Appeal No. UKEAT/0028/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 June 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR K IGBINAKE — APPELLANT

AXIS SECURITY LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR EDWARD KEMP (of Counsel) Bar Pro Bono Scheme
For the Respondent	MISS KERRY BRETHERTON (of Counsel) Instructed by: Croner Consulting Limited Croner House Wheatfield Way Hinckley Leicestershire LE10 1YG

SUMMARY

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

The central question was why C's manager decided to refuse his request (made in August) for holiday in early December. He said he believed it to be company policy that no holiday should be taken this month. A written policy permitting holidays until 15th December had been signed for by him just before the start of August. The ET did not reconcile this with the manager's expressed belief, though possibly suggested that it was because the manager had worked until recently in a different part of the business where such holidays were not permitted; it also found that the policy re taking holiday in December had changed (probably in October, though this was unclear), and by implication the manager would not have known of the change at the time of his decision. The evidence to support a relevant change in October was unclear, and the ET might have been in error in supposing that the date of the introduction of the policy for which the Manager had signed receipt in July, whereas the employer's documents showed it to have been November the year before. Held that the reasoning on a crucial issue was insufficiently clear, and it was remitted back to the same ET for reconsideration.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. For Reasons delivered on 8 May 2013 an Employment Tribunal at Manchester (Employment Judge Vinecombe, Mr Clissold and Mrs Jarvis) dismissed the Claimant's complaint that he had been directly discriminated against on the grounds of his religion and belief. The act of which he complained was a refusal by the Assistant Regional Manager, a Mr Duncan, to grant him time off to attend Church Harvest on 9, 10 and 11 December 2011. The request was made and refused on 8 August 2011.

2. The Claimant could point to employees of other faiths who did have holidays granted for their particular religious observance. He could also point to employees permitted to take time off in December, though not for particular religious reasons. The reason that Mr Duncan gave him at the time, according to his own witness statement, was that holidays in December were not permitted.

The Employment Tribunal Decision

3. The Tribunal concluded in these terms at paragraph 28:

> **"The Tribunal concluded that it was not because of the claimant's Christian beliefs that he was refused holiday in December 2011 rather it was because Mr Duncan believed at the time that he refused the request that it was the respondent's policy not to allow holidays in December and that this policy would apply to all employees' regardless of their beliefs. Subsequently holidays were allowed in December because the policy changed but there was no further application from the claimant for the respondent to consider."**

4. The central focus of the case was thus on the reason why the Claimant had been refused his application for holiday in December. Mr Duncan told him at the time it was because it was not permitted to have a holiday in that month. That is a stance which he steadfastly maintained throughout, though he recognised, according to the Tribunal Judge's notes of evidence, that the

position was now different. According to the Judge's notes of that cross-examination, he was referred to a written policy of the Respondent, a 15-page document headed "Commercial Assignment Instructions". One sentence of that, at the top of page 8, says against a bullet point "Leave will not normally be granted in the period 15 December to 15 January in any year".

5. The next evidence recorded from Mr Duncan by the Judge was this:

> **"I was aware of the holiday policy. With my background I was aware that there was a blanket ban on holidays for the whole of December. The new rules relating to holidays came into effect in October 2011."**

The Appellant's Case

6. The appeal against the central findings and conclusions in paragraph 28 of the Tribunal's Judgment take two central points and, as a second point, argues a matter of disposal. The two central points are that the Tribunal was perverse in coming to the conclusion it did as to Mr Duncan's reason. The second, and allied argument, was that it insufficiently expressed its reasons for coming to that conclusion.

Perversity

7. As to the first, perversity, the basis for it was that there was a written policy. That permitted holiday prior to 15 December. Mr Duncan had signed to show receipt of the document containing that policy statement on 23 July, therefore just a matter of two weeks before the meeting with the Claimant. He was therefore acting inconsistently with the policy. It was perverse to regard the reason for refusal of the holiday as being his belief, for there was nothing to justify it.

8. I cannot accept that argument. Perversity occurs, as many cases show us, where a finding is reached which is wholly impermissible. To adopt just two of the many different phrases used to describe the height of the hurdle which a person claiming perversity has to overcome, the

conclusion must "fly in the face of reason" or "excite astonished gasps from the reasonable observer". Where there is evidence given on oath that that was the reason why a decision maker acted as he did, it cannot be perverse, save in exceptional circumstances, for a Tribunal to accept that evidence, as plainly it did.

