

Appeal No. UKEAT/0094/13/RN

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 21 January 2014

**Before**

**THE HONOURABLE MRS JUSTICE COX DBE**

**(SITTING ALONE)**

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MR M MAGUIRE

APPELLANT

LONDON BOROUGH OF BRENT

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

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For the Respondent

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## **SUMMARY**

### **UNFAIR DISMISSAL – Reasonableness of dismissal**

The Claimant appealed against the Employment Tribunal's dismissal of his complaint of unfair dismissal. The issue was the ET's approach to the overall reasonableness of the dismissal in a redundancy situation, and specifically to the employer's efforts to find suitable alternative employment.

The ET were found to have erred in focussing on the narrow issue of whether a particular post, identified by the Claimant as offering suitable alternative employment for him, was vacant because it was under review; and in failing to resolve questions relating to that post, which were clearly relevant to the overall question of the reasonableness of the Claimant's dismissal as at the time it occurred.

Case remitted for re-hearing before a freshly constituted Tribunal.

## **THE HONOURABLE MRS JUSTICE COX DBE**

### **Introduction**

1. This is an appeal by the Claimant against the judgment of the Watford Employment Tribunal, dated 11 June 2012, dismissing his claims of unfair dismissal and indirect age discrimination. There is no appeal against the dismissal of the age discrimination claim. The appeal has proceeded to a full hearing on amended grounds of appeal relating to the unfair dismissal claim, following an earlier preliminary hearing. Since then, by order dated 15 January 2014, the appeal proceeds on grounds 4 and 6 only of the amended grounds, all remaining grounds of appeal having been dismissed upon withdrawal.

2. Those two grounds raise issues relating to the correct approach to be taken by an Employment Tribunal when assessing the efforts made by an employer, in a redundancy situation, to find suitable alternative employment for an employee who is at risk of redundancy.

3. The Tribunal hearing was held over three days between 30 May and 1 June 2012. In his ET1 the Claimant made a number of complaints, but in relation to unfair dismissal he complained specifically that the Respondent had failed to offer him suitable redeployment, identifying as suitable alternative employment a post formerly held by a Mr Al-Jawad, which was under review and which the Claimant maintains should have been offered to him. The Claimant complained, in particular, that the review of this post had not been completed prior to his departure on 26 August 2011, despite the fact that he had earlier been told that the review was due to be completed by the end of June 2011; and that he was entitled to be considered for that post before it was more widely advertised.

4. At paragraph 6.1 of their Reasons, the Tribunal identified the issues to be determined in this respect as follows:

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**“6.1 In relation to the unfair dismissal claim, the claimant accepted that the reason for his dismissal was redundancy caused by the need to save costs. The issue was, however, whether the respondent acted reasonably in treating that reason as a sufficient reason for dismissal. In particular the following questions arise:**

**(a) Did the respondent carry out a reasonable consultation process?**

**(b) Further questions which arose in this regard are:**

**(i) Did the respondent follow its own redundancy policies?**

**(ii) Should the claimant have been interviewed for Mr Al Jawad’s vacant post?”**

5. After hearing evidence from the Claimant and from Christopher Walker, Assistant Director of Planning and Development, on behalf of the Respondent and considering a substantial bundle of documents, the Tribunal found the following facts, so far as they are relevant to the issues arising in this appeal.

### **The relevant facts**

6. The Respondent Local Authority employs approximately 3,000 people. A new department, the Regeneration and Major Projects Department, was established on 18 October 2010. Their housing and planning functions became part of this new department. During 2010, as a result of the general economic situation, the Respondent had to make substantial savings and reductions in its expenditure. It embarked on two re-organisations, which both involved staffing cuts.

7. The Claimant had commenced employment with the Respondent on 11 August 2003, working as Assistant Team Manager, Planning Policy, in the Planning and Development Unit. This unit therefore became part of the much larger Regeneration and Major Projects Department. The Claimant’s post was identified as one of the posts to be deleted as part of the Respondent’s budget reductions.

