Appeal No. UKEAT/0600/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 June 2013
Judgment handed down on 14 October 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MRS R CHAPMAN

BARONESS DRAKE OF SHENE

SOMERSET COUNTY COUNCIL — APPELLANT

MS H R CHALONER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ADRIENNE MORGAN (of Counsel) Instructed by: Somerset County Council Legal Department County Hall Taunton Somerset TA18 7DY
For the Respondent	MS DEBBIE GRENNAN (of Counsel) Instructed by: Peter Dodson Solicitor Central House Church Street Yeovil Somerset BA20 1HH

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Unfair dismissal – redundancy – reduction in number of employees and re-organisation of business – competitive interviews.

The Claimant, deputy director of a business run by the Respondent, applied for a new post created in the course of a reduction in number of members of staff. The Respondent, having provided her with a job description for the new post, changed the job description materially without informing her, and then rejected her candidacy after interviews where it did not carry out its stated policy of fully analysing qualifications, skills, performance, contribution, expertise and potential savings. The Tribunal held the dismissal to be unfair. The Respondent appealed, arguing in particular that the Tribunal failed to apply the reasoning in **Morgan v Welsh Rugby Union** [2011] IRLR 376. **Held**: appeal dismissed. The Tribunal had applied section 98(4) of the **Employment Rights Act 1996** appropriately; this was entirely consistent with **Morgan**; and the Tribunal was entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair (see **Morgan**, paragraph 36).

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Somerset County Council ("the Council") against a judgment of the Employment Tribunal (Employment Judge Griffiths presiding) dated 27 February 2012. The Tribunal upheld a claim by Ms Helen Chaloner that she had been unfairly dismissed.

The background facts

2. Dillington House in Ilminster is an adult education and conference centre owned and operated by the Council. It was described as a "traded function" of the Council. It operated at a profit for many years. Ms Chaloner was employed by the Council with effect from 2 November 2009 as its deputy director.

3. There was a sudden and severe downturn in the income of Dillington House during the year 2010/2011, largely because two-thirds of its business had come from the public sector which was subject to cuts in expenditure. The Tribunal said that its "profitability and finance became critical". Mr Griffiths, who held the post of "critical commercial change manager" with the Council, was responsible for taking steps to deal with this problem.

4. In the first place Mr Griffiths put forward a document called "Business Case for Restructure" dated November 2010 ("BS1"). This was concerned with senior management posts. There were five of these, one of which – the post of Director – was unaffected. The remaining four posts were to be reduced to two – one concerned with business development, sales and re-organisation, the other concerned with business delivery and facilities management. The Claimant regarded one of them – Business Development Manager – as very similar to her own. Mr Griffiths had prepared a job description for it ("JD1"). It was at a lower

grade (grade 11) but she resolved to apply for it. As it happened, she was the only senior manager interested in that post. So she had every expectation that she would be appointed.

5. In December and over the Christmas period Mr Griffiths produced a second document also called "Business Case for Restructure" ("BS2"). The Tribunal said that the financial position of Dillington House was worse than he first thought. BS2 extended the re-organisation to other management posts.

6. One of these posts was finance officer, a grade 12 post held by Ms Boyland. There was a reduction in the work required at a senior level for finance officer not only because Dillington House was less busy but also because the Council had introduced better centralised processes. Mr Griffiths said that headline information and detailed information was now readily available from this centralised process.

7. As a result of BS2, therefore, Ms Boyland's job became redundant. She was entitled to apply for the role of Business Development Manager, and she did so. The Claimant was aware of BS2. She was accordingly aware that others might apply for the post in which she was interested.

8. What the Claimant did not know – because Mr Griffiths omitted to tell her – was that he revised the job description ("JD2") for the post of Business Development Manager. He added a new section adding responsibilities for financial reporting. He revised certain other aspects as well.

9. The original job description had contained four main responsibilities and duties: business generation, business delivery (such as the management and control of adult education courses),

course development and staff management and organisation. It was said that "a general knowledge and understanding of marketing, public relations and business management is essential and more general management functions, such as HR management and policy adherence are also required".

10. The new job description added an entire new section on "Financial Control and Administration". It required (with the assistance of the centralised function which we have mentioned) the production of annual budgets and revised forecasts, the production of year end accounts, the production of draft management accounts, the production of management information and the direct management of at least one finance assistant. It still required (with some alterations) the four main responsibilities and duties. It was still said that "a general knowledge and understanding of marketing, public relations and business management is essential". It was now said that general management functions such as HR management and policy adherence "are also ideal but it is expected that a number of skills will be developed as the needs and focus of the business develop".

