Appeal No. UKEAT/0151/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 August 2014
Judgment handed down on 18 September 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR C EDWARDS

MRS N CHALMERS — APPELLANT

MENTOR GRAPHICS (UK) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ALEX MONACO (Representative) Compromise Agreements Ltd 52B Conyers Road London SW16 6LT
For the Respondent	MISS ELIZABETH MELVILLE (of Counsel) Instructed by: Cater Leydon Millard Limited 68 Milton Park Abingdon Oxfordshire OX14 4RX

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

The Claimant argued that the Employment Tribunal was required to determine, but did not determine, issues relating to the acquisition of a company known as Flowmaster Limited – specifically whether there was a TUPE transfer and whether the Claimant was entitled to resign because the Respondent failed properly to address that issue. Held: the Employment Tribunal had correctly understood the issues. Whether there was a TUPE transfer of Flowmaster employees was not an issue for the Employment Tribunal to determine.

The Claimant argued that the Employment Judge's conduct was such as to evince apparent bias. Held: while the Employment Judge's choice of language at one point during the hearing was open to criticism, a fair minded and informed observer would not have thought there was a real possibility of bias.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mrs Nicole Chambers ("the Claimant") against a Judgment of the Employment Tribunal sitting in Reading dated 15 May 2013 (Employment Judge Hill sitting with Mrs Barnes and Mr Skelton). Only one lay member of the Appeal Tribunal was available: with the consent of the parties given under section 28(4) of the **Employment Tribunals Act 1996** the appeal was heard by a Judge and a single lay member.

2. By its Judgment the Employment Tribunal dismissed a claim of constructive unfair dismissal which the Claimant had brought against Mentor Graphics (UK) Ltd ("the Respondent"). There are essentially two grounds of appeal. The first relates to the scope of the hearing. It is the Claimant's case that the Employment Tribunal was required to determine, but did not determine, issues relating to the acquisition of a company known as Flowmaster Limited – specifically whether there was a TUPE transfer and whether the Claimant was entitled to resign because the Respondent failed properly to address that issue. The second relates to the fairness of the hearing. It is the Claimant's case that the Employment Judge's conduct was such as to evince apparent bias.

The Background

3. The Respondent is a UK subsidiary of Mentor Graphics Corporation, an American corporation responsible through subsidiaries for a total workforce of some 5,000 people. The global corporation's Regional HR Director for Europe was Dr Amit Geva.

4. The Claimant has for many years worked in the field of Human Resources. She is a Fellow of the Chartered Institute of Personnel and Development. She was appointed as

Human Resources Manager of the Respondent with effect from 2 January 2011. She resigned by letter dated 12 February 2012. Her resignation took effect on 16 March 2012.

5. The Claimant brought Employment Tribunal proceedings in May 2012. She was at all material times represented by Mr Alex Monaco, a representative with a firm known as Compromise Agreements Ltd.

6. The main thrust of the Claimant's case related to what she considered to be a "sham selection process" for redundancy. It was her case that a major reason for her resignation was the Respondent's requirement placed upon her to participate in such a process. Her ET1 form was accompanied by detailed Particulars of Claim. The "case summary" within those Particulars of Claim reads as follows:

> **"3. I was the UK HR manager, and I resigned primarily due to being ordered to perform a redundancy selection process which was clearly unlawful, whereby I was presented with a list of individuals to be made redundant before the 'selection process' had even begun.**
>
> **4. I was asked to instigate a sham selection process whereby employees were 'scored' based on seemingly objective criteria, when in fact the decision had already been made by management as to who should be made redundant. This is highly unusual, unethical and unlawful and I eventually had no choice but to resign."**

7. The case summary went on to outline various redundancy exercises or proposed redundancy exercises in which the Claimant was involved. These were in April, May and October 2011 and January 2012. In each case it was said that she was presented with a list of names of people that would leave through redundancy, asked to prepare a spreadsheet with the financial figures for them and to deal with the redundancy process. It was said that the last straw was "the latest round of redundancy and the fact that the employees' names were provided before any consultation or assessment took place." She said that her reasons for resignation were "relating to being asked to conduct a sham redundancy process".

