Appeal No. UKEAT/0318/12/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 July 2013
Judgment handed down on 5 December 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MS V BRANNEY

MRS M V McARTHUR FCIPD

SENATOR HOTELS LTD — APPELLANT

MR M RATKOWSKI — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BERRY HOLDING-PARSONS (Solicitor) Holding-Parsons Solicitors Suite 010 Hurlingham Studios Raneleagh Gardens London SW6 3PA
For the Respondent	MR ANDREW SMITH (of Counsel) Instructed by: Basingstoke Citizens Advice Bureau 19/20 Westminster House The Library Potters Walk Basingstoke Hants RG21 7LS

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

The employer, a company, failed to provide a witness statement for the hearing of an unfair dismissal claim. There were disputed issues of fact as to the manner in which the Tribunal dealt with the claim – including in particular (1) whether the Tribunal offered the company's director an opportunity to give oral evidence, (2) whether the director offered to give oral evidence, (3) whether the Employment Judge told the director that the company would lose without a witness statement, (4) whether the reason for dismissal was conceded by the Claimant. These issues were resolved in favour of the Claimant. In particular the Tribunal did offer the company's director an opportunity to give evidence and explained that without evidence the company would be likely to lose the case. Held, applying **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531 (especially paragraphs 28 and 36) and **Radakovits v Abbey National plc** [2010] IRLR 307 (especially paragraph 24) that the Tribunal had acted properly and was not in breach of any legal duty.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Senator Hotels Limited against a judgment of the Employment Tribunal sitting in Southampton dated 15 March 2011. By its judgment the Tribunal awarded Mr Marek Ratkowski compensation for unfair dismissal in the sum of £9090.01 together with an award under section 38 of the **Employment Rights Act 1996** of 4 weeks pay (£1284.92).

2. The principal ground of appeal concerns the procedure followed at the hearing. The sole director and manager of the company, Mr Gurpal Sekhon, attended the hearing without a witness statement. Put shortly, Mr Sekhon says that the Employment Judge ignored his offer to give oral evidence and effectively prevented him from developing the company's case. The appeal was allowed to proceed to a full hearing on this ground at a hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993** on 20 June 2012. It is, however, said on behalf of Mr Ratkowski that the Employment Judge repeatedly asked Mr Sekhon whether he would give oral evidence and he declined to do so.

3. In a case such as this, where there is an important dispute as to what occurred at the Tribunal hearing, the Appeal Tribunal is not bound by what the Tribunal says. It conducts an enquiry of its own as to what occurred before the Tribunal. The need for such an enquiry emerged at a hearing of the appeal on 14 January 2013. At that time there was only a witness statement from Mr Sekhon. Directions were given by His Honour Jeffrey Burke QC for further witness statements to be lodged and for those statements to be forwarded to the Employment Judge and members for comments.

4. At the hearing before us the company was represented by Mr Holding-Parsons and Mr Ratkowski was represented by Mr Andrew Smith. We have received statements from Mr

Sekhon and from Mr Williams, a voluntary adviser at Basingstoke Citizens Advice Bureau who appeared for Mr Ratkowski, and comments from the Employment Judge and members. Mr Sekhon and Mr Williams gave evidence and were cross examined.

5. In this judgment we will set out the background; make findings as to what occurred at the Tribunal; and then consider whether the appeal is made good.

The background

6. The company owns and operates the Copper Beeches Hotel in Basingstoke. Mr Ratkowski was employed there from 7 February 2008 until 30 September 2010.

7. In his claim form Mr Ratkowski described himself as undertaking various hotel duties including night porter, security, reception, bar service and gardening. He said that on return from a holiday in September 2010 he was told that he was being made redundant. He complained that he had not been consulted. He said:

> **"I have now found out that my post has been filled by 2 men of Indian origin, so I clearly was not redundant, as the post continues…."**

8. In the response form which Mr Sekhon prepared it was said that Mr Ratkowski was employed as the weekend night porter; that the position had been declared redundant; and that no-one had been employed to carry out the duties which Mr Ratkowski carried out.

