Appeal No. UKEAT/0120/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 June 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MS T WOOD — APPELLANT

LLOYDS TSB BANK PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

PRELIMINARY HEARING - APPELLANT ONLY

APPEARANCES

For the Appellant	MS ROBIN WHITE (of Counsel) (Appearing under the Employment Law Appeal Advice Scheme)
For the Respondent	Written Submissions

SUMMARY

REDUNDANCY – Fairness

There was no reason to interfere with the findings on redundancy selection made by the Employment Judge. The now "tediously common" criticisms of judicial conduct were expressly very properly abandoned by counsel instructed after the home-made Notice of Appeal.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about unfair selection for redundancy constituting a claim of unfair dismissal. I shall refer to the parties as the Claimant and the Respondent. It is an appeal by the Claimant in those proceedings against the Judgment of Employment Judge Gumbiti-Zimuto heard at Reading over three days and sent with Reasons on 6 December 2012. The Claimant represented herself; today, she has the distinct advantage to be represented by Ms Robin White of counsel, giving her services under ELAAS. The Respondent was represented by Ms Charlotte Davies of counsel, who has, pursuant to an order of HH Jeffrey Burke QC, provided written submissions for the purposes of today. The Claimant claimed that in a redundancy exercise she was unfairly selected; previous challenges to the need for redundancies have disappeared.

2. The essential issues were set out by the Employment Tribunal, and, as now refined in the careful hands of Ms White, the simple issue is whether there was sufficient consideration of alternative employment rather than redundancy for the Claimant. The Employment Judge looked at those contentions, principally relating to two positions – one was as a business analyst, and the other was as a group IT officer – and decided that there was no unfairness in the alleged failure by the Respondent to make the Claimant aware of those roles and to slot her into them. The Claimant appealed.

EAT procedure

3. In her Notice of Appeal, which runs to roughly four times as many words as the Judgment, she raised many, many points; they can be divided into substance and procedure. A major part of her complaint was as to the fitness of the Judge to try the case. HH Jeffrey Burke

QC on the sift asked for the Judge's and the Respondent's comments. The Claimant now abandons her criticisms of the Judge. They were very strong. As so many disappointed appellants see, they go nowhere and can be put aside. The Claimant has, if I may say so, very wisely accepted the advice she has been given today. Nevertheless, it is a source of constant regret in this Tribunal that litigants in person, to bolster a weak case, add in criticisms of the judiciary, either procedurally or as a matter of bias. I have myself drawn attention to this – see, for example, **Whyte v London Borough of Lewisham** UKEAT/0256/12 a year ago – but the message does not seem to have got through. Rimer LJ most recently in upholding a Judgment of mine in **Kennaugh v Jones (t/a Cheshire Tree Surgeons)** [2013] EWCA Civ 1 described these challenges as "tediously common" (see paragraph 18). Fortunately, it is not necessary for me to go through this tedious business. It is a thousand pities that the Judge, who properly carried on with this case, had to be vexed with this point. There were other subsidiary points too, which I shall record for their utter banality, such as that the Judge was seen going to the men's toilet. Nothing about the Judge escaped this litigant's wrath. I now turn to the substance of the matter.

The facts

4. The Claimant was employed by Lloyds TSB. The parties were introduced by the Judge in the following way:

> **"7. The Claimant's employment commenced in 1997 and continued for a period of 14 years until her dismissal on 31 December 2011 on the grounds of redundancy.**
>
> **8. The Claimant was employed to work at a site in Aylesbury. The Aylesbury site was originally owned by Equitable Life Assurance (ELAS). In 2001, HBOS bought ELAS' existing pensions IT systems after ELAS had got into difficulties. HBOS inherited a number of staff who transferred pursuant to a TUPE [re the Transfer of Undertakings (Protection of Employment) Regulations]. The Claimant was one of those employees.**
>
> **9. In 2009 HBOS and Lloyds, the Respondent, became part of the same group and the Claimant became an employee of the Respondent.**
>
> **10. Before 2009, approximately 1,200 members of staff were working at the Aylesbury site. The majority of these employees were part of what was the Respondent's Life Pensions and**

Investment division (LP&I), around 200 of these employees were IT employees. They were part of what is known by the Respondent as the Strategic Change & IT Team (SC&IT). Providing IT services to the LP&I business.

