Appeal No. UKEAT/0141/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 May 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR COLIN NORMAN — APPELLANT

EC HARRIS SOLUTIONS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR SINCLAIR CRAMSIE (of Counsel) Bar Pro Bono Unit
For the Respondent	MR SEBASTIAN NAUGHTON (of Counsel) Instructed by: Bircham Dyson Bell LLP 50 Broadway London SW1H 0BL

SUMMARY

AGE DISCRIMINATION

The Respondent employer did not give notice in accordance with paragraph 2(1) of Schedule 6 to the **Age Regulations 2006**. **R&R Plant (Peterborough) Ltd v Bailey** [2012] IRLR 503 applied: it is authority for the proposition that an employer must, in order to comply with paragraph 2(1), inform an employee that he has a right to make a request under paragraph 5 of the Schedule.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This appeal concerns a statutory regime governing retirement which lasted from 2006 until 2011. That statutory regime recognised retirement as a potentially fair reason for dismissal and introduced complex procedural and substantive provisions concerning such dismissals. It was swept away in 2011.

2. The statutory regime was contained partly in the **Employment Rights Act 1996** and partly in the **Employment Equality (Age) Regulations 2006** ("the Age Regulations"). It was considered by the Court of Appeal in **R&R Plant (Peterborough) Ltd v Bailey** [2012] IRLR 503, a case of central importance to this appeal. I will adopt with gratitude the description of the statutory regime given by Dame Janet Smith in paragraphs 7-12 of her judgment:

> **"The Age Regulations 2006 were introduced into domestic law to implement the requirements of the European Framework Directive (2000/78/EC) which established a framework for equal treatment in employment and occupation. The Directive included provisions to combat discrimination on the ground of age. The Age Regulations 2006 made general provisions relating to discrimination on the grounds of age, including a provision that an employer must not discriminate against a person on the ground of age by dismissing him. Regulation 30, however, created an exception to that general rule and provided that:**
>
> > **'Nothing in Part 2 or Part 3 (*which parts contain the substantive provisions*) shall render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for the dismissal is retirement.'**
>
> **Thus, an employer who retired an employee at or over the age of 65 would not be committing an act of unlawful discrimination. Dismissal by reason of retirement at or over 65 was therefore a potentially fair reason for dismissal.**
>
> **8. Schedule 6 to the Age Regulations 2006 is headed 'Duty to consider working beyond retirement'. As explained above, it provides a procedural scheme for the handling of dismissal by retirement. Paragraph 2(1) provides:**
>
> > **'An employer who intends to retire an employee has a duty to notify the employee in writing of –**
> >
> > > **(a) the employee's right to make a request; and**
> > >
> > > **(b) the date on which he intends the employee to retire,**
>
> **not more than one year and not less than six months before that date.'**
>
> **9. According to the interpretation provisions in paragraph 1(1), the 'request' referred to in paragraph 2(1)(a) means a request made under paragraph 5.**
>
> **10. Paragraph 5(1) provides that the employee may make a request to his employer not to retire him on the intended date of retirement. Paragraph 5(3) provides:**

> **'A request must be in writing and state that it is made under this paragraph'**
>
> **11. If the employer gives valid notice under paragraph 2 and receives a valid request under paragraph 5, the employer is obliged to consider the request at a meeting and to inform the employee of the decision in writing (paragraphs 6 and 7). If the decision is to refuse the employee's request, the employer must allow the employee to appeal against that decision (paragraph 8). The employee is entitled to be accompanied at the meeting and on the appeal (paragraph 9). The employee may initiate the procedure by making a request under paragraph 5 so as to take advantage of the consultation process.**
>
> **12. Where an ex-employee who has been dismissed allegedly by reason of retirement brings a claim for unfair dismissal, the first question for the tribunal is, as always, to determine what was the reason or principal reason for the dismissal. That question must be determined in accordance with sections 98ZA to 98ZF of the Employment Rights Act 1996 (ERA 1996). These sections are headed 'Retirement' and were inserted into Part X of the ERA 1996 (*the part which deals with unfair dismissal)* in 2006. Sections 98ZA to 98ZE make for provision for determining whether a dismissal is by reason of retirement in various different situations. Section 98ZD of ERA 1996 makes provision for the dismissal of an employee who has a normal retirement age of 65 and who is to be retired on a date at or after the normal retirement age. It is the section which applied to Mr Bailey's case. Section 98ZD(2) provides that, where an employer has notified the employee, in accordance with paragraph 2(1) of Schedule 6 of the Age Regulations 2006, of his intention to retire the employee on a particular date and the contract of employment terminates on the intended date of retirement, the retirement of the employee shall be taken to be the only reason for the dismissal by the employer and any other reason shall be disregarded. Subsections 3 and 4 deal with specific circumstances with which we are not concerned in this appeal. If the employer has failed to give a notice which complies with paragraph 2 of schedule 6, the reason for dismissal may be held to be retirement or it may not. The tribunal must determine that question by reference to section 98ZD(5) which requires it to have regard to various factors, set out in section 98ZF. In summary, they require the ET to consider the extent to which the employer has complied with the rest of the procedural scheme apart from paragraph 2."**

