Appeal No. UKEAT/0090/15/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 July 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MISS H C PREMACHANDRA — APPELLANT

HBOS PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NAOMI CUNNINGHAM (of Counsel) Free Representation Unit
For the Respondent	MR WILL DOBSON (of Counsel) Instructed by: DLA Piper UK LLP Victoria Square House Victoria Square Birmingham B2 4DL

SUMMARY

PRACTICE AND PROCEDURE - Perversity

UNFAIR DISMISSAL - Reasonableness of dismissal

The Claimant's tier 1 visa, permitting employment as a banking adviser, was coming to an end. The Respondent had made plans to employ her as a financial consultant under a tier 2 visa - it withdrew from doing so at short notice and dismissed her. The Employment Judge approached the question of fairness under section 98(4) of the **Employment Rights Act 1996** on the basis that "the stringent requirements of the FCA meant that she could not be employed" as a financial consultant without a particular qualification known as CeFAP. Appeal allowed. As the Respondent accepted at the appeal hearing, there was no requirement of the FCA that the Claimant could not be employed as a financial consultant without the CeFAP qualification. The Employment Judge approached the question of fairness under section 98(4) on a basis for which there was no legal or factual foundation.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Ms Kush Premachandra ("the Claimant") against a Judgment dated 19 June 2014 of Employment Judge Etherington, sitting alone at the London Central Employment Tribunal. By his Judgment the Employment Judge dismissed the Claimant's complaint that she was unfairly dismissed by HBOS Plc ("the Respondent").

The Background Facts

2. The Claimant is of Sri Lankan nationality. She came to the United Kingdom as a student in 2008. She commenced part-time work with the Respondent as a banking adviser while she completed her MBA. In 2011 she was granted leave to remain until 28 April 2013 on what is known as a "tier 1 post-study visa". Such a visa cannot be extended.

3. It was the Claimant's desire to remain in the UK and work in the financial sector. In order to do so she would require what is known as a "tier 2 visa". Such a visa can be granted to a person who is a financial consultant. She was encouraged by her managers to undertake the assessment process for such an appointment. Unfortunately, she failed the process. If she had passed the process, there would have been further steps for her to undertake. There would have been high-risk security referencing - a type of vetting process - and she would have been expected to obtain a qualification known as a certificate in financial administration and planning (the CeFAP). In its description of a financial consultant's job the Respondent expressly said that the role:

> **"… requires that you will need to obtain the CeFAP qualification (or equivalent) before we are able to make a formal offer of employment …"**

4. It was known in early March that the Claimant had failed the assessment process. Her managers, however, retained a high opinion of her. They wanted to continue to employ her. For this purpose they took a number of steps. These were, as the Employment Judge said, unique and potentially controversial. Hundreds of people had failed assessments before without such steps being taken. Firstly, they wrote to her a letter dated 10 April 2013 offering her employment in the post of financial consultant. Secondly, they provided her with a certificate of sponsorship, which confirmed the Respondent's intention to sponsor her in the financial consultant role from the expiry of her tier 1 visa. The certificate was dated 10 April. Thirdly, they ensured that the high-risk security referencing was completed; this was done by 20 April. Fourthly, they enrolled her on a training programme to acquire the CeFAP qualification. The programme was to start on 20 April. By reason of these steps, including, most importantly, the certificate of sponsorship, the Claimant was able to secure a tier 2 visa on 19 April 2013.

5. Everything therefore seemed set for the Claimant to move seamlessly from banking adviser to financial consultant, although no contract of employment in that capacity had actually been entered into; but she was to be disappointed. On 22 April the Respondent withdrew her registration on the CeFAP course. She was told, incorrectly, that she had failed pre-vetting and that there would be no new contract. It appears, the Employment Judge found, that the Respondent would not employ her as a financial consultant until she was in possession of the CeFAP qualification. In the end she was dismissed. The Respondent first sought to allege that she resigned but was constrained to accept by the time of the ET3 that it had dismissed her.

