Appeal No. UKEAT/0278/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 July 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MS M SHEVLIN — APPELLANT

(1) INNOTECH ADVISERS LTD
(2) LADY LISA SAINSBURY (DECEASED)
(3) LORD SAINSBURY OF TURVILLE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MATTHEW GULLICK (of Counsel) Instructed by: Messrs Royds Solicitors 65 Carter Lane London EC4V 5HF
For the Respondents	MR ANDREW BURNS QC (of Counsel) Instructed by: Dentons UKMEA LLP One Fleet Place London EC4M 7WS

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Unfair dismissal - Redundancy dismissal - the fairness of the dismissal for that reason - whether the Claimant's argument that the Respondents had acted in breach of contract was relevant to the question of fairness

Having found the Claimant had been dismissed by reason of redundancy, the ET further found that the dismissal for that reason was fair in all the circumstances of the case. In reaching that conclusion, the ET did not consider the alleged (by the Claimant) breach of contract on the part of the Respondents was relevant but even if there had been such a breach (on which the ET made no finding), the dismissal was still fair.

On appeal, the Claimant argued that the ET had erred in law by failing to make a specific finding as to whether the Respondents had acted in breach of contract. She contended that she had a contractual right to continue to be employed for the term of Lady Sainsbury's life plus six months and, by dismissing her earlier than this, the Respondents had acted in breach of contract and that was relevant to the fairness of the dismissal.

The general principle was that the statutory right not to be unfairly dismissed was wholly separate from common law entitlement under a contract of employment (**Treganowan v Robert Knee & Co Ltd** [1975] ICR 405). In some cases, it had been allowed that the contractual position might be relevant to (albeit not determinative of) the question of fairness of a dismissal; see **Redbridge LBC v Fishman** [1978] ICR 569, **Hooper v British Railways Board** [1988] IRLR 517, **Farrant v the Woodroffe School** [1998] ICR 184 and **Ford v Libra Fair Trades Ltd** UKEAT/0077/08/MAA. Such cases, however, involved alleged breaches of contract which gave rise to issues that had proper coincidence with the determination of the

fairness of the dismissal. That was not this case. The Claimant was not saying that the Respondent had contractually committed not to making her redundant, simply that the issue of job security was part of the relevant factual background. Her argument was really that the Respondents had acted in breach of contract in dismissing her before the period in question had expired (the lifetime of Lady Sainsbury plus six months). That was an issue that went to the timing of the dismissal, not the fairness of the dismissal for the reason in question. The ET had correctly characterised this as no different from a case involving an allegation of short notice.

In the alternative, the ET had concluded that the dismissal was fair even if it had been in breach of contract as the Claimant alleged. Having regard to what the ET found that the Respondents had taken into account (and applying a range of reasonable responses test), that was a permissible conclusion and it was not open to the EAT to interfere.

Appeal dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondents, as below, save where it is necessary to distinguish between the Respondents, in which case I refer to them by name. The appeal is that of the Claimant against a Judgment of the London (Central) Employment Tribunal (Employment Judge Walker sitting with members on 4 and 5 February 2014 and 20 March 2014; "the ET"), sent to the parties on 15 April 2014. Representation before the ET was as before me. By its Judgment the ET dismissed the Claimant's claims of unfair dismissal and direct age discrimination. The appeal relates solely to the unfair dismissal claim.

2. The appeal was considered by HHJ Serota QC at an Appellant-only Preliminary Hearing on 17 November 2014 and was allowed to proceed on two grounds. Since then, the ET has provided further Reasons for its decision, in the light of which the Claimant no longer pursues one of her grounds of challenge; the sole matter before me now relates to the ET's finding on breach of contract.