3. The statutory provisions were of great complexity. Dame Janet Smith added to her judgment "an expression of satisfaction that this unnecessarily complex piece of legislation is no longer on the statute book". It is not possible to set out all or most of the provisions of this legislation without overburdening this judgment. They are labyrinthine in nature.

4. Further, the statutory provisions included some which were likely to be traps for employer or employee or both. The requirement of paragraph 5(3) of Schedule 6 quoted by Dame Janet Smith was likely to be a trap for an employee. It was apparently mandatory - and the EAT in **Bailey** reached the conclusion that it was indeed mandatory, a conclusion not the subject of any challenge in the Court of Appeal. An employee, however, would be most unlikely to appreciate that his notice actually had to state that it was given under paragraph 5 of Schedule 6 unless he was in some way alerted to that requirement.

5. The EAT took the view that paragraph 2(1) required the employer to inform an employee of the essential requirements of paragraph 5. The Court of Appeal did not approve of such a wide view. Dame Janet Smith expressed its conclusion as follows:

> **"26. Mr Galbraith-Marten did not seek to support the exact wording of the EAT's decision. It will be recalled that the EAT had held that the paragraph 2(1) duty required the employer to tell the employee of the essential requirements for making a request to stay on. Mr Galbraith-Marten did not go so far. He submitted that the plain and ordinary meaning of paragraph 2(1) was to impose on the employer the duty to tell the employee that he had a right to make a request under paragraph 5 of schedule 6 of the Employment Equality (Age) Regulations 2006. That was because, if paragraph 2(1)(a) was read with the interpretation section, it was clear that the word 'request' meant a request under paragraph 5 of schedule 6. The words of the paragraph meant no more and no less. With that information, the employee would be alerted to the need to find out what he was required to do to make his request.**
>
> ***Discussion***
>
> **27. I accept the submissions of Mr Galbraith-Marten. In my judgment, the words of paragraph 2(1), read with the interpretations section, as they should be, require the employer to tell the employee that he has a right to make a request not to retire pursuant to paragraph 5 of schedule 6 of the Employment Equality (Age) Regulations 2006. Parliament had set up a statutory scheme which, if followed, had potential advantages to both employer and employee, over and above the consequences of the mere communication between the parties of a decision to retire the employee and the employee's request to stay on. It is important, in my view, that the employee should be told that the employer is invoking a statutory procedure and not merely writing to terminate the employment. The way in which Parliament has provided for that information to be imparted is by requiring the employer to tell the employee that he has a right to make a request not to be retired under paragraph 5 of the schedule.**
>
> **28. I would accept that Mr Galbraith-Marten was right not to seek to uphold the very words of the EAT. There is, in my judgment, no requirement under paragraph 2(1) for the employer to tell the employee what the requirements of his request will be when he comes to make it. It need tell him only that he has a right under paragraph 5 of the schedule. I would add that it might be said to be good practice for an employer to go the extra distance and advise the employee of the technical requirements he will have to comply with. However, there is no statutory requirement to do so. The intention of Parliament appears to be that, once the employee has been told of his statutory right to make a request, it can properly be left to him to him to find out how to go about making it."**

6. This is another appeal concerning, among other issues, the requirement of notice under paragraph 2(1). Before I turn to the facts, it is also necessary to note that provisions I have referred were repealed by the **Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011**. The Regulations were made on 5 April 2011 and came into force on 6 April 2011, but it was widely known prior to April that they were to be introduced. They contained transitional provisions. The effect of the transitional provisions was that if notice under paragraph 2 of Schedule 6 was given before 6 April 2011, the old provisions would apply. Otherwise they would not.

