Appeal No. UKEAT/0135/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 May 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

WESTERN UNION PAYMENT SERVICES UK LTD — APPELLANT

MR C ANASTASIOU — RESPONDENT

Transcript of Proceedings

JUDGMENT

FOR DISPOSAL

APPEARANCES

For the Appellant	MR THOMAS KIBLING (of Counsel) Instructed by: Orrick Herrington & Sutcliffe (Europe) LLP Solicitors 107 Cheapside London EC2V 6DN
For the Respondent	MR MARTIN FODDER (of Counsel) Instructed by: Archon Solicitors Martin House 5 Martin Lane London EC4R 0DP

HER HONOUR JUDGE EADY QC

Introduction

1. In giving judgment I refer to the parties as the Claimant and the Respondent as they were below. Judgment in the substantive appeal was handed down by this Court (then comprised of three members) on 21 February 2014, allowing the appeal in part. This is the disposal hearing.

2. The appeal had raised three main questions: first, whether the Employment Tribunal had correctly identified and defined the protected disclosure in this case. Second, if so, whether the Tribunal nevertheless erred in its approach to the question of causation. Third, and in any event, whether there was a breach of natural justice in the conduct of the Tribunal proceedings.

3. We disagreed with the Respondent on the first of the three issues, but considered that the second and third questions raised by the appeal did indeed disclose errors of law on the part of the Tribunal. Having reserved our judgment, we invited the parties to make representations on the question of disposal.

4. In its representations on the question of disposal, the Respondent contended that the appropriate order would be for the EAT to quash the Tribunal's judgment in relation to protected disclosure detriments. In contrast, the Claimant urged that this matter should be remitted to the same Tribunal for further consideration.

5. In the light of these competing positions, I considered that justice would be best served by permitting the parties to address me orally on the question of disposal.

The judgment on the appeal

6. The relevant parts of the judgment on the substantive appeal start at paragraph 74. Relevantly, on the question of causation, we found (I summarise):

(1) That the requisite material influence could be found, notwithstanding the final actor did not have personal knowledge of the protected disclosure in question. In such cases, however, it would still be necessary for the Employment Tribunal to explain how it had arrived at the conclusion that this is what had happened.

(2) In this case, the Tribunal had not made any finding that the relevant decision-takers had personal knowledge of the protected disclosure and the findings did not disclose any basis for linking the decisions taken to the disclosure. We were therefore left with no understanding as to why the Tribunal felt able to draw a causal link, or inference, between the disclosure and the detriments in this case.

(3) That said, we did not feel able to conclusively say that this was because the Employment Tribunal had erred by failing to ask whether the protected disclosure materially influenced the detriments in question (at least in respect of all but the fourth detriment), or simply reached a conclusion that was perverse on the evidence before it or failed to adequately set out its reasoning.

(4) More specifically, on the fourth detriment (the Respondent's intervention in the Claimant's bankruptcy proceedings in the US), we found it hard to read paragraph 106 of the Tribunal's Reasons as applying anything other than a "but for" test. It seemed to us that, in respect of that detriment, the Tribunal had simply failed

to ask the question whether the protected disclosure materially influenced the Respondent's decision to intervene.

7. On the natural justice ground, we allowed that the Respondent's complaints, relating specifically to the recasting of the first detriment and the addition of an entirely new third detriment, fairly identified issues on which the parties should have been given the opportunity to make representations on the recasting or amendment to the list of issues.

8. On that natural justice ground, it seems plain that if that was the only matter on which we had allowed the appeal, the natural course would have been to remit this matter to the Employment Tribunal to permit those further representations to be made. The focus for today's hearing on the question of disposal is therefore on our finding in respect of the causation issue.

The legal principles

9. The approach to the question of disposal, as between the EAT and the Employment Tribunal, has most recently been considered by the Court of Appeal in the case of **Jafri v Lincoln College** [2014] EWCA Civ 449, judgment having been handed down on 16 April 2014. Not only does that authority - in the lead judgment of Laws LJ - carefully set out an analysis of the previous guideline authorities and a consideration of the respective roles of the Employment Appeal Tribunal and Employment Tribunal, but it is buttressed by the judgment of Underhill LJ, a former President of the EAT with particular depth of experience in this court.

