Appeal No. UKEAT/0200/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 January 2014

Before

HIS HONOUR JUDGE PETER CLARK

MR M CLANCY

MRS M V McARTHUR FCIPD

DR R ISLAM APPELLANT

ABERTAWE BRO MORGANNWG UNIVERSITY LOCAL HEALTH BOARD RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION – APPELLANT ONLY
PRELIMINARY HEARING – ALL PARTIES

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APPEARANCES

For the Appellant	DR R ISLAM (The Appellant in Person)
For the Respondent (for the Preliminary Hearing only)	MR G POWELL (of Counsel) Instructed by: Morgan Cole LLP Solicitors Llys Tawe Kings Road Swansea SA1 8PG

<u>SUMMARY</u>

UNFAIR DISMISSAL – Reasonableness of dismissal

UNLAWFUL DEDUCTION FROM WAGES

Unfair dismissal appeal by Claimant rejected. Respondent's cross-appeal in relation to Claimant's 'Wages Act' claim, upheld by Employment Tribunal, permitted to proceed to full hearing.

<u>HIS HONOUR JUDGE PETER CLARK</u>

1. This case has been proceeding in the Cardiff Employment Tribunal. The parties are Dr Islam, Claimant, and ABM University Local Health Board, Respondent.

2. The Claimant was employed by the Respondent as a Consultant Psychiatrist from 1 April 2003 until his dismissal by six months' notice on 14 March 2012, taking effect on 14 September.

3. He presented two forms ET1 to the Tribunal. Following earlier strike-out orders a full hearing took place before Employment Judge Beard and members during October/November 2012. Following deliberations in private, that Tribunal delivered itself of a judgment and reasons running to some 80 pages on 10 January 2013. In short, the Claimant's remaining claims of disability discrimination and ordinary unfair dismissal were dismissed. A 'Wages Act' claim, that is unlawful deduction from wages under Part II of the **Employment Rights Act 1996**, was upheld.

4. Against the unfair dismissal and disability discrimination findings the Claimant appealed to the EAT. That appeal was considered by HHJ McMullen QC on the paper sift. He permitted the disability appeal (ground 2) to proceed to a full hearing. The remaining grounds, 1 and 3-7, directed to the finding of fair dismissal, together with the **Human Rights Act** ground, were rejected. Dissatisfied with that opinion the Claimant has exercised his right to an oral hearing under rule 3(10). That hearing is listed before me, sitting alone, today.

5. Following Judge McMullen's directions for the full hearing of the disability discrimination appeal, the Respondent lodged an Answer, disputing the Claimant's contentions

in ground 2 of his appeal, and cross-appealed the Tribunal's finding as to the unlawful deductions claim. That cross-appeal was sifted to an all parties preliminary hearing by HHJ Serota QC. Hence there was also listed for today that cross-appeal before this full division.

Background

6. From the outset of his employment, the Respondent had concerns about the Claimant's practice, leading to an assessment by the National Clinical Assessment Service (NCAS). The final NCAS report, produced in April 2009 identified a number of concerns with the Claimant's practice (see reasons, paragraph 21). It was reasonable, the Tribunal found, for the Respondent to accept that assessment. Recommendations were made for improvement, including supervision. The Claimant would have none of it. He did not accept the report and would not co-operate in any proposals for his improvement. Ultimately he was asked to accept a sub-consultant role under supervision, failing which he was warned he would be dismissed. He would not do so and was dismissed.

7. During the employment it emerged that he suffered from Asperger's syndrome, a disability within the meaning of the Act. The Respondent's knowledge of his condition was found to date from 7 September 2011.

8. I need not dwell on the disability findings, which will be subject to scrutiny at the full hearing directed by Judge McMullen.

9. As to the complaint of unfair dismissal, the Tribunal found that the reason for dismissal related to the Claimant's capability and that dismissal for that reason was fair (see paragraph 88).

10. The Wages Act claim is considered at paragraph 89.

The rule 3(10) application

11. The question for me is whether it is reasonably arguable that the Tribunal fell into error as a matter of law in concluding that dismissal of the Claimant by reason of capability was fair.