8. The Respondent denied that the Claimant had been asked to conduct a sham redundancy process. The Respondent said that the Claimant had misunderstood the spreadsheet, which was a financial document to be populated with the employees who would have the greatest redundancy cost so that maximum cost accruals could be forecast for internal financial reporting. There was support for the Respondent's position in an e-mail dated 27 April 2011 when the Claimant was told, when completing the spreadsheet: "Just take the most expensive settlement amount." The Respondent accepted that its managers had put on papers which employees were likely to be made redundant, but said that this was subject to a proper redundancy exercise taking place. In October 2011 only five of 11 named people were ultimately dismissed.

9. The Employment Tribunal proceedings were heard between 23 and 25 April 2013. Mr Monaco represented the Claimant. Mr Pirani, a barrister who has since left private practice, represented the Respondent. There had been claims other than constructive unfair dismissal, but these were withdrawn – some at the beginning of the hearing, others, relating to the making of public interest disclosures, after the Claimant's cross-examination.

10. The Employment Tribunal, drawing on issues defined at a case management discussion, identified the Claimant's case as being that the Respondent breached her contract by:

> **"...requiring her to execute redundancy exercises that were sham or in a way which was contrived so as to be unlawful or where a fair procedure, including as a selection for redundancy, was not followed in April 2011, July 2011, October 2011 and January 2012..."**

11. It was common ground that if the Respondent had behaved in this way, its conduct would have entitled the Claimant to resign and claim constructive unfair dismissal. The question was whether the Respondent had behaved in this way.

12. The Employment Tribunal did not accept the Claimant's case. It found that she had indeed misunderstood the Respondent's requirements in respect of the spreadsheet. The purpose of the spreadsheet was as the Respondent had said: see paragraphs 56-58. No complaint could be made of the April or May proposals: the first was never pursued and the second concerned named individuals because they were contract workers whose contracts had come to an end. The Employment Tribunal found that, although the Respondent had identified in advance which employees were likely to be made redundant, the process (which the Claimant had designed and which the Employment Tribunal approved as a proper process) was not a sham. The following passages from within a longer selection give the essential reasoning of the Employment Tribunal:

> **"62. Ms Wetzel accepted and we agree that the practice of using names to identify posts was lazy and not best practice. We are however satisfied that the function of those names was to identify the number of positions and type of positions to go. We are entirely satisfied that the role of the locally placed HR manager was to put in place processes to achieve the end to be desired. The end to be desired was a reduction in headcount not to dismiss the named individuals.**
>
> **63. The processes put in place by the Claimant could not achieve the end of the named individuals being selected by a device unless we were to believe that everyone within the company was in some way in cahoots with each other. Inevitably the bigger the conspiracy the more people will talk. It simply did not make sense. The Claimant identified the persons to do the assessments, she drew up the selection criteria, she identified the people to hear the appeals, she prepared the paperwork. All the managers operated in accordance with the procedure she prepared and supervised.**
>
> **64. Realistically if managers have been discussing at a business level where they have areas that they can make leaner they will have an idea of who is in the post that is going to be sliced away. If there are performance issues and the assessment criteria prepared by the independent HR manager includes performance issues, clearly the poor performers are more likely to score badly on the assessment than those who are the stars.**
>
> **...**
>
> **66. We therefore find as a fact that the Claimant is wrong to say that the way in which she was given names meant that she was obliged to ensure that those individuals were the persons selected for redundancy. Her obligation was to set up a process to ensure that there was a reduction in headcount in accordance with the company's direction. Small groups of managers managing small groups of employees will inevitably have some idea who is likely to be selected in advance. That is human nature. That is the way of business.**
>
> **67. We therefore find that the Claimant was not asked to do anything that was unlawful in relation to the redundancy. She failed to follow proper instructions by the completion of the financial spreadsheet. She should have included the highest placed employees to ensure that the company financial department could show the worst case scenario and finance as regards costings for the rebalancing exercise. The spreadsheets would only be altered as different people became either confirmed as redundant or if they had been redeployed [and] should not longer be reflected in the spreadsheet as their costs would no longer be applicable."**