8. In relation to redundancy, the Respondent followed its Managing Change policy. On 11 January 2011 the Claimant was told by Mr Walker that he was at risk of being made redundant because a decision had been taken to delete his post. On that date, after meeting Mr Walker, the Claimant was placed on the redeployment register in order to match his skill-set with an appropriate alternative post. He was able to contact the Respondent's human resources department, to assist in his search for suitable vacancies, and he had access to posts on the Respondent's Intranet. He was given details of social work posts, but he was not a qualified social worker and those vacancies were considered unsuitable.

9. The Tribunal found that there was nothing suitable for the Claimant and that he was therefore at risk of being made redundant. On 7 February 2011 a letter was sent to the Claimant confirming that his post had been identified for potential deletion and that he was at risk of redundancy. On or around 9 February 2011 the Claimant was sent a copy of the Department's consultation paper by Mr Donald, the Director of Regeneration and Major Projects. The Claimant and others were required to submit any comments by 28 February. In addition they were given details of the new job descriptions available on the Department's shared drive. As Mr Donald was going to be on leave for the majority of the consultation period, he advised that in his absence Mr Walker would conduct matters on his behalf. He also stated that the trade union representatives had been informed of the proposals.

10. This consultation paper provided the rationale for the restructuring and the savings anticipated. It also referred to the job descriptions for the new structured positions and confirmed that the Assistant Team Manager, Planning Policy position, among others, was to be deleted. The Claimant and his colleagues were given the opportunity of attending staff consultation meetings with Mr Walker in February 2011 but the Claimant was unwell and decided to express his views in writing. A number of matters were raised by the Claimant,

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which are not relevant to the issues in this appeal. On 18 March 2011 the Respondent set out its response to the concerns raised by staff.

11. Time moved on. The Claimant had meetings with Mr Walker on 6 May and 31 May 2011. A termination package was provided to him on 31 May, and there was no dispute as to the figures. A termination letter dated 31 May was also sent, referring to restructuring as the reason for the Claimant being at risk of redundancy and for the eventual termination of his employment. It gave the Claimant's last day of service as 26 August 2011 and stated that there was no offer of suitable alternative employment. His pension details and redundancy entitlements were confirmed. This letter also informed the Claimant of his right to appeal to Mr Donald against redundancy dismissal.

12. On 6 June 2011 the Claimant submitted grounds of appeal. He referred in these grounds to the post being held by Mr Al-Jawad, who had tendered his resignation in April. He contended that it was a suitable alternative post, but that it had not been offered to him. The post he was referring to was the post of Assistant Team Manager, Regeneration and Design. It was a specialist role, focussing on project delivery across the Council. In April 2011 Mr Al-Jawad had tendered his resignation, giving the Respondent three months' notice so that he would be leaving in July 2011 before the Claimant's due departure date. The Tribunal found as follows in relation to this post and the Claimant's appeal:

**“...From April 2011 the respondent became aware of this potential vacant position. The Claimant submitted that the position was in fact an internal redeployment and that it should have been offered to him. He had the requisite qualification and experience required, such as what was described as section 106 negotiations, and experience.**

**8.23 We were told by Mr Walker that section 106 refers to the provision in the Town and Planning Act 1990. It gives local authorities financial benefits if work is secured with a developer, for example, in relation to a housing scheme, the authority might ask for contributions towards provision of facilities for children. In evidence before us there was no dispute that Mr Walker considered that the claimant had experience relevant to Mr Al Jawad's post but he, Mr Walker, had to review the post in the light of forthcoming legislation to what he described as the Communities Infrastructure Levy. In 2011 he had to deal with a number of maternity leave issues. The period following Mr Al Jawad's resignation gave him**

the opportunity to review the role, he discussed it with the claimant who was told that it was going to be looked into. Mr Walker had £180,000 excess over budget and it meant that there had to be some budgetary controls over spending. The role and title changed to principal planner (section 106) and was graded at PO5. He told the tribunal that the respondent would be recruiting for someone to fill this post in two months from the date of the hearing.