11. The Claimant was employed as a Business Acceptance Test Lead. The Business Acceptance Team (BAT Team) were part of SC&IT. The Claimant's role involved being part of the process of developing new IT systems for the Respondent and testing the Respondent's systems from a user point of view identifying defects and reporting them.

12. Following the merger of HBOS and Lloyds the Respondent was required to look at the way in which it carried out its business and looked to make savings by working more efficiently. One of the things that was decided was to consolidate LP&I activity in Bristol, Edinburgh and Leeds, creating centres of excellence in those locations. This meant reducing or ceasing LP&I actively in other locations.

13. A strategic review was undertaken of the IT development activity carried on for ELAS at the Aylesbury site. It was decided to attempt to re-employ staff from the bank in both customer services and IT to run the remaining policy administration in-house."

5. So far as is live on appeal, two points arise for discussion, and these were itemised in the issues that the Judge set out:

"3.2 The Claimant asserts that she was unfairly selected for redundancy; that the Respondent undertook inadequate redundancy consultation; that no fair or objectively justifiable selection criteria were adopted; and that the Respondent did not take adequate steps to identify suitable employment. […]

3.5 The Claimant further asserts that she was not informed of a suitable alternative employment for example of PSO role that Ms Anne Gooding was appointed to and commenced in November 2011; and other PSO roles in November 2011.

3.6 The Claimant says that she was specifically blocked or prevented from taking up possible suitable alternative employment with Equitable Life in November 2011."

6. The Judge dealt with what must have been the hurtful experience for the Claimant of the appointment of her colleague, Ms Gooding, for the business operations analyst role. I say hurtful because she got the job and survived the chop where the Claimant did not. Here is what the Judge said about it:

"49. During the early part of 2011 Christopher Andrews the Respondent's IT hosting team manager undertook a review of the support required to provide IT hosting for ELAS by the Respondent. As a result a number of vacancies were advertised in about August 2011. The Claimant was aware of these vacancies however for reasons which are not clear the Claimant had wrongly formed the view that she was ineligible to put herself forward for roles. She believed the roles were to be outside of her grade and that it was therefore not possible for her to apply for these roles.

50. There appear to be two aspects of the Claimant's misunderstanding. The first one relates to the existence of a policy that in a redundancy process she was not permitted to apply for a role outside her grade. The Claimant was a 'C grade' and the relevant Business Operational Analyst role was a 'DL grade'. The Claimant's understanding is incorrect. The evidence

from the Respondent was that there was no such policy which limited the Claimant's ability to apply for a role at a 'DL grade' when she was a 'C grade'.

51. The second point which appears to have formed part of the Claimant's misunderstanding is that the available roles were of much higher grade and therefore not the type of roles that she would in any event be considered for.

52. In about August 2011 the Claimant did not put herself forward for the Business Operational Analyst role which was advertised at that time. There was a conflict of evidence between the Claimant and the Respondent as to whether the Claimant was made aware of this role. I am satisfied from the evidence that has been presented that the Claimant should have been aware of this role. However, if she was not aware of this role this was not the fault of the Respondent. The Claimant misunderstood the nature of the role or alternatively her entitlement to put herself forward for the role.

53. At the time that this role was first advertised the Claimant was away from work due to illness, she remained away from work for the whole of August until September 2011. Although the Business Operational Analyst role was advertised for a fortnight in August nobody was appointed to the role. The Respondent carried out a further review and determined that there were further roles which needed to be filled and so that role plus additional roles were advertised in September 2011. There is again a conflict between the Claimant and the Respondent as to whether the Claimant was informed about these roles.

