Appeal No. UKEAT/0007/13/RN
UKEAT/0008/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 June 2013

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

BARONESS DRAKE OF SHENE

MR T HAYWOOD

BAKERS FOOD & ALLIED WORKERS UNION — APPELLANT

MR D IPPOMA — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS HELEN GOWER (of Counsel) Instructed by: Thompsons Solicitors The St Nicholas Building St Nicholas Street Newcastle upon Tyne Northumberland NE11 1TH
For the Respondent	MR MICHAEL SALTER (of Counsel) Instructed by: Quality Solicitors Hill & Abbott Threadneedle House 9-10 Market Road Chelmsford Essex CM1 1XH

SUMMARY

UNFAIR DISMISSAL – Mitigation of loss

PRACTICE AND PROCEDURE – Costs

In their decision on liability the Employment Tribunal held that the Respondent trade union had not established that the reason for the Claimant's dismissal was redundancy. The dismissal was unfair. They went on to hold that the 'redundancy' was a 'ruse' to terminate his employment. The Employment Tribunal relied upon the 'ruse' finding to hold that the Claimant had not acted unreasonably in refusing to attend an interview with the Respondent to effectively re-apply for his job. They therefore found that he had not failed to mitigate his loss. A maximum compensatory award was made. The 'ruse' finding was also relied upon to hold that the Respondent had acted unreasonably and that a costs order should be made against them.

The finding of unfair dismissal was not appealed. The conclusion that 'redundancy' was a 'ruse' to dismiss the Claimant was not **Meek** compliant. The reader of the Judgment could not know the reason for the finding. The Claimant had alleged in his ET1 that his dismissal was connected with his candidacy for the post of General Secretary. The Employment Tribunal expressly declined to make any findings in relation to this allegation. Reference was made by the Employment Tribunal to evidence about dissatisfaction with the Claimant's performance but there was no express finding that this was the reason for dismissal nor did the findings of fact necessarily lead to such a conclusion. 'Ruse' was a key finding in the award of compensation and costs. The finding was not explained. Appeals allowed. Compensation and costs remitted to a different Tribunal for determination having regard to relevant matters including their findings on the reason for dismissal (finding that it was not redundancy to stand), whether the Claimant failed to mitigate his loss and in the light of the reason for his dismissal, should an award of costs be made against the Respondent. All finding of fact in the three Judgments were on liability, remedy and costs to stand save that specified passages in those Judgments relating to the finding of 'ruse' were to be removed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. The Bakers Food & Allied Workers Union, the Respondent, appeals from two Judgments of an Employment Tribunal on a claim for unfair dismissal brought by Mr Ippoma, the Claimant. Mr Ippoma was one of two former employees whose claims were heard together. Mr Ippoma was the Second Claimant but in this judgment we refer to him as "the Claimant". The two Judgments under appeal are a remedies Judgment sent to the parties on 13 January 2012 (the Remedies Judgment), and a costs Judgment sent to the parties on 30 March 2012 (the Costs Judgment).

2. A Notice of Appeal from the Judgment on liability sent to the parties initially on 11 November 2011 and corrected and sent in corrected version on 6 December 2011 (the Liability Judgment) was amended by permission of HHJ Peter Clark on 16 January 2012. Ms Gower for the Respondent does not challenge the finding of unfair dismissal in that Judgment but challenges paragraph 21.1 in that Judgment, which is relied upon by the same Tribunal in their Remedies Judgment and in their Costs Judgment. She rightly recognises that an appeal does not lie against the reasoning in a judgment where the order made is not appealed. Such an appeal would be academic. Accordingly, an appeal against the Liability Judgment is not pursued. However, paragraph 21.1, which is a key part of that Judgment, was relied upon in the Remedies Judgment and in the Costs Judgment, and incorporated in those Judgments to arrive at the orders which are under appeal.

Outline facts

3. The Claimant brought claims against the Respondent of unfair dismissal and victimisation under the **Race Relations Act 1976**. He initially also brought a complaint of race

discrimination. His claim of unfair dismissal was heard together with that brought by a Miss Christou. Miss Christou was employed on 1 June 2004, and dismissed on 31 March 2010. She was the organising secretary of the Respondent. The Claimant was employed on 1 June 2002 and was also dismissed on 31 March 2010. At the time of his dismissal he was a project manager in the Respondent's learning services project. This was an education project which provided training to trade union members. The funding for the project came from a third party, the Union Learning Fund. The fund was administered by Union Learn on the Government's behalf.

