Appeal No. UKEAT/0529/12/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 October 2013

Before

HIS HONOUR JUDGE SEROTA QC

MR B BEYNON

MR B WARMAN

MR B MITRA — APPELLANT

MONTPELIER PROFESSIONAL (WEST END) LTD PRACTISING AS A H MONTPELIER — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR J DIXON (of Counsel) Bar Pro Bono Unit
For the Respondent	MS MING-LEE SHIU (of Counsel) Instructed by: Muscatt Walker Hayim Solicitors Speen House Porter Street London W1U 6WH

SUMMARY

AGE DISCRIMINATION

The Employment Tribunal has clearly found on the facts that the Claimant was not dismissed by reason of his age.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. Today is the renewed hearing of an appeal after we have considered the response of the Employment Tribunal to a request we made at the beginning of the hearing under the **Burns-Barke** principle seeking further clarification and information from the Employment Tribunal.

2. This is an appeal by the Claimant from the decision of the Employment Tribunal at London Central sent to the parties on 24 November 2011. Oral reasons were given, and later written reasons were sent out on 23 February 2012. The Employment Tribunal was presided over by Employment Judge Norris, who sat with lay members. There has been a regrettable delay in hearing various interlocutory hearings both in the Employment Tribunal and in the Employment Appeal Tribunal.

3. The Employment Tribunal dismissed the Claimant's claims for age discrimination and a redundancy payment. He had made what would have appeared to be an unanswerable claim for unfair dismissal, but this claim was either dismissed or struck out earlier in September 2011 at a Pre-Hearing Review by Employment Judge Lewzey. The Claimant denied this was the case, but I have not seen any copy of a Pre-Hearing Review judgment, and the point that the unfair dismissal was struck out appears to have been generally accepted. It appears, although we cannot be sure, not having seen the judgment, that the claim may have been presented out of time.

The procedural history

4. The Claimant's appeal first came before HH Jeffrey Burke QC on 11 May 2012 on the paper sift. He disposed of the appeal under rule 3(7) of the Employment Appeal Tribunal Rules

on the basis there were no reasonable grounds for bringing the appeal and directed that no further action be taken upon it. Mr Mitra, as he was entitled to do under rule 3(10), had the matter referred for an oral hearing, which came before HHJ Peter Clark on 24 October 2012. HHJ Peter Clark directed that one ground only of the Notice of Appeal should be referred to a full hearing. He declined to refer the claim for unfair dismissal to a full hearing but said he would reconsider it if within seven days of the seal date of his order the Claimant produced a Pre-Hearing Review judgment showing that it had not been struck out; this was not done. He also declined to refer a claim in relation to a redundancy payment. He allowed the one matter to go forward to a full hearing – that was the issue of age discrimination – and permitted an amended Notice of Appeal to be filed.

5. Essentially, the amended Notice of Appeal asserted that the Employment Tribunal did not resolve the issue of whether Mr Jackson had made the remark at a meeting with the Claimant that the Claimant maintained he had; secondly, that there was no apparent consideration of **Igen v Wong** [2005] IRLR 258 and the reverse burden of proof; and even if the Claimant was dismissed for capability, did age play any part in the decision to dismiss?

6. The matter came before us on 22 April, and we concluded there might be some merit in the Claimant's complaint that the Employment Tribunal made no finding in relation to the alleged meeting of 10 October between him and the visiting chief executive who had come over to this country, I believe from the United States, Mr Jackson. We accordingly made a **Burns-Barke** direction, to which I have already referred.

