Appeal No. UKEAT/0358/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 February 2014
Judgment handed down on 25 March 2014

Before

HIS HONOUR JUDGE PETER CLARK

MR J MALLENDER

MS P TATLOW

THE COUNCIL OF THE CITY OF NEWCASTLE UPON TYNE — APPELLANT

(1) MS S FORD
(2) MR K KHAN
(3) MS M E STEWART-WYKE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON GOLDBERG (of Counsel) Instructed by: Newcastle upon Tyne Legal Services Civic Centre Newcastle upon Tyne NE99 2BN
For the Second Respondent	MS NICOLA NEWBEGIN (of Counsel) Instructed by: UNISON Legal Services UNISON Centre 130 Euston Road London NW1 2AY
For the First & Third Respondents	No appearance or representation by or on behalf of the First & Third Respondents

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

Redundancy dismissals found by Employment Tribunal to be unfair, subject to **Polkey** deductions.

No procedural unfairness, nor impermissible substitution of view by ET. Employer's liability appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Newcastle Employment Tribunal where the parties were (1) Ms Ford, (2) Mr Khan, (3) Ms Stewart-Wyke, Claimants, and Newcastle City Council, Respondent. We have before us for full hearing an appeal by the Council against findings of unfair dismissal made by an Employment Tribunal chaired by Employment Judge Garnon in favour of the First and Second Claimants in a Judgment with Reasons promulgated on 27 February 2013. Ms Ford has taken no part in this appeal. There is a somewhat equivocal letter from the Third Claimant, who represented herself and Ms Ford below, to the EAT dated 10 August 2013. However, Mr Goldberg, appearing on behalf of the Council, accepts that the appeal stands or falls against both Ms Ford and Mr Khan. The Employment Tribunal dismissed all claims made by the Third Claimant. Mr Khan, supported by his trade union, Unison, is now represented by Ms Newbegin.

The facts

2. We are concerned with a restructuring (downsizing) of the Council's Youth Service Department in 2011-12. The method used was not by way of selection for redundancy from existing staff; rather all staff in the department were invited to apply for a new role in the new structure. Neither Ms Ford nor Mr Khan were entitled to slotting-in to a new post; instead each applied for the post of part-time Youth Development Worker (YDW) at grade N5. Ms Ford had been employed as a part-time Youth Support Worker at grade N3 and Mr Khan as a grade N5 full-time Youth Worker under the old structure.

3. Mr Khan had been employed since 1 January 1990. We shall focus on his case in light of the concession made by Mr Goldberg as to the cases of Khan and Ford standing together.

4. The recruitment process was agreed by the Council with Unison. It involved interviewing the internal candidates first. Following a proper consultation exercise the internal candidates, including Ms Ford and Mr Khan, were interviewed by a panel consisting of Jill Bauld, Youth Services Manager; Lisa Rake, Youth Services Lead Adviser; and an external member, Michael Evans, who was experienced in the youth services field. Prior to interview each candidate had been offered interview training but that offer was declined by both Ms Ford and Mr Khan. Ms Bauld and Ms Rake had some knowledge of the candidates; both had recently been involved in a disciplinary investigation into Mr Khan's conduct which came to nothing.

5. At interview each candidate was asked the same six questions, for which model answers had been prepared. Out of five candidates only one was successful, a Mary McPherson. Even she scored just below the minimum score of 46. Out of a maximum of 104 points Mr Khan scored only 25. In an internal e-mail dated 12 January 2012 Ms Bauld said of the process:

> **"We had a fair and robust process in place and were disappointed at the outcome as it was much lower than we had anticipated."**

6. Both Mr Ford and Mr Khan were then dismissed by reason of redundancy following an appeal process.

The Employment Tribunal decision

7. Having accepted that the reason for dismissal was redundancy, a potentially fair reason, the question for the ET in each of these cases was whether dismissal for that reason was fair or unfair, applying s.98(4) **ERA 1996**.

8. Again, concentrating on the case of Mr Khan, the Employment Tribunal rejected his case that Ms Bauld in particular had exhibited bias towards him based on her knowledge of him. On the contrary, the ET accepted her evidence that she did not take into account anything other than what was said by the candidates at interview (paragraph 3.36); not even the expression of interest documents completed by the candidates.

9. Where the Employment Tribunal found that the Council fell down in its procedure (paragraph 4.16) was in failing to tell these internal candidates that no account would be taken of their expression of interest letter nor any knowledge gained in their dealings with the candidates over a period of time unless it was spelled out by the candidate at interview. That was why these Claimants performed so badly.

10. Having found the dismissals unfair, the Employment Tribunal went on to apply the **Polkey** principle, reducing Mr Khan's compensatory award by 40 per cent and Ms Ford's by 50 per cent (paragraph 5.1) I rejected Mr Khan's cross-appeal against the **Polkey** deduction in his case both on paper and following a rule 6(16) hearing held on 28 January 2014.

The appeal

11. In advancing the Council's appeal Mr Goldberg takes essentially two points. The first concerns an allegation of procedural unfairness: that the Employment Tribunal decided the s.98(4) issue on a point not in issue between the parties. The second is a contention that the Employment Tribunal impermissibly substituted its view for that of the Respondent employer. We shall consider each in turn.

Procedural unfairness

12. Mr Goldberg's starting point is that the role of the Tribunal is not to conduct a free-standing enquiry of its own: its role is to adjudicate on disputes between the parties on issues of fact and law. See **McNicol v Balfour Beatty Rail Maintenance** [2002] ICR 1498, paragraph 26 per Mummery LJ, and the EAT Judgment in that case, [2002] ICR 381, paragraph 47.

