Appeal No. UKEAT/0244/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 December 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR H SINGH

MR B M WARMAN

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(1) TAVISTOCK AND SUMMERHILL SCHOOL
(2) SUMMERHILL COURT SCHOOL (HAYWARDS HEATH) LTD APPELLANTS

MS A RICHARDS & OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR JOHN MEHRZAD (of Counsel) Instructed by: Messrs Charles Russell LLP Buryfields House Buryfields Guildford Surrey GU2 4AZ
For the 1st – 7th Respondents	MS HEATHER PLATT (of Counsel) Direct Public Access Scheme
For the 8th Respondent	No appearance or representation by or on behalf of the 8th Respondent

SUMMARY

REDUNDANCY – Definition

CONTRACT OF EMPLOYMENT

PRACTICE AND PROCEDURE – Perversity

Definition of redundancy; reason for dismissal at EDT.

Determining the terms of a contract of employment. See **Autoclenz v Belcher**.

Perversity. Inconsistent findings as to term dealing with additional pay.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This is an appeal by the Respondents before the Havant Employment Tribunal, (1) Tavistock and Summerhill School and (2) Summerhill Court School (Haywards Heath) Ltd, against the Judgment of a Tribunal chaired by Employment Judge Soulsby, promulgated with Reasons on 13 February 2013, upholding certain claims brought by the eight Claimants, Respondents to this appeal, all former employees at the school. There is a challenge to five of those findings.

2. By way of background the relevant school, an independent preparatory school, fell into difficulties due to falling rolls. Attempts were made by the old Board of Governors, chaired by Mr Day, to resolve the problem, but on 31 March 2011 all eight Claimants were given notice of dismissal by reason of redundancy; the school was then expected to close completely. The effective date of termination of their employment was to be the end of the summer term, 6 July 2011, apart from the Seventh Claimant, the Bursar and Acting Deputy Head, Mrs Wright, whose employment was to continue until 30 September. In addition the Eighth Claimant, the Head Teacher, was to receive two terms' pay in lieu of notice, taking her pay to 9 December 2011.

3. A group of parents banded together and saved the school. The new Board of Governors offered continuing employment to the First to Sixth Claimants, but only days before their notices were due to expire. At that point the Seventh Claimant had been suspended pending disciplinary proceedings, which, in the event, were never completed. She did not receive an offer of continued employment before her effective date of termination and no offer of continued employment was offered to the Eighth Claimant, the Head Teacher.

4. In those circumstances the Tribunal found:-

(1) That all Claimants were entitled to a redundancy payment.

(2) The Eighth Claimant was unfairly dismissed. She was the only Claimant to bring a complaint of unfair dismissal.

(3) All the Claimants were entitled to a protective award representing 30 days' pay.

(4) The Seventh Claimant was entitled to an Acting Deputy Head uplift, paid originally from 1 September 2010, for the month of August 2011.

(5) The Eighth Claimant was entitled to two terms' pay in lieu of notice.

All other claims were dismissed. There is no cross-appeal against those findings.

5. We turn now to the five points taken by Mr Mehrzad in support of the appeal.

Redundancy pay

6. Mr Mehrzad submits that there was no final determination as to the reason for dismissal. Although it is common ground that the original notices of dismissal were given by reason of redundancy, he contends that that no longer applied at the effective dates of termination because by then the redundancy had ceased. He further submits that the Tribunal erred in taking into account section 141 of the **Employment Rights Act 1996** in determining the reason for dismissal rather than the specific purpose of that section, which is to deal with cases in which notice of dismissal by reason of redundancy has been given but before the effective date of termination the employer makes an offer to renew the contract of employment or alternatively to re-engage the employee on different terms, that renewal or re-engagement to take effect not later than four weeks after the effective date of termination under the notice. He further submits that, in approaching section 141 in the way in which the Tribunal did,

particularly at paragraph 8 of their Reasons, they were guilty of a procedural irregularity in that the section was not invoked by any party in determining the reason for dismissal.

7. We reject each of those submissions. First, we are satisfied that there was, within the meaning of section 139, a genuine redundancy reason for dismissal when notice was given on 31 March 2011. The question is whether that reason changed during the period of notice. In our judgment, it did not, on the Tribunal's findings. True it is that the new Board of Governors offered to continue the employment of the first six Claimants without alteration shortly before the termination date. However, that is precisely the situation in our view which is presaged in section 141. That section assumes that notice has been given by reason of redundancy but that before the effective date of termination an offer was made, on the facts of this case, to renew the contract of employment. If that offer is an offer of suitable employment, which this Tribunal found the offers were in the case of the first six Claimants, then the question is whether the employee has unreasonably refused that offer. That was the question raised by Mr Mehrzad in the course of argument below, and in our view was the question which was considered and properly answered by the Tribunal at paragraph 8 of their Reasons. In short, those first six Claimants had not acted unreasonably in refusing the offer because it came very late in the day after all of them had made alternative arrangements either by way of alternative employment or in one case planned retirement. Nor do we think that there is any procedural irregularity here. The question of section 141 was raised on behalf of the Claimants at the initial stage of the hearing when the issues were being discussed and, as we have been shown, was also referred to by Mr Mehrzad at paragraph 137 of his written submissions below. In our view, the Tribunal were entitled to conclude that each of these Claimants was entitled to a redundancy payment.