The facts

7. The Claimant was born on 27 June 1939. He was employed by Babcock Support Services ("Babcock") with effect from 25 June 2007 as a Clerk of Works. His terms and conditions of employment stated that the normal retirement age for all employees was 65. He was almost 68 when he was employed. On 1 July 2010 his employment was transferred to EC Harris Solutions Ltd ("the Respondent"). The Respondent had an express policy that the normal retirement age was 65.

8. The Tribunal noted that the Claimant was regarded as a model employee, popular and reliable, with a professional approach to his work. There was no criticism of the way in which he conducted himself during his employment. Nevertheless on 26 January 2011 the Claimant was given a letter which included the following:

> **"Dear Colin,**
>
> **As you know, the Firm's policy is that all employees will retire at the age of 65. You are currently working beyond your Normal Retirement Age. I am writing to you to confirm that we would like you to retire on 1 August 2011. Your employment will terminate on this date.**
>
> **You have the statutory right to request to continue working beyond the intended retirement date of 1 August 2011. If you wish to make a request to continue working, you should continue to do so in writing in accordance with the statutory requirements. You can use the enclosed form titled 'Request to Continue Working Beyond Statutory Date', for this purpose. You must state on this form whether you would like to continue working indefinitely, for a specified period or until a specified date. Your request should be sent to Jenna Phillips, Assistant HR Advisor more than three months, but not more than six months, before your intended retirement date of 1 August 2011."**

9. Attached to the letter was a form which the Claimant could and did complete. The form stated that it was important that all questions should be completed "because otherwise your request may not be valid". It gave the dates between which the request had to be made. It afforded an opportunity for an employee to state his wishes in a way which would comply with paragraph 5. It concluded with the following:

"I wish to submit a request not to retire and to continue working beyond my intended retirement date in accordance with my statutory right under the Employment Equality (Age) Regulations 2006. I declare the above information to be correct."

10. The letter and the form were, save for two features, an exemplary attempt to conform with the unduly technical requirements of the law. The two features are the following. Firstly, the letter did not inform the employee that his statutory right was a right to make a request under paragraph 5 of Schedule 6 to the Age Regulations. This fact is central to the appeal. Secondly, the form did not contain the statement required by paragraph 5(3) of the Regulations that the request was made under paragraph 5 of Schedule 6 to the Regulations. In the result, therefore, when the Claimant submitted the form on 28 February 2011, it did not conform with the requirement in paragraph 5(3). No-one noticed or took any point on this.

11. I can state quite briefly what then occurred. There was a meeting on 10 March 2011, following which the Respondent declined the Claimant's request by letter dated 16 March 2011. There was an appeal meeting on 21 April 2011, following which the Respondent wrote the following letter on 26 April 2011:

"I am writing to inform you that after our meeting on 21 April 2011 to discuss your appeal not to be retired, the Firm still intends to retire you on 1 August 2011.

You have now exhausted the appeal process and this decision is final."

12. There was, however, to be one more development. In June 2011 the Respondent found that a replacement Clerk of Works which it had expected to be available was no longer available. The Claimant was requested to stay on until 28 October 2011 and did so. The letter dated 13 June which requested him to stay on was carefully written. I will quote it in full:

"Dear Colin

Further to your retirement appeal meeting that took place on 31 March 2011, I write to confirm the outcome of that meeting.

We have carefully considered your request and the representations you made and have taken into account the general needs of the business.

The Firm has considered your request to work beyond retirement and is pleased to confirm that we will consider an extension of 3 months post your original intended retirement date of 1 August 2011.

I can therefore confirm that your last working day with EC Harris will therefore be Friday 28 October 2011 and this date will be your new retirement date.

I would like to thank you for your patience in this process and look forward in continuing to work with you over the coming months.,

Yours sincerely,

Martin Rance"

13. Although this letter is expressed to be a grant of a request to work beyond retirement in the course of the appeal process, the truth is that the request had been refused. The refusal had been expressed to be final, and, as the Tribunal found, there was a request to the Claimant to agree to an extension of three months to the original intended retirement date.