The Background Facts

3. The Claimant commenced employment as Assistant Secretary to Lady Sainsbury on 12 July 2004. Lady Sainsbury, now deceased, was the mother of Lord David Sainsbury, the widow of his late father, and was aged over 100 at the time of the ET hearing. Her affairs were managed by her solicitor and Lord Sainsbury, pursuant to an enduring power of attorney. Innotech Advisors Ltd is a company which runs the private office of Lord Sainsbury.

4. In 2007, when the Claimant was working two days a week for Lady Sainsbury, she also took up another post working as a secretary for the Chairman of Innotech, also for two days a week. As a result she had then two separate contracts of employment. The ET records that the Claimant was encouraged to regard the role at Innotech as offering her some degree of job security on a longer term basis in the event that Lady Sainsbury, then aged 95, should die.

5. In 2008, Lady Sainsbury's full-time secretary retired; she was not replaced. In 2010, there were discussions with the Claimant as a result of certain changes and the then Innotech Chairman considering that his PA's role needed to be full-time. The result was that the Claimant continued to be employed under a contract with Innotech but ceased to be PA to its Chairman. She was to devote all her time to Lady Sainsbury's affairs, albeit reporting to the Innotech Chairman and continuing to be on that company's payroll. The Innotech Chairman saw this as confirming what had already been happening for a long time (paragraph 12).

6. Letters sent to the Claimant recording these matters, dated 19 October 2010, also referred to arrangements in the event of Lady Sainsbury's death. The Claimant responded on 4 November, to which the Innotech Chairman replied by letter of 16 November 2010, making clear he considered the discussion closed. Subsequently, going into 2013, there was a review into matters concerning the costs of running Lady Sainsbury's home and office (not her nursing or other care). That review included the costs of the secretarial and administrative support.

7. In March 2013, it was decided that the Claimant's pay under her Innotech contract should in future come from the payroll for Lady Sainsbury's office. She was accordingly given a P45 from Innotech, although assured that did not affect her employment status.

8. In April 2013, as part of the cost review, the question was raised by Lord Sainsbury (who ultimately met the costs of his mother's household and office) as to whether there was a continuing requirement for Lady Sainsbury to have a secretary working four days a week. As the ET found, the Claimant's role was more in the nature of an administrator of household rather than a conventional secretarial position dealing with correspondence and so on. Consultation was opened with her, with the proposal that her role be reduced to two days a week, with it being left open as to whether that was two complete days or four half-days. That proposal was accompanied with a suggestion that her salary would be increased pro rata in recognition of her long service. The alternative would be for the role to be made redundant.

9. During the course of the redundancy consultation with the Claimant, reference was made back to the 2010 correspondence. The Claimant considered this had given rise to a contractual agreement that she would continue to be employed for the term of the lifetime of Lady Sainsbury plus six months. The Respondents disagreed, interpreting it as merely referring to the Claimant's possible redundancy entitlement should she have continued in her employment for six months after Lady Sainsbury's death. The Claimant saw that as reneging on what she considered to be an agreement reached in 2010 and this informed her involvement in the consultation process thereafter. Ultimately the decision was taken that she be dismissed by reason of redundancy. She appealed that decision, but was unsuccessful.

The ET's Judgment and Reasoning

10. The ET was satisfied that the Claimant's dismissal had been by reason of redundancy for the purposes of section 139 of the **Employment Rights Act 1996** ("the ERA"). It also considered her dismissal for that reason had been fair. This appeal concerns the ET's treatment of the Claimant's contention that, in 2010, it was agreed her employment would continue until

shortly after Lady Sainsbury's death and thus she had agreed to give up the long-term security of her second job. She said this was relevant to the fairness or otherwise of her dismissal.

11. Included within the Claimant's ET1 was a claim for a declaration of the terms of her contract. At a Preliminary Hearing, before the ET on 18 December 2013, it was determined the declaration claim should be stayed *sine die*. There was no appeal against that ruling.