9. The Tribunal made a case management order dated 24 November 2010. One direction was that each side should prepare a witness statement for each witness (including a party) in good time before the hearing and send it to the other party. Mr Ratkowski, with the assistance of Mr Williams, complied with this direction. Mr Sekhon did not. When Mr Williams

enquired he said that "the respondent will not be presenting any witnesses". Mr Williams told him in an email dated 10 March 2011 that it was expected by the Tribunal that he would have a witness statement for himself. Nevertheless Mr Sekhon prepared no witness statement. This unfortunate failure to comply with the Tribunal's case management order is the backdrop to what subsequently occurred.

10. In his evidence before us Mr Sekhon said that he did not prepare a witness statement because at a previous hearing, for which he had prepared witness statements, the Employment Judge appeared to pay no attention to them at the hearing, concentrating on questions which he asked orally. If this was his reason for failing to prepare a witness statement it was misconceived.

11. We would make three comments. Firstly, a major purpose of the provision of witness statements is to enable the Tribunal to concentrate on that which is important at the oral hearing. The provision of witness statements saves time at the hearing and assists focus. Secondly, another major purpose of the provision of witness statements is so that the opposite party will know what is to be said in advance of the hearing. Mr Sekhon prepared and brought to the Tribunal hearing detailed notes for asking questions, which he has produced in his evidence: but he denied a similar opportunity to Mr Williams. Thirdly, whatever Mr Sekhon's personal opinion of the utility of a witness statement, he had been directed to produce a witness statement setting out in date order the facts about which the witness could give evidence. If he intended there to be evidence on the company's behalf he should have complied with the order.

12. We now have a witness statement setting out the evidence which Mr Sekhon wishes he had given at the Tribunal hearing. It contains a significant amount of detail which is absent from the company's response form.

13. There is no doubt that Mr Sekhon was permitted to cross examine Mr Ratkowski at some length and that he was permitted to make closing submissions. Equally, however, the absence of evidence was fatal to the company's case. The Tribunal's written reasons make this clear. It is sufficient to quote paragraphs 1-5:

> **"1. This was a claim for unfair dismissal.**
>
> **2. Mr Sekhon director for the Respondent, decided not to give evidence to the Tribunal or to call any evidence at the hearing despite being encouraged to do so. The Claimant did give evidence and was cross-examined.**
>
> **3. The onus is on the Respondent to prove to the Tribunal what the reason for the dismissal was and whether it was a potentially fair reason. The Tribunal has to decide whether the Respondent had established that the reason was a potentially fair reason for dismissal, and if the Respondent does so, then the Tribunal considers whether or not it was reasonable to treat that reason as a ground for dismissal.**
>
> **4. Despite the Tribunal warning Mr Sekhon of his difficulties if he decided not to give evidence, he chose not to give or call any evidence to the Tribunal.**
>
> **5. The consequence of this is that the Respondent has not established by bringing evidence to the Tribunal that the reason for dismissal was a potentially fair reason, therefore, the Claimant's claim for unfair dismissal must succeed."**

The hearing on 14 March 2011

The evidence before us

14. Mr Sekhon's account may be summarised from his first witness statement.

> **"5. I appeared unrepresented at the hearing as a director of the Appellant. The Respondent was represented by Mr Keith Williams, of Basingstoke CAB. As we entered the hearing room, we both greeted the Tribunal, of which the Chairman was Judge John Warren. Both parties then took their seats. The proceedings started with the Chairman asking who had prepared the bundles. I said that I had. He then asked "Do we have witness statements?" He said is there one from the Respondent but, looking at me, he said words to the effect that "You have not presented one Mr Sekhon, is that so? I replied that I intended to rely on asking questions of the Respondent and on documents in the bundle. I also offered to answer any questions on oath if required. ..... At a previous hearing before the same Chairman in another case I had formed the impression that written witness statements were not important and that the Tribunal would make its decision without them.**
>
> **6. The Chairman replied, and these were his actual words, that "if you are not going to make a witness statement I can tell you that you will lose." In the context of the discussion, I took what he said to mean that if I was not going to make a written witness statement, I can tell you that you will lose. He said that, as there was no witness statement for the Respondent, would Mr Williams please go ahead. The lack of a witness statement seemed to have angered the Chairman and from then on I felt the Tribunal was conducted in a very hard manner, with no quarter allowed to me. Although the Chairman may have intended what he said to be an encouragement to me to make a written witness statement, I took it as the opposite, namely I was very discouraged and I took it to be a statement of finality, that I was going to lose, since I did not have a written witness statement. The Chairman did not take up my offer to answer**