8.24 In relation to the claimant's appeal, Mr Donald replied by letter dated 22 June 2011, giving his outcome decision. In relation to the assistant team manager post in design, following notice being given by Mr Al-Jawad, Mr Walker had informed Mr Donald that he wished to review the post given the forthcoming changes which were due through the introduction of the Community Infrastructure Levy and the consequences of the Localism Bill. He went on:

'In terms of other changes our DMT has already agreed that our priorities for spend should be around the identified infrastructure requirements in our growth areas and that the New Initiatives Team will be responsible for the spend of money raised through CIL where the spend relates to infrastructure. I am also of the view that the S106/CIL account can be managed through departmental finance team, although I accept that accountability would remain with planning. Once this review takes place it would be our intention to advertise the post. I am satisfied that this post, with amendments to its remit to reflect service needs, continues to be required and I would not agree to it being deleted in substitution for your current post. I also take the view that the post duties differ significantly from those of your current post and this is partly reflected in the current grading PO4/5. As a potential redeployee you are entitled to be matched against the post under the Managing Change Procedure and if an appropriate match applies, be given the opportunity to be considered for the post before it was more widely advertised.

I see no reason for withdrawing the redundancy notice as your post would in any event be deleted. In terms of timescales I expect the review of the post to be completed by the end of June together with any consequent evaluation, and that we would be in a position to recruit well within your notice period.'

13. The Tribunal went on to find that, under Mr Walker's remit, six positions were made redundant in Planning and Development. Of that number, three employees were reallocated to other roles. Two opted for voluntary redundancy. Only the Claimant was made compulsorily redundant.

### **The Tribunal's decision**

14. In relation to the law, the Employment Tribunal directed themselves to s.139 of the **Employment Rights Act 1996** and to the guidance given in the well-known case of **Williams v Compair Maxam Ltd** [1982] ICR 156. No express reference was made to s.98(4), but it is clear from paragraph 6.1 of their reasons that the Tribunal identified, as an issue for them to determine, whether the Respondent had acted reasonably in treating redundancy as a sufficient reason for the Claimant's dismissal.



15. There was no dispute that the reason for the Claimant's dismissal was redundancy, and the Tribunal found that the decision was taken by competent managers, who bore no ill feelings towards the Claimant. In relation to consultation, the procedure followed by the Respondent was found to be adequate and meaningful, both at the strategic level and individually in relation to the Claimant himself. At paragraphs 17 to 20 the Tribunal's conclusions were expressed as follows:

**"17. Was the claimant offered suitable alternative employment? He relied on Mr Al Jawad's post. This issue resulted in the tribunal taking some time in discussion. The reason being that Mr Walker became aware in April 2011 that Mr Al-Jawad was going to leave that post in July.**

**18. Was the respondent under an obligation to make available that position to the claimant? On the one hand a view could be taken that as that post was to be available and the claimant was potentially redundant, Mr Walker ought to have met with him to discuss it as a possible suitable vacancy. Mr Walker agreed that he had some of the skills required for the post. On the other hand, however, the evidence that came out during the course of the hearing and supported in the appeal outcome letter by Mr Donald was that Mr Walker was reviewing Mr Al-Jawad's old post in the light of forthcoming legislation.**

**19. We have come to the conclusion, though we accept that it is not helpful to the claimant, that the obligation here was to offer the claimant a suitable alternative vacant position. In our view, having heard all the evidence and having made our findings of fact, the operative word here is 'vacancy'. We have come to the conclusion that that post was not vacant. It is currently under review, the matter being finalised two months from now.**

**20. There was, in the circumstances, no suitable vacant position to be offered to the claimant. He was provided with the opportunity to search for alternative employment and the only other positions made available to him were clearly unsuitable social work vacancies."**

The unfair dismissal claim was therefore dismissed.

