Appeal No. UKEAT/0183/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 October 2013

Before

THE HONOURABLE MR JUSTICE MITTING

MR D BLEIMAN

MS N SUTCLIFFE

MR T MASSON — APPELLANT

MEGGITT AVIONICS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR T MASSON (The Appellant in Person)
For the Respondent	MS H PLATT (of Counsel) Instructed by: EEF Legal Services Broadway House Tothill Street London SW1H 9NQ

SUMMARY

JURISDICTIONAL POINTS – 2002 Act and pre-action requirements

UNFAIR DISMISSAL

Unfair dismissal. Application of transitional provisions in case of dismissal alleged to have been unfair under s98A **Employment Rights Act 1996**. Whether employers had reasonable grounds to believe in lack of capacity of senior employee.

THE HONOURABLE MR JUSTICE MITTING

1. The Claimant is now 55 and was 51 at the date of his dismissal on 25 August 2009. He was employed or had been employed as an electronics engineer since March 2000. At the date of his dismissal he was a Senior Engineer.

2. The employer's business was in the avionics industry. The Claimant's role was safety critical and of high importance.

3. In January 2009 he received no pay increase whereas other members of the engineering staff received increases averaging 4.3%. The Employment Tribunal does not set out in its Reasons how that percentage was arrived at but in a statement which they adopted as true, the statement of Mr Evans, the Engineering Capability Manager, he did explain how it was arrived at. Every year an annual salary review is conducted and dependent upon the performance in the previous year of the employee whose salary is being reviewed he or she will receive an increase typically in the range 0% to 8% to 10%. Plainly those who have performed well will receive an award at the higher end of the range and those assessed not to have done so will receive one at the lower end of the range or even nought. We do not know, although we have no reason to doubt, that this pay structure was contractually what the Claimant was entitled to.

4. On 4 February 2009 the Claimant was notified by the employer that a formal three stage review of his capability and performance was going to begin. On 9 February claimed shortcomings were identified in a meeting with Mr Evans. There was a note of the meeting in which, with aid of translation of acronyms, it possible to understand what the criticisms were. On 18 February 2009 a letter was sent in these terms:

> **"You will be expected to reach the required standard of performance by 9th May 2009. At the end of this period the company will review the situation and you must be aware that if your performance does not improve to the required standard by the specified date then the company will proceed to stage two of the capability policy."**

5. If at the end of the third stage, performance and capability had not improved to the employer's satisfaction, redeployment was possible or dismissal if redeployment was not practicable.

6. Stage one concluded on 9 May 2009. In Mr Evans's view no or no adequate improvement in the Claimant's performance had taken place. On 11 May a letter was sent to him to tell him that stage two would be put into effect and would conclude on 9 July 2009. Mr Evans concluded that no adequate improvement had occurred by that stage as well and so on 4 August 2009 the Claimant was notified that the third stage of the procedure, that which could result in dismissal, would be put into effect. It was and it did result in his dismissal on 25 August.

7. The Claimant made a claim of unfair dismissal to the Employment Tribunal which dismissed his claim on 4 November 2010 for reasons set out in a document sent to the parties on 26 November 2010. The Claimant appealed to the Employment Appeal Tribunal on two grounds; 1) the Employment Tribunal should have considered whether his dismissal was automatically unfair under section 98A of the **Employment Rights Act 1996** and should have held that it was; 2) the Employment Tribunal did not decide whether the employer had reasonable grounds for its belief in the Claimant's lack of capability.

8. The Appeal Tribunal upheld the Claimant's appeal on both grounds and remitted the case to the same Employment Tribunal if possible to determine; 1) whether the transitional provisions in the schedule to the **Employment Act 2008** (Commencement 1 Transitional

Provisions and Savings) Order 2008 had the effect that section 98A of the **Employment Rights 1996** applied to the Claimant's dismissal; 2) if so whether the employer had complied with section 98A; 3) whether the employers belief in the lack of capability was reasonable.

9. In a reserved Judgment sent to the parties on 16 January 2013 the Employment Tribunal, constituted as before, held; 1) that section 98A did not apply; 2) if it did the employers has satisfied its requirements; 3) the employers did have reasonable grounds to believe in the Claimant's lack of capability. Accordingly it dismissed his claim for the second time. The Claimant appealed against all three findings.