any questions orally under oath if required. He seemed to be focussing on written witness statements."

15. Later in his witness statement Mr Sekhon said (paragraph 7):

"I accept that I said that I did not intend to put forward a written witness statement at the hearing but I believe the Judge misunderstood me if he thought that I did not intend to give any evidence at all."

16. Mr Sekhon also suggested that Mr Williams conceded that the reason for dismissal was redundancy. He said that when Mr Williams opened his case he told the Tribunal that "we accept a redundancy situation existed".

17. Mr Sekhon later served a second witness statement: it was essentially a detailed reply to the statement of Mr Williams, in substance confirming the account given in his first witness statement, answering Mr Williams point by point and adding reference to his own notes of preparation. While we have taken it into account we need not summarise it here.

18. Mr Williams' account can be summarised as follows.

"10. The hearing commenced at around 10am. Almost immediately Judge Warren stated that he had not been given a witness statement from Mr Sekhon and asked Mr Sekhon if he had one. I cannot recall word for word what Mr Sekhon's reply was but he confirmed that he had not prepared a written witness statement. I recall that Judge Warren told Mr Sekhon that he would find it very difficult to prove that the dismissal was for a fair reason if he did not give any evidence to the Tribunal. It was clear to me that Judge Warren was inviting Mr Sekhon to put forward evidence at the hearing, by making an oral statement (on which he could be cross-examined by me) and referring to documents in the bundle which he wished to draw attention to.

11. I do not believe that Judge Warren said at the start of the hearing or at any time "if you are not going to make a witness statement I can tell you that you will lose", as alleged by Mr Sekhon.

12. I specifically recall that in the course of their discussions Judge Warren did invite Mr Sekhon to make an oral statement. When Judge Warren invited Mr Sekhon to do this, I remember feeling concerned that I would have to be ready quickly to cross-examine Mr Sekhon, without having had the advantage of knowing in advance what he was going to say in his evidence.

13. It is my recollection that Judge Warren invited and encouraged Mr Sekhon to give evidence on at least two further occasions during the hearing, each time making it clearer that he needed to give evidence. The final time that Judge Warren asked Mr Sekhon whether or

not he was going to give evidence, he did say something along the lines of "if you don't give any evidence you will lose".

14. At no point did Mr Sekhon offer to give oral evidence under oath, as he alleges.

15. At no point did Judge Warren state that the only acceptable evidence was a written statement."

19. Later Mr Williams also said:

"18. When Mr Sekhon made his closing submissions, Judge Warren would not allow him to refer to evidence which he had not put forward during the hearing. I had been unable to cross-examine Mr Sekhon during the hearing, as he had chosen not to give any evidence or make a statement, despite encouragement by Judge Warren to do so.....

20. Judge Warren did his best to get Mr Sekhon to give evidence to the Tribunal. He made it clear that he was prepared to listen to any evidence put forward by Mr Sekhon. At no point did he say that failure to provide a written statement would result in the case being lost. He invited Mr Sekhon on at least three occasions to give oral evidence, and did not (as Mr Sekhon alleges) insist that this evidence be in writing.

21. ..... I point out that I do not accept that I conceded at the hearing that Mr Ratkowski was redundant, as alleged by Mr Sekhon. The Claimant's ET1, which I had drafted from what he told me, clearly stated that "I have now found out that my post has been filled by 2 men of Indian origin, so I clearly was not redundant, as the post continues".

