Appeal No. UKEATS/0028/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 23 October 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MRS GILLIAN JAMIESON APPELLANT

NATIONWIDE BUILDING SOCIETY RESPONDENT

Transcript of Proceedings

JUDGMENT

REVIEW APPLICATION

APPEARANCES

For the Appellant	MR M DEMPSEY (Representative) Instructed by: University of Strathclyde Law Clinic The Law School Graham Hills Building Room 551b, Level 5 40 George Street Glasgow G1 1BA
For the Respondent	MR MAURICE O'CARROLL (of Counsel) Instructed by: Olswang Apex Plaza Forbury Road Reading Berkshire RG1 1AX

SUMMARY

PRACTICE AND PROCEDURE – Review

UNFAIR DISMISSAL – Dismissal/ambiguous resignation

An employee who worked for a building society was disciplined for carrying out personal transactions whilst serving at the branch. The disciplinary panel had not yet announced its decision when the Claimant's trade union representative asked to appeal to the Chair. He did, and was told that the decision would be to dismiss her. He asked if he could consult the Claimant before it was announced, and whether if she resigned before the announcement she could have a "clean" reference. He consulted her; she spoke to her husband; and then offered her resignation. The Employment Tribunal concluded this was a resignation, and not a dismissal.

The Claimant appealed, asserting untruthfully that the TU representative was an employee of the Respondent, and thus that she was pressured into resignation, such that it was not truly a voluntary choice but a dismissal. Leave to proceed to a full hearing was granted partly on that basis. When the true facts came to light, the Respondent sought a review of the grant of permission to proceed. Though it had to be emphasised that reviews of such a decision would very rarely if ever be granted, one was: but on review, the Claimant having declined to accept the hearing as the hearing of the appeal itself, it appeared there still remained an issue of law which should be determined at a full hearing, and the original decision was confirmed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This matter comes before me in unusual procedural circumstances. The facts relate to a Claimant who alleged that she had been unfairly dismissed. An Employment Judge, sitting in Glasgow, concluded, for reasons which she expressed on 1 March 2013, that that complaint failed. It failed on two bases. First, and the real reason for its failure, was that she concluded that the employee had not been dismissed but had resigned. Second, she thought that even if she had been dismissed it was "likely that I would have found that dismissal was within the range of reasonable responses open to a reasonable employer." She went on to explain why that was likely, but it is possible that her findings fell short of an actual determination of the case rather than indicating a likelihood.

2. The central facts were these. The Claimant worked at the Lanark branch of a building society. As such, she was subject to strict financial controls, in particular prohibiting her from making transactions for her personal account whilst serving at the branch. I need not set out the precise facts which were alleged to have occurred, but they gave rise to disciplinary proceedings against her, one very obvious conclusion of which was that she might be dismissed. A disciplinary hearing occurred. She was represented at that hearing by a Mr Richards. He was described by the Tribunal as an experienced trade union representative. He asked the Chair of the disciplinary hearing if he could speak to him before the result of the disciplinary hearing was announced. He was told (see paragraph 51) that the decision which would be communicated to the Claimant would be that she would be dismissed. He asked if could consult with the Claimant before the meeting was reconvened. When he did so, he told the Claimant that it looked like they were going to dismiss her and told her that if she resigned she would get a good reference. It would be a "clean" one that would advantage her in securing similar work elsewhere. Without it, in the financial climate it would be difficult for her to get

alternative work. The suggestion of resignation did not come from the employer. It came solely from Mr Richards. She discussed the suggestion with her husband by telephone. She discussed it with Mr Richards. She then chose to resign. It appears from the findings in fact that was within a matter of minutes of the Chair of the disciplinary panel having spoken to Mr Richards.

3. The Tribunal set out a number of the relevant cases. The Judge was referred to a case of **Sandhu v Jan de Rijk Transport Ltd** [2007] ICR 1137. The conclusion which the Judge reached was that (see paragraph 90) the cases which had been cited to her by the Claimant's representative could be distinguished on their facts. She said that the option of resignation was not initiated or proposed by the Respondent. Rather, the proposal emanated from the Claimant's representative and she said, again, that he was an experienced trade union representative. She took into account these factors: first that the outcome was more advantageous than dismissal. Second, she had time to speak with her husband and with Mr Richards. Third, she was not easily persuaded that she should resign. Fourth, there was no pressure nor duress from the Respondent. Fifth, the resignation she gave was clear and unambiguous. She also found that the Claimant did not act "in the heat of the moment", by which I take it she meant did not act because of the pressure of immediacy in respect of the decision which fell to be made (see paragraphs 90 to 98).