12. Dr Islam takes a number of points. First, he submits that the Tribunal was guilty of "substitution". He refers to the Court of Appeal's decisions in **Fuller v LB Brent** [2011] EWCA Civ 267 and **London Ambulance Service v Small** [2009] EWCA Civ 220, [2009] IRLR 563. It seems to me that that submission is misconceived; those were cases where the question was whether the Tribunal had impermissibly substituted its view for that of the employer in deciding that the dismissal was unfair. Here, the Tribunal accepted that the Respondent acted reasonably in dismissing the Claimant.

13. Dr Islam also invokes the well-known **Burchell** test, appropriate to conduct dismissals. However, the Tribunal found this was a capability case. They were entitled to do so based particularly on the NCAS report in 2009 and the Claimant's refusal to countenance steps to correct his perceived, albeit not by him, practice weaknesses.

14. He also points to the Tribunal finding that the Respondent was in breach of the contractual procedure in dismissing him and the absence of an opportunity to appeal. However, as Dr Islam fairly points out in his detailed skeleton argument, existence of a breach of procedure, even if contractual, is a factor but not a determinative factor in deciding the fairness question under section 98(4) ERA; see, particularly, **Westminster City Council v Cabaj**

[1996] IRLR 397. That deals also with his point under Article 6 of the Convention; see **X v Y** [2004] IRLR 625.

15. Ultimately, in considering the application in this appeal, I am reminded of the observation of Longmore LJ in **Bowater v Northwest London Hospitals NHS Trust** [2010] IRLR 331 at paragraph 19, to which Judge McMullen referred in his rule 3(7) observations: At [19] his Lordship said:

> **"It is important that, in cases of this kind, the EAT pays proper respect to the decision of the ET. It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt sometimes, difficult and borderline decisions in relation to the fairness of dismissal. An appeal to the EAT only lies on a point of law and it goes without saying that the EAT must not, under the guise of a charge of perversity, substitute its own judgment for that of the ET."**

16. That, effectively, it seems to me, is what Dr Islam is inviting this EAT to do. He cannot succeed in that endeavour. In these circumstances the rule 3(10) Application is dismissed.

The Respondent's cross-appeal

17. In summary, Mr Powell submits, first, that there was here a material procedural irregularity. Although a Wages Act claim, as I have categorised it, was raised in advance of the hearing before the Cardiff Tribunal, and indeed appears in the list of issues drafted by Mr Powell himself, then as now appearing on behalf of the Respondent, it is his case on appeal that that claim was not pursued throughout the hearing. Rather, the Claimant put his case for the payment of wages during the relevant notice period in 2012 on the basis of the principle in the Court of Appeal decision in **Nottinghamshire County Council v Meikle** [2004] EWCA Civ 859 in connection with his disability discrimination claim, a claim which was dismissed as a matter of liability by the Tribunal subject to his appeal, which is proceeding to a full hearing.

18. In support of that contention and the review application having been rejected by the Tribunal, the Respondent has put in a detailed affidavit, exhibiting notes of evidence from Paula Kathrens, a solicitor with conduct of the Respondent's case below. I note that the Tribunal members do not take issue with anything in Ms Kathrens' affidavit. See page 455 of the EAT bundle. Dr Islam strenuously opposes this ground of appeal, but having heard the argument, we are all of us quite satisfied that the point ought to be resolved at a full hearing before this Tribunal. In addition, although it is Mr Powell's primary case that the point was not before the Employment Tribunal, he advances at least arguable submissions in support of the proposition that, on the basis of the Tribunal's own findings of fact, they could not properly find that the Claimant was ready, willing and able, and we emphasise the last of those three requirements, to perform his role as a consultant during the relevant notice period.

19. Thirdly, and if he fails on the first two points, Mr Powell has a further point in relation to the proper start date for any such unlawful deductions claim. The Tribunal ruled that the claim begins on 12 March 2012 but, having been taken to the fitness note at page 326 of the EAT bundle, we can see it as arguable that the claim begins no earlier than 25 June 2012.

20. In short, all grounds of the cross-appeal, it seems to us, are arguable, and hence the cross-appeal will proceed to a full hearing, to be heard together with the Claimant's appeal on disability discrimination.