20. Both Mr Sekhon and Mr Williams adhered to their accounts when they were cross examined.

21. Mr Sekhon told us that prior to the hearing he believed he had the option of not putting in a witness statement – he did not believe it was obligatory. He said that little attention appeared to be paid to witness statements at an earlier Tribunal hearing in a different case before the same Judge. He did not accept that the Judge invited him to give oral evidence – he said that he thought the Judge was talking only about a written witness statement. He accepted that even then he did not ask for time to prepare a written statement – he said that by then he was a "rabbit in the headlights".

22. Mr Williams said that the Employment Judge made it clear to Mr Sekhon on three occasions that he could give evidence. He, Mr Williams, clearly understood that the Employment Judge meant oral evidence – it was, he said "quite a shock" to him, because he

had no idea what evidence Mr Sekhon might give. Mr Sekhon declined to give evidence and did not say he was prepared to answer questions under oath. It was, he thought, on the last of three occasions when he broached this matter that the Employment Judge told Mr Sekhon that it was highly likely the company would lose if it did not give evidence of the reason for dismissal.

Comments from the Tribunal

23. The Employment Judge said the following.

> **"The clerk had before the start of the hearing brought in numerous papers. We had the Claimant's witness statement and a bundle of documents from the Respondents. At the commencement of the hearing and after introduction I informed the parties as always, of the documentation we had given, and that we had no witness statement from the Respondents. Mr Sekhon said there was none and he did not intend to give evidence.**
>
> **I pointed out that in an unfair dismissal case the burden was with the Respondent to establish what was the reason for dismissal and that it was a potentially fair reason and I expressed the importance therefore for the respondent to give evidence. Mr Sekhon again stated that he had no intention to give evidence.**
>
> **I made it quite clear that notwithstanding Mr Sekhon had not prepared a written witness statement he could give oral evidence. I would have allowed Mr Williams a short break after Mr Sekhon had given evidence-in-chief if he needed to take instructions.**
>
> **Mr Sekhon was insistent that he had no intention of giving evidence. I asked him at least three times to consider his position and I remember saying that whilst I could not advise him it was in the company's best interest to give evidence and if he did not and the company could not show a fair reason for dismissal that it was highly likely that the company lose. Mr Sekhon still insisted that he would not give evidence."**

24. Mrs Metcalf, one of the two Tribunal members, confirmed that Mr Sekhon was given the opportunity to give evidence at least twice, that these opportunities were not accepted and that he did not offer to give oral evidence prior to submissions. She said that she had no recollection of Mr Williams conceding the redundancy point. Mr Starck, the other member, said that Mr Williams' statement was "a much more accurate account of the hearing of the 14th March 2011".

25. There is some doubt as to whether the Employment Judge and members had Mr Sekhon's first statement when they made their comments. Given the wording of the Appeal Tribunal's order dated 14 January 2013 it would not be surprising if only the subsequent statements had

been forwarded, although the recollection of the Associate of the Employment Appeal Tribunal is that she forwarded Mr Sekhon's first statement as well. There are indications in the comments of the members that they had read only the second statement. Mr Holding-Parsons suggested that this was a significant omission which vitiated their comments. We think, however, that the issues in dispute were clear to the Employment Judge and the members from the statements which they undoubtedly received and that they have had sufficient opportunity to comment upon them. We make it clear in any event that it is for the Appeal Tribunal to make its own findings as to what occurred at the Tribunal hearing.

Our findings

26. The following seem to us to be the main disputes of fact on which we ought to make findings. (1) Did the Employment Judge give Mr Sekhon an opportunity to give oral evidence? (2) Did Mr Sekhon offer to give oral evidence? (3) Did the Employment Judge tell Mr Sekhon he would lose if he would not make a witness statement? (4) Did Mr Williams concede that the reason for dismissal was redundancy?