14. Finally, I should note that the Claimant was not the only person over retirement age who was dismissed at this time. The Employment Tribunal recorded that two other such employees were also dismissed on grounds of retirement.

15. Against this background I turn to the three substantive grounds of appeal.

Ground 1 – Notice under Paragraph 2(1).

16. The Claimant's principal claim to the Employment Tribunal was unfair dismissal. The Claimant submitted, in reliance on **Bailey**, that the Respondent's letter dated 26 January was not a sufficient notice. The Tribunal dealt with this argument as follows:

"36. Mr Norman, who has conducted his case in a very professional and well argued fashion, contends that the ratio decidendi of *Bailey* is that the right to make a request under paragraph 5 of Schedule 6 of the Age Regulations 2006 (my underlining) must be made clear by an employer to an employee. Failure to do so means that the employer has failed to comply with that part of the Age Regulations 2006. Therefore everything that occurs afterwards is invalid in his case because there has been no further notification by the respondent to make up for that deficiency. This is a very plausible argument.

> **37. However, although that is one reading of the judgment, the Tribunal's view is that if, as here, the respondent in providing the notice for the claimant to make the application, has set out all the provisions of the relevant Schedule, there has been compliance with the relevant provisions of the Schedule. That is sufficient.**
>
> **38. In those circumstances we are of the view that paragraph 2(1) was in fact complied with.**
>
> **39. Otherwise the position would be that an employer who merely mentioned paragraph 5 of Schedule 6 of the Age Regulations 2006 (without setting them out) would comply but an employee who set out all the relevant provisions in a notice (but failed to include the words 'paragraph 5 of Schedule 6') would not."**

17. On behalf of the Claimant Mr Sinclair Cramsie submits that the Tribunal's reasoning cannot be reconciled with the decision of the Court of Appeal in **Bailey** which I have already quoted. He points out that, contrary to the reasoning of the Tribunal, the Respondent's letter did not contain all the information required by the Age Regulations since it did not inform the Claimant of the critical requirement to state in his request that the request was made under paragraph 5 of the Regulations.

18. On behalf of the Respondent Mr Sebastian Naughton submits that the decision in **Bailey** is distinguishable. He points out that the Respondent had informed the Claimant that his rights were statutory, that the Respondent had gone to great trouble to provide a form which would enable the Claimant to make a request in accordance with the Age Regulations and that the form had made reference to the request being made under the Age Regulations albeit without reference to the particular paragraph. He submits that there was substantial compliance with the provisions of paragraph 2(1) and paragraph 5 of Schedule 6. In essence the Claimant was told of his right to make a request under paragraph 5 even if the precise provision was not mentioned. The Respondent had "gone the extra distance", as recommended by Dame Janet Smith in **Bailey**. It was possible to uphold the essentially purposive approach put forward by the Employment Tribunal.

19. Counsel referred me to two decisions of the EAT since **Bailey**, **Tajul-Arfeen v Health Protection Agency** [2013] UKEAT/0393/12 and **Copeland v E Coomes (Holdings) Ltd** [2013] UKEAT/0606/12. In these cases appeals were allowed on the basis of **Bailey** without any argument along the lines which Mr Naughton has put forward, and it is not possible to see from the terms of the judgments whether the employers had provided a notice and accompanying form of the kind which was provided in this case. They do not provide any further reasoning beyond that given by the Court of Appeal in **Bailey**.

20. I will therefore reach my own conclusion as to whether Mr Naughton's argument can be reconciled with **Bailey**. In my judgment, it cannot. I consider that **Bailey** is authority for the proposition that an employer must, in order to comply with paragraph 2(1), inform an employee that he has a right to make a request under paragraph 5 of the Schedule. I cannot read paragraphs 57 and 58 of the judgment of Dame Janet Smith in any other way.

21. Moreover such an interpretation of paragraph 2(1) seems to me to be the minimum essential to make any practical sense of the statutory provisions. Unless specifically directed to paragraph 5 of Schedule 6 an employee is unlikely to know of, still less comply with, its requirement that a request must be in writing and must state it is made under that paragraph. I do not think it can have been the intention of Parliament to provide a right to an employee and then hedge it about with requirements without making any provision for the employee to know what those requirements were. As the Court of Appeal held, the minimum required of an employer is that the employee must be informed that his right was to make a request specifically referring to paragraph 5 of the Schedule, so that he is at least directed to the precise provision which lays down the requirements he must meet.