12. There was no breach of contract claim before the ET, albeit the Claimant reserved her right to bring such a claim elsewhere. In the circumstances, the ET was circumspect about the findings of fact it should make in this regard. It did, however, find the Respondents had considered the question of the contractual obligation owed to the Claimant as a result of the 2010 correspondence both before making the decision to dismiss and on the appeal. The Respondents considered that the contractual obligations had been applied correctly. The ET took the view it was not for it to determine what the actual contractual position was: even if there was a breach of contract, if the Respondents had acted fairly, the dismissal could still be fair. It would not, for example, be uncommon for an employer to dismiss without giving full notice (in breach of contract), but for the dismissal to be fair. Even if the Respondents had been wrong in their interpretation of the contract and there had been a breach of contract, the ET was satisfied that did not render the dismissal unfair. Proper regard had been given to the contractual position, and the Respondents had believed they were acting in accordance with it.

The Appeal

13. The sole basis of the appeal now pursued is whether the ET erred in its approach to the issue of whether the Claimant's dismissal was unfair as a result of being in breach of contract.

Submissions

The Claimant's Case

14. The Claimant argued that whether or not an employer had dismissed in breach of contract was relevant to the question of the fairness of the dismissal; see **London Borough of Redbridge v Fishman** [1978] IRLR 569 EAT, **Farrant v Woodroffe School** [1998] ICR 184 EAT and **Weston Recovery Services v Fisher** UKEAT/0062/10. Where it would not be relevant would be where the breach related to the notice period; see **Treganowan v Robert Knee and Co Ltd** [1975] ICR 405. The **Treganowan** case rightly drew a distinction between the fairness of the dismissal and the question whether the timing of the dismissal was in breach of contract. That case was to be distinguished from those in which the contractual rights were relevant to the fairness of the dismissal for the reason relied on; see e.g. **Fishman**, **Farrant**, **Hooper v British Railways Board** [1988] IRLR 517, and **Fisher** - cases in which the fairness of the dismissal related to the lawfulness of an instruction (e.g. **Farrant**, **Fishman**, **Fisher**) or where the question was whether the dismissal was in breach of a contractual obligation (e.g. **Hooper**); the present case fell to be considered as raising similar issues to **Hooper**.

15. The Claimant contended the effect of the 2010 changes was that her dismissal was in breach of contract. The 2010 agreement was that she would be employed by the Respondents until Lady Sainsbury's death and for at least six months thereafter. Her dismissal in breach of that agreement was therefore unfair. The ET had failed to answer the crucial question as to whether the Respondents had breached the Claimant's contract of employment by dismissing her. Only by answering that question could the ET have properly gone on to consider whether the Respondent had acted fairly in dismissing the Claimant despite the dismissal itself being in breach of contract. Thus the ET's characterisation of this as "*not for us*" (paragraph 92) was an

error of law. That issue was relevant not only to the fairness of the dismissal *per se* but also to the question whether another employee should have been dismissed rather than the Claimant.

16. Further, in the alternative, the ET erred in considering that the dismissal was fair even if the Respondents were wrong in their interpretation of the contract simply because they had considered the point. That failed to take account of the fact that employers would rarely consciously and deliberately dismiss in breach of contract. The ET, by accepting the Respondent's evidence in that regard, had allowed the question to be considered from a subjective rather than an objective point of view. Moreover the ET's analogy with the failure to give proper notice was not apt. The ET was concerned with the fairness of the dismissal not with the notice that then followed. This ET had failed to determine the contractual obligation relevant to the issues raised by the unfair dismissal claim. To the extent that its failure arose because of potential High Court proceedings, it had wrongly abdicated its responsibility.

The Respondents' Case

17. The Respondents argued that the question of the existence of an alleged fixed-term contract was not relevant to the section 98(4) question of reasonableness of a redundancy dismissal. The ET had regard to the relevant factors (paragraph 79), including whether the process was unfair (paragraph 84). In any event, it held - contrary to the Claimant's case - that the Respondents had taken account of the alleged contractual arrangements and the dismissal was fair (paragraphs 87 and 89). Yet further, the ET considered and answered the contractual case in the alternative. In those circumstances the Claimant's case was really one of perversity.