27. We have no hesitation in preferring the evidence of Mr Williams to that of Mr Sekhon on these issues, for the following reasons.

28. We find that Mr Sekhon came to the hearing with a fixed view that he did not intend to rely on witness evidence – even his own. He had said so specifically to Mr Williams prior to the hearing; he had not paid attention to Mr Williams' very clear email to him on the subject; and his preparation notes do not indicate any intention to rely on witness evidence. It is surprising that he held this view, given that witness statements had been exchanged at the previous Tribunal hearing in which he had participated and given the clear terms of the case management order. Mr Sekhon's explanation is that he thought that no attention had been paid

to witness statements at the previous hearing: we find this difficult to accept. We do not need to make findings as to the true reason; but we suspect that Mr Sekhon may have had a hazy grasp of the requirement upon the company to establish the reason for dismissal, and that he intended to try to undermine Mr Ratkowski's evidence without giving a similar opportunity to Mr Williams to undermine his evidence.

29. We found the evidence of Mr Williams impressive and convincing as to what occurred at the Tribunal hearing. He said he was concerned that he might have to prepare cross examination at short notice given what the Employment Judge said to Mr Sekhon; this appeared to us entirely genuine and to have the ring of truth, bearing in mind that (as he explained to us) most of his cases settled and he was a relatively inexperienced advocate. His concern is consistent with the Employment Judge making it clear to Mr Sekhon that he could give evidence. We do not accept that the Employment Judge limited his invitation to the making of a witness statement or that Mr Sekhon thought he did. If Mr Sekhon had thought that he was being invited to make a written witness statement, and if he wished to do so, he would have asked for an opportunity to do so. It is plain that he did not. We are satisfied that the Employment Judge made it clear to Mr Sekhon that he could give oral evidence.

30. We are satisfied that Mr Sekhon, having come to the hearing with his fixed view as to how it should be conducted, did not respond to clear indications from the Employment Judge as to the importance of giving evidence. We think he may to some extent have been (as he put it) "a rabbit in the headlights", but we do not think this is by reason of any misconduct or want of proper assistance on the part of the Tribunal. It was the result of his own failure to comply with a case management order despite Mr Williams' email to him to point out the position, coupled with his fixity of views about how he intended to conduct the hearing.

31. We do not accept that Mr Sekhon offered to answer questions under oath. Again we prefer the evidence of Mr Williams on this point. If he had made this offer we think there would have been a discussion about it – the Employment Judge would have asked why, if he was prepared to answer questions under oath, he was not prepared to give his own account under oath.

32. Nor do we accept that the Employment Judge said to Mr Sekhon that he would lose if he did not make a witness statement. We have no doubt that the Employment Judge was prepared to countenance the possibility of Mr Sekhon giving oral evidence. We accept the evidence of Mr Williams on this point. The Employment Judge did speak about the company losing – but this was if no evidence at all was given. Mr Sekhon, we emphasise, did not ask for any opportunity to give evidence – either by witness statement or by oral evidence.

33. Finally, we do not accept that Mr Williams conceded that the reason for dismissal was redundancy. He told us, and we accept, that his instructions were in accordance with the claim form. We think he put forward a positive case that, on any view, the selection of Mr Ratkowski for redundancy would have been unfair, but we accept his evidence that he did not concede the reason for dismissal – which, of course, lay within the knowledge of Mr Sekhon.

The appeal: discussion and conclusions

34. In his submissions to us Mr Holding-Parsons criticised the Tribunal in two main ways for its approach, given that the company had failed to provide a witness statement. He submitted that the Tribunal ought to have adjourned the appeal so that Mr Sekhon could produce a witness statement or at the very least should have offered Mr Sekhon an adjournment in clear terms. Alternatively, if the Tribunal was to go forward, he submitted that the Tribunal should have taken effective steps to ensure that Mr Sekhon's evidence was heard. It should have asked him

to swear to the truth of the ET3 and the documents which he had produced to the Tribunal; or to give evidence on oath to amplify the case put forward in the ET3. In answer to these submissions Mr Smith argued that the Tribunal had acted properly and that it owed no duty to assist the company to any greater extent than it did.