Reasons

9. However, the reasons challenge here seems to me to have greater force. The principle to be applied is, again, familiar territory: see **Meek v City of Birmingham Council** [1987] IRLR 250. As Underhill LJ encapsulated it in the recent Court of Appeal Decision of **Co-operative Group Ltd v Baddeley** [2014] EWCA Civ 658 at paragraph 57:

> **"The reasons given must be sufficient for the parties, and any appellate tribunal, to understand why the ET reached the decision that it did on any issue that affects the result of the claim. The degree of detail required will vary according to the nature and significance of the issue in question."**

10. The central question in the current circumstances was the belief of Mr Duncan, or rather the reason why he denied the Claimant his holiday request. The challenge to the genuineness of his statement of belief was based upon its inconsistency with the policy as it had been written and as Mr Duncan had signed up to.

11. I note that the policy statement itself comes in a document, internally referred to as "HR 25 A Issue No 2", issued on 15 November 2010 (see the foot of the eighth page of the 15-page document to which I have referred. Although the policy does not say that holiday leave will be given between 1 December and 15 December, nor does it say that there may not be a more restrictive regime during those dates, it certainly does not say the converse. It implies that the period of restriction begins on 15 December, not before.

12. Why, then, the litigant might wish to know, was Mr Duncan's belief that the whole of December was covered by a ban on holiday to be credited? Before me it is suggested that there

are two reasons for this, stated by the Tribunal. The first is at paragraph 5. That is that Mr Duncan had come from the retail arm of the Respondent. A distinction was made between the retail arm and the arm where the Claimant worked. In the retail arm no holidays were permitted in December because of the understandable, exceptionally busy time in that sector during that month. The implication is that Mr Duncan brought with him, into his job as Assistant Regional Manager in respect of the Claimant, a reaction he had derived from long experience in the retail sector.

13. The Tribunal did not, however, at any stage in its Reasons examine the inconsistency between the written policy and Mr Duncan's view.

14. In paragraph 28 the suggestion apparently being made is that there had been a change of policy between August and December, hence the Tribunal thought that it was because Mr Duncan believed "at the time that he refused the request" that it was the Respondent's policy not to allow holidays in December, going on to say that "subsequently" holidays were allowed. Those words describe a policy change. It may be that the Tribunal did not intend to say that the policy in force when Mr Duncan reached his decision in August was consistent with his understanding, but this is the general thrust of paragraph 28, and it is also the general thrust of paragraph 28 that that policy was the one which had changed and that "subsequently" related to a time after August. That that is a reasonable view of what the Tribunal was saying is supported by its paragraph 11. That reads as follows:

> **"In November 2011 Mr Watkin [he was the Regional Manager, who had had some concern about the way in which holiday requests were granted] reviewed and granted resubmitted holiday requests for three employees Kenneth, Martin and a Mr Doh for holidays on the 9th, 10th and 11th December. These holiday requests were granted because there had been a change of policy in relation to taking holidays in December for those employees not working in the retail sector. The claimant had not renewed his request for holiday in December."**

15. Reading those two together, the reader will be left with a sense that the Tribunal had concluded that there was no particular inconsistency between Mr Duncan's view in August and the then policy of the Respondent, but that it was only later, some time round about November but in any event before December 2011, that the policy had changed. Neither Mr Bretherton, who appears to represent the Respondent, nor Mr Kemp could assist with any detail as to what the Tribunal might have had in mind here by the change of policy. There is merely a reference, otherwise unexplained, in the evidence of Mr Duncan to which I have already referred.

Conclusions

16. I return, against this background, to the question of principle. A central issue was why Mr Duncan acted as he did. It was in issue between the parties whether what he did was inconsistent with the policy at the time, the suggestion being that, because he signed the 15 page document in late July, he knew of the policy which was a small part of it.

17. The answer it appears the Tribunal may well have been given was that the policy had changed after Mr Duncan's meeting with the Claimant. That may be a mistake, if it implies, as it would seem to do, that there was no inconsistency at the time that Mr Duncan reached his decision between what he decided and the official policy. It leads to a question whether the Tribunal appreciated that the policy upon which the Claimant relied had been in place throughout and had not changed or, putting it another way, leaves it unexplained to the reader why the change of policy was relevant to the decision which Mr Duncan made and indeed what precisely it was.

18. In these circumstances, I have concluded that, although the Tribunal may very well have had in mind the answers to these questions, it has insufficiently expressed its findings upon these central issues for an appellate court to be confident that it did so. The consequence of this

decision will be, as the parties are agreed, that the matter must be remitted to the same Tribunal for it to consider and state, after listening to such other submissions as it thinks it requires, whether its decision in respect of Mr Duncan is one which takes into account the inconsistency between his view and the written policy at the time. If the Tribunal was indeed in error in thinking that the change of policy occurred after August and before December and if that change of policy was material, then it will no doubt wish to hear such evidence as it thinks appropriate from Mr Duncan and any other witness who can shed light upon it from the Respondent's point of view before reaching a fresh determination. The scope of the remission, therefore, is for the Tribunal to reconsider its decision in the light of this Judgment of the Appeal Tribunal.