Appeal No. UKEATS/0003/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 25 June 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR P PAGLIARI

MR M SMITH OBE JP

MR RONALD FRANCIS — APPELLANT

PERTEMPS RECRUITMENT PARTNERSHIP LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RONALD FRANCIS (The Appellant in Person)
For the Respondent	MR. ALASDAIR HARDMAN (Advocate) Instructed by: Pinsent Masons LLP Princes Exchange 1 Earl Grey Street Edinburgh EH3 9AQ

SUMMARY

UNFAIR DISMISSAL – Dismissal/ambiguous resignation

An employee was employed by an agency which placed him in work with a client whose identity was specified in the contract of employment. When that client no longer had need for the services of the Claimant, he was offered the choice of 2 weeks' notice, plus redundancy pay, or 2 week's notice, with the agency seeking out fresh work with a view to his entering into a new contract to do that work. He chose the former. The Tribunal thought the termination of the employment was consensual, such that no claim for unfair dismissal could be maintained. It was held that the question to be asked for the purposes of unfair dismissal proceedings was whether the *contract of employment* had been terminated by the employer, not the similar question arising if the question had been the right to a redundancy payment, which (expressed broadly) is whether the *employment relationship* had been brought to an end. The ET had construed the contract as providing that the Claimant was to work for a specific client. It was right to do so. The contract by which the agency provided that the Claimant would work for that client ended; no party argued it was frustrated; the agency could no longer perform it. In the circumstances it was terminated by the agency. The choices offered to the Claimant both involved his being given notice.

An argument that "notice" and "redundancy" were loose terms, not intended to have their formal meaning, and that when HR wrote to the Claimant to tell him he could appeal against his redundancy and he exercised the right to do so, this was meaningless (since he had already asked to be given notice and to be paid redundancy pay) was rejected as unrealistic.

The appeal was allowed and a finding that there had been dismissal was substituted.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. The issue in this appeal is whether the Claimant was dismissed by his employer so as to found a claim potentially for unfair dismissal. An Employment Tribunal at Edinburgh, Judge Craig and members, decided on 17 October 2012 that the Claimant was not dismissed. He had chosen to leave the employment of the Respondent, so there was no unfair dismissal. A claim for a protective award under section 188 of the **Trade Union & Labour Relation Consolidation Act** to the effect that there had been no consultation as required was dismissed, there being no obligation to consult. Full Reasons were given on 2 November 2012.

The Essential Facts

2. We can state the central facts shortly. The Claimant was employed under a contract which ended as long ago as 28 December 2006. The reason why it has taken so long to reach this stage, on effectively a preliminary determination of a necessary pre-condition for the claim of unfair dismissal, is that there was an appeal by the Claimant against an earlier Tribunal decision. The grounds were procedural. The matter proceeded to the Inner House of the Court of Session. On 1 March 2012 the appeal was allowed and the matter remitted to a fresh Tribunal for reconsideration.

3. The Claimant was employed by Pertemps, who operate a recruitment business supplying contract labour to clients. Though employed by Pertemps, as was common ground, his specific assignment was as an administrative assistant to work under the direction of a specified client, Transco, to whose business SGN later succeeded. At a time while the Claimant was off sick SGN decided that the work in respect of which he was engaged for them would transfer from Midlothian to its existing staff at Hillingdon in Glasgow. The need for SGN to utilise the Claimant's services thus ended.