The Scope of the Hearing

Submissions

13. On behalf of the Claimant Mr Monaco, while accepting that the central thrust of the Claimant's case related to the alleged sham process, argued that there was a subsidiary point which the Employment Tribunal ought to have addressed. This related to the January 2012 set of redundancies (not in fact carried through until after the Claimant's resignation, but proposed and in contemplation before she resigned). The global corporation had acquired the shares of a company known as Flowmaster Ltd. It was proposed to make several employees at Flowmaster redundant. Mr Monaco argues that the employees of Flowmaster were the subject of a transfer pursuant to the provisions of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"); that the proposal was to dismiss them because of the transfer; that it was unlawful to do so; and that the Employment Tribunal was required to decide (1) whether there was such a transfer (Ground 1 in the Notice of Appeal) and (2) whether the Claimant was entitled to resign because the Respondent failed properly to address her concerns about a TUPE transfer (Ground 2 in the Notice of Appeal).

14. On behalf of the Respondent Miss Elizabeth Melville submits that these were never issues for the Employment Tribunal and the Employment Tribunal cannot be faulted for failing to deal with them. The TUPE issue was never directly in play and the Claimant did not allege that she had resigned because of it. The only complaint related to a refusal to allow her to take advice on the matter in circumstances where the Respondent had general counsel who could and did take such advice. This complaint, which was a minor complaint in the context of the overall case, the Employment Tribunal dealt with. If the Employment Tribunal had truly been tasked with deciding whether there was a TUPE transfer, substantial additional issues would

have arisen which were never identified or addressed. She also submits that the point is academic since the Claimant did not resign for any reason to do with TUPE.

The Employment Tribunal's Reasons

15. It is plain that the Employment Tribunal did not consider that it was required to decide a TUPE issue. It dealt with this aspect of the matter principally in two short paragraphs within its findings of fact. It said:

> **"45. In December 2011 Mentor Graphics Corporation acquired a company Flowmaster Limited. This is based in Towcester. The Respondents say that this was not a TUPE transfer. The Claimant argues that it is. Ms Wetzel took advice from UK employment lawyers and advised that TUPE did not apply.**
>
> **46. The Claimant queried and continues to query this. The Claimant is unhappy that she was unable to get her own legal advice on this matter. It is not for this Tribunal to decide whether or not TUPE applies."**

16. The Employment Tribunal returned to the question of taking advice within paragraph 59 of its Reasons:

> **"We therefore believe that she misunderstood what she was being asked to do, and why, for her American bosses. We consider that the reason that she was in this position is that she found it difficult working under such close scrutiny. We reach that view because she considered she should be able to seek legal advice directly outside the company. This fails to recognise that in a hierarchical organisation such as Mentor Graphics her source of legal advice would be from Sharon Wetzel. It would be her role (Ms Wetzel's) to get additional legal advice if she so deemed it. Having been given the position in law by Ms Wetzel the Claimant's duty would be to operate in accordance with her instructions."**

17. Mr Monaco says, and we accept, that he was discouraged from pursuing this issue by the Employment Judge at the hearing. In comments which the Employment Tribunal requested from the Employment Judge in connection with the issue of apparent bias, she said:

> **"9. The difference in apparent treatment of the two advocates relates to the difference in how they performed as advocates. Mr Pirani did not stray off the point; Mr Monaco did. Part of my role is to ensure that parties deal with the issues before us. I do recall that I found Mr Monaco's style of advocacy rather difficult. He also appeared to be trying to pursue a case which was not in accordance with the agreed list of issues, in particular in relation to TUPE. I may have presented as less than patient with him for that reason."**

Discussion and Conclusions

18. In order to see who is correct on this question, it is, we think, necessary to trace the way in which the Flowmaster issue was addressed prior to the commencement of the Employment Tribunal hearing.