4. The Employment Tribunal found that at the material time there were six project workers working for the Respondent in the Union Learning Fund operation and a project manager. Funding for the project had been provided by agreements lasting two years with Union Funding. Funding had been provided up to 1 April 2010. As for future funding, the Employment Tribunal set out evidence given relating to a number of meetings between the Respondent and Union Funding. A number of observations and findings were made by the Tribunal in their Liability Judgment in relation to the progress of those discussions and the role played by the Claimant in them.

5. It appears that the Union Funding project had not been conducted by the Claimant to the satisfaction of Union Funding. However, the Employment Tribunal held in paragraph 15.7 that the Tribunal was satisfied that when the criticism from Union Funding became apparent it did come as a considerable surprise to Mr Marino, the General Secretary.

6. So far as the bidding for further funding for the two years from 1 April 2010 is concerned, in paragraph 15.9 of the Employment Tribunal's Judgment it is recorded that on 10

December 2009 Mr Marino wrote to the Claimant saying that he had been getting complaints from his Executive Committee that the bid documentation was always presented to them very late in the day, giving them little time to consider it and make relevant changes. It appears that on 16 December 2009 the Respondent approved bid documentation which had been submitted for approval by the Claimant. When that documentation was submitted to Union Funding it was rejected. Further attempts were made to obtain funding and the Claimant continued to be involved in the bid process. The Tribunal record that on 3 February 2010 the Claimant:

> **"[…] attended a meeting with Union Learning Fund in Liverpool to try to resolve matters. He had received from them seven recommendations as to how the project might be acceptable, which included reducing the project management on the matter; combining the finance and administrative posts; and reducing the number of project workers and generally downsizing the project."**

7. On 4 March 2010 a meeting took place with Union Funding at Congress House at which the Claimant was present. Following that meeting, a redraft of the Respondent's proposal was made. The Employment Tribunal set out an exchange of emails between Union Learning and the Respondent, which track the progress of the bid and its eventual success. It appears that on 29 March 2010 the General Secretary wrote to the fund providers, saying:

> **"[…] I trust the reduction in staff into one project manager and five project workers and the holding of pay to the same as the old bid shows our commitment to meet Union Learning concerns in this area."**

On 30 March the response came to the General Secretary of the Respondent that the funders were now in a position to approve the project bid in line with "the changes submitted yesterday".

8. As is recorded in paragraph 15.16 of the Tribunal's Judgment, at an earlier stage the funders had suggested to the Respondent, that "rescindable termination notices should be

given” to the staff. In accordance with those rescindable termination notices, the employment of both the Claimant and Miss Christou came to an end on 31 March 2010. The Claimant was invited to attend an interview for the post of Project Manager after that date. He did not attend or apply for the post. Miss Christou was invited to attend an interview for the post of Project Worker. She too did not attend.

9. The Claimant presented a claim for unfair dismissal on 28 June 2010 in which he also made a complaint of race discrimination. In his ET1, he alleged:

> **“7. Given that funding had been secured there was in fact no redundancy situation. The Claimant’s position was not redundant as there was no diminution in the Respondent’s need for employees to carry out the kind of work he was employed to do at that workplace.”**

10. In paragraph 8 the Claimant set out a number of procedural failures by the Respondents and their failure to consider or provide alternative employment opportunities and/or training so that he might be redeployed to another position. In paragraph 9 the Employment Tribunal held:

> **“In the circumstances the Claimant contends that he was unfairly dismissed.”**

11. The Claimant added in his ET1:

> **“10. The Claimant is currently standing to be the General Secretary of BFAWU. The election is due to commence on 12th July 2010 and the result announced after 9th August 2010.**
>
> **[…]**
>
> **12. It is the Claimant’s primary case that he was unfairly dismissed for the reasons set out above. Further and/or alternatively the Claimant will contend that he was made redundant not for the reasons specified by the Respondent, but because of an underlying desire to frustrate the Claimant’s campaign to become General Secretary of the Union. The Claimant will contend that he would not have been made redundant had he not stood as a candidate for election as General Secretary.”**

The Claimant also presented a victimisation claim under the race relations legislation.

12. The Claimant withdrew his claim of race discrimination. His claim of unfair dismissal was heard with that of Miss Christou on dates between 18 and 25 July 2011. There were three hearing days, other days being occupied by reading and deliberation by the Tribunal. The Tribunal determined that the victimisation claim should be heard at a later date.

The Liability Judgment

13. The Employment Tribunal held that Miss Christou's dismissal was unfair. Her post was redundant but suitable alternative employment as a Project Worker was available and she was not offered this post. The Employment Tribunal held that the Claimant was unfairly dismissed. It was held that there was no redundancy affecting the Claimant. There is no appeal from the finding of unfair dismissal and no challenge to the conclusion that his post was not redundant.