10. The first issue raises again a tricky question about the applicability of section 98A after its repeal by the **Employment Act 2008**. It was repealed with effect from 5 April 2009 but remained in force even when a dismissal took effect after that date in the circumstances set out in paragraph 2(1) of the schedule to the 2008 Order.

11. Section 98A provided:

> **"1. An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if:**
>
> **(a) One of the procedures set out in part 1 of schedule 2 to the Employment Act 2002 (Dismissal and Disciplinary Procedures) applies in relation to the dismissal.**
>
> **(b) The procedure has not been completed and;**
>
> **(c) The non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements."**

12. Schedule 2, paragraphs 1 and 2 provided:

> **"Step 1. Statement of grounds for action and limitation to meaning.**
>
> **(1) The employment must set out in writing the employees alleged conduct or characteristics or other circumstances which lead him to contemplate dismissing or taking disciplinary against the employee.**
>
> **(2) The employer must send a statement or a copy of it to the employee and invite the employee to attend a meeting to discussion the matter.**

Step 2. Meeting.

(1) The meeting must take place before action is taken except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless:

(a) The employer has informed the employee what the basis was for including in the statement under paragraph 1.1 the ground or grounds given in it.

(b) The employee has had a reasonable opportunity to consider his response to that information."

13. It is not necessary to set out the further requirements of paragraph 2.

14. Paragraph 2(1) of the schedule to the 2008 Order provided:

"2(1) The amendments and repeals referred to in paragraph 1 shall not have effect where on or before 5th April 2009 the standard dismissal and disciplinary procedure or the modified dismissal procedure applies by virtue of regulation 3 of the Regulations and on or before that date the employer has:

(a) complied with the requirements of paragraph 1, 2 or 4 of schedule 2 to the 2002 Act,

(b) taken relevant disciplinary action against the employee or;

(c) dismissed the employee.

2(2) For the purposes of paragraph 2.1 the employer shall be treated as having complied with;

(a) paragraph 1 of schedule 2 to the 2002 Act where that employer has complied with paragraph 1.1 of schedule 2 to that Act and sent the statement or a copy of it to the employee.

(b) paragraph 2 of schedule 2 to the 2002 Act where the employee attends a meeting with the employer and the employee is informed that the employer is contemplating dismissing or taking disciplinary action against them."

15. For the transitional provisions to apply it follows that one or more of two groups of conditions must be met. The first group contains four elements; 1) the employer must contemplate dismissing or taking disciplinary action against the employee: this is the pre-condition for the obligation to comply with the remaining procedural requirements of Schedule 2 to the 2002 act; 2) the employer must set out in writing the employee's conduct or characteristics which lead him to contemplate either step. This follows from the opening words of paragraph 1(1) of schedule 2 of 2002 Act; 3) on or before 5 April 2009 the employer must send that statement or a copy of it to the employee and invite him to attend a meeting:

paragraph 1(2) of schedule 2 to the 2002 Act. An employer who has fulfilled those conditions shall be treated as having complied with paragraph 1 of schedule 2 to the 2002 Act: see paragraph 2(2) of the schedule to the 2008 Order; 4) on or before 5 April 2009 the employer must have taken, "relevant disciplinary action" against the employee or "dismissed the employee". Article 2(1) (b) and (c) of the schedule to 2008 Order "Relevant disciplinary action" has the meaning given to it by Article 2(1) of the **Employment Act 2002 (Dispute Resolution) Regulations 2004**; see paragraph 4 to the schedule to the 2008 Order. Article 2(1) of the 2004 Regulations defines "Relevant disciplinary action" as "action short of dismissal which the employer asserts to be based wholly or mainly on the employees conduct or capability other than suspension on full pay or the issuing of warnings (whether written or oral)".