19. In the detailed Particulars of Claim drafted by Mr Monaco, the passage relating to the January 2012 redundancies begins at paragraph 30. The main passage of potential relevance is the following:

> **"30. In around January 2012, the recent acquisition of a company called Flowmaster Ltd, and the integration of the new company into Mentor Graphics and the proposed restructure planned for January 2012 caused me concern.**
>
> **31. I mentioned to my Manager, Amit Geva, that we should examine potential TUPE conditions in detail and seek specialist legal advice prior to any proposed rebalance/redundancy. There was a proposal to merge two organisations and some employees who were listed were from the new company.**
>
> **32. In around January 2012 I was presented with a further list of names that would be affected by redundancy. There were 6 UK employees affected and 5 were given notice following the selection process. One further employee was delayed as the Company wanted to hire a replacement and agree a handover with him prior to making him redundant. The purpose of his particular redundancy was because there was some duplication of activities following the acquisition of Flowmaster.**
>
> **33. So again I had been provided with a list of names of people to be made redundant (NC16, NC17). I again expressed my concern about the planned redundancy and that the Company should be stating numbers of roles that are affected not actual names (NC18). This was a protected disclosure.**
>
> **34. I had not been involved in any prior due diligence discussions and I had suggested that I could recommend a local Lawyer with whom I had worked previously who could provide this advice. My Manager Amit Geva said that we should not make recommendations regarding legal advice, as the Mentor Legal department will not follow these up and that this would be viewed badly. I was very shocked to hear this, as my aim was to ensure that we ensured that there was not exposure for the company, yet I was silenced by the company politics."**

20. There is no assertion in the Particulars of Claim that there was a TUPE transfer, still less any detailed reasoning as to why a TUPE transfer had taken place or why, if it had, any proposed redundancies would be unlawful. The subsequent paragraphs deal with the "sham process" point in some detail. There is no suggestion that the Claimant resigned because the Respondent was in some way acting unlawfully by reason of TUPE. The reason for resignation given, which we have already quoted, relates to the "sham process".

21. In its ET3 response the Respondent dealt with this matter briefly. It said:

> **"In December 2011, a Dutch entity of the Company acquired the share capital in the Dutch based ultimate parent of a UK company known as Flowmaster. The Transfer of Undertakings (Protection of Employment) Regulations 2006 did not apply to the acquisition and the Claimant was informed of and accepted this."**

The ET3 went on to address the sham redundancy point.

22. The Claimant made detailed requests for further information. The requests all related to the "sham process" point. No request related in any way to a TUPE point.

23. The Claimant prepared a schedule of legal and factual issues and proposed directions for the case management discussion. This is a significant document. It is a detailed listing of potential issues. There is no reference, under the heading "February 2012 redundancies" to any TUPE point. This is a particularly telling document since it was prepared for the express purpose of informing the Employment Tribunal and the Respondent as to the issues in the case.

24. The issues were clarified at the case management discussion. The listing of issues was boiled down to something much shorter than the Claimant's schedule. The issues relating to redundancy were one which we have already quoted and a further issue "requiring the Claimant to carry out a redundancy exercise where there was no genuine requirement for redundancies."

25. The Claimant prepared a witness statement for the hearing. It takes the matter no further, as regards any TUPE point, than the Particulars of Claim. The emphasis remained on the sham process issue. There is no suggestion that the Claimant resigned because the Respondent was in breach or may have been in breach of any obligation relating to TUPE.

26. Mr Monaco prepared written submissions dated 15 April 2013 prior to the hearing. There is no reference to any TUPE point in the submissions. He tells us, and we accept, that the written submissions were principally related to disclosure issues. It is plain that Mr Monaco did not see any disclosure issue arising in respect of a TUPE question.

27. In our judgment, taking into account this background, it is plain that the question whether the Flowmaster employees had transferred under TUPE was not an issue for the Employment Tribunal to determine. It did not arise in any direct way from the Particulars of Claim or from the various documents in which the Claimant had set out her case. It is plain that the summary of issues at the case management discussion was not intended to, and did not, raise any TUPE issue.

28. We further agree with Miss Melville that the issue would have required documents, evidence and argument, for which neither party had prepared. The limited documents before us suggest that the global corporation had acquired the parent company of Flowmaster Ltd by share acquisition. The documents also suggest that its employees remained in the employment of Flowmaster Ltd, which became part of a division of the global corporation; and that redundancies were not limited to Flowmaster employees. Whether there was a transfer at all, and if so whether the redundancies were lawful having regard to Regulation 7 of TUPE, would raise a raft of issues which were never identified and which the Employment Tribunal could not properly have determined.