Unfair Dismissal Provisions

6. It is convenient at this stage to set out section 98(1), (2) and (4) of the **Employment Rights Act 1996**:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employee to show -**
>
> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> >
> > **(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.**
>
> **(2) A reason falls into this subsection if it -**
>
> > **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
> >
> > **(b) relates to the conduct of the employee,**
> >
> > **(c) is that the employee was redundant, or**
> >
> > **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
>
> **…**
>
> **(4) 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) -**
>
> > **(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**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

The Reason for Dismissal

7. The Respondent's primary case was that its reason for dismissal fell within section 98(2)(d). The Claimant could not continue to work in the position that she held, banking adviser, because the Respondent would contravene section 15 of the **Immigration, Asylum and Nationality Act 2006** by employing her in that capacity when she no longer had a visa. Its alternative case was that it dismissed her because it genuinely believed this to be the case and that was "some other substantial reason". Both these cases were in principle open to the Respondent. There is a difference between the two provisions. An employer who wishes to

rely on section 98(2)(d) must get it right in the sense that the continued employment must in fact contravene a statutory enactment. However, an employer does not necessarily have to get it right to rely on "some other substantial reason" as long as the employer's belief is genuine; see **Bouchaala v Trust House Forte Hotels Ltd** [1980] IRLR 382 and, most importantly, **Klusova v Hounslow London Borough Council** [2008] ICR 396 at paragraphs 11 to 12.

The Fairness of Dismissal

8. Once the reason for dismissal is established, the question of whether the dismissal was fair is decided in accordance with section 98(4). This requires an Employment Tribunal to decide whether the employer acted reasonably in treating the reason as sufficient for dismissing the employee, a question to be decided in accordance with equity and the substantial merits of the case. It is well established that the Employment Tribunal's task is to examine all aspects of the decision to dismiss, substantive and procedural, and to ask whether the employer acted reasonably in dismissing, recognising that reasonable employers may take different approaches and reach different decisions. Thus it is often said that Employment Tribunals must recognise that there is a band of reasonable responses.

9. Even if the employer establishes a reason within section 98(2)(d), the Employment Tribunal must go on to consider section 98(4). It does not follow that a dismissal for a reason within section 98(2)(d) must be fair, although no doubt in most circumstances it will be; see for a discussion of this issue **Kelly v University of Southampton** [2008] ICR 357 at paragraphs 59 to 65. It is for example possible to envisage circumstances in which an employer ought to retrain or redeploy an employee, and it is certainly possible to envisage circumstances where the employer should give the employee a fair opportunity to be heard.

10. In this case it was part of the Claimant's argument that she ought to have been redeployed to the financial consultant role as the Respondent had apparently been intending to do until 22 April. It is this part of the argument that is relevant to the grounds of appeal.

The Employment Judge's Reasons

11. The Employment Judge's Reasons, after a statement of the issues and a summary of the evidence he heard, contain a section entitled "The Facts", a further section entitled "Considerations", a summary of the applicable law and a set of conclusions. The conclusions appear to travel the ground twice. The reason for dismissal is dealt with in paragraph 22, the section 98(4) issue in paragraphs 23 to 25, the reason for dismissal again in paragraph 26 and the section 98(4) again in succeeding paragraphs. There are therefore multiple passages setting out relevant reasoning on some of the issues.

12. The Employment Judge found that the reason for dismissal indeed fell within section 98(2)(d) because the Claimant could not continue to work in the position she held without contravention on her part and on the part of the Respondent of a duty or restriction imposed under the **2006 Act**. He would in the alternative have found that there was some other substantial reason (see paragraphs 22 and 26). This conclusion is not challenged on appeal. The Employment Judge was, to my mind, plainly right to find that the reason for dismissal fell within section 98(2)(d).

13. The Employment Judge recognised that it was part of the Claimant's case that if the Respondent had acted competently, she should have been redeployed to the financial consultant role, and that (paragraph 25):

> **"25. … the Respondent had not called sufficient evidence to establish that it had a reasonable belief in the illegality of employing her beyond the expiry of the visa …"**

14. The Employment Judge dealt with aspects of this case in different places within his Reasons. There are typographical mistakes in the text of his Reasons, but it is generally plain what the Employment Judge meant. He said (paragraph 10):

> **"10. … The [FCA; Financial Conduct Authority] is in light of recent history focused upon the style in which people hold themselves out to the public. No longer can just anyone call themselves a financial consultant. The FCA requires a minimum standard of [qualification before] an individual is permitted to describe themselve's [sic] or be described as a financial consultant, is qualification [sic] the Claimant did not Possess."**