### **The appeal**

16. There is no dispute as to the law. The essential question for the Tribunal was whether the Respondent acted reasonably in treating redundancy as a sufficient reason for this Claimant's dismissal. It has long been established that, in a redundancy situation, reasonable employers should act in accordance with the five principles laid down in **Williams v Compair Maxam Ltd**. In addition to the requirements for meaningful consultation and for fair selection criteria and procedures, the fifth of these principles is that the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. Reported cases UKEAT/0094/13/RN

since then all refer to an employer's duty to consider suitable alternative employment for an employee who is at risk of redundancy. In the case of **Polkey v AE Dayton Services** [1987] IRLR 503 Lord Bridge said this, at paragraph 28, in relation to reasonableness and redundancy:

**“...in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation.”**

17. The focus in this appeal has therefore been on the Tribunal's judgment and the answer they gave to the question whether the Respondent acted reasonably in this case in treating redundancy as a sufficient reason for the Claimant's dismissal.

18. Mr Ross, on behalf of the Claimant, submits essentially that the Tribunal misdirected themselves as to the correct legal test by answering, at paragraph 19, a different question from the one they had posed correctly at paragraph 17, namely was the Claimant offered suitable alternative employment. In paragraph 19, he submits, the Employment Tribunal incorrectly described the Respondent's obligation as an obligation to offer the Claimant a suitable alternative “vacant” position. In coming to the conclusion that Mr Al-Jawad's post was not vacant because it was still currently under review and was therefore not a suitable alternative vacant position, he submits that they were in error.

19. This, submits Mr Ross, is not just a matter of semantics, as the Respondent's counsel suggests in his skeleton argument. In many, if not most cases, suitable alternative employment and a suitable alternative vacant post will be synonymous. In this case the relevant, alternative post was in fact vacant at the date of the Claimant's departure in August 2011, because Mr Al-Jawad was found to have left it shortly before then in July. The post was under review, but the Tribunal's misdirection led them to take an impermissible short-cut from the fact that the post

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was still under review to the finding that there was no obligation on the Respondent to offer the post to the Claimant. Their misdirection meant that the Tribunal bypassed the broad, reasonableness test which had to be applied in determining whether the Respondent acted reasonably in treating redundancy as a sufficient reason for the Claimant's dismissal.

20. In particular, submits Mr Ross, notwithstanding Mr Donald's letter in response to the Claimant's appeal, to which the Tribunal clearly attached some weight, the Tribunal made no findings of fact as to the nature of the review being carried out; why the review had not been completed when anticipated, or by August 2011 when the Claimant's departure date arrived; why the fact that the post was under review meant that it was not available to be occupied by the Claimant as at the date of his departure, which was the time when the reasonableness of the steps taken by the Respondent fell to be considered; or why the Claimant's date of departure was not deferred pending completion of the review. The only matters referred to in the Tribunal's conclusions, in particular at paragraph 18, are the fact that the Claimant had some of the skills required for the post; that, since it was to be available, Mr Walker should have discussed it with him; and the fact that the post was still being reviewed by Mr Walker. The Tribunal therefore erred in their consideration of an important issue relating to the reasonableness of the Claimant's dismissal and his appeal should be allowed.

21. On behalf of the Respondent, Mr Aggrey-Orleans submits that this appeal amounts to an impermissible attack upon the Tribunal's findings of fact. The Tribunal were plainly alive to section 98(4) and to all the salient issues and they correctly identified, at paragraph 6.1, the test to be applied. They heard detailed evidence from the Claimant and from Mr Walker and made appropriate findings of fact on the issues. The findings of fact and the reasons should be read as a whole, and there is, he submits, in paragraph 8.23 an implicit finding of fact that

Mr Walker was acting reasonably in taking his time to review Mr Al-Jawad's post, given the other onerous tasks he was found to be simultaneously carrying out.

22. In addition, their finding at paragraph 18, he submits, implicitly includes a finding that the time Mr Walker was taking to review the post was reasonable. The use of the word "vacancy" in paragraph 19 was not a misdirection. The Tribunal meant only that they regarded the post as not being available, because it was under review. The Tribunal were entitled to conclude that it was reasonable not to offer that post to the Claimant. To extend the Claimant's departure date to a date later on in 2012 would not be reasonable, and this is implicit in the Tribunal's reasoning. The findings of the Tribunal make it clear to this Claimant why he lost his claim. Importantly, he submits, the Tribunal rejected the suggestion of any sinister motives on the part of Mr Walker in carrying out the review.