29. It is axiomatic that an Employment Tribunal should determine only those issues which are properly before it for determination. In our judgment the Employment Tribunal was plainly correct not to address or determine the question whether there had been a TUPE transfer.

30. This leaves Mr Monaco's alternative formulation, which is that the Employment Tribunal did not properly address the question whether the Claimant was entitled to resign because her concerns about TUPE's application were dismissed out of hand by the Respondent. There is, in truth, very little about this point in the Claimant's wide-ranging letter of resignation dated 12 February 2012. In paragraph 55 of the Particulars of Claim, which we have quoted, the Claimant said that she had "set out my reasons for my resignation as relating to being asked to conduct a sham redundancy process." Once again, this was not an issue defined in the Claimant's Schedule of Legal and Factual Issues at the case management discussion. Insofar as the Respondent's refusal to allow the Claimant to take legal advice was an issue, it was properly dealt with by the Employment Tribunal in the paragraphs which we have identified.

31. For these reasons we reject the Claimant's arguments concerning the Flowmaster issue.

Apparent Bias

32. Where there is an allegation of procedural irregularity at an Employment Tribunal hearing, the Employment Appeal Tribunal investigates it by calling for an affidavit in support and then affording to the Employment Judge and members individually the opportunity to comment and to the opposite party also to put in an affidavit. That procedure has been followed in this appeal. There are affidavits from the Claimant herself and Mr Monaco. There is an affidavit from Mr Pirani, the Respondent's then Counsel. There are comments from the Employment Judge and members.

33. Mr Monaco says that the main thrust of the Claimant's appeal relates to a remark made by the Employment Judge on 24 April 2013 during cross-examination of Dr Geva. In his affidavit Mr Monaco describes what occurred as follows:

> **"During the evidence of Amit Geva of the Respondent on 24 April 2013, the learned Judge interjected during the cross-examination of Mr Geva to ask about how the employees of the Respondent were selected for redundancy. (It was the Appellant's case that employees were unfairly preselected prior to any objective process). The Judge, trying to understand the Respondent's case, said 'so, they were like the scum that rose to the top'.**
>
> **2. By this 'scum' analogy, one can only assume that she meant to say that they were not unfairly preselected, but fact were objectively selected, due to issues such as competence or capability, in the same way that scum naturally floats to the top of liquid. But this incredible reference to the unfortunate employees as 'scum' gives rise to a perception that the learned Judge was biased in favour of the Respondent."**

34. Mr Pirani accepts that the remark was made. In his affidavit he said:

> **"'Scum rose to the top comment: The comment was made to illustrate a point, to reflect back her understanding of the Respondent's evidence. No reasonable person could construe it as giving rise to a perception in favour of the Respondent. No objection was made to it at the time or the following day."**

35. The Employment Judge said:

> **"3 <u>Scum rising to the top remark</u>:-**
>
> **I have no recollection of making it but I accept that the claimant does have that recollection. If she understood me to be saying that I viewed the employees of the respondent as scum, I could understand her complaint.**
>
> **4. It would not occur to me to use a negative word to describe people who might be about to lose their job. I often try to rephrase evidence to ensure that I have correctly understood the concept being put forward. The phrase was used to clarify that the respondent had a general discussion where lots of names were thrown into the melting pot and certain names emerged as front runners for selection, i.e their names rose to the top. I could have used 'sort the wheat from the chaff'. I acknowledge, with hindsight, that I might have chosen my words better.**
>
> **5. Whereas I can see that if the claimant had been a person who was in the redundancy pool she might have been offended, I cannot see how my remark might give the impression that I was biased toward the respondent. It was simply a clarification of a process. Whether that process was a valid or legal process is not suggested by the remark."**

36. One Employment Tribunal lay member did not recall the remark. The other, Mr Skelton, said the following:

> **"'Scum rose to the top' Comment by the Employment Judge was formed to try to understand how redundancy took place in America which allowed the Claimant to say that the redundancy in the UK was a sham. ... No-one objected to the term 'scum'. I did not take it out of context as to me it meant 'unwanted' or 'waste part of anything'. Not used to favour the Respondent. It was not bias in favour of the Respondent."**

37. We have said that this remark was described as the main basis of the ground of appeal. It was also suggested that the Employment Judge had intervened to ask questions of the Claimant;

given a strong indication that a whistleblowing claim was bound to fail; and shown "considerable anger" towards Mr Monaco, though remarking on the third day that she looked forward to a calmer approach.