13. We accept that principle but have looked carefully at how the case developed below.

14. The findings of fact forming the basis of the ET's rationale on unfairness emerged principally from the evidence of Ms Bauld, called on behalf of the Council. The point was clearly argued by Mr Morgan, then appearing for Mr Khan, in his closing written submissions (see the alternative submission recorded at paragraph 4.1 of the Reasons) and responded to by Mr Goldberg at paragraph 9 of his closing submissions. The ET accepted the argument advanced by Mr Morgan. It was entitled so to do, subject to the substitution point to which we shall return. It is not even a case of the ET arriving at a finding not advanced by either party: see **Judge v Crown Leisure Ltd** [2005] IRLR 823 and **Woodhouse School v Webster** [2009] IRLR 568, both Court of Appeal, in which no procedural unfairness was found.

15. In these circumstances we reject the procedural unfairness ground of appeal.

Substitution

16. It is now well-settled that an ET must not substitute is views for that of the employer in determining whether a dismissal is fair: see **Iceland Frozen Foods v Jones** [1982] IRLR 439, approved by the Court of Appeal in **Post Office v Foley**; **HSBC Bank v Madden** [2000] IRLR

827. This ET directed themselves to that principle (Reasons, paragraph 2.9) and demonstrated their practical awareness of this trap at paragraphs 4.12 and 4.17

17. We in turn are conscious of the danger of this Appeal Tribunal of falling into the trap of substituting our view for that of the fact finding ET: see **NW London Hospitals NHS Trust v Bowater** [2011] IRLR 331, particularly at paragraph 19 per Longmore LJ, and in my own case, **Graham v DWP** [2012] IRLR 759.

18. In this connection the ET plainly drew guidance from the Judgment of Underhill P, as he then was, in **Samsung Electronics (UK) Ltd v Monte D'Cruz** (EAT/0039/11/DM, 1 March 2012). That case, like **Morgan v Welsh Rugby Union** [2011] IRLR 376 (EAT), considered and applied in **Samsung**, involved a process of job application rather than the traditional selection for redundancy method. The employer appeal in **Samsung** was allowed on the basis that the ET had wrongly substituted its judgment for that of the employer as to the claimant's suitability for a new role. In **Morgan** the ET decision that dismissal was fair was upheld on appeal.

19. For completeness we have also been referred to a later Judgment of Underhill J in **Mental Health Care (UK) Ltd v Biluan** (EAT 0248/12/SM, 28 February 2013) handed down after the ET Judgment in this case. **Biluan** was a traditional redundancy selection exercise, found by the ET to be unfair on the basis that the exercise used disregarded the employee's past performance in the job. The employer's appeal was dismissed.

20. What we draw from these authorities is that each case is fact sensitive. The principles are clear. The question for us is whether this ET crossed the line, substituting its views, impermissibly, for that of the employer.

21. Mr Goldberg answers that question in the affirmative. He points out that the ET found that the Council acted reasonably in deleting the old roles and appointing to the new roles, which differed from the old, by way of interview. The only criticism made by the ET was that, having said that selection was by interview, the Council did not go on to say that selection was by interview only**.** Further, Mr Khan's case was that Ms Bauld used her previous knowledge of him against him (a case rejected by the ET); now he succeeds on the basis that her previous knowledge was not used in assessing him.

22. He further suggests that, having given themselves the appropriate warning against substitution, the ET then proceeded to fall into that very same trap identified in **Samsung**. They started from the premise that the marking of Mr Khan was so "self-evidently bizarre" (paragraph 4.15) that there must have been something wrong with the process. The ET, submits Mr Goldberg, formed the clear view that these two Claimants were suitable for appointment.

23. In advancing these submissions, Mr Goldberg recognises that this is essentially a perversity argument, as did Underhill J in **Havering PCT v Bidwell** (EAT 0479-80/07/MAA, 22 April 2008), paragraph 25.

24. Having so characterised it, Ms Newbegin submits that the high hurdle faced by an appellant relying on the perversity ground has not been crossed. She starts from the position that it was for the ET to stand back and view the process as a whole, based on their findings of fact, in order to determine whether dismissal was fair or unfair. The opinion that the results were surprisingly poor came from Ms Bauld. The explanation, the ET found, for that outcome stemmed from the fact that inadequate information as to the process was imparted to the candidates, in particular relating to differences between the old and new posts (paragraphs 3.19-

3.32) and the fact that previous knowledge of the candidates, all of whom were "internal", would not be taken into account. That is why these Claimants failed to sell themselves at interview. So they did not have a fair opportunity to save their jobs (paragraph 4.6).

25. In our judgment, this issue is finely balanced. Had the members of this appeal tribunal been constituted as an ET, we may well have reached a different conclusion as to the fairness of these redundancy dismissals. However, we are not and we must be wary of substituting our view for that of the ET. Having held that the point was fairly before them for determination, we are unable to say that the ET's conclusion on fairness was one which is legally perverse or that they substituted their view for that of the Council. They did not find, as Mr Goldberg submitted, that the Claimants ought to have been appointed to the new YDW role; on the contrary their **Polkey** findings recognised that there was only a chance that, had a proper process been followed, they would have retained their employment. The ET did not purport to re-mark the scoring exercise; they merely observed, as had Ms Bauld, that the results were abysmal for candidates with their experience (see paragraph 3.52). That was not a substitution of their view, as they reminded themselves (see paragraph 4.10), nor based on sympathy for the Claimants. It merely reinforced their permissible judgment as to the flaws in the process amounting to unfairness under s.98(4).

26. Accordingly, we reject the second ground of appeal. This appeal fails and is dismissed.