11. Both BS1 and BS2 said that interviews for the management posts would be conducted in January 2011. It was said that if compulsory redundancies were required "selection will be justified through a full and proper analysis of qualifications, skills, performance, contribution, expertise and potential savings".

12. The Council had a Redundancy Policy. The policy dealt, as one would expect, with such matters as consultation, avoiding redundancies and seeking compulsory redundancies. On the question of compulsory redundancy, it said that there had to be an "objective process to select individuals for redundancy from the remaining pool". It said that the criteria should be

"evidence-based and supported by reasonable professional opinion to ensure that employees are treated fairly".

13. The Policy laid down two Methods. Method one reads as follows.

> **"One way of selecting individuals from a pool of staff at risk is to undertake a ring-fenced selection/interviewing process for the posts that remain or where new posts have been created (e.g. where 4 new posts replace 7 existing posts). Trade Unions will need to be consulted over the ring-fence, Person Specification, selection criteria, scoring process and make-up of a properly constituted panel including HR representative."**

14. By email dated 23 January 2011 Mr Griffiths told Ms Chaloner that there would be a competitive interview for the post of Business Development Manager on 1 February 2011. He said that the interview would aim to explore a number of things such as:

> **"1. The applicant's motivation and attitude to change.**
>
> **2. The applicant's understanding of the role and their interpretation of their contribution to the task at hand.**
>
> **3. The applicant's ability, flexibility and approach to leadership and management.**
>
> **4. The applicant's approach to ownership of and responsibility for their teams' effectiveness.**
>
> **5. The applicant's understanding of the various demanding requirements that the post comes with."**

15. He said that the first five minutes would be an opportunity to present a detailed view of the role and how it could be fulfilled successfully; the balance would be questions. It referred to the "job description that has been given to you" – but he had neither given the new job description to Ms Chaloner nor told her that it had been changed.

16. The interview panel had before it a series of questions and "preferred responses". It scored each candidate against these preferred responses. The selection of the candidate depended entirely on the scoring and assessment of presentation at interview. A noteworthy feature of this system is that it did not in direct way score the ability of the candidates to

undertake the basic tasks of the job – for example, managing and controlling adult education courses, course development, marketing or production of financial reports.

17. The panel scored Ms Boyland much higher than Ms Chaloner. She had an average question score of 6.95. The panel described her as "Very passionate about Dill and the role she wants to play in its future" and said that her presentation was "really quite impressive".

18. The first two questions asked in interview related to detail of the financial position of Dillington House. Not surprisingly, the answers of the finance officer were (as the panel's report said) "spot on". Ms Chaloner, by contrast, had an average score of just 4.67. The panel were also less impressed with her presentation. Her case, however, was that from the outset of the interview she had been asked financially technical questions. She was taken by surprise and found the interview unnerving. She said that her overall performance was affected.

19. Ms Boyland was appointed on the basis of the interview. Ms Chaloner was dismissed. She appealed. It was in the course of preparation for the appeal that she first realised the job description had been changed. She argued before the appeal panel that the job description of Business Development Manager was so close to her existing job description that there was no genuine redundancy: she should have been appointed without any competitive interview. She also argued that process was flawed.

20. The appeal panel dismissed her appeal, holding that there was a genuine redundancy and that the process was not flawed. The panel considered that the Council was within its rights to choose a selective process for staff in the pool; that the competencies were "clearly signalled in the email dated 23 January 2011"; that the questions asked, including the financial questions, were appropriate and that Ms Chaloner should have been able to respond appropriately.

21. Later in its reasons the panel said:

> **"The Panel agreed that the differences between the draft Job Description and the final job description were justified by the change to the structure. It was unfortunate that you did not receive a copy of the final draft but the Panel concluded that this was in no way deliberate. The opportunity for you to be given a copy of the final draft at a meeting when paper copies were available was missed by yourself and by the manager. The Panel noted that you took copies of the Job Descriptions for other posts."**

22. The job description which Ms Chaloner received was not labelled as a draft. The panel did not suggest any reason why Ms Chaloner should have appreciated that the job description had changed.

The Tribunal's reasons

23. The Tribunal set out findings of fact upon which we have already drawn in this judgment. The key passage in the Tribunal's reasons is the following.