14. At paragraph 21.1 the Employment Tribunal made observations which are at the heart of this appeal:

> **"21.1 So far as the second claimant is concerned, the tribunal is of the view, on the findings of fact found by the tribunal regarding the history of the funding, that funding was available for 2010/2011 at 31 March 2011, as it had been on previous occasions and that we regret to say that this was merely a ruse by the first respondent. It was quite obvious when we have extracted the relevant emails that Union Funding had made it quite clear to the first respondent that payment of staff would occur from 1 April as it had on previous occasions. There was no redundancy situation in relation to the second claimant's job. The project manager role for 2010/2011 would be exactly the same as the project manager role carried out by the second claimant up to 31 March 2011. Union Funding had specifically guaranteed the payments in Catherine McClennan's email on 31 March 2010 at 9.51.**
>
> **21.2 In those circumstances we find that Second Claimant was also unfairly dismissed."**

The Tribunal went on to hold that there could be no contributory fault by either the Claimant or Miss Christou.

15. Another material finding made by the Employment Tribunal was in relation the Claimant's suspicion or complaint that he may have been dismissed because he was running for the post of General Secretary of the union. At paragraph 14 the Tribunal observed:

> **"It is also important for the purposes of this Judgment to say that there was a relevant background to these complaints, namely the election of a new General Secretary. Mr Marino was coming up for retirement. The Second Claimant was a candidate to be General Secretary as was Mr Draper, whose unofficial campaign manager was the Second Respondent. It should also be mentioned that, because the election is inextricably linked with the victimisation claim, the Tribunal will not make any relevant findings of fact in that regard either."**

16. The victimisation claim was dismissed in a decision to the parties on 13 January 2012. At paragraph 14 the Employment Tribunal rejected the Claimant's evidence regarding victimisation and held that they were driven to the conclusion that the allegation of victimisation was false and that the Claimant did not make this allegation in good faith. The Tribunal held that the race discrimination claim, which was relied upon in the victimisation claim as the protected act, was not such an act because the claim was made not in good faith.

17. The Liability Judgment, having initially been promulgated on 11 November 2011, did not include the passage in paragraph 21.1 relating to 'ruse'. The Employment Tribunal sent out a corrected judgment on 6 December 2011 in which the passage in 21.1 appeared as it is in the Judgment before us. It included the word 'ruse'. The remedies hearing started on 16 November 2011. It is apparent from the Remedies Judgment that an issue arose as to the meaning of 'ruse' in the Tribunal's Liability Judgment. It may well be that this was because the word 'ruse' was used orally by the Employment Tribunal but at the time of the remedies hearing in November 2011, it was not in the original Liability Judgment and the corrected Judgment had not yet been circulated.

18. In paragraph 4 of the Remedies Judgment, it is stated:

"Ms Gower, on behalf of the Respondents, put to the Tribunal alternative meanings in relation to the Tribunal's comments that we felt the whole exercise of dismissing the Claimant was a ruse. If that part of the Tribunal's oral Judgment (unfortunately excluded from the written reasons but now included under a certificate of correction) was unclear, the Tribunal is now confirming that the Tribunal concluded this was an invented redundancy situation, deliberately created by the First Respondent to get rid of the Claimant, who at the time was fully aware that there was no redundancy because the funding had in fact been guaranteed by Union Learning. That being the case, we now turn to consider compensation."

19. At the remedies hearing the Respondent advanced the argument that the Claimant had failed to mitigate his loss because he had not responded to an invitation to be interviewed for the post of Project Manager. The Employment Tribunal rejected that argument. They developed their reasoning for this conclusion in paragraph 3 of the Judgment:

"Our reasoning is, first of all, that it is quite clear to the tribunal that there has been a total breakdown in trust and confidence between the claimant and the senior figures in the first respondent and, second, we cannot see how the claimant could possibly have felt that he would be treated fairly in the circumstances that had happened to him at that time. We take into account, of course that the allegations of the second and third respondent had not occurred at that particular time. We find that it has not been shown by the first respondent that the claimant did act unreasonably in turning down the job offer."

It is plain from that paragraph and from paragraph 4 that this Employment Tribunal was relying on its finding made in the Liability Judgment at paragraph 21.1 that the exercise of dismissing the Claimant was a ruse. The Tribunal amplified their reasoning in paragraph 21.1 by saying that they had concluded that this was an invented redundancy situation.

20. The Employment Tribunal awarded a compensatory award of the statutory cap, namely £63,500 together with a basic award. The hearing took place on 16 to 18 November 2011 and the judgment sent to the parties on 13 December 2011. On 16 December 2011 a review application was made on behalf of the Respondent. The reasons for the application were stated to be as follows:

"The key factual finding that underpinned the finding of unfair dismissal in Mr Ippoma's case was that there had been a 'ruse' to get rid of him. The Respondent considers that it is unable

adequately to identify or understand the reasons for this finding as it is not adequately explained by reference to the evidence before the Tribunal."