16. The second group of conditions contained three elements; 1) the employee must attend a meeting with the employer; 2) the employer must inform the employee that he is, "contemplating dismissing or taking disciplinary action" against him. Both are clearly set out in paragraph 2(2)(b) of the schedule to the 2008 Order. It is not necessary that the remaining conditions set out in paragraph 2 of schedule 2 to the 2002 Act are fulfilled; 3) on or before 5 April 2009 the employer must have taken "relevant disciplinary" action against the employee or dismissed him: paragraph 2(1)(b) and (c) of the schedule to the 2008 Order.

17. The Employment Tribunal found that the employer was not contemplating dismissal when invoking stage one of its three stage procedure on 4 February 2009 or at any time before the "failure" as it put it of stage two on 29 July 2009.

18. The Employment Tribunal heard evidence from the employer, including detailed evidence from Mr Evans. Notwithstanding the precise wording of all of the documents that

passed between the parties it was entitled to reach that conclusion and that conclusion is sufficient to dismiss the first of the grounds of appeal. However, the Employment Tribunal could, had it undertaken the analysis of the statutory scheme which we have, also have justified its decision for another reason: that at no time before 5 April 2009 did the employers take, "relevant disciplinary action" against the Claimant. All that they did at the meeting of 9 February 2009 and by their letter of 18 February 2009 was to warn the Claimant about future consequences of a failure to improve capability or performance. Therefore if that amounted to disciplinary action it was not "action short of dismissal… other than suspension on full pay or the issuing of warnings (whether written or oral)" within Article 2(1) of the 2004 Regulations.

19. Mr Masson, confronted that proposition contended that the employers had in fact taken disciplinary action against him by making no increase in his annual salary at the pay review and by instituting the three stage review which eventually resulted in his dismissal. As to the first it is clear from the witness statement of Mr Evans and the explanation which the Tribunal accepted as reliable and true that the award of no pay increase was not a disciplinary measure. It was simply the application of a policy, by which the Claimant was contractually bound, based upon the employer's assessment of his performance in the preceding year.

20. As to the disciplinary process, that cannot be described as disciplinary action. It is the process by which disciplinary action may be taken. It is not in itself disciplinary action. Accordingly, and for the reasons which we have given, the decision of the Employment Tribunal not only can be upheld but should be upheld on that alternative ground. It provides a conclusive answer to the Claimant's contention that section 98A applied to his dismissal.

21. We turn therefore to the second ground of appeal. The Tribunal's reasoning, inadequate at the first hearing, was expanded upon somewhat at the second but even so it does not explain

to us upon its face, in sufficient detail for us to be able to understand what its reasons were, why it concluded that the employers did have reasonable grounds to believe that the Claimant had not performed his work sufficiently to justify dismissal. However, the Tribunal did, as we have already noted, refer expressly to and adopt as true the detailed witness statement of Mr Evans.

22. Having read that as we have done, we are entirely satisfied that Mr Evans not only did believe but also had reasonable grounds to believe in a lack of capacity on the part of the Claimant and that the Employment Tribunal were entitled to reach the same conclusion.

23. Mr Masson's complaint is not that he was not told in sufficient detail in what respects his performance was inadequate but that it was never explained to him or justified to the Tribunal that it was sufficiently serious to justify undertaking the three stage process which eventually resulted in his dismissal. He was, however, working in an industry which is safety critical - avionics. There is no reason to doubt his technical capacity in that respect. There is no hint of criticism of that in the Employment Tribunal's reasoning and little, if any, in Mr Evans's detailed witness statement. What was in issue was his leadership skills. These are always difficult to tie down in a concrete manner but Mr Evans's statement satisfied the Tribunal and satisfies us that there were proper and serious grounds for considering that the Claimant's performance of his duties fell significantly short of that which was required by the employers and did so in a manner that was sufficiently serious to justify his dismissal when genuine efforts to secure an improvement in performance did not have that result.

24. Accordingly, although it would have been helpful to us for the Tribunal to set out its reasons in greater detail and perhaps to give fully reasoned examples of the Claimant's shortcomings, of which Mr Evans speaks in his written statement, we are satisfied that the

Employment Tribunal was entitled to reach the conclusion that it did, and by reference to Mr Evans's statement that he gave adequate reasons for doing so.

25. Accordingly, and for those reasons, this appeal is dismissed.