4. The Notice of Appeal was received at this Tribunal on 9 April 2013. It asserted that it was an error of law to find that there was no pressure or duress on the Claimant to resign and no clear explanation why the authorities cited by the Appellant could be distinguished (paragraphs 7.5 and 7.6). In respect of the suggestion that there had been pressure from the Respondent, the Notice of Appeal referred to the Employment Tribunal Judge finding that the Appellant had the benefit of Mr Richards' advice and guidance. It averred that he was an

employee of the Respondent employer. He was not therefore independent. In effect (see five lines from the bottom of 7.6) the Appellant had faced an ultimatum, "resign or be sacked", put forward by an employee of the Respondent. There had been no opportunity for proper advice.

5. Those assertions were unfounded. That is now clear and has not been challenged before me. It is accepted that in fact Mr Richards is engaged by a union independent of the Rsepondent. The findings in fact which the Tribunal Judge made about him and his role were therefore entirely open to her and betray no error of law.

6. Before that came to light, permission was granted on the sift for the matter to go to appeal. Rather than waiting to an inter partes hearing to defeat the appeal, the Respondent decided on a pre-emptive strike. It applied to review the decision to proceed to a full appeal, which had been reached on the sift. It relied upon rule 33(1)(a), that the order was wrongly made as the result of an error on the part of the Tribunal or its staff, and that the interests of justice required such a review.

7. Before me, there has been little argument about whether there should be a review. Mr O'Carroll asks for it. Mr Dempsey appearing for the Claimant does not resist it, though he argues that the result should be the same, that there is a reasonable ground for appealing. That, it seems to me, is a sensible stance to take in the circumstances. I observe that it should always be exceptionally rare that there is a review of a decision made on the sift to grant a full hearing. That is because it is almost inevitable, as happened here, that there will be a lengthy inter partes hearing which follows, which might, just as conveniently, have been a hearing of the full appeal of itself. The overriding objective would generally therefore be served by rejecting a review. Moreover, if the review were to succeed, then technically there would be a decision to refuse permission to appeal to a full hearing. That under rule 3(10) would be open to an oral hearing

at which the Respondent would have no right, as such, to appear though might be invited to do so, which would have the potential in resulting in a full hearing or, for that matter, an amended Notice of Appeal. This is unsatisfactory procedurally. It is likely to put the parties to expense and to waste their time. Accordingly, it seems to me it should be in exceptionally rare circumstances that such an application is made. But there is nothing in the Rules which prevents such an application being made if there is a proper cause, although the considerations I have just given should, in my view, significantly affect the exercise of the discretion which exists under rule 33(1), whether or not grounds are made out, as in 33(1)(a) and (33)(1)(c), to grant or refuse a review. Normally a party should expect that the application for a review will be refused. This is of particular significance in these days where fees are payable once permission to proceed to a full hearing has been given. I accept, however, Mr O'Carroll's point that if this Tribunal were of the view, on review, that there was truly no reasonable prospect of success, no reasonable ground for appealing, then the hearing would be likely to have the practical effect of ensuring there would be no further appeal, though a decision as to this would lie in the hands of the would-be appellant. However, a situation in which a Notice of Appeal has been frankly misleading is an exceptional case.

8. I have heard and considered the applications. Mr O'Carroll has declined the invitation that this hearing should be treated as a full hearing of the appeal. Accordingly I am concerned, first, with whether I should grant a review, whether grounds under rule 33(1)(a) and 33(1)(c) are made out and, secondly, if I do grant a review, whether I should myself give permission for the appeal to go to a full hearing. That depends not upon what I think the result would probably be, but whether I think there are reasonable grounds for appealing.

9. As to the first, whether I should grant a review, I am satisfied that the expression "error on the part of the Tribunal" looks usually to an error which the Tribunal has itself made. The

error here relied upon is an error in understanding the true facts, but that error was not, within the wording of the Rule, one that the Tribunal or its staff made. It was the fault of the Appellant. However, that same consideration leads me to conclude that the ground under 33(1)(c) is made out. It is plainly in the interest of justice that if the Appeal Tribunal has been misled in a material respect, and the position of Mr Richards was highly material, central perhaps to the appeal, then there should be a review and I therefore grant one.

Decision on review

10. Here, Mr O'Carroll argues that the cases show that there has to be an error of law or perversity if a decision as to whether there has been a resignation or dismissal has occurred. He argues that cannot be said now and a central basis for asserting it, the lack of independence of Mr Richards, has disappeared. He argues that the Tribunal's findings in fact show that the cause of the resignation was the Claimant's own voluntary act. There were no such circumstances of pressure that, in the Tribunal's view could mean that it was not a resignation. That is a finding of fact to which the Tribunal was entitled to come.