18. The ET had held, even if the Claimant was right as to the correct construction of the contract, it was not relevant to the statutory question of fairness (paragraph 92). It expressly

concluded "*if there has been any breach of contract … this is a fair dismissal.*" The ET's approach was correct as a matter of law, see **London Borough of Redbridge v Fishman** [1978] ICR 569 and, further, note the Judgment of Lord Kerr in **Gisda Cyf v Barratt** [2010] ICR 1475 at paragraph 39, where it was stressed it was fundamental to segregate common law principles from statutorily conferred rights.

19. The Claimant's attempt to distinguish her arguments from the notice period point, which the ET had taken into account, was false. There was no relevant distinction between dismissing with short notice and dismissing before the expiration of a fixed term.

The Claimant in Reply

20. The Respondents had made a fundamental error of confusing this case - a breach of contract which went to the fairness of the decision to dismiss for that reason - with those cases involving breaches of contract which simply went to the timing of the dismissal.

The Relevant Legal Principles

21. This being an unfair dismissal claim, the starting point has to be section 98 of the **ERA**. The ET having made its unchallenged finding that the dismissal was for the statutorily permissible reason of redundancy (section 98(2)(c)), the question was "whether the dismissal is fair or unfair (having regard to the reason shown by the employer)", which:

> **"(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."**
>
> **(section 98(4) ERA)**

22. The statute thus provides for a different right to that allowed under common law and it is subject to a different test. As observed by Phillips J in **Treganowan v Robert Knee and Co Ltd** [1975] ICR 405 (a case involving an allegation that the Claimant's summary dismissal was in breach of contract and was thereby unfair), at page 411B-D:

> **"… The concept of unfair dismissal … is quite different from the common law action for wrongful dismissal. The former in effect confers on the employee a quasi-property in his employment, whereas at common law, provided proper notice is given, an employee has no right to retain his employment or to be compensated if he is dismissed. Accordingly the essential subject matter … is the fact of dismissal. The question is: is it unfair, rather than is it wrong: see *Norton Tool Co Ltd v Tewson* [1972] ICR 501, 504, where, sitting in the National Industrial Relations Court, Sir John Donaldson said:**
>
> > **"In our judgment, the common law rules and authorities on wrongful dismissal are irrelevant. That cause of action is quite unaffected by the Industrial Relations Act 1971 which has created an entirely new cause of action, namely, the 'unfair industrial practice' of unfair dismissal." "**

23. Similar observations were made, again by Phillips J, then presiding in the EAT, in **Redbridge London Borough Council v Fishman** [1978] ICR 569, albeit that it was allowed that contractual rights and duties might not be irrelevant to the question of fairness (see page 574C-D). In that case the contractual position was seen as potentially relevant in determining what the Claimant had been employed to do and thus whether the instruction that she do something different was reasonable; the contractual question and the statutory question being thus essentially the same (see at page 576D-E).

24. In the case of **Hooper v British Railways Board** [1988] IRLR 517 the Court of Appeal approved the earlier statement of law in **Treganowan**. In **Hooper** it was conceded that the fact that a dismissal was in breach of contract was a factor relevant to the consideration of fairness albeit it was not decisive. The Court of Appeal did not disapprove that concession but specifically did not accept (see the Judgment of Gibson LJ at paragraph 53) that, if a dismissal was in breach of contract, the only rational conclusion for an ET to reach would be that it was unfair (see also the specific rejection of that argument in submission at paragraph 54).

25. The issue in **Hooper** was whether the Respondent had fairly dismissed the Claimant on capability grounds in breach of his contractual right to be kept on in his employment whilst on sick leave. In that case, the EAT considered it relevant that the ET should determine what the true contractual position was, applying normal common law principles in construing the terms of the contract; an approach upheld by the Court of Appeal.