The facts

7. We now look at the decision of the Employment Tribunal and take the factual background from that. The Respondent is a firm of chartered accountants. The Claimant was formerly a teacher of English; he is a life fellow of the Royal Society of Arts and describes himself as a guardian of the Queen's English. Correspondence from him shows he has a wide knowledge of English literature, especially of John Bunyan's work *Pilgrim's Progress.* He apparently took to sending poetry to colleagues. Latterly, Mr Mitra has practised as an accountant and began working as a tax manager on 31 March 1998, initially working full-time with the firm of Auerbach Hope. There was a **Transfer of Undertakings (Protection of Employment) Regulations** (TUPE) transfer to the Respondent in about April 2010 when Auerbach Hope was taken over by the Respondent. The Claimant – and we are pleased to record this – was a popular member of staff, loyal and satisfactory in performance, for the first 12 years at least of his employment with the Respondent.

8. At the time of the takeover to which we have referred, the Claimant was working part-time. A director of the Respondent at the time of the takeover began to have concerns about the Claimant's competence and increase in the number of mistakes he was making. The Claimant denied that his performance had deteriorated, but the Employment Tribunal concluded that they were legitimate concerns. Between April and September 2010 two of the directors, Mr Randolph and Mr Marco, gave oral warnings to the Claimant on their case; this was denied by the Claimant. The Employment Tribunal was satisfied that the Respondent had legitimate concerns over some elements of the Claimant's performance – I do not feel we need go into this – and the Employment Tribunal found it was reasonable for the Respondent to conclude that steps needed to be taken to deal with his attitude and performance. We shall come back to that later.

9. On 10 October Mr Robert Jackson, who was the chief executive officer of the Respondent's holding company and a director of the Respondent, came to London to meet and greet the employees working in the London office. There was no suggestion that he met the Claimant on a one-to-one basis at that time. In October 2010 the Claimant maintained that he was in the London office when Mr Jackson was there and that Mr Jackson had invited him to a one-to-one meeting at which he is said to have challenged the Claimant for working beyond the state retirement age. Mr Jackson denied this in his evidence before the Employment Tribunal, and there is no evidence that the Claimant raised a grievance at that time, nor indeed that he ever raised a specific grievance, about the words he now contends were used. That is to be found at paragraph 6 of the decision of the Employment Tribunal.

10. The Claimant's case was as set out by the Employment Tribunal, but the occurrence of this meeting was denied by Mr Jackson. There was no corroboration of the Claimant's evidence, and no grievance was raised at the time; in fact, Mr Jackson denied that he had visited the London office in October as the Claimant said and made clear that as the chief executive officer of the holding company he does not involve himself in the day-to-day running of individual offices. Also, it was the Respondent's case that there were other employees over the age of 65 and the Claimant was not the eldest of them. Both the Claimant and Mr Jackson gave live evidence.

11. On 22 November 2011 Mr Jackson and Mr Marco called the Claimant to a meeting. They did not tell him what the meeting was about, but at the meeting they discussed some perceived shortcomings on the part of the Claimant. The Claimant denied that there were shortcomings in his performance, but nonetheless he was given notice of dismissal. He

maintained in his correspondence with the Respondent and in his claim to the Employment Tribunal that he was entitled to compensation for wrongful discrimination on the grounds of age, I believe also race, and unfair dismissal in the total sum of £217,800, which claim he repeated in his skeleton argument. He appealed against his dismissal; the appeal was dismissed.

The decision of the Employment Tribunal

12. The Employment Tribunal started by reciting the facts as we have just recounted them. The Employment Tribunal was highly critical of the dismissal procedures followed by the Respondent, which showed a complete failure to comply with the usual norms and in particular with the ACAS guidelines (see paragraphs 11.5 and 12.4). Although the Claimant submitted that the treatment of the dismissal showed a general lack of acceptable norms and this was relevant to whether or not he had in fact been dismissed on the grounds of his age, the failings in dismissal procedure it seem to us to be irrelevant to the issue of age discrimination. However, the fact that the Employment Tribunal spent some time criticising the Respondent's conduct of the dismissal procedures showed that it was not unsympathetic to the Claimant.