38. In response to this, Mr Pirani says that the Claimant's case on the question of whistleblowing was weak and not pursued effectively, but nothing the Employment Judge said or did was untoward. There were exchanges between the Employment Judge and Mr Monaco, when he failed to ask concise questions relating to the issues. The "whistleblowing" claims had become untenable by the time they were withdrawn.

39. Miss Barnes, the other lay member, said the following:

> **"In my view the complaints directed at Judge Hill are both unfair and unreasonable. Her style is direct and can be brusque if Counsel or Witnesses are poorly organised in terms of content and time management. Certainly we had reservations about the presentation of this case and Judge Hill did repeatedly remind Mr Monaco of the need to focus and there were tensions between them. To her credit, however, it was she who sought to calm matters on Day 3, which Mr Monaco accepted with alacrity."**

40. We have quoted from the materials before us. We did not think it necessary, and the parties did not ask us, to hear cross-examination. It is agreed that the principal remark containing the word "scum" was made. There was no other evidence sufficiently specific for cross-examination to be a useful exercise.

41. The approach of the Appeal Tribunal to an allegation of bias by an Employment Tribunal is the same as that of any other appellate court. It is derived in modern times from the decision of the Court of Appeal in **In Re Medicaments and Related Classes of Good (No 2)** [2001] 1 WLR 700 at 726-727, approved by the House of Lords in **Porter v Magill** [2002] 2 AC 357 at paragraph 103.

42. The Employment Appeal Tribunal must first ascertain all the circumstances which have a bearing on the suggestion that the Employment Tribunal was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Employment Tribunal was biased.

43. We address, first of all, the remark about "scum rising to the top". In his reasons for allowing the appeal to proceed, HHJ Clark said that the "scum" remark was plainly unacceptable. We agree. The Employment Judge was certainly correct that she might have chosen her words better. Redundancy is a misfortune occurring to employees by reason of circumstances which are usually far outside their control. Selection for redundancy often involves hard choices between decent employees. The Employment Judge, searching off the cuff for an analogy to describe a process explained to her by a witness, made a poor choice.

44. We must ask, however, what the impact of this remark would be on the fair-minded and informed observer. We think such an observer would disapprove of the remark. But we do not think it would lead such an observer to conclude that there was a real possibility of bias. The remark was not made with reference to the Claimant (who was of course not redundant); nor was it made with reference to any particular individual or individuals. The Employment Judge was searching off the cuff for a word to describe a process outlined by a witness. Mr Monaco suggested that the fair-minded and informed observer might conclude that there was a real possibility of bias because the Claimant was, as he put it, "in the camp" of the persons made redundant. On any view, however, there had to be a redundancy process (indeed the Claimant designed one which involved assessment by managers). We do not think the fair-minded and informed observer would look at it in the way in which Mr Monaco suggested.

45. As to other exchanges between the Employment Judge and Mr Monaco, there was in truth very little detail before us. Mr Monaco's main complaint in oral submissions related to the Employment Judge's refusal to allow him to develop his TUPE point. This, as we have found, was justified. For the rest, we are satisfied that the Employment Judge was acting to keep Mr Monaco to the point and clarify that which genuinely required clarification, especially as regards whistleblowing.

46. On the one hand, we accept that the Employment Judge was direct and brusque, as a lay member said she could be. On the other hand, having heard Mr Monaco, we do not find it difficult to accept that he may have wandered from the point, as he from time to time did before us. We do not think that interventions from the Employment Judge would have been regarded by a fair-minded and informed observer as evincing bias.

47. For these reasons the appeal will be dismissed.