> **"20. There is no argument about the redundancy situation. There is no argument about BS1: the respondent was entitled to re-organise its business as it saw fit. The claimant believed JD1 was sufficiently close to her existing role as [to] lead to the reasonable conclusion that she should be slotted into it. JD1 had no financial and accounting responsibilities and the Finance Officer was not targeted for redundancy. As at November 2010, therefore, there was either no redundancy because JD1 was sufficiently close to her existing role to result in slotting; or, even if there were a redundancy, JD1 was suitable alternative employment.**
>
> **21. What is curious is that over Christmas 2010 the respondent made three material changes to the proposals. Firstly, it incorporated finance and accounting responsibilities into JD2; secondly, it included the Finance Officer in the redundancy pool; and thirdly it changed the redundancy selection criteria by adopting a simple interview and not undertaking a *"full and proper analysis of qualifications, skills, performance, contribution, expertise and potential savings".***
>
> **22. We find the incorporation of the finance and accounting responsibilities into JD2 to be a material change to the role. Its impact was then considerably increased by the inclusion of the Finance Officer in the redundancy pool. The fact that the respondent failed to inform the claimant of the changes to the job description was a material omission. Both Mr Griffith and the Director were aware of the change; both had ample opportunity to inform the claimant of the change and its impact; neither did so.**
>
> **23. The inclusion of the Finance Officer in the redundancy pool resulted in her becoming a competitive candidate for JD2. Under BS1 and JD1, the claimant was reasonably entitled to assume that she would not be dismissed. The combination of JD2 and the Finance Officer becoming a candidate was a material change to the circumstances about which she was kept wholly in the dark.**
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> **24. The claimant had been informed both at the BS1 and BS2 stages that the selection for redundancy would be evidence based and that the selection process and criteria would be an objective assessment of a number of different factors and that the *"selection would be justified through a full and proper analysis of qualifications, skills, performance, contribution, expertise***

> ***and potential savings."*** **In the event there was no such *"proper analysis"* and the selection of the claimant was undertaken on a short interview and nothing else. Quite simply, the respondent singularly failed to comply with its own policies and the procedure it had informed the claimant it would apply. Applying the s98(4) principles, this was unfair.**
>
> **25. The respondent sought to persuade us that the differences between JD1 and JD2 were insufficient to put the claimant at any disadvantage in interview. We do not accept that. If an employer makes changes to a job description without informing a candidate prior to interview, that is in our view inherently unfair. We find that the differences between JD1 and JD2 were material, not least of all because it enabled the Finance Officer to become a competitive candidate for the role. In any event, the claimant felt significantly disadvantaged and we accept that she was justified in so feeling.**
>
> **26. The respondent had an opportunity to retrieve the situation at appeal. The appeal panel failed to consider whether or not the interview panel had complied with the respondent's own policies."**

24. It is also relevant to mention three other features of the Tribunal's reasoning.

(1) The Tribunal rejected a submission by the Council that **Morgan v Welsh Rugby Union** [2011] IRLR 37 was of critical importance to the case. It described **Morgan** as "very much a case on its own facts".

(2) When it addressed the **Polkey** issue (the question whether there was a chance that Ms Chaloner would have been dismissed in any event) the Tribunal was faced with a submission which included reference to the Claimant's "attitude" and "arrogant approach". Having made its core findings on the **Polkey** issue in the first part of paragraph 28, it went on to say the following -

> **"The respondent's submissions on *Polkey* seem to rely upon the respondent's view of the claimants "attitude" and "arrogant approach" which encourages our suspicion that the entire process adopted by the respondent was subjective and that the change from JD1 to JD2 was designed to provide an opportunity to retain an employee with long service as against an employee with very short service and salary protection."**

(3) On the question of contributory conduct, the Council submitted that she contributed to her own dismissal by her failure to prepare fully for interview and her inability to answer the interview questions. The Tribunal rejected this submission. It accepted Ms Chaloner's evidence that she was wrong footed by the interview which was, the Tribunal said, undertaken in breach of the Council's own policy and procedure.

Submissions

25. On behalf of the Council, Ms Adrienne Morgan made the following submissions.

26. Firstly, she submitted that the Tribunal's reasons fail to meet its duty to give reasons for its findings. (1) The Tribunal rejected the evidence of Mr Griffiths that the number of redundancies should be increased because an additional £100,000 of savings had to be found: it gave no reason for rejecting his evidence in this respect. (2) The appeal panel considered the allegation of flawed process in general and the issue of the altered job description and reached a conclusion on the matter: the Tribunal has not said why it rejected the appeal panel's conclusion.

27. In answer to this submission Ms Grennan on behalf of Ms Chaloner submitted that the Tribunal's reasons were sufficient.