13. The Employment Tribunal directed itself to the relevant provisions of the **Equality Act** (sections 13(1) and 39(2)(c)), it noted that age was a protected characteristic under section 5, and at paragraph 9.4 it refers to the reverse burden of proof in section 136, which it said had been explained to the parties at the hearing. The Employment Tribunal explained that initially the burden of proof was on the Claimant in order to provide facts from which the court could decide in the absence of any other explanation that his employer contravened the legislative provisions:

> **"If he does that, then the court must hold that the contravention occurred unless the Respondent is able to show it did not contravene the provision. In other words the burden of**

proof then shifts from the Claimant to the Respondent and we would need then to address whether or not we are satisfied the Respondent has disproved the allegation."

14. We have set that out because it is asserted by the Claimant that the reverse burden of proof was not given effect to. Having regard to the decision of the Supreme Court in the case of **MA (Somalia) v Secretary of State for the Home Department** [2010] UKSC 49 to which we referred the parties at the hearing in April and to which we shall refer again shortly, it seems highly unlikely that the Employment Tribunal would correctly address the law and immediately afterwards fail to apply it.

15. The Employment Tribunal's conclusions were as follows. At paragraph 12.1, the Tribunal stated that the Claimant's capability was a fair reason to dismiss him and it was the reason for which he was dismissed. The Employment Tribunal then went on to say (paragraph 12.2):

> **"We have concluded there is no evidence from which we could glean that there had been discrimination. The Claimant has not produced any evidence that his age as a protected characteristic played any part whatsoever in his dismissal. Had he done so we have concluded in any event the Respondent has shown evidence of the reason, or the principal reason for dismissing him, namely his capability."**

16. As Mr Dixon has pointed out, it is wrong if one takes that paragraph literally to say that there was no evidence produced by the Claimant as to the fact that his age might have played any part in his dismissal. He had produced such evidence, and that is set out in paragraph 6, to which we have already referred. However, it seems clear that the Employment Tribunal does not mean that no evidence had been put forward but no evidence that it was able to accept, because it must have been absolutely clear that the Claimant's evidence was rejected. If one goes to his original Notice of Appeal, he makes it crystal clear that so far as he was concerned the Employment Judge had shown favouritism to the Respondent and believed all of the

Respondent's evidence while rejecting his. This is a topic to which he has referred on a number of occasions.

17. It is right to say that the Employment Tribunal did not expressly make findings as to the alleged meeting between the Claimant and Mr Jackson. It is tolerably clear that the Employment Tribunal rejected the Claimant's evidence. We therefore, and to avoid any lack of clarity, in our **Burns-Barke** request enquired of the Employment Tribunal if it had made any findings, and if so what findings as to the conversation the Claimant allegedly had with Mr Jackson in October 2010. If it found such conversation had taken place, did the Employment Tribunal make any findings as to whether the conversation provided evidence from which the Employment Tribunal could have found that the dismissal of the Claimant was by reason of his age. If the conversation did provide such evidence, we asked whether the Employment Tribunal found that the Claimant's age played any part in the decision to dismiss him.

18. In accordance with the EAT's standard direction, the Employment Tribunal was requested to give its answers by reference to its notes of evidence without the need to adduce or allow the adduction of further oral evidence.

19. The Employment Tribunal responded that its unanimous findings were that Mr Jackson was a more credible witness than the Claimant and accordingly on the balance of probabilities, that the meeting between them did not take place, and hence nor did the conversation as alleged by the Claimant.

20. The Employment Tribunal for the avoidance of doubt repeated that it was unanimous that age played no part in the decision to dismiss, which was in any event taken by Mr Randolph

and Mr Marco without any influence from Mr Jackson. The reason for the dismissal was the Claimant's capability and not his age.

