Appeal No. UKEAT/0112/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 July 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MISS G HAKKI APPELLANT

INSTINCTIF PARTNERS LIMITED (FORMERLY COLLEGE HILL LTD) RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID GRAY-JONES (Solicitor) Thomas Mansfield Solicitors LLP 4th Floor 35 Artillery Lane London E1 7LP
For the Respondent	MR CHRISTOPHER MILSON (of Counsel) Instructed by: DAC Beachcroft LLP 7 Park square East Leeds LS1 2LW

SUMMARY

REDUNDANCY - Definition

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Reasonableness of dismissal

Whether the Employment Tribunal was entitled to hold that two new posts replacing a single post held by the Claimant involved a diminutive in the requirement for employee(s) to do work of a particular kind (**Employment Rights Act 1996** section 139(1)(b)(ii)).

Dismissal for the redundancy reason was fair in all the circumstances.

Appeal is dismissed. The Respondent's application for costs refused.

HIS HONOUR JUDGE PETER CLARK

1. "Read the statute". In a nutshell that was my answer to the question, "What is redundancy?", which I posed at the beginning of my Judgment in **Safeway Stores plc v Burrell** [1997] ICR 523. That question arose because the statutory provision at section 139(1)(b) of the **Employment Rights Act 1996** had become encrusted with the barnacles of authority, leading to an unnecessary distraction arising from the then so-called "contract" and "function" tests. My approach was later endorsed by the Lord Chancellor in his opinion in **Murray & Anr v Foyles Meat** [2000] 1 AC 51 at 56G.

2. Despite that simple and obvious approach I have now before me for Full Hearing an appeal in which the principal question is whether Employment Judge Isaacson, sitting alone at the London (Central) Employment Tribunal, was wrong in law in holding that the Claimant, Miss Hakki, was dismissed by the Respondent, IPL, formerly College Hill Ltd, by reason of redundancy and, further, that dismissal for that reason was fair under section 98(4) **ERA**.

3. This appeal against the Judgment dismissing her complaint of unfair dismissal for the reasons provided on 3 May 2013 was brought by the Claimant. It was rejected under Rule 3(7) on the paper sift by Supperstone J for the following reasons contained in the EAT's letter dated 22 August 2013:

> **"The ET directed itself correctly as to the law. There is no arguable basis for challenging the material findings of fact made by the Tribunal. I cannot discern any arguable error in the ET's decision. None of the grounds are arguable."**

4. However, at an Appellant-only Rule 3(10) Hearing, held on 7 March 2014, HHJ Shanks allowed the appeal to proceed to this Full Hearing on two grounds contained in an Amended Notice of even date.

5. Judge Shanks's reasons for permitting the appeal to succeed are contained in a document sent to the parties and included at page 73 of the bundle. I shall return to those reasons in due course.

Redundancy

6. I have been provided with a bundle of 25 authorities, to which a further authority was added this morning for this appeal hearing. It will not be necessary to refer to them all. I have mentioned the leading case of **Murray v Foyles Meat**.

7. Section 139(1) **ERA** provides, as far as is material:

> **"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—**
>
> **...**
>
> **(b)the fact that the requirements of that business—**
>
> **(i)for employees to carry out work of a particular kind...**
>
> **are expected to cease or diminish."**

8. Thus, as the Lord Chancellor pointed out in **Murray** (page 56) the language of paragraph (b) is simplicity itself. It asks two questions of fact. The first relevant question here is whether the requirements of the business for employees to carry out work of a particular kind are expected to cease to diminish. The second question is whether the dismissal was attributable, wholly or mainly, to that state of affairs. The issue in the present case is the redundancy question, the first question. The second, causation question is not in issue in the Amended Grounds of Appeal.

9. If the Respondent shows the potentially fair redundancy reason, then the reasonableness question arises under section 98(4).

10. Since the redundancy question is one of fact, it is to the Employment Judge's findings of primary fact that I now turn.

The facts

11. The Claimant commenced her employment with the Respondent on 1 November 2010 as an HR co-ordinator. She was appointed by and worked to the HR manager, Ms Ullah. They worked together at B&Q and had been friends. In that role the Claimant carried out administrative tasks for Ms Ullah and also provided administrative assistance to Mr Nicholls, CEO, and some limited assistance to Mr Talbot, the Group Financial Director (see paragraphs 26-27). In October 2011 a private equity firm, Vitruvian Partners, invested in the Respondent, which was an international business communications company, employing over 300 people in 16 offices around the world. Following the Vitruvian investment the 17 different entities including that in the UK come together under a single holding company in which Messrs Nicholls and Talbot were respectively CEO and Financial Director. On 1 November 2011 the Claimant's job title was changed to HR Administrator/PA to CEO.

