appeal given its failure to file an Answer or to respond to communications from the EAT.

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The Background Facts

3. The Claimant is a former Royal Marine who, on leaving the Forces, made a career in the security industry; specifically, from 2011, working as a Maritime Security Officer ("MSO"). Initially he had worked for an organisation called Drum Cussac and was deployed on various clients' ships, essentially as an armed guard.

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4. Towards the end of 2011, Drum Cussac transferred its MSOs - including the Claimant - to the Respondent, a Guernsey-registered company structured on a protected cell basis. A protected cell company has a central hub or core and a number of separate cells into which the company can segregate its assets whilst remaining one single legal entity (see paragraph 10 of the ET's Decision in this regard). The Respondent thus contracted to provide MSOs to Drum Cussac but also to other companies working in the maritime security industry. The Claimant's employment duly transferred to the Respondent, and he was employed on a rolling fixed-term contract from 1 February to 31 January each year, the last such contract effective from 1 February 2014 and then due to expire on 31 January 2015.

5. The Claimant's employment as an MSO with the Respondent appears to have gone well. He was promoted to the rank of team leader and received positive feedback from Drum Cussac, to which he continued to be assigned.

6. In November 2014, however, Drum Cussac sold its transit security business to Ambrey Risk. The contract between the Respondent and Drum Cussac was novated to a contract between the Respondent and Ambrey Risk, and employees of the Respondent previously hired out to Drum Cussac were now offered for hire to Ambrey Risk. Ambrey Risk apparently viewed the employees concerned positively and wrote out to them encouraging them to agree to the assignment to Ambrey Risk and inviting them to attend induction days.

7. On 25 November 2014, the Claimant duly attended an induction training day with Ambrey Risk. He arrived late due to traffic and other difficulties, and during the course of the day three incidents took place that apparently led Ambrey Risk's Associate Director for Recruitment and Training (Mr Kelly) to determine that it would not wish to offer work to him, a

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decision communicated to the Claimant by email of 1 December 2014. Having also forwarded that message to the Respondent and having then been asked for further explanation, Ambrey Risk emailed to say that its decision had been based on its assessment of the Claimant's "*attitudinal and behavioural fit*" with Ambrey, which was not positive. It provided further detail by email to the Respondent on 22 December 2014.

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8. Having received that information, on 23 December 2014 the Respondent emailed the Claimant to say that it would investigate the allegations made against him but meanwhile released him from the contractual constraint that prevented him taking work for other companies, explaining that the Respondent was "*unable to offer you deployments until the investigation is over*".

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9. Although the Respondent had said that it would write to the Claimant once the investigation was completed, in fact he heard nothing further. On 31 January 2015 his fixed-term contract expired without the Respondent having carried out any significant investigation.

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<u>The ET Proceedings, Decision and Reasoning</u>

10. By his ET claim the Claimant pursued complaints of unfair dismissal and breach of contract. The ET rejected the Respondent's contention that it did not have territorial jurisdiction to determine the Claimant's unfair dismissal complaint and further found that the Claimant had sufficient continuity of service to enable him to pursue that claim. There have been no challenges against those findings, and they therefore remain extant.

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11. On the substantive claim, the ET found that the Claimant had been dismissed on 31 January 2015 for a potentially fair reason, being some other substantial reason justifying

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dismissal, namely pressure for his removal by a third party client to whom the Claimant had been assigned to work. The ET reminded itself (see paragraph 61) that it had to judge the fairness of that dismissal against the range of reasonable responses test. It noted that the Respondent had obtained a full explanation from Ambrey Risk about the events at the induction day that had caused it to reject the Claimant's assignment. Allowing that some employers might have sought to investigate matters further with Ambrey Risk and/or the Claimant, the ET did not consider it was outside the band of reasonable responses for the Respondent to take the view that it would let matters rest where they were so far as Ambrey Risk was concerned and to consider that there was nothing to be gained from investigating matters further with the Claimant. Having heard from the Claimant himself, the ET was in any event satisfied that his explanation would not have changed the position (specifically, see its findings at paragraph 68).

12. Having concluded that the Respondent had reasonably taken the view that there was no possibility of the Claimant working for Ambrey Risk, the ET then turned to the question of other alternatives. Without making any findings as to the precise nature of a protected cell company under Guernsey law for these purposes, the ET accepted that the Respondent was divided into different cells for the purposes of its contracts with different clients and it was not the Respondent's practice to see if there was alternative work for an employee working in one cell to work for other clients who were served by a different cell (see paragraph 69). The ET further accepted the Respondent's evidence that its employee base was contracting around this time and there was no evidence of other vacancies with different clients prior to the Claimant's contract ending at the end of January 2015 (see paragraph 70). The ET concluded:

> **"71. Whilst some employers in the Respondent's position may have been more active in looking for other work, I do not find that the Respondent's failure to do so here, given its cell structure, fell outside the band of reasonable responses from reasonable employers. The unfair dismissal claim accordingly fails on its merits."**

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13. The ET also rejected the Claimant's contract claim. There is no appeal in that respect.