The appeal

21. Mr Dixon, who has appeared under the auspices of the Bar Pro Bono Unit, has made a number of submissions. Firstly, he complains that, whereas the **Burns-Barke** request refers to notes of evidence, the Employment Tribunal has made no reference to its notes of evidence or produced them. He maintains that as this is a discrimination case, which needs to be approached with particular sensitivity, the way in which the Employment Tribunal has dealt with its findings is insufficient. The Employment Tribunal was wrong in saying that there was no evidence in paragraph 12.2 to which we have just referred, and, as we have said, we do not consider that the Employment Tribunal were saying that there was no evidence, because it had specifically referred to it a moment or two before. What it clearly meant was that there was no evidence that it could accept.

22. It was then submitted that we should look at the findings of the Employment Tribunal against the background of the wholly inadequate dismissal procedure, but as Mr Warman pointed out during the course of submissions the Employment Tribunal clearly had that in mind and indeed showed some sympathy to the Claimant. However, this does not, in our view, impact in any way on its findings as to the reason for the dismissal. Mr Dixon submitted that the case illustrated the dangers of going back to the Employment Tribunal to revisit a particular question under the **Burns-Barke** procedure because there was a danger that the Employment Tribunal would simply repeat and use the opportunity to buttress its earlier conclusions. He was otherwise left to the argument that the Employment Tribunal had failed to appreciate the strength of the Claimant's case and should not have accepted the Respondent's case. Mr Dixon

recognised the difficulties with that line of submissions, because the Employment Appeal Tribunal can only entertain appeals on questions of law not on questions of fact in the absence of perversity.

23. We now want to say something briefly about our approach to this appeal. We have already indicated to the parties the principles on which we intend to rely, and they are not controversial. It is not necessary for an Employment Tribunal to refer to all of the submissions or all the facts save those that are necessary for its decision (see, for example, the judgment of Buxton LJ in **Balfour Beatty Power Networks v Wilcox** [2007] IRLR 63 at paragraph 37). One should not also expect the same polish from a decision of the Employment Tribunal that one would expect to find from a reserved judgment of the Court of Appeal, for example. In **Hewage v Grampian Health Board** [2012] IRLR 870 Lord Hope said:

> **"It is well established and has been said many times that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."**

24. I also drew the parties' attention to the case of **El-Magrisi v Azad University in Oxford** UKEAT/0448/08 in which Underhill J had stated that the principal reason for a dismissal is a question of fact for the Tribunal that in the absence of perversity the Tribunal should not interfere with. We also refer to the decision of the Supreme Court and the Judgment of Lord Dyson in **MA (Somalia)**:

> **"43. Before we examine these two criticisms, we need to make some general points about the proper role of the Court of Appeal in relation to appeals from specialist tribunals to it on the grounds of error of law. Although this is not virgin territory, the present case illustrates the need to reinforce what has been said on other occasions. The court should always bear in mind the remarks of Baroness Hale of Richmond in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at para 30:**
>
> > **'This is an expert Tribunal charged with administering a complex area of law in challenging circumstances … [T]he ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right … They and they alone are judges of the facts … Their decisions should be respected**

unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.'

44. Those general observations were made in a case where the Court of Appeal had allowed an appeal against a decision of the AIT. The role of the court is to correct errors of law. Examples of such errors include misinterpreting the [*European Convention on Human Rights*] ECHR (or in a refugee case, the *Refugee Convention or the Qualification Directive*); misdirecting themselves by propounding the wrong test on some legal question such as the burden or standard of proof; procedural impropriety such as a breach of the rules of natural justice; and the familiar errors of omitting a relevant factor or taking into account an irrelevant factor or reaching a conclusion on the facts which is irrational.