23. In my judgment, the finding of an absence of sinister or improper motives on the part of Mr Walker does not fill what I regard as a substantial gap in the Tribunal's consideration of the reasonableness of this Claimant's dismissal. It is a gap which cannot satisfactorily be filled by the suggestion that obvious questions arising as to the reasonableness of the steps taken by the Respondent on the facts of this case were answered implicitly in the Tribunal's judgment, in particular when the Respondent's obligation has been characterised as an obligation to offer the Claimant a suitable alternative vacant position. Given the detailed findings of fact on a number of other issues before them, and given the specific complaint being advanced by the Claimant in his ET1, the lack of relevant findings of fact and reasoned conclusions on what was clearly a main plank of the Claimant's case is all the more surprising.

24. The time to consider the reasonableness of a dismissal is the time the dismissal occurred. On the evidence the Tribunal found that Mr Al-Jawad had tendered his resignation in  
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April 2011, giving three months' notice. The post was therefore vacant, in the ordinary and natural meaning of that word, in July 2011 before the Claimant's due departure date of 26 August 2011. The Tribunal found that Mr Walker considered the Claimant to have experience relevant to that post and, further, that Mr Al-Jawad's post was not to be deleted. They found that Mr Donald told the Claimant, in his letter of 22 June 2011, that he expected the review to be concluded by the end of June 2011; that, as a potential redeployee, the Claimant was entitled to be matched against the post under the Respondent's procedures and to be given the opportunity to be considered for the post before it was more widely advertised; and that the Respondent would be in a position to recruit to that post well within the Claimant's notice period.

25. At the hearing, in May-June 2012, Mr Walker told the Tribunal that the review was still ongoing. In considering the overall reasonableness of the decision to dismiss, I accept Mr Ross's submission that the Tribunal focussed erroneously on the narrow issue of the ongoing review, which they considered meant that the post was not vacant, rather than on the broader question of whether the Respondent acted reasonably in treating redundancy as a sufficient reason to dismiss the Claimant at the time he was dismissed.

26. I do not accept Mr Aggrey-Orleans' submission that it is clear from the Tribunal's findings of fact and conclusions why this Claimant lost his claim. The obvious discrepancy between Mr Donald's assurance to the Claimant, as to the date of the completion of the review and his entitlement to be considered for that post, and Mr Walker's evidence to the Tribunal a year later that the review was still ongoing, was not resolved. There are no findings as to why the review had not been completed by the day of the Claimant's departure, or why it was not vacant after Mr Al-Jawad had left the post in July, notwithstanding the fact that it was under review. There is no finding, in considering the overall reasonableness of dismissal, as to why

the Claimant's departure date was not, or could not be, deferred pending completion of the review or why, if it be the case, he could not occupy that post pending completion of the review.

27. All these questions were clearly relevant to the question of reasonableness, and in my view the answers to them cannot legitimately be implied in the brief reasons given for the Tribunal's conclusions, or on reading the judgment as a whole. In my judgment, the Tribunal failed to apply the correct legal test, in focussing impermissibly on the necessity for a suitable alternative vacant position and in failing to resolve all the issues relevant to the reasonableness of dismissal in this case. I accept Mr Ross's submission that the Tribunal were in error in this respect, and the Claimant's appeal will therefore be allowed.

28. Mr Ross invited me to substitute my own decision for that of the Tribunal, on the basis that no reasonable employer in the Respondent's position would have treated redundancy as a sufficient reason for the Claimant's dismissal on the evidence in this case. I cannot accept that submission. The deficiencies identified in the judgment mean that the matter must be remitted for re-determination at a fresh hearing. Mr Aggrey-Orleans submits that it should be remitted to be re-determined by the same Tribunal. I do not agree. Having regard to the well-known case of **Sinclair Roche Temperley v Heard** [2004] IRLR 763, to the delay since this case was heard and to the obvious concern as to the temptation on the part of a Tribunal to reach the same result on being given 'a second bite at the cherry', in my view the unfair dismissal claim should now be remitted for re-hearing before a freshly constituted Tribunal.

29. For all these reasons, this appeal is allowed.