4. In the light of that, when the Claimant returned to work for Pertemps on 12 December 2006 he had a conversation with a Miss Robertson. She explained that there were two options. In paragraph 37 the Tribunal set them out:

> **"37 Depending on how you feel yourself, whether you are happy for Pertemps to keep on looking for another assignment for you elsewhere, and we do have other bits and pieces in at the moment or things coming up in the New Year, that we'll be happy obviously to speak to you about or … there might be an entitlement for you to a redundancy payment from Pertemps because of the work you have previously … for the last 2 ½ years … has come to a natural end."**

5. Paragraph 38 of the Tribunal's decision said this:

> **"38 She explained that in each option the Claimant would receive a payment of two weeks pay which she described as notice pay."**

6. This thus appears to be a finding that the Claimant had a choice presented to him by his employer. The choice was: option A, to be given two weeks notice on the basis that Pertemps would keep looking for alternative employment; or option B, to be given two weeks notice, but to be paid redundancy pay instead of Pertemps seeking an alternative employment for him. The language which Miss Robertson had used was that of "notice" and of "redundancy" with their connotations of dismissal

7. The Claimant at first thought he would accept option A but later changed his mind to option B, because he said he lacked faith that he would be engaged through Pertemps to work in a possible opening at the Scottish Parliament.

8. Two days after the meeting the Claimant emailed Miss Robertson to "confirm that I would like to be paid two weeks notice and Pertemps will continue to look for work for me";

this was therefore option A. At the same time Miss Robertson emailed him, thanking him for the confirmation saying:

> **"I can confirm that your two week notice period will commence on Tuesday 12th December, when you attended a meeting at the Pertemps office, and will continue until Tuesday 26th December 2006."**

9. The Claimant attended at the jobcentre. It became plain to him there that he would not receive unemployment benefit unless he were no longer in an employment relationship. On 28 December he emailed Pertemps to express no confidence that the Scottish Parliament would clear him for employment and to say that he should accept the three weeks redundancy money; therefore option B.

10. By a letter dated 3 January 2007 Pertemps wrote to the Claimant. The letter was written by an HR advisor, not Miss Robertson. It is formal in its terms. It said materially:

> **"Following your meeting of 12th December 2006 it is with regret that I confirm the position of Process Assistant will become redundant with effect from 12th December 2006 … Please treat this letter as formal notice of redundancy."**

11. It set out the calculation of a proposed redundancy payment and then said this:

> **"In accordance with your contract of employment you are entitled to two weeks notice, therefore your last date of employment will be recorded as 26th December 2006."**

12. The last paragraph of the letter told him that he had the right to appeal, "against the decision to terminate your employment". He exercised the appeal right there confirmed. An appeal followed, at the conclusion of which in February 2007 the regional manager confirmed the decision regarding the redundancy.

13. These facts were not significantly in dispute.

The Tribunal Decision

14. The Tribunal asked itself who had brought the contract of employment to an end. At paragraph 95, having set out citations from the case of **Birch & Humber v The University of Liverpool** [1985] IRLR 165 CA and **Burton Alton & Johnston v Peck** [1975] IRLR 87 it expressed its conclusion that, "… the parties mutually terminated the contract. There was no dismissal."

15. The Tribunal's reasoning was that the Claimant was under no pressure to end the contract (paragraph 98), there was in reality no real likelihood of work with and for the Respondent (paragraph 100), and that he could not claim Jobseekers Allowance whilst he remained an employee (paragraph 102). At no point however did the Tribunal consider the application of the statutory test in section 95 of the **Employment Rights Act** to the contract before it. It did, however, express views about that contract. Between paragraphs 14 and 20 it gave what it regarded as the proper interpretation of the contract. It set out at paragraph 15 that the Claimant had been employed to work for Transco under its direction though employed by Pertemps, that the Claimant's place of work was in St John's in Edinburgh, and noted that the contract provided that Pertemps might transfer the contract employee (the Claimant) to another location on a temporary or permanent basis for operational business reasons. The contract provided that if it were terminated Pertemps would take reasonable steps to find alternative employment for the Claimant.