26. The potential relevance of an employer's breach of contract to the question of fairness was also acknowledged by the EAT, HHJ Peter Clark presiding, in **Farrant v The Woodroffe School** [1998] ICR 184 (see page 194G-H). That was another case where the issue for the ET had been the employee's refusal to obey an instruction. Thus the question of reasonableness - and, therefore, the lawfulness of the instruction - was relevant (see page 196H). A similar issue as to the reasonableness of the employer's instruction, albeit in the context of a question of the employee's performance, arose in **Ford v Libra Fair Trades Ltd** UKEAT/0077/08. The EAT agreed with the approach adopted in **Farrant** (paragraph 32) and opined (paragraph 35):

> **"35. So far as s98(4) is concerned, it goes without saying that the Tribunal has to look at the reasonableness of the decision made by the employer and, in the context of a potentially mistaken belief as to whether the conduct complained of fell within the duties of the employee under his contract of employment, whether such mistaken belief was one which it was reasonable to hold."**

27. Although, see also, **Weston Recovery Services v Fisher** UKEAT/0062/10/ZT, a conduct dismissal case where the ET was held to have erred in holding the dismissal was unfair under section 98(4) **ERA** because the conduct was not gross misconduct for contractual purposes.

28. The Respondents also rely on the approach adopted by the Supreme Court in the case of **Gisda Cyf v Barratt** [2010] ICR 1475, where it was said that there was a need to segregate

intellectually common law principles relating to contract law from statutorily conferred rights (per Lord Kerr). In **Cyf** it was allowed (paragraph 38):

> **"… where the protection of employees' statutory rights exactly coincides with common law principles, the latter may well provide an insight into how the former may be interpreted and applied but that is a far cry from saying that principles of contract law should dictate the scope of employees' statutory rights. … where common law principles precisely reflect the statutorily protected rights of employees they may be prayed in aid to reinforce the protection of those rights."**

29. Finally, the Respondents have also relied on the case of **Southern Cross Healthcare Co Ltd v Perkins and Others** [2011] ICR 285 where the Court of Appeal, albeit in the context of claims by existing employees seeking a declaration of their contractual rights from an ET, held it was not the function of the ET to interpret contractual terms. The Claimant observes that was not an unfair dismissal case; it involved applications by employees whose employment was still continuing and is not an authority that has relevance for this appeal.

Discussion and Conclusions

30. The starting point in this case is that the reason for the dismissal was (as the ET found) redundancy. There is no challenge to that finding. The ET thus found (I paraphrase) that the Respondents dismissed the Claimant because they had a diminishing requirement for employees to carry out the kind of work for which the Claimant was employed.

31. The Claimant says her dismissal for that reason was unfair because she had a contractual right to continue to be employed for the term of Lady Sainsbury's life plus six months.

32. The first question that seems to me to arise is - assuming that the Claimant did have such an entitlement - what would be its relevance for the ET charged with determining the fairness or otherwise of the decision to dismiss by reason of redundancy?

33. The cases involving the question of the reasonableness or otherwise of an employer's instruction - either in the context of a dismissal for misconduct in refusing to obey that instruction (**Farrant**) or in the context of an inefficiency in performance dismissal in relation to tasks assigned by the employer (**Ford**) - look at the issue of relevance of the contractual obligation in terms of that reason. In **Hooper** the reason for the dismissal was capability due to ill-health. Mr Hooper's argument was that the Respondent could not lawfully dismiss for that reason given his contractual entitlement and that was a relevant factor in determining whether the dismissal was unfair. So, in that case, the relevance of the point arose from the fact that the Respondent had, on Mr Hooper's argument, committed itself to retaining employees on sick leave and not dismissing them on medical grounds. It then did precisely that which it had said it would not. Even then, it was held that the existence of such a contractual obligation would not be determinative of the question of fairness, albeit that it might be a potentially relevant factor in determining the reasonableness of the employer's decision to dismiss.