15. He also said (paragraph 14):

> **"14. To gain the cover of the Tier 2 visa which the Claimant had obtained with the support of the Respondent, she had to be doing the Financial Consultant job - she would satisfy the UKBA [UK Border Agency] requirements if undertaking that work in a training capacity. The short point is she was not doing that job and could not do so until she had passed CeFAP. This she had not done and when the Respondent's HR [department] agreed they could employ her in a lower status capacity & sponsor her to study for CeFAP. Unfortunately it was impossible for them to achieve this as the Claimant's T1 would expire in days and so she could not be retained in employment under it - despite the Respondent's wishes to the contrary. She could not take advantage of Tier 2 visa because the job she would be doing initially did not and could not qualify for Tier 2 as a financial consultant post until she had passed [the] CeFAP exam and undertaken the Respondent's pre-FCA training course."**

16. I observe that the Employment Judge recognised that the Claimant could satisfy the UKBA requirements; his point is that she had not passed the CeFAP exam and could not qualify as a financial consultant without it. In paragraph 24 the Employment Judge said:

> **"24. … the Respondent actually offered the Claimant a post, which it was to fund whilst she gained the minimum qualification necessary to permit her to take a post which would entitle her to work in the UK under a Type 2 visa."**

17. Most importantly, the Employment Judge said this in his conclusions in relation to section 98(4) (paragraph 28):

> **"28. The Respondent in doing all it could to employ the Claimant in the proposed new role took short cuts in the hope that expedition would lead to her employment. I mentioned above the particular steps taken. The parties' hopes were frustrated when in the event the Respondent formed the reasonable belief on unchallengeable grounds that the Claimant could not be employed on the expiration of the Type 1 visa because she could not take the benefit of the Type 2 unless she was a employed [sic] as a financial consultant - and, due to the stringent requirements of the FCA she could not be employed in a job with that appellation [sic] until she had completed the CeFAP course. …"**

18. The Employment Judge's primary finding therefore was that the Respondent could not have employed the Claimant as a financial consultant because the stringent requirements of the FCA required her to complete the CeFAP course before she could be employed as a financial consultant. The first ground of appeal that I must consider relates to this finding.

19. The Employment Judge, however, also put it a different way. He said (paragraph 29):

> **"29. I have taken rather a long time to deal with that point. There is however a shorter route which arrives at the same destination. This case is about the termination of the Claimant's post as a banking adviser. The parties agree that job became defunct on the 28 April 2014 [sic] as a consequence of the expiry of the Claimant's visa and that had the Respondent done nothing more the Claimant would have had no claim. Everything that the Respondent had done before and after to extend the Claimant's employment was focused on providing new employment. Its actions successful or otherwise did not affect the existing job - the conditions surrounding it would be the same come what may. On the 28 April 2013 that job was terminated as it was always going to be and for the same reason - the Claimant was not entitled to continue to work in this country in that post. The actions of the Respondent, which the Claimant now seeks to adversely criticise, played no part in that process and could not have done - the visa could not be extended. To have kept the Claimant in employment would have been illegal. Thus the dismissal by the employer was inevitable and was not unfair."**

20. This reasoning, if I have understood it correctly, is that it was sufficient for the Respondent to show that it could no longer employ the Claimant as a banking adviser. The fact that it might have been able to employ her as a financial adviser was nothing to the point. Similar reasoning appears in broader terms in the following paragraphs.

Submissions

21. On behalf of the Claimant Ms Cunningham submits that the Respondent produced to the Employment Judge no evidence of any provision of the FCA requiring the CeFAP qualification before a person could be employed as a financial consultant. There was no basis for the finding that such a requirement existed. When this appeal came before Supperstone J at a Preliminary Hearing he required the Respondent to lodge with the EAT and serve on the Claimant a copy of the FCA rules relied on. The Respondent did not comply. No linkage has been made between the CeFAP qualification and any requirement of the FCA. The Employment Judge's

conclusion was without foundation. Insofar as it was a conclusion that the Respondent was subject to a legal requirement to employ as financial consultants only those who held the CeFAP qualification, it was wrong in law. Insofar as it was a factual finding, it was perverse and without any sufficient reasoning.

22. On behalf of the Respondent Mr Dobson submits that the Employment Judge did not fall into any error. Mr Dobson however did not rely on any FCA rules; he confirmed to me that the Respondent did not rely on any particular FCA rule. There was no FCA rule requiring the Respondent only to employ a financial consultant if the person held the CeFAP qualification; rather, this was the Respondent's policy. He reminded me of authorities to the effect that the Reasons of an Employment Tribunal should be read in the round - not in a pernickety or technical way. He submitted that the Employment Judge was saying no more than that it was the Respondent's requirement or policy that a financial consultant should hold the CeFAP qualification.