16. At paragraph 20 the Tribunal said:

> **"Of those employed by the Respondent by September 2006 only one other employee was employed on the same contractual terms as the Claimant. All others were employed on contracts that did not name a specific client and which entitled the Respondent to place the employee with any client or on any assignment as its needs required."**

17. The distinction which the Tribunal drew between the Claimant's contract, specifying in its view a specific client, and the contract of others, which did not, was a matter to which it returned at paragraph 108. It was dealing there with the meaning of the contract, though in the context of the claim for a protective award under the 1992 Act, and commented that the evidence was clear that:

> **"… all but the claimant and one other employee working at Vantage Point were on contracts that would have entailed their being moved elsewhere so there was no basis for asserting a proposal to dismiss."**

18. In other words, the Tribunal took the view that the distinction between the Claimant's contract and that of other employees working for Pertemps in the general interests of SGN was that he (and the one other who shared the term that they worked for a specific client) potentially would be dismissed if the work at SGN came to an end, because in their case neither could assert a right to be moved or to move elsewhere, and nor could Pertemps do so without breaking the provision that the Claimant worked for SGN unless it had the consent of the Claimant to that variation.

19. The Tribunal in concluding as it did that there had been a mutual or consensual parting of the ways did not apply in any clear terms the analysis of the contract to which it had come. The matter is important, since section 95 of the **Employment Rights Act 1996** provides in subsection 1:

> **"For the purposes of this Part an employee is dismissed by his employer if … (a) *the contract under which he is employed* is terminated by the employer whether with or without notice." (emphasis added)**

20. The reference to "this Part" is to Part X, "Unfair Dismissal". There is a separate right to be paid a redundancy payment, which comes under Part XI, Chapter 2: virtually identical words to those which appear in section 95(1) also appear there in section 136:

> **"… for the purposes of this Part an employee is dismissed by his employer if … (a) the contract under which he is employed by the employer is terminated by the employer whether with or without notice."**

21. However, section 138 goes on to set out situations where the statute provides that, despite that definition, there is actually no dismissal where the contract is terminated: that is where the employee's contract is renewed or he is re-engaged under a new contract. If looked at colloquially, therefore, the question upon which a claim for unfair dismissal is predicated is whether the **contract** is terminated, whereas the question upon which the right to a redundancy payment depends might be put broadly as the **employment relationship** being terminated.

22. The focus thus for unfair dismissal is not upon whether the employee remains in the employment of the Respondent. It is whether the contract under which the employee was employed is terminated, and if so who terminated the contract. The interpretation which the Tribunal put upon the contract meant inevitably that as soon as SGN indicated that they had no further need for the services of the Claimant his contract with Pertemps could no longer be honoured, for the Tribunal's interpretation was that the contract required SGN as his client.

23. There was no Respondent's notice which put in issue the interpretation of the contract to which the Tribunal had come. That may be because Mr Hardman, who appeared for Pertemps and who has argued the Respondent's case with no little skill, submitted that the Tribunal had not come to such a conclusion. For the reasons we have already intimated we think it plain that the Tribunal did, but in the light of those submissions we thought it right to reflect on whether the Tribunal had indeed come to a correct conclusion. The construction of a contract is a matter of law and therefore it is open to an appeal court with a jurisdiction limited to points of law to review.

24. The contract provides under the heading, “Background” that Pertemps had been awarded a contract to supply contract employees to Transco Connections, “hereinafter referred to as the client”. Under the heading “Duties”, the contract employee (i.e. the Claimant) “agrees to work under the direction of the client in the execution of his/her duties.” The client was (or became) SGN. It was made clear that nonetheless he remained an employee of Pertemps.

25. Mr Hardman argues that the clauses which follow about the place of work (to which the Tribunal drew attention, as we have noted), mean that Pertemps could within the contract nonetheless assign the Claimant to another client. That in our view is not a tenable construction of this contract for these reasons. First the heading is “Place of Work”. The right to transfer the contract employee relates therefore not from one client to another, but from one place at which the work has to be done to another. The wording is carefully drawn. It reserves the right to transfer the contract employee, “To another location on a temporary or permanent basis, for operational or other business reasons”. It says nothing about transfer to another client.