11. Mr Dempsey, for his part, has argued that the advice of Mr Richards was not the same as impartial advice. The error of description of his role does not invalidate the appeal. The issue was about the situation and the effect on the mind of the Claimant. It was not a question of the identity of the person telling the Claimant that she was about to be dismissed or should resign. The misdirection in law was failing to distinguish between agreement here to secure a clean reference, which amounted to an attempt to mitigate loss in the face of an almost inevitable dismissal, because she had been told that she was to be dismissed, on the one hand, and a resignation involving negotiation and being a voluntary act, on the other.

Discussion

12. The Claimant faces high hurdles. She must show that the Tribunal made an error of law. She must satisfy a court on appeal both that it was in error in reaching the conclusion it did about whether she resigned or was dismissed and, secondly, if dismissed, that what the Judge said was not in reality a determination of the fairness of her dismissal, which itself would then have to be addressed.

13. Second, a conclusion whether there has been a resignation or a dismissal is essentially one of fact. A conclusion as to fact cannot be upset on appeal unless it is shown that there is an error of law, which will either here be a misdirection of law or a perverse conclusion, or possibly a failure of the decision to be **Meek** compliant, since it is said here that the Tribunal did not spell out the respects in which the facts here were different from the authorities.

14. The central authority is, to my mind, that referred to in **Sandhu**: another, earlier, decision of the Court of Appeal, **Jones v Mid-Glamorgan County Council** [1997] ICR 815. In the course of that, Waite LJ at pages 818-819 set out what he described as "dismissal by enforced resignation". He compared two factual circumstances sitting at opposite ends of the same spectrum. One was, effectively, "resign or be sacked". The other was a negotiated settlement. He said:

> **"Between those two extremes there are bound to lie much more debatable cases to which, according to their particular circumstances, the Industrial Tribunals are required to apply their expertise in determining whether the border line has been crossed between a resignation that is truly voluntary and a retirement unwillingly made in response to a threat. I doubt myself whether, given the infinite variety of circumstance, there can be much scope for assistance from authority in discharging that task: indeed attempts to draw analogies from other cases may provide more confusion than guidance. In cases where precedent is nevertheless thought to be of value, the authority that will no doubt continue to be cited is Sheffield v Oxford Controls Co Ltd [1979] ICR 396."**

This emphasises the factual nature of the enquiry, taking into account all the circumstances.

15. The situation here rests between the two extremes. However, in the course of the argument, I could not escape the feeling that the despite the compelling and, it may ultimately be, entirely successful arguments put forward by Mr O'Carroll, the Claimant here had shown no indication of resigning before she went to the disciplinary hearing. It was only when she was told, as the Tribunal indicates she was, that was what the Tribunal was going to decide, if that is what the findings of fact amount to, that she then attempted to cut a deal. The fact that it was Mr Richards who was told, rather than her, may, but I cannot say must, necessarily make a difference. It may equally be that he, being her representative, was effectively her alter ego, and therefore, it may be that telling him of the imminent dismissal was effectively telling her and that, when he asked if a resignation would be accepted on terms that it would be clean, it might be equivalent to her making that request of the employer at the same time and then asking for some minutes to think about it. It may be, though it will require careful argument and analysis, that a court could come to the conclusion that the Tribunal did not sufficiently take those dynamics into account. It would have to fall within error of law or error of approach or perversity, neither of which is easy. But, in the light of the interesting and difficult arguments which I have heard, I cannot rule it out as a reasonable possibility.

16. Given that I am not determining this case today, because of the nature of it, I should merely say that it seems to me that the matter should be heard for argument in the light of the cases at a full hearing of this Tribunal. It follows that the conclusion to which I have come is that the review is allowed, but having reconsidered the matter, for the reasons I have given, I think that the appeal is something for which permission to proceed to a full hearing should be given. I say no more than I already have about the prospects of success for the Claimant on that appeal, as to which, in the light of my comments, she must take her own view. But it is, to my mind, a proper decision which I have to reach.

17. I would like to thank both Mr Dempsey and Mr O'Carroll for their submissions, which have been thoughtful, careful and helpful, and I am only sorry that they have had to wait until now during the day to have this conclusion.

18. The order to be made therefore should be the same order as was made before for a full hearing. Plainly, so far as this hearing is concerned, it would have to recite that the review was allowed but that the decision was confirmed.