Submissions

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14. On behalf of the Claimant it is submitted that the ET erred in refusing to make a finding on the main plank of the Respondent's defence, its assertion that it was illegal as a matter of Guernsey law for a search for alternative work to be conducted elsewhere within the other cells. Such material as the Respondent had adduced in this regard did not prove its point, as the ET would have been bound to find had it investigated that question. That in turn would have meant the ET would have been bound to find that the failure to look for alternative work rendered the dismissal unfair. Alternatively, the ET's approach indicated it had failed to apply the test of reasonableness required by section 98(4) of the **Employment Rights Act 1996** ("ERA") or had reached a perverse conclusion. Allegations made by Ambrey Risk were never put to the Claimant. No appeal was afforded to him. He was never given the opportunity to explain himself or indeed any hearing at which he might do so.

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Discussion and Conclusions

15. The case before the ET was one of unfair dismissal. It was obliged to determine that claim in accordance with section 98 **ERA** and in particular, given that the reason for dismissal was not in dispute, to have regard to section 98(4), which, relevantly, provides:

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> **"(4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> > **(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 equity and the substantial merits of the case."**

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16. Even where an employee is dismissed for a reason that is obviously capable of being fair, the process an employer follows before determining to dismiss remains a key factor for

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section 98(4) purposes, and the issue of fairness is not answered by the ET itself determining the hypothetical question whether it would have made any difference, although it may allow that it was within the range of reasonable responses for the employer in those circumstances to conclude that further investigation or process was simply futile. As Lord Bridge explained in **Polkey v A E Dayton Services Ltd** [1988] ICR 142 at pages 162G-163C:

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> **"… in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; … If an employer has failed to take the appropriate procedural steps in any particular case, the one question [the employment tribunal] is *not* permitted to ask in applying the test of reasonableness posed by [section 98(4)] is the hypothetical question of whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [section 98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [section 98(4)] may be satisfied."**

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17. With that guidance in mind, I turn to the criticisms made of the ET's assessment in the present case.

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18. On the specific issue of alternative work, I am not persuaded that the ET necessarily erred in declining to investigate further the precise legal position of the protected cell company. I do not read its conclusion as dependent upon an acceptance of the Respondent's position in that regard. Although it apparently considered it relevant that the Respondent as a matter of practice - even if not as required by law - did not look to see if alternative work was available in other cells of the company, that was not the determining factor in the ET's assessment of fairness, hence the use of the word "however" at the start of paragraph 70.

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19. It is, moreover, paragraph 70 that explains the ET's crucial finding: that there simply was no evidence of alternative work being available. It was that, coupled with the

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Respondent's cell structure, that meant the failure to look for alternatives did not render the dismissal unfair.

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20. Where I do consider that an error arises, however, is in relation to the ET's approach to the question of fairness at a more basic level, the issue raised by the second ground of appeal. The ET was entitled to allow that the range of reasonable responses might have included a decision not to investigate further either with Ambrey Risk or with the Claimant himself, but it needed to make a finding that this was indeed what the Respondent had determined, not what the ET considered to be the case. Even if I approach the ET's decision as perhaps not as clearly explained as it might have been - such that I should infer that the ET had intended to say that this was a view it had found that the Respondent, not merely the ET itself, had reached - I am left with the difficulty that it is not what the Respondent said at the time. The Respondent had, on the contrary, told the Claimant that it would investigate matters further. Whilst I would not say that an ET would be bound to find that was the Respondent's *final* position and thus determinative of the question of fairness, to simply ignore that evidence would be to fail to take into account the Respondent's stated position at the time and/or render the decision potentially perverse. It certainly, in my judgment, renders the decision unsafe.

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21. Turning to the impact of that conclusion in respect of disposal, Mr McNerney has persuaded me that this is a failing in the Judgment that requires the matter to the remitted to a different ET to hear this matter afresh. Having regard to the guidance laid down in **Sinclair Roche & Temperley v Heard & Anor** [2004] IRLR 763, I note that this was a short case and so it is not disproportionate to say that it should be reheard. The importance of the case to the Claimant (at least) is plain; he has lost his job, and his reputation is potentially affected. Most significantly, paragraph 68 of the Reasons reflects the view apparently held by the ET, and it

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would be hard for the parties to have confidence that the issues had not been pre-judged if the case was returned to the same ET. So, I rule that this matter will go back before a freshly constituted ET, which will make its own findings afresh and form its own conclusions on the unfair dismissal claim.

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Costs

22. Having given my Judgment in this matter, the Claimant has applied under Rule 32A(2)(a) of the **Employment Appeal Tribunal Rules 1993** as amended for recovery against the Respondent of his costs in the form of the fees incurred to lodge and pursue the appeal: in total, £1,600. Given that he has been successful on his appeal, my jurisdiction to make such an order is necessarily engaged, and, as has been made clear in various decisions of this court, given the new fee regime, it is reasonable to expect a successful Appellant will be entitled to recover those fees. There is no good reason indicated as to why that should not happen in this case, and I duly make such an award.

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