26. The other clauses of the contract are consistent with the Tribunal’s construction. We agree with the Tribunal’s construction.

27. In his argument Mr Hardman, though submitting as he did that the contract permitted Pertemps to reallocate this Claimant to another client, accepted albeit reluctantly that the contract as it was would have to be varied for this to happen. He is right in that: but that reluctant concession demonstrates that the contract could not continue in force as it was once SGN had no further need of the Claimant’s services, and therefore had to be terminated unless rescued by the consent of the parties which it never was.

28. If the Tribunal had focused not upon the employment relationship, but upon the contract of employment, it could have reached no other conclusion but that that contract had come to an end without the Claimant having in any way consented to that taking place. It follows that the conclusion of the Tribunal is wrong. We suspect it committed the error, understandable in the particular circumstances of this case, of focusing upon the employment relationship and its continuation rather than on the contract which could not continue as it had before.

29. No one has suggested that the contract was in way frustrated. The contract was with Pertemps. Pertemps could in the circumstances no longer honour it. That was the background necessary to contextualise the conversations of 12 December to which we shall come: but we should add that the references in the contract to Pertemps making efforts to secure alternative employment are to efforts made without obligation, and therefore expressly of non-contractual effect - see under the heading, "Redundancy" - though in any event, if the issue had been the right to a redundancy payment and whether dismissal for redundancy was fair, we would expect an employer, particularly a responsible one such as Pertemps, to take appropriate steps to see if alternative work could be obtained. The guideline cases suggest it. None of that, however relevant it might be to rights on redundancy, could affect the issue of whether there was a dismissal or a consensual parting.

30. What we have said so far is sufficient to dispose of this appeal. There was no other conclusion on the facts set out and accepted by the Tribunal to which this Tribunal could come other than that the contract was terminated and that Pertemps could no longer honour its side of the bargain.

31. However, if matters had rested with the findings in fact which the Tribunal made as to the nature of the termination, we think that the Tribunal would have been in error there too. As we

have pointed out, its discussion was predicated effectively upon the Claimant having a choice. The choice the Tribunal appears to have envisaged was between his remaining in employment on the one hand (the Tribunal's option A) or receiving a redundancy payment coupled with notice payment (the Tribunal's option B). That depends upon a critical look at the discussions which occurred and the documents.

32. The Tribunal set out, perhaps not as clearly as it might have done, that the Claimant was given two options by Miss Robertson; see paragraphs 37 and 38. Where an employee is given two options, both of which involve dismissal, albeit the two options are distinguished by different terms upon which the dismissal is to be effected, the only sensible conclusion is that the dismissal is intended by the person offering those options. The position is illuminated by the cases to which the Tribunal referred, and by the useful discussion in **Optare Group Ltd v Transport & General Workers Union** [2007] IRLR 931 in which the Appeal Tribunal, presided over by Wilkie J, reviewed the case-law. The factual position may very from case to case. Arnold J in **Sheffield v Oxford Controls Company Ltd** [1979] IRLR 133 had set out, as recorded by Wilkie J that where an employee resigns, in circumstances in which that resignation is determined upon by him because he prefers to resign rather than be dismissed, having been threatened by his employer that if he does not resign he will be dismissed, the mechanics of the resignation do not cause it to be other than a dismissal. The principle is one of causation. In that example, the threat is the cause of the termination. He went on to observe:

> **"Where the willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which had been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him then we think there is no room for the principle to be derived from the decided cases. In such a case he resigns because he was willing to resign as a result of the offered terms which are to him satisfactory terms on which to resign. He is no longer impelled or compelled by the threat to dismiss or resign but a new matter has come into the history; namely that he has been brought into a condition of mind in which the threat is no longer the operative factor of his decision, and has been replaced by the emergence of terms which are satisfactory."**

33. There the Judge was contrasting two particular factual circumstances. In this area, as in so many in employment, each case must turn upon its own facts, but the principle may be expressed that the issue is determining on the evidence who it was that brought the contract to an end.