35. We were taken to leading cases on the extent of the Tribunal's duty to assist parties who are not legally represented. These included at Court of Appeal level **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531 (especially paragraphs 28 and 36), **Radakovits v Abbey National plc** [2010] IRLR 307 (especially paragraph 24) and **Muschett v HM Prison Service** [2010] IRLR 451 (especially paragraphs 30-31). It will, we think, suffice to cite two passages from these authorities.

36. In **Mensah** Sir Christopher Slade said (paragraph 36):

> **"I too would strongly encourage Industrial Tribunals to be as helpful as possible to litigants in formulating and presenting their cases, particularly if appearing in person. There must, however, be a limit to the indulgence which even litigants in person can reasonably expect. The desirability in principle of giving such assistance must always be balanced against the need to avoid injustice or hardship to the other party on the particular facts of each case. This, in my judgment, is a very good reason for holding that the manner and extent of such assistance should generally be treated as a matter for the judgment of the Tribunal and not as subject to rigid rules of law."**

37. **Radokavits** was a case where the claimant, a litigant in person, had to establish certain facts in order to show that he was entitled to an extension of time for bringing a claim. He did not give evidence. Elias LJ said (paragraph 24):

> **"In this case [the claimant] did not give evidence. He was apparently given the opportunity to do so and chose not to, apparently on the basis that Ms Bascetta had given evidence he did not think that he had anything more to add. This was unfortunate. I stress that there is no legal obligation on the tribunal to assist litigants in person or those who appear before them without legal representation, and tribunals will quite properly want to guard against appearing to be partial to one side. But a tribunal can quite properly, and without descending into the arena, explain to a party the issue they have to determine and explain why, for example, that party may be prejudiced if he fails to give evidence. It is possible that was done in this case and we are not criticising the tribunal if they did so. Of course the tribunal must say nothing at all about the evidence he should give in order to sustain his case or anything of that kind (as opposed to the questions they have to consider), but it is a proper function for a tribunal**

dealing with unrepresented litigants to give them appropriate assistance so that they can understand the implications of a decision they need to take."

38. Put shortly, an Employment Tribunal may assist an unrepresented party by explaining the issues which have to be determined and by exploring how the case is put by that party. This assistance may extend to explaining the importance of an unrepresented party covering a particular point in evidence. The giving of such assistance is often helpful and desirable; it does not of itself compromise the independence of the Tribunal. It is, however, one thing to say that such assistance may be given; another altogether to say that the Tribunal erred in law in failing to give assistance on a particular point, or in failing to give more assistance that it did.

39. There is an appeal to the Employment Appeal Tribunal only on a question of law. Given our findings as to what occurred at the Tribunal hearing, we do not think it can be said that the Employment Tribunal erred in law.

40. We see no foundation at all for Mr Holding-Parson's submission that the Employment Tribunal should have adjourned the appeal or offered Mr Sekhon an adjournment in clear terms. On any possible view this was a straightforward claim which should have been disposed of on the allocated day of hearing. The company's failure to provide a witness statement did not begin to justify an adjournment. If the company was to be allowed to remedy its failure to provide a witness statement, the time for any remedy was that very day.

41. Nor do we accept Mr Holding-Parsons' submission that the Tribunal was obliged to ensure that the company adduced evidence in support of its case. We see no foundation for any such duty. As we have found, the Tribunal highlighted to Mr Sekhon the importance of adducing evidence and offered him the opportunity to do so on the day. This was, if anything, a generous stance towards the company: if Mr Sekhon wished to adduce evidence after failing to

provide a witness statement he should have applied to do so, and the Tribunal would then have heard Mr Williams before deciding whether to grant the application. On our findings the Tribunal did not mislead Mr Sekhon in any way; and the Tribunal had no legal duty to go any further than it did to assist him.

42. For these reasons the appeal will be dismissed.