45. But the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account.

46. We turn to the first of the Court of Appeal's criticisms. In our view, the court was wrong to interpret paras 109 and 121 of the determination as if the AIT were saying that they were dismissing the appeal because MA 's account was incredible. In the light of the clear and impeccable self-direction set out only a few paragraphs earlier (at para 105), and having regard to the need for restraint to which we have referred, the court should surely have been very slow to reach the conclusion that it did. It should only have interpreted these paragraphs in the way that it did if there was no doubt that this is what they meant. It is often easy enough to find some ambiguity or obscurity in a judgment or determination, particularly in a field as difficult and complex as immigration, where the facts may be difficult to unravel and the law difficult to apply. If, as occurred in this case, a tribunal articulates a self-direction and does so correctly, the reviewing court should be slow to find that it has failed to apply the direction in accordance with its terms. All the more so where the effect of the failure to apply the direction is that the tribunal will be found to have done precisely the opposite of what it said it was going to do. The striking feature of the present case is that the Court of Appeal was of the view that at para 109, the AIT failed to apply the direction that they had set for themselves only four paragraphs earlier."

25. I have already drawn attention to the fact that the Claimant never had any illusions as to why he had lost the case; he had lost the case because his evidence had not been accepted and the Respondent's evidence had been. I could refer to a number of matters outside his original Notice of Appeal, but he has been consistent in this, and his original Notice of Appeal dated 20 December 2011 in the first ground of his appeal is that:

"[…] Judge Norris of the Central London Employment Tribunals did not see my point. She did not believe a word I said, while she believed everything that all four of the directors of respondent's firm [sic]." Her wholehearted leanings for them annoyed me tremendously."

26. I could point to a number of other instances in which the Claimant has made the same point. It is thus absolutely clear to us that the Claimant's principal complaint is that his evidence was rejected, he maintains wrongly, while the Respondent's evidence was accepted,

again, he says, wrongly. Appeals against findings of fact in such cases are exceptionally difficult. It is necessary to prove that the findings were perverse, and where one has a case in which the Employment Tribunal has to weigh up two conflicting accounts it is in essence virtually impossible to upset that decision. That was the case here.

Conclusions

27. Firstly, we reject the submission that the Employment Tribunal was required to provide or specifically refer to in its answers to the questions we posed, its original notes. The order that was made is the standard order that is made by the Employment Appeal Tribunal when making a **Burns-Barke** request, and the Employment Tribunal is expected to answer the questions by reference to its notes rather than hearing further evidence or oral submissions. It certainly does not require them to provide their notes to the Appeal Tribunal, unless specifically requested, or to specifically refer in its answers to its notes. We have already said that in our opinion the reference to the absence of evidence by the Employment Tribunal can only mean evidence that the Employment Tribunal felt able to accept. As Mr Warman pointed out, the dismissal procedure was wholly inadequate, and the fact that the Employment Tribunal referred to it showed that it had it in mind and displayed some sympathy to the Claimant but was not relevant to the core finding on credibility. We have already made clear that the Claimant can have had no doubt based on his own writings that his evidence had been rejected.

28. Regarding Mr Dixon's point on the appropriateness of the **Burns-Barke** request, we say that the remission was wholly in accordance with the guidance of this Tribunal in the case of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 and that even if Mr Mitra has doubts about the integrity and professionalism of the Employment Tribunal, we see absolutely no

reason to doubt it and express our faith in their professionalism and integrity. We have no reason to doubt the accuracy of the answers they gave to which we have referred.

29. In all the circumstances, we are quite satisfied that there is no merit in this appeal. It was decided on a question of fact, and, as pointed out in **El-Magrisi**, an appeal against that fact can only be successful if it can be shown that the finding was perverse. The Employment Tribunal was entitled to find on the evidence that the principal reason for the dismissal of the Claimant was, as the Respondent said, by reason of his capability and not by reason of his age, which played no part in the decision to dismiss him. In those circumstances, we must dismiss the appeal.

30. Before we leave matters, we would like to thank both advocates – Ms Shiu and Mr Dixon – and we would again like to express our gratitude to Mr Dixon, who has appeared out of a sense of public duty under the aegis of the Bar Pro Bono Unit. We are extremely grateful to him, and the Employment Appeal Tribunal is always grateful. As we said earlier, he has said absolutely everything that could properly be said in support of this appeal, and we hope that the Claimant is as grateful to him as we are.