28. Secondly, Ms Morgan submitted that the Tribunal erred in law by declining to apply **Morgan v Welsh Rugby Union**. She submits that this case, like **Morgan**, was a case where a reorganisation involved redundancy coupled with the creation of two new posts.

29. In answer to this submission Ms Grennan submitted that in this case the Respondent's own policy, expressly adopted in BS1 and BS2, promised that selection would be justified through a full and proper analysis of qualifications, skills, performance, contribution, expertise and potential savings. The interview panel carried out no such analysis. In evidence not one of the Council's witnesses could satisfactorily explain what the criteria actually were. When it was pointed out to witnesses that the interview was simply the means of testing or assessing candidates against criteria, not one witness could satisfactorily state what the criteria were.

Morgan did not compel a Tribunal to find that a dismissal was fair in such circumstances. She took us through factual differences between the present case and **Morgan**.

30. Thirdly, Ms Morgan submitted that paragraph 25 of the Tribunal's reasons contains errors of law. The Tribunal should not have relied on Ms Chaloner's subjective feeling that she felt disadvantaged. The Tribunal should have asked whether the appeal panel was reasonably entitled to conclude that she was not disadvantaged by the process. The Tribunal was not entitled to rely on the very fact of competition for the new role as indicating unfairness. There is no reasoning to support the conclusion that it was unreasonable and unfair for the Council to allow two individuals to be interviewed for the role.

31. Ms Grennan submitted in answer that the Tribunal did not simply rely on Ms Chaloner's subjective assessment. It carried out its own assessment of the matter as it was entitled to do in dealing with and rejecting a submission of the Respondent that there was no material difference between JD1 and JD2.

32. Fourthly, Ms Morgan submitted that the Tribunal failed to assess the fairness of the dismissal in the light of the appeal hearing. She refers to and relies on **Taylor v OCS** [2006] ICR 1602 at 47, 50 and 51. She submits that the appeal panel properly considered the points which Ms Chaloner made and reached reasonable conclusions upon them. The overall process was fair.

33. Ms Grennan submitted that the Tribunal sufficiently considered the appeal and was entitled to conclude that the deficiencies which it identified had not been corrected by the appeal.

34. Fifthly, Ms Morgan submitted that the Tribunal's conclusions were tainted by the suspicions which it voiced in paragraph 28 of its reasons. It would seem that the Tribunal suspected that the whole process was a sham. But it made no finding to this effect, still less did it give reasons for its finding.

35. Ms Debbie Grennan submitted that, while the Tribunal may have had doubts about the evidence which the Council called on this issue, it was entitled to, and did, decide the case on the basis put by Ms Chaloner.

Statutory provisions

36. Once granted that the reason for dismissal was redundancy the key statutory provision for the Tribunal to apply was section 98(4) of the **Employment Rights Act 1996**, which provides –

> **"….the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

Discussion and conclusions

37. It is important to keep distinctly in mind the different roles of the Tribunal and the Appeal Tribunal in an unfair dismissal case.

38. The Tribunal's role was to apply section 98(4) of the **Employment Rights Act 1996**, which required it to review all aspects of the decision to dismiss the Claimant by reference to the standards of the reasonable employer – recognising, of course, that there may be a range of reasonable approaches to an issue such as dismissal.

39. It was also the Tribunal's role to give reasons for its decision. Thus, in **Meek v City of Birmingham District Council**, Bingham LJ stated that, although tribunals are not required to create 'an elaborate formalistic product of refined legal draftmanship', their reasons should:

> **"... contain an outline of the story which has given rise to the complaint and a summary of the tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises;"**

40. The Appeal Tribunal's role is more limited. By virtue of section 26(1) of the **Employment Tribunals Act 1996** its task is limited to ensuring that the Tribunal took its decision in accordance with the law. It will review the Tribunal's reasons to ensure that it not only stated but also applied the correct legal test. It will consider whether the Tribunal's reasons meet the standard required by law. The Appeal Tribunal must, however, be careful not to substitute its own views for those of the Tribunal; and it must read the Tribunal's decision in the round without being hypercritical or pernickety.

41. In this case there is no doubt that the Tribunal had section 98(4) well in mind. It made express reference to section 98 in paragraphs 18 and 19 of its reasons, and to "section 98(4) principles" in paragraph 24 of its reasons.

42. Against this background it is convenient to consider first Ms Morgan's submission that the Tribunal erred in law in its treatment of **Morgan v Welsh Rugby Union**.