23. Ms Cunningham also submits that the Employment Judge's alternative reasoning contained in paragraph 29 is wrong in law. It would amount to saying that when applying section 98(4) it was irrelevant to consider whether the Respondent could and should have redeployed the Claimant. If this had been a redundancy case, the proposition would be absurd. It is well known law that an Employment Tribunal considering section 98(4) in such a case should consider whether there was alternative work to which the Claimant could be deployed; see, for example, **Vokes v Bear** [1974] ICR 1. There is no reason why the law should be different in a case that is concerned with illegality.

24. Mr Dobson accepts that section 98(4) remains relevant in a case where the reason for dismissal falls within section 98(2)(d). He submits that the Employment Judge was saying no more than that the Respondent had no obligation to re-employ the Claimant in the circumstances of this case and that the Employment Judge did not err in law.

Discussion and Conclusions

25. The Employment Appeal Tribunal must, as Mr Dobson submitted to me, avoid pernickety and hypercritical criticism of an Employment Tribunal's Reasons. Thus Lord Hope said in **Hewage v Grampian Health Board** [2012] ICR 1054 at paragraph 26:

> **"26. It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis. …"**

26. It would have been open to the Respondent in order to meet the Claimant's case that it should have redeployed her to the role of financial adviser to say that it was its policy only to appoint persons with the CeFAP qualification and that it was not prepared to make an exception in her case. Mr Dobson, as I understand his submission, says that this was in reality the Respondent's case. If the Employment Tribunal had understood this, it would have been its duty to ask, applying section 98(4), whether it was reasonable for the Respondent to dismiss in those circumstances. The Respondent would have had to meet the point that it had apparently been prepared to make an exception for the Claimant right up to 22 April. It would have had to meet the point that it did not give her any opportunity to be heard on the question before changing its mind.

27. It is, however, to my mind plain that the Employment Judge approached the matter on the basis that the Respondent's case was that it had no power to employ the Claimant in the role of financial consultant. He said that (paragraph 28):

> **"28. … due to the stringent requirements of the FCA she could not be employed in a job with that appellation [sic] until she had completed the CeFAP course. …"**

28. It is also plain that the Claimant did not accept this was the case. Given that the first reason the Respondent gave for withdrawing the CeFAP course was bogus, it is not surprising that the Claimant was challenging this reason. The Respondent put before the Employment Judge no evidence of any "stringent requirement" of the FCA that required the CeFAP qualification. This "stringent requirement" need not necessarily have been a rule; it is not difficult to suppose that the requirement might have been imposed by means of a statutory code or guidance or even by requiring an employer to set and publish its own minimum standards. But nothing at all of this kind was placed before the Employment Judge or before me to suggest any stringent requirement of the kind.

29. The Employment Judge's reasoning is therefore flawed. It is based on the premise that the Respondent could not employ the Claimant as a financial adviser by reason of the FCA's requirements. The Employment Judge gave no reason for saying that any such requirement existed; he simply asserted its existence. The Employment Judge seems to have thought that the Respondent reasonably believed in its existence; again, he gave no reason for that conclusion, and he was in fact wrong about the existence of the requirement. As Mr Dobson has explained to me, the requirement for the CeFAP course was not externally imposed; it was the Respondent's own policy.

30. I have really already explained why the Employment Judge's alternative reasoning in paragraph 29 cannot stand: see paragraphs 8 to 10 above. Section 98(4) is engaged in a case where the reason falls within section 98(2)(d). There was an issue for the Employment Judge whether in all the circumstances it was reasonable for the Respondent to dismiss the Claimant from the position she held in circumstances where it was withdrawing an offer to redeploy her as a financial consultant. The matter was a proper one for the Employment Judge to consider. His reasoning in paragraph 29, which would appear to foreclose consideration of that issue, is erroneous.

31. I turn to the question of remission. Ms Cunningham submits to me that the case is so clear that I can substitute a finding of unfair dismissal. I do not accept that submission. Applying **Jafri v Lincoln College** [2014] ICR 920, I consider that this is a matter that must be remitted to the Employment Tribunal. The Employment Judge has retired. He also expressed strong views on a basis that I have found to be erroneous. In all the circumstances, I have no doubt that remission must be to a different Employment Judge. As I have said, there is no dispute about dismissal, nor is there any dispute about the establishment of a reason under section 98(2)(d), but section 98(4) is in issue. The Employment Judge should reach entirely fresh conclusions on all aspects of the case related to section 98(4).