54. On this point the evidence of Mr Burns was not contested by the Claimant. Mr Burns informed the Claimant about the roles at the mediation meeting. The Claimant again may have misunderstood the nature of the roles and considered them to be roles which were outside the scope of ones that she would be eligible to put herself forward for. I am satisfied that those roles were notified to the Claimant."

7. This deals with both the business operational analyst role and the GITO role. The Judge made those findings of fact as to notification to the Claimant. Ms White draws my attention to the written submissions of the Claimant at the hearing about knowledge. The Judge returned to that issue in his conclusions in the following way:

"66. The Claimant attacks the Respondent's position in relation to the Business Operational Analyst role. For the reasons which have been set out above I am satisfied that the Claimant was aware of this role, that the Claimant was informed about the role by Mr Burns. There may have been some misunderstanding on the part of the Claimant as to the nature of the role but the Claimant was made aware of the role. I am not satisfied that that [sic] there was any desire to keep the role hidden from the Claimant or to prevent the Claimant from securing any other role with the Respondent.

67. A number of other matters have been referred to by the Claimant which arose out of the evidence. The Claimant deals with these under the heading of 'Business Operational Analyst'. I am unable in relation to those matters set out by the Claimant, such as the matter relating to picking up documents from the photo copier, to conclude that there was any unfairness to the Claimant in relation to the redundancy process."

Submissions and conclusion

8. Ms White argues before me that the finding by the Judge is perverse. I reject that submission. There was evidence before the Judge on these contested issues. Whether the Claimant knew about the roles was an issue before the Judge. There was material from both sides. The Judge has made a finding of fact. The criticism does not reach the standard necessary for the decision to be overturned, as set out by the Court of Appeal in **Yeboah v Crofton** [2002] IRLR 634. Judges in Employment Tribunals have to make painful decisions on the evidence, and it is for those Judges and not for the EAT to make the decision.

9. This Judgment was within a narrow scope. Criticisms are made of the Judge for failing to record the principles set out in **Amazon v Hurdus** UKEAT/0377/10, which he himself had heard. The EAT, HHJ Peter Clark and members, overturned this Employment Judge's decision; the Judge does not mention that case. Nevertheless, the principle that the Claimant advances is that where there is a vacancy a Respondent acting fairly should consider a potentially redundant employee for it; that is part of fairness under the well-established principles in **Vokes v Bear Ltd** [1974] ICR 1 and **Williams v Compair Maxam** [1982] IRLR 83. I am satisfied that there was evidence before the Judge as to the availability of those roles, the Claimant's awareness of them and the Respondent's treatment of them. I accept in full Ms Davies' written submissions.

10. These cases on selection for redundancy are re-emerging in substantial numbers during the current austerity. There have been waves of such claims throughout the last 40 years while this jurisdiction has been in play. But the problem is that the selection criteria and the selection process are often very difficult to overturn in this court; see, for example, **Capita Hartshead Ltd v Byard** UKEAT/0445/11 (Silber J), **Samsung Electronics (UK) Ltd**

v Monte-D'Cruz UKEAT/0039/11 (Underhill P, as he then was) and my own Judgment in **Halpin v Sandpiper** UKEAT/0171/11. It is as well to bear in mind the very careful guidance and teaching of Burton P in **Kingwell and Ors v Elizabeth Bradley Designs Ltd** UKEAT/0661/02.

11. I have every sympathy with a longstanding and faithful employee when redundancy hits and the unfortunate selection that has to be made by employers. This case has been tried by an Employment Judge on evidence over three days. The result is not satisfactory to the Claimant, but no question of law arises which entitles me to intervene, to send it to a full hearing.

12. I am very grateful to Ms White for her very succinct submissions and helping me through what would have been a very lengthy skeleton argument of Ms Wood. I dismiss the appeal.