22. Speaking for myself, if the accompanying request form provided by the Respondent had additionally contained a provision that the request was made under paragraph 5 of Schedule 6 to the Age Regulations, I would have read the form and the letter together and found the employer had complied with paragraph 2(1). But the form did not contain such a provision, with the result that the Claimant's request, when it was made, did not comply with paragraph 3.

23. For these reasons, I consider that Mr Cramsie's argument is correct. The Respondent's Notice did not comply with paragraph 2 of the Age Regulations. There is no room for the kind of purposive interpretation of the Regulations for which Mr Naughton contended. It is, therefore, common ground in this case that the transitional provisions did not apply, and the Claimant is entitled to have his claim of unfair dismissal adjudicated in accordance with the law following repeal.

24. Given this conclusion I will deal with grounds 2 and 3 quite shortly, for they concern points which would only have arisen if the old law were applicable.

Ground 2 – Normal Retirement Age

25. "Normal retirement age" was a key concept when applying the retirement provisions of the 1996 Act prior to their repeal. It was defined by section 98A as meaning "the age at which employees in the employer's undertaking who hold or have held the same kind of position as the employee are normally required to retire". The Tribunal held, relying on the terms and condition of Babcock and the policy of the Respondent that 65 was the Claimant's normal retirement age.

26. Mr Cramsie accepts that these documents give rise to what he would describe as a rebuttable presumption that the normal requirement age was 65 (see **Barclays Bank v O'Brien**

[1994] ICR 865 for the approach). He submits that, since at least two other employees over retirement age were also dismissed at the same time as the Claimant, and since the Claimant had said as part of his case that there was a policy of employing people between the age of 70 and 75, the Tribunal ought to have specifically addressed whether the presumption was rebutted. Mr Naughton submits that the terms and conditions and the policy documents were indeed of central importance and the Employment Tribunal was entitled to rely on them.

27. On this part of the case, I prefer the submissions of Mr Naughton. The terms and conditions of Babcock were supplemented by the policy of the Respondent, which was an up-to-date and relevant policy. I do not, in the circumstances of this case, think that the Tribunal was required to look further.

Ground 3 – extension of time

28. Mr Cramsie submits that the extension of the Claimant's employment, agreed in June 2011, in any event meant that the new statutory regime applied. Effectively a new retirement date was imposed after the conclusion of the statutory process. Dismissal at the new retirement date in October was not saved by anything in the transitional provisions.

29. Mr Naughton submits that the letter dated 13 June was treated as part of the appeal process and was a notification under paragraph 8(9)(a)(ii) of Schedule 6 to the Age Regulations of a "decision..that the employee's employment would continue for a further period". Thus the new date became the intended date of retirement (see section 98ZD(2)(b), section 98ZH, Schedule 6 paragraph 1(d) and paragraph 3(1)(b)). He submits that the Claimant by his correspondence and ET1 effectively accepted that this was the effect of the letter dated 13 June.

30. In my judgment it is plain beyond argument that the letter dated 13 June was not a notification under paragraph 8(9)(a)(ii). This paragraph applies to a notice of decision on an appeal, which must be given as soon as reasonably practicable after the appeal meeting - see paragraph 8(8). The notice of the decision on the Claimant's appeal had been given on 26 April 2011. The letter dated 13 June cannot sensibly be regarded as falling within paragraph 8(9). It follows that I would have allowed the appeal on this ground as well. But I have given my reasons briefly and without setting out the statutory provisions in full because the principal reason for allowing the appeal relates to ground 1.

Outcome

31. The Respondent's ET3 stated that the reason for dismissal was retirement. This reason ceased to be a substantial reason for dismissal with the repeal of the old law. To my mind, a finding of unfair dismissal is inevitable and I will substitute it. I will therefore allow the appeal, substitute a finding of unfair dismissal and remit the matter to the Employment Tribunal to assess compensation if compensation cannot be agreed.

32. I would add one final note. I have heard advocacy of a very high standard on both sides in this case. Within the term "advocacy" I include the provision of skeleton arguments, which are an essential part of advocacy before the Employment Appeal Tribunal. The skeleton arguments in this appeal were models of their kind. They navigated their way succinctly to the real issues through extremely complex statutory provisions; and I am very grateful to counsel for them.