34. The link between the contractual obligation and the fairness of the reason for dismissal seems to me to thus arise where it can be said there is a coincidence between the employee's common law contractual right and her statutory right not to be unfairly dismissed. That might be a slight stretch of the language in **Cyf** but it seems to reflect the way in which the relevance of contractual rights has been treated in unfair dismissal law. The contractual right has relevance to the fairness of the dismissal when (and because) there is a coincidence in the issues to be determined given the particular reason for the dismissal. Thus fairness of a dismissal for a refusal to obey a reasonable instruction will require consideration as to whether that instruction *was* reasonable, and that, in turn, may require a determination as to whether the instruction was lawful under the contract or, by analogy with Mr Hooper's case (where the employer dismissed for a reason relating to capability due to ill-health, where it had previously committed not to

dismiss in such circumstances), the fairness of the employer's decision might give rise to the question whether that employer had previously agreed it would not dismiss employees in precisely the circumstances in which, and by reason of which, it had dismissed that employee.

35. The difficulty, as I see it, for the Claimant lies in the nature of the contractual term she asserts. She says the agreement was that that she would be employed for a term fixed by the lifetime of Lady Sainsbury plus six months. That, of itself, says nothing about her employer's ability to fairly dismiss for redundancy at some earlier point. I do not see the same coincidence of issues as arose, for example, in Mr Hooper's case.

36. In exploring the issue with Mr Gullick in oral argument, what the Claimant's case really came down to was that she considered it relevant that a commitment had been made to her in 2010 (she says a contractual commitment, but I am not sure that was really essential to her argument) that she be employed for the lifetime of Lady Sainsbury plus six months. She does not say that meant the Respondents could not dismiss her by reason of redundancy, although she reserves the right to claim that it was thereby in breach of contract in terms of the timing of that dismissal. Her argument is simply that it became part of the relevant factual background.

37. Other than seeing the commitment as part of the relevant factual background, the Claimant's case becomes simply a complaint about the timing of her dismissal rather than about the fairness of the decision to make her redundant. She accepts the Respondents were able dismiss her by reason of redundancy notwithstanding the term on which she relied. Thus her complaint is that the dismissal took place *when* it did rather than for the reason it did.

38. So, allowing that, on anyone's case, the actual contractual entitlement could not be determinative of question of fairness for the purposes of unfair dismissal, did the ET err by failing to expressly determine what the contractual obligation was in this case? I do not consider that it did. If seen as an argument that the Respondents were wrong to dismiss the Claimant earlier than the period of Lady Sainsbury's lifetime plus six months, then this is a complaint about the timing of the dismissal and no different to a wrongful dismissal argument where the complaint is about short notice. If seen as an argument that the contractual entitlement went to the fairness of dismissing for that reason, then the contractual agreement relied on by the Claimant case simply did not go that high; it did not give rise to the kind of coincidence of issues in respect of the contractual right (on the one hand) and the fairness of the decision to dismiss for a particular reason (on the other) that has been allowed in the case law. The contractual commitment would need to be that the Claimant would not be made redundant; simply fixing the term of contract (which is all the Claimant argued the Respondents had done) does not go that far. It was potentially relevant background; nothing more.

39. Even if I am wrong about that, I cannot see that the ET erred. It expressly went on to consider the case in the alternative. It concluded that, even if there had been a breach of contract, the dismissal was fair (paragraph 92). Significant for the ET in this context was the fact, as it found, that the Respondents had considered the contractual position and had taken the view that they were acting in accordance with it. The question for the ET was whether the Respondents' approach fell within the range of reasonable responses of a reasonable employer in this context. The ET concluded it did. That was a permissible conclusion. It would not be open to me to interfere because of any view that I might or might not take as to the correct contractual position. In those circumstances, and for those reasons, I dismiss the appeal.