8. The second point relates to the finding of unfair dismissal in the case of the Eighth Claimant only. This is dealt with at paragraph 14 of the Tribunal's Reasons. The Tribunal found that the reason for dismissal when notice was given was redundancy. That is plainly correct and is not in dispute. It was argued, first, that the Eighth Claimant had resigned on 2 July: that is, before the effective date of termination. That submission was rejected on the facts. Secondly, it was said, the Claimant left because she had found other employment, but the Tribunal held that that alternative position was just for a fixed term of two school terms providing maternity cover and was not the reason why she left. The reason she left was that she was under notice of dismissal. That paragraph ends with the Delphic sentence:

"There was no potentially fair reason for redundancy and dismissal was clearly unfair."

9. What we understand that to mean, and think any reasonable reader of the Judgment as a whole would conclude, is that the Tribunal found that the reason for dismissal in the Eighth Claimant's case was redundancy. That is a potentially fair reason under section 98 of the ERA. However, the dismissal for that reason was unfair, we think, looking at the Reasons again as a whole, because there was at the effective date of termination alternative employment available for the Eighth Claimant, namely her position as Head Teacher. It was never offered to her and no good explanation as to why it was not offered appears to have been put forward.

10. In these circumstances the dismissal was unfair under section 98(4) on the simple basis that insufficient steps had been taken to find alternative employment for her. Alternatively, if Mr Mehrzad is right, and the reason for dismissal had somehow changed from redundancy during the course of the notice period, a situation which is considered in the case of **West Kent College v Richardson** [1999] ICR 511, drawing on the earlier Court of Appeal decisions in **Alboni v Ind Coope Retail Limited** [1998] IRLR 131 and **Parkinson v March Consulting**

Ltd [1998] ICR 276, then the difficulty faced by the Respondents is simply that no alternative potentially fair reason has been established. In these circumstances, whichever way one looks at it, the finding of unfair dismissal must stand.

11. The third challenge relates to an unauthorised deductions award made in favour of the Seventh Claimant, Mrs Wright, and it relates to her acting up as Deputy Head, as we have indicated, since 1 September 2010. The material findings of fact occur at paragraph 5.20 of the Tribunal's Reasons where they state that, in relation to the Seventh Claimant, there had been no Deputy Head Teacher in post from 1 September 2010, so it had been agreed that the Seventh Claimant as Bursar would act as Deputy Head Teacher and receive an additional element of salary until such time as a new Deputy Head was formally appointed. In fact two new Deputy Heads were appointed towards the end of June 2011. In these circumstances we accept the submission made by Mr Mehrzad that the finding that this Claimant was entitled to the acting up supplement during the month of August 2011 is perverse in the legal sense. She was paid for July 2011 and there seems to be no reason, on the basis of the finding as to the term, as to why she should be entitled to the August payment. We have taken into account the Tribunal's reasoning at paragraph 12 but we are unable to see any basis for their being satisfied that the parties must have intended, at the time the uplift was agreed, that if she remained in that post to the end of the end of the summer term she would continue to get the uplift over the school holiday period. That seems to us entirely inconsistent with their earlier finding that the uplift would only continue until such time as a new Deputy Head was appointed. In these circumstances we shall adjust the Seventh Claimant's ultimate award following a remedy hearing on 3 April 2013 by reducing that overall award by the sum of £312.66, which reflected the award in relation to deduction from wages.

12. The fourth challenge is to the two terms' pay in lieu of notice, which was ordered in favour of the Eighth Claimant, the Head Teacher, Mrs Gaughran. The finding of fact by the Tribunal was that there was verbal agreement between the Eighth Claimant and the then Chairman of the Governors, Mr Day, in September or October 2010 that it would not be necessary for her to undergo a probationary period upon her appointment as Head Teacher so that she would not be deprived of the normal two terms' notice which went with the Head Teacher's position. However, on 10 December 2010 a written contract of employment was entered into between the parties, which indicated that she would undergo a probation period and therefore would have only one term's notice entitlement. Mr Mehrzad submits that there is no power in the Employment Tribunal to rectify the terms of a written contract and that the Tribunal were bound to conclude that the terms of the written agreement held sway. We disagree.

13. We have been taken to **Autoclenz v Belcher** [2011] ICR 1157, the Supreme Court decision which, in relation to the employee/worker question, determined whether or not parties were bound by what appeared in their written contract or whether it was permissible to look at the overall factual matrix in order to determine what was the true agreement between the parties. Mr Mehrzad refers us to paragraph 21 of the Judgment of Lord Clarke in the Supreme Court where he approves a passage in the Judgment of Aikens LJ at paragraph 89 of the Court of Appeal Judgment in that case. Ultimately, in each case, the question the court has to answer is what contractual terms did the parties actually agree. The Tribunal's finding in this case is clear. They find that the term was agreed orally and they were entitled to reach that finding and consequently to award two terms' pay in lieu of notice to the Eighth Claimant.

14. Finally, in relation to the protective awards, there is no challenge to the 30-day award to the First to Sixth Claimants. The challenge is in relation to the Seventh and Eighth Claimants

on the basis that they were privy to discussions at a management level with the Governors in the run-up to dismissal in March 2011 and that differentiated their case from those of the other six Claimants, who the Tribunal found were not consulted about redundancy for the purpose of section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992** until 21 March 2011. In fact, the Tribunal found that that failure to consult before 21 March applied to all eight employees. Having listened to Mr Mehrzad's submissions, we see no possibility of that finding being characterised as perverse in the sense explained by Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634. A clear distinction must be drawn between the discussions with a view to saving the school at a high management level and consultation with employees about job losses or possible job losses in the future. It follows that we reject that ground of appeal also.

Disposal

15. The appeal is dismissed save in relation to the unauthorised deductions claim brought by the Seventh Claimant with the adjustment to which we have earlier referred.