Appeal No. UKEAT/0138/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 July 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

CAPITAL ENERGY SOLUTIONS APPELLANT

MR A ARNOLD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Legal Services The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR ANDREW ARNOLD (The Respondent in Person)

SUMMARY

REDUNDANCY – Collective consultation and information

Judge held that when the bulk of a workforce, all or most of whom were employed under fixed term contracts, did not have those contracts renewed, their impending dismissals on expiry of the fixed terms were for a reason not related to the individuals: it was the withdrawal of Government funding for the work.

Since her decision, the Inner House of the Court of Session had decided **University of Stirling v University College Union**. That emphasised the importance of establishing the reason for dismissal, and that if there was more than one reason, all had to be unrelated to the individual if the dismissal was to be for redundancy for the purposes of s.188 TULR(C)A 1992. It indicated that agreeing and entering into a fixed-term contract was a matter individual to the employee, such that dismissal by reason of its termination could (and perhaps usually would) be such a reason. The judge here did not clearly identify that she had considered the reasons for dismissal of the employees said to number more than the necessary 20 to trigger consultation, and more particularly whether there was more than one reason for their dismissals all on the dates when their fixed terms expired. Accordingly, although it was open for a judge to find that the dismissals here were not for reasons related to the individuals, she had not clearly considered whether there might be other reasons which were so related: if she had done so, and found that a reason was the expiry of a pre-agreed fixed term, she might well have concluded that the consultation duty was not triggered.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. By a Decision, Reasons for which were given on 7 January 2014, Employment Judge S Jenkins, sitting on her own at Reading, decided that the Claimant should be paid £860 by way of protective award because his former employer, Capital Energy Solutions ("Capital"), had failed to consult under section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992**.

2. Consultation is required under that section, as it was at the time, where an employer was proposing to dismiss as redundant 20 or more employees within a specified period of time. The meaning of "redundancy" in this context differs from its definition for the purposes of unfair dismissal or eligibility for a redundancy payment. It is set out by section 195. That provides:

> **"In this Chapter references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related."**

Thus, in counting the 20 or more proposed dismissals, any dismissal which is in whole or in part for a reason related to the individual concerned does not count.

3. The Judge found that Capital had 50 or so staff engaged in providing energy solutions on work which was funded under government initiatives. The funding for that work expired on 30 December 2012. The employees concerned were on fixed-term contracts. The Claimant himself says that he was not, because he never saw any particular contractual terms which he was required to sign. That may well be the case. It does not, however, affect the counting, which is that of the total number of persons to be made redundant. The Judge was clear that, to reach the number at which the consultation obligations were triggered, employees who had been on fixed-term contracts had to be counted.

4. The Judge said, at paragraph 9 in his findings of fact:

> **"As no new funding was forthcoming during [January 2013], the Claimant's employment, and the employment of many of his colleagues, ended on 31 January 2013"**

5. Others, the Judge had said, had their fixed-term contracts not renewed at the end of the previous month, December 2012. Some 25 to 30 employees in total had been dismissed on the expiry of their fixed-term contracts. If those dismissals counted for the purposes of section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992**, there was an obligation to consult. There had been one consultation which could possibly come within the terms of section 188.

6. Critical, however, to the question whether a protective award could be made as it was, was whether the dismissals which were counted were dismissals which came within the wording of section 195: that is, whether they were dismissals for reasons which were not related to the individual concerned.

7. The Judge's finding at paragraph 9 links the dismissals to the absence of funding. In her conclusion (paragraph 15, penultimate sentence) she said:

> **"As the expiry of all the fixed term contracts related to the withdrawal of funding, they did not relate to reasons related to the individuals and therefore all the dismissals counted for the purpose of s.188. As there were in excess of 20 within a 90 day period, the provisions were engaged."**

8. This reasoning does not specifically ask what the reason for the dismissal of each employee was in terms, but it amounts to the following questions and answer. Question: what was the reason for dismissal? Answer: the expiry of the fixed-term contract. Question: was that a reason related to the individual? Answer: no, it related to the withdrawal of funding.

The General Principle

9. Where an employee has entered a fixed-term contract (that is, one which may not last beyond a set date, although it may be terminated lawfully before that), is dismissal, on the expiry of the fixed term, necessarily for a reason related to that individual? The contract is, as all contracts of employment in theory are, one which necessarily is individual to the employee. The employee must therefore be taken to have agreed that at the end of the term he would expect, unless a new contract was entered or his fixed term extended by agreement that his employment relationship with his employer would end. But the legal answer is one which accommodates the practical realities of the workplace within a legal context. It is not that the expiry of a fixed-term contract automatically would be for a reason related to the individual; rather it is that it might be. But it does not have to be. That is the law was made clear by the Inner House of the Court of Session in a case on which Mr Rees, who appears to represent Capital, places heavy emphasis: **The University of Stirling v University College Union** [2014] CSIH 5, [2014] IRLR 287. That case, like this, was one the facts of which pre-dated amendments which came into effect from 6 April last year. Those amendments to the **Trade Union and Labour Relation (Consolidation) Act 1992** include an amendment to section 282 of the Act providing that the provisions of Chapter II of Part IV, that is the procedure for handling redundancies, does not apply to employment under a fixed-term contract unless the employer is proposing the employee as redundant and the dismissal will take effect before the expiry of the specific term, the completion of the particular task for the occurrence or non-occurrence of the specific event, as the case might be.