12. One of the effects of the new holding company arrangement was that Ms Ullah became responsible for managing the HR function in all 17 offices. As a result, the Respondent decided to create two new full-time posts: HR adviser and PA to the CEO/FD. This was to reflect not a decrease but an increase in the work formerly done by the Claimant. Moreover both new roles required different skill-sets from those formerly shown by the Claimant. The PA role required increased responsibility and greater technical ability than previously required (see paragraphs 39-41). The HR role also required the post-holder to take greater responsibility (paragraph 38). It involved advisory work for which the Claimant accepted she did not have the qualification nor experience (paragraph 65). The Judge accepted the Respondent's

evidence, given by Mr Talbot, that the two new roles differed materially from the joint role formerly performed by the Claimant (paragraph 66). In the expectation of the two new roles the Respondent decided that the Claimant's role was redundant (paragraph 42). Having identified the Claimant as being at risk of redundancy, consultation meetings took place between 12 and 16 December. As to alternative employment, three possibilities were raised with the Claimant, the two new roles and an accounts junior role. She was only interested in the new PA role. She applied for it but was unsuccessful following an interview. Another candidate with the necessary skillset going forward was appointed (see paragraph 69). In these circumstances, the Claimant was dismissed by a letter dated 21 December 2012. She was not required to work out her notice. She did not think it worth appealing the dismissal decision.

The ET decision

13. Having directed herself as to the law (paragraphs 8-23) the Judge concluded, on the facts found, that the redundancy reason was made out (paragraphs 64-67) and that dismissal for that reason was both procedurally and substantively fair (paragraphs 68-72) notwithstanding criticisms of the Respondent's lack of written procedures (paragraph 61) and the short consultation period (paragraph 69). The position is summed up at paragraph 73.

The appeal

14. I turn to Judge Shanks's reasons for allowing the two amended grounds of appeal to proceed to a Full Hearing. As to ground 1, the redundancy question, he said this:

> **"It seemed to me arguable that the work being carried out by the [Claimant/Appellant] both on HR and PA all still had to be done after her role ceased to exist so there was simply no diminution of any work which could give rise to a dismissal for redundancy under s.139 ERA 1996."**

15. With some diffidence, I venture to suggest that that reasoning demonstrates a misreading of the statutory provision. Section 139(1)(b)(ii) is not concerned with a reduction in work per se, although there may be such a reduction as part of the factual matrix in a redundancy situation. It is not concerned with a reduction in head count, although again that may feature as part of the factual picture. The question is whether there is a reduction, actual or anticipated, in the employer's requirement for employees to do work of a particular kind. Here the Judge found as fact that the requirement for an employee to do the Claimant's old job was going, to be replaced by two materially different jobs. In fact the work increased, as did the employees to do it. But there was nevertheless a state of affairs which rendered the role performed by the Claimant redundant. Examples in the cases may be found in **Robinson v British Island Airways Ltd** [1977] IRLR 477 EAT, Phillips J presiding, and **Murphy v Epsom College** [1985] ICR 80 CA.

16. In both cases, following a reorganisation, the new job differed from the old job. The requirement of the employer for an employee to do work of a particular kind, the Claimant's old job, had gone or was expected to go.

17. In advancing ground 1 of the appeal Mr Gray-Jones does not suggest that the Judge misdirected herself as to the meaning and effect of section 139(1)(b)(ii) **ERA**. Rather he seeks to challenge what seemed to me are the Judge's clear findings of fact that the new role of PA to the CEO/FD was materially different to that part of the joint role formerly carried out by the Claimant. Having considered his submissions, I am quite unacceptable that any error of law was made out. The conclusion that the new roles were materially different from the old role was plainly open to the Judge. In my judgment, she correctly summarised the law, particularly at paragraph 13, and then applied it permissibly to the facts found.

18. It follows that it is unnecessary in this appeal to consider the Respondent's alternative case that the reason or principal reason for dismissal was some other substantial reason. The finding of redundancy stands.

19. As to the question of reasonableness under section 98(4) **ERA**, again this is essentially a perversity challenge, as Judge Shanks acknowledged in allowing this ground of appeal to proceed. Mr Gray-Jones focuses on the short consultation period and the Respondent's failure to provide the Claimant's scores in her unsuccessful application for the new PA role. She scored lowest of the four candidates during the consultation process.

20. The Judge plainly had those features in mind (see Reasons, paragraphs 6-9 and 57 respectively) but nevertheless had to reach an overall Judgment as to whether dismissal fell within or outside the range of reasonable responses. She found the decision was within the band. It is not for this Appeal Tribunal to substitute its judgment for that of the ET (see **Bowater v Northwest London Hospitals NHS Trust** [2011] IRLR 331 at paragraph 19 per Longmore LJ). In short, the perversity hurdle is nowhere near crossed. Having heard full argument, I agree with the assessment made by Supperstone J on the initial sift. No error of law is made out. The appeal fails and is dismissed.

21. Following judgment, Mr Milson applied for the Respondent's costs. The power to order costs in this case is a matter of discretion. I think that, though I personally do not take the same view, having persuaded Judge Shanks that it is reasonably arguable to proceed to a Full Hearing, it was not unreasonable to go the full distance. I have had the advantage of full argument on the other side and I reject the appeal. I am not persuaded that this is a case for costs under Rule 34A(1). My attention has been drawn to the observations of Burton P in **Iron**

and Steel Trades Confederation v ASW Ltd in Liquidation [2004] IRLR 926 at paragraphs 7 and 8. I do not reject this costs application simply and automatically on the basis that the matter was allowed through to a Full Hearing on two grounds, but rather have taken that into account as a factor, concluding it would not be a proper case in which to order the Appellant to pay costs.