43. **Morgan** was concerned with the type of case where redundancy arises in consequence of a re-organisation and there are new, different, roles to be filled. Re-affirming earlier cases, we held that principles laid down by the Appeal Tribunal in **Williams v Compair Maxam** [1982] IRLR 83 did not seek to address the process by which such roles were filled: see paragraphs 29-

35. In such a case the Tribunal's task was to apply section 98(4) of the 1996 Act. Thus we said (paragraph 36):

> **"36. To our mind a Tribunal considering this question must apply section 98(4) of the 1996 Act. No further proposition of law is required. A Tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A Tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A Tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98(4)."**

44. In paragraph 19 of its reasons the Tribunal made it clear that it was indeed applying section 98 to the facts of the case before it. In following the statute it also followed the approach in **Morgan**. We suspect that the reference to **Morgan** "turning very much on its own facts" reflect submissions on the part of the Respondent emphasising factual similarities between **Morgan** and this case. But the key point is that – whatever the Tribunal meant when it said that **Morgan** turned on its own facts – the Tribunal applied section 98 of the 1996 Act. It therefore applied the correct legal test. In doing so it was – as **Morgan** makes clear in the passage which we have cited – entitled to have regard to how far the employer established and followed through procedures when making an appointment and whether they were fair. We therefore reject Ms Morgan's submissions on this point.

45. We turn next to the question whether paragraph 25 of the Tribunal's reasons indicates that the Tribunal applied an incorrect legal approach. We do not think it does. The Tribunal, having approached the matter correctly in law, was dealing with a specific submission made by the Respondent that the differences between JD1 and JD2 were insufficient to put the Claimant at any disadvantage. Contrary to the submission of Ms Morgan, the Tribunal did not simply rely on the Claimant's subjective feeling of disadvantage: it stated its own conclusion that the differences were material and the Claimant was justified in feeling significantly disadvantaged.

We agree with Ms Morgan that the mere fact that the differences enabled the Finance Officer to become a competitive candidate for the interview would not of itself render the process unfair. But it is important to keep in mind the context of paragraph 25: the Claimant did not know about the differences between JD1 and JD2, so when preparing for the interview she did not know the extent to which the Finance Officer had become a competitive candidate for a role which on the basis of JD1 was a close fit for her own. This, we think, is the point the Tribunal was making.

46. We turn next to the way in which the Tribunal dealt with the appeal. Its reasoning is succinct, and it does not repeat any reference to the section 98(4) test, but we see no reason to suppose it forgot the test when it considered the appeal. In truth, given the Tribunal's primary criticisms of the process, it is plain that the appeal did not put them right. Ms Grennan explained the background in her submissions to us. The interview process had not been concerned to assess a "full and proper analysis of qualifications, skills, performance, contribution, expertise and potential savings". It had not assessed qualifications and skills to any significant extent at all but had relied entirely on subjective assessment of answers to a series of questions. This became clear in cross examination of the Respondent's witnesses. The appeal panel plainly did not put this right. While we think the Tribunal's reasons would have been improved by a more detailed consideration of the appeal panel's reasons, we think that fundamentally the parties, and the Appeal Tribunal, can see why it reached the conclusion it did.

47. Ms Morgan's other point on sufficiency of reason rested on the premise that the Tribunal rejected the evidence of Mr Griffiths that the number of redundancies should be increased because an additional £100,000 of savings had to be found. We do not think the Tribunal rejected Mr Griffiths' evidence on this point. In its findings of fact, when it explained that Mr

Griffiths extended the number of redundancies, it said in terms that "the financial situation on Dillington House was worse than first thought" (paragraph 7).

48. This brings us finally to Ms Morgan's criticism of the latter part of paragraph 28 of the Tribunal's reasons. This paragraph is not part of its core reasoning for finding the dismissal unfair: it is under a heading "supplemental issues" and concerns the **Polkey** issue. The Tribunal plainly did not approve of Ms Morgan's submission that the Claimant had an "attitude" and an "arrogant approach". It was sufficiently stung to voice a suspicion which it can hardly be blamed for harbouring, especially when neither the Director nor Mr Griffiths informed the Claimant of the change to JD2. But it did not decide the case this way. The points on which the Tribunal decided the case were set out earlier in its reasons. The change from JD1 to JD2 was never notified to the Claimant; and the panel which made the appointment did not, as promised, carry out an assessment of skills, qualifications and the like, but relied on a subjective assessment of answers to interview questions. So long as the Tribunal applied section 98(4) – as we are satisfied it did – it was entitled as a matter of law to decide the case this way.

49. For these reasons the appeal will be dismissed.