10. The approach I am to adopt is set out in the judgment of Laws LJ in **Jafri** as follows:

> **"21. … It is not the task of the EAT to decide what result is 'right' on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."**

11. Although expressing some regret with that conclusion in cases where the EAT might be thought as well-placed as the Employment Tribunal to decide the issue in question, Underhill LJ agreed, noting:

> **"The disadvantages of this ruling can be mitigated to some extent if the EAT always considers carefully whether the case is indeed one where more than one answer is reasonably possible... even where more than one outcome is indeed possible, there is in my view no reason why the EAT cannot still decide the issue if the parties agree; and in an appropriate case they should be strongly encouraged to do so."**

This is not one of the latter cases where there is agreement. The decision for me is, therefore, whether there is more than one answer reasonably possible in this matter.

Submissions, discussion and conclusions

12. In his skeleton argument, Mr Kibling (for the Respondent) urged that there is a public policy in support of the finality of litigation which would support a robust view being taken by the EAT. In oral submissions he observed that there had been, in this case, a very full hearing before the Employment Tribunal, with detailed witness and documentary evidence. The Tribunal provided full findings of fact, in a detailed 32-page analysis of the evidence, and has determined not to make any further findings of fact in respect of matters already reserved to it. He noted that it was also apparent that the Tribunal properly referred to the relevant case-law and correctly directed itself as to the material influence test. In these circumstances, Mr Kibling submitted, there were no further findings that could provide a foundation in fact for holding or inferring the requisite causation in this case.

13. Mr Kibling further submitted that, at the substantive hearing of the appeal, the Claimant's counsel had been unable to demonstrate that the conclusion on causation was permissible on the findings of fact made. To the extent that it was necessary, Mr Kibling also relied on the agreed note of evidence which specifically confirmed that there was no evidence that the relevant decision takers were aware of the Claimant's interview with Mr Falleck (the protected disclosure).

14. Relying on the second limb identified by Laws LJ in **Jafri**, Mr Kibling submitted that this was a case where the EAT was able to conclude what the result must be. On the basis of the judgment of this Court on the substantive appeal, I can be satisfied that the conclusion reached by this Tribunal's misdirection was plainly and unarguably wrong on the facts, and those facts do not require further amplification or investigation. The proper course would, therefore, be to quash the decision on protected disclosure detriments and not remit for further consideration.

15. In his skeleton argument on disposal, Mr Kibling had referred to this Court's substantive judgment on the appeal as recognising that there was no evidence that the protected disclosure materially influenced the relevant decision takers. That puts it too high. As that judgment states, we had seen no evidential basis to support a conclusion that Mr Falleck's investigation report was generally known amongst the Respondent's senior management and, on the Tribunal's findings, we had seen nothing to provide a basis for linking the protected disclosure to the decisions taken (paragraph 75). That said, as Mr Fodder observed, we expressly recognised that it was possible that there could be cases where there was an organisational culture or chain of command such that the final decision-taker might not have personal

knowledge of the protected disclosure but where, nevertheless, that had materially influenced the treatment of the complainant (paragraph 74).

16. Our problem with the Tribunal's judgment in this case was that we could not understand the basis on which it had felt able to make the inference or draw the causal link (see paragraph 76). We hypothesized that this could have been because the Tribunal had failed to ask the right question or because it had reached a perverse conclusion on the facts found or even that it had failed to adequately set out its reasoning (see paragraph 77). Only the second of those possibilities would inevitably lead to there being only one possible conclusion on this issue. The other two possibilities left open more than one possible outcome.

17. The same is true in respect of our judgment on the fourth detriment. Indeed, on the fourth detriment it appeared to us that the Tribunal had failed to ask the right question (see paragraph 78). We did not find that the conclusion reached would inevitably have been perverse. We did not know.

18. It may be that the reason why we could not see the evidential basis for the Tribunal's reasoning is that there is not one. This Court has, however, not heard the evidence and simply does not know what the final answer must be. In those circumstances, applying **Jafri**, this matter must be remitted. It is possible that there is more than outcome, and that is a matter for the Employment Tribunal as the fact-finding Tribunal and not for this Court.

19. As for whether it should be to the same Employment Tribunal or a different Tribunal, the parties are agreed: if there is remission, it should be to the same Employment Tribunal. Applying the guidance laid down by this Court in **Sinclair Roche Temperley v Heard** [2004]

IRLR 763 that must be right. The order therefore will be that the appeal is allowed in part and this matter is therefore remitted to the same Employment Tribunal.