34. Even if we were wrong on our analysis of the contract, we here would have regarded the Tribunal's reasoning as flawed in taking a view of the meeting of 12 December which was simply not the view that it appeared to have expressed earlier in its own reasoning. Moreover, it is a view which we, for our part, regard as out of step with industrial reality.

35. When Mr Hardman addressed us he explained that Miss Robertson, in using the words, "notice period", must not or could not have meant "notice" in the terms of contractual notice. Plainly the Tribunal could not have so regarded it. What else was it? He speculated that it was the offer of two weeks' pay as a form of gratuitous payment by Pertemps in recognition of the service which the Claimant had had with SGN. It was empathetic. It had to be looked at in the matrix of fact, and it had to be recognised that the parties were using the loose language which employers and employees unfamiliar with the precise requirements of the law might well adopt. When the use of the word, "Redundancy" appeared, as it did on a number of occasions throughout a record of what Miss Robertson had said, that too was an expression used in a loose sense. The Tribunal must have concluded that she had not meant to say that the Claimant was indeed redundant because there was no work which Pertemps had for him to do at SGN. The word must rather have been referring simply to the end of an assignment, whilst Pertemps retained the ability within the contract to re-assign the Claimant elsewhere on some other client's business. He noted the Tribunal's reliance on the letter of 28 December 2006. It came in response to an email from Miss Robertson two days after the meeting confirming a "two week notice period" but that was used in the same loose sense.

36. The letter of 3 January 2007 from Mr Cox of HR, describing itself as a formal notice of redundancy, was a standard form letter which Mr.Hardman speculated was produced for this employee effectively because the button on the word processor was pressed. The matters it mentioned there did not a represent the reality of the situation. The right to have an appeal which appeared to be conferred by the letter, which right was in appearance exercised, was, as the Tribunal found, no exercise of any actual right to appeal because the Claimant had not been dismissed in the first place.

37. These submissions do not seem to us to be realistic. They involve speculating that words do not mean what they say on their face, and the appeal process had no actual significance, though the parties at the time pretended it did.

38. Despite this, it is right to note that in the Claimant's own documentation he referred to his having made a choice. He now presents this as the choice between two dismissal options, one with redundancy pay and one without, but that was not necessarily always the way in which he put it. At times he seemed to have been arguing that he should have been regarded as continuing in employment. It is doubtless that these difficulties which placed the Tribunal in the position it was in when attempting to unravel the events of 2006; complicated no doubt by the agency and contract worker relationships which underlay it.

39. All that said, we have concluded that the logic of the Tribunal proceeded on a basis which is not consistent with its own reasoning. It certainly does not explain how it regarded the words "notice" and "redundancy" as having a meaning other than the obvious, nor set out an understanding of the formal letter consistent with its overall factual conclusion that the

termination of employment was consensual. As we have indicated, we have come to the conclusion that the result is simply wrong in law.

Conclusion

40. In conclusion therefore this appeal must be allowed. The basis upon which we have decided is covered by the grounds of appeal, in particular at paragraph 2. The parties are agreed that this decision on appeal cannot dispose of the claim for unfair dismissal, which must continue upon the basis that there was a dismissal. It will be for the employer to show the reason for that. The parties are agreed that that matter should return to a fresh, differently constituted Tribunal.

41. We say nothing about the likely outcome, save that it is plain to us that the amount of money at stake may not be high. We would have hoped that the parties would, even before now, have come to terms. We recommend mediation. Though Pertemps say through Mr Hardman that that has been offered, the Claimant for his part does not accept that it has, but both parties are before us agreed that mediation would be sensible if it is approached in the proper spirit.

42. Our formal order, albeit with a recommendation for mediation, must be remission to a fresh Tribunal to consider the case on the basis that there has been a dismissal.