10. To that extent that case, like this, may largely now be of academic interest. But it is of particular importance because of the developed consideration in the judgments of the wording of section 195 and its application. Lord Drummond Young, in his speech, said at paragraph 79:

> **"In my opinion the respondents are correct in submitting that the termination of a fixed term contract cannot inevitably be said to be for a reason not related to the individual concerned. Such a contract is entered into voluntarily by the employee. The reasons for permitting termination to take place in accordance with the contract may vary considerably. In some cases there may be a substantial number of fixed term employees and a practice of renewal which is departed from when the employer's work diminishes. In such a case it might reasonably be inferred that the reason for dismissal had nothing to do with the individual employees but was entirely a matter of the employer's need for their services. In other cases, however, it might be established as a matter of fact that the fixed term contract was not renewed for reasons that were personal to the individual concerned, including the fact that he or she was employed under a contract that was due to terminate at a particular time. That is particularly so when the reasons for concluding such a contract were individual to that contract, and did not extend across a range of employees."**

11. He then added these words, with particular reference to the **University of Stirling** case:

> **"That is the case here. It was a matter of agreement that in each of the four test cases at least one of the reasons for the respondents' dismissing the employee was the fact that the employee had agreed to accept that the contract would come to an end after a particular time or when a particular event occurred. In each case it is clear that the duration of the contract related to a specific matter..."**

12. He went on to say what they were. One of them was the case of an employee who had been employed on a post-doctoral research project, the funding for which ceased. It appears to have been an individual contract. The reasons, therefore, were plainly individual to the employee. It is also clear that in **University of Stirling** the agreement reached between Counsel made it virtually impossible for there to be a redundancy within the terms of section 195. Once it had been agreed that a reason for dismissal was that the individual had agreed to enter a fixed-term contract and the term had expired, then there was a reason which was plainly related to that individual. Section 195(1) requires there to be no reason which is related to the individual if there is to be a redundancy within that definition.

13. Accordingly, there are two bases upon which the factual position in **Stirling** and that here may be distinguished. The first is the agreement reached between Counsel. That agreement does not exist here. Secondly, this is a case, as Sterling was not, in which there were, as Lord Drummond Young would have put it, a substantial number of fixed-term employees, all of whom were dismissed at about the same time and for the same reason. That is strongly

suggestive that the reason for their dismissals had nothing to do with their individual circumstances, but everything to do with their collective circumstances, which might be thought to be the antithesis drawn by the provision.

14. The case of **University of Stirling**, however, is of importance in considering the approach which a Tribunal should take. The error in that case was to misinterpret section 195 by adding an unnecessary and unwarranted gloss upon it. But it was also a failure properly to consider what the reasons were for dismissal in the particular cases before the Tribunal and to consider as part of that whether any part of the reason for dismissal related to the individuals.

15. I find myself satisfied by the Skeleton Argument of Mr Rees that the Judge did not carefully take the approach which should have been adopted after **Stirling**. In particular, she did not consider whether there may have been a mixture of reasons for the dismissals, part of which were reasons related to the particular individuals which were necessary consequences of their having entered into fixed-term contracts in the first place. Lord Drummond Young's formulation at paragraph 79, though it is not to be given the force of statute, since it was setting out an example of a circumstance which might, depending upon the whole facts, be one in which the reason did not relate to the circumstances of the individual, not only mentioned a substantial number of fixed-term employees but also a practice of renewal which was departed from when the employer's work diminished. This is making the obvious point that, if in every case, or almost every case, in which there was a fixed-term contract, the employee left service at the expiry of that fixed term and was therefore in law dismissed, then the entry into the fixed-term contract at its inception, and the expiry thereafter, would plainly be related to the individual. If, by contract, the pattern of employment was such as to provide for fixed-term contracts rather than open-ended contracts (albeit that both would be terminable on notice) and

regularly to extend the fixed-term contracts, the fact that the term had expired would have little or nothing to say as to the reason why the employment actually was ending.

16. Though very brief, and although it resulted in a finding of fact, I am not satisfied that the approach required by **Stirling** was adopted by the Judge. She is to be acquitted of any blame in this since the decision in **Stirling** post-dated her own decision in this case. She could not have taken it into account. But the approach seems to be right and self-evident. The question that first has to be asked is what was the reason for dismissal. The second question is whether there was more than one reason. The third question is whether that reason or those reasons are all (I emphasise that word) unrelated to the individual. The careful analysis, in particular in the leading speech of Lord Brodie in the Court of Session, support the view that in most, if not all, cases where a fixed-term contract ends on the date that the term expires, a reason is likely to be that the employee agreed when the employee first entered the contract that it would do so.

17. Accordingly, as I see it, there has been an error of approach here by the Judge. The facts relating to the other employees, so far as they may be evidenced, need to be established, as are the reasons for their dismissals. It may be, at the conclusion of that exercise, that the Judge is satisfied that the original view, expressed in the Judgment of January 2014, is to be upheld. It may be that the Judge takes a different view in the light of all the facts and having considered the assistance which **University of Stirling**, on the one hand, and this decision, on the other, can give. But I am clear there is here an error of law in the Judge's approach. I am in no position to decide myself what the proper answer is. The case will have to be remitted. In the absence of any opposition from the parties, I shall remit it to the same Judge for her to reconsider in the light of this Judgment. It will be a matter for the Judge to hear such evidence

as she thinks will assist, whatever that may be. So I do not suggest that this is a case which is limited to the evidence she heard before.

18. The appeal is consequently allowed.