The application for review was rejected by the Employment Tribunal by a decision sent to the parties on 16 January 2012. The Employment Tribunal said at paragraphs 3 and 4:

> **"3. The basis of the review application is that the Judgment does not comply with the authority of Meek v City of Birmingham District Council [1987] IRLR 250.**
>
> **4. The Tribunal is satisfied that the Judgment as a whole (and in particular the whole of paragraph 21.1) is Meek compliant."**

21. The Tribunal then considered applications by the Respondent for costs against the Claimant and by the Claimant for costs against the Respondent. The Claimant's victimisation claim had been dismissed and his race discrimination claim withdrawn. His unfair dismissal claim had succeeded. The Employment Tribunal awarded the Claimant costs against the Respondent in the sum of £6,600. At paragraph 12 of the Reasons, the Employment Tribunal held:

> **"We do not consider the conduct of the First Respondent was unreasonable(sic) and the Tribunal has considered it appropriate to exercise its discretion to make an award of costs against the First Respondent in favour of the Second Claimant. In particular we refer to paragraph 21.1 of our Judgment sent to the parties on 6 December 2011."**

Submissions of the parties

22. Ms Gower submitted that the basis of the Remedy Judgment and the Costs Judgment is the conclusion expressed by the Employment Tribunal at paragraph 21.1 of the Liability Judgment that the dismissal of the Claimant for redundancy was a ruse. She said that conclusion, which was at the heart of both Judgments under appeal, does not give the parties sufficient reasons to enable them to know why the redundancy was held to be a ruse. The basis for the decisions is simply not **Meek** compliant. This point loses nothing by its simplicity.

23. Further or alternatively, it was said that the conclusion under challenge, namely that in paragraph 21.1 of the Liability Judgment, was perverse. A number of reasons were given to support that contention. However, Ms Gower very fairly and properly, pointed out that by reason of the inadequacy of the reasoning for the conclusion under challenge, it was somewhat difficult to analyse how it was perverse. That difficulty illustrates the defect in the reasoning supporting the important finding at paragraph 21.1.

24. Mr Salter, for the Claimant, contended that on a fair reading of the Employment Tribunal's Judgment in the liability hearing, there was sufficient evidence to support their conclusion that the reason given for the dismissal, alleged redundancy, which was found not to be such, was a ruse. Importantly, he points out that there was no redundancy situation. At the time of the dismissal it was known not just by the Respondent but by the Claimant himself that funding would be available for the following two years going forward and that the post occupied by the Claimant was not redundant.

25. Mr Salter also referred to other facts set out by the Tribunal in particular those which related to criticism of the way in which the Claimant performed his job. He suggested that it was implicit in the Tribunal's findings that the purported redundancy dismissal was, in fact, a dismissal to get rid of an employee who it was thought was not performing satisfactorily.

Discussion and conclusion

26. It is well established that an Employment Tribunal is required to give reasons for their decision. Parties must know why they have either won or lost. The case of **Meek v City of Birmingham District Council** [1987] IRLR 250 is so well known that **Meek** has almost become an adjective in the lexicon of employment lawyers so it is that it is said that

a Judgment is not **Meek** compliant. However, since this attack is at the heart of the appeal, it is worth setting out the passage in **Meek** on which reliance is placed and which is particularly apposite in this case. In paragraph 8 Bingham LJ held:

> **"It has on a number of occasion been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must 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, and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."**

27. At the heart of the appeals against these two decisions is the finding by the Employment Tribunal in the Liability Judgment at paragraph 21.1 that the dismissal of the Claimant asserted to be for redundancy, was, "Merely a ruse by the First Respondent". The Employment Tribunal found that there was no redundancy situation in relation to the Claimant's job. In those circumstances, as the Respondent had not established a reason for dismissal within the **Employment Rights Act 1996** section 98(1)(b) the Employment Tribunal found that the Claimant had been unfairly dismissed. Rightly there was no challenge to that conclusion by the Respondent on appeal.

28. The Employment Tribunal relied upon the finding that the exercise of dismissing the Claimant for alleged redundancy was a ruse to conclude that there had been a total breakdown of trust and confidence between the Claimant and the Respondent and therefore that the Respondent had not shown that the Claimant acted unreasonably in turning down their offer of the job. Accordingly they made no finding that he had failed to mitigate his loss. Further, the Employment Tribunal relied upon their finding in paragraph 21.1 to conclude that the conduct of the Respondent was unreasonable. It was on this basis that the Employment Tribunal

exercised their discretion to order the Respondent pay to the Claimant costs in the sum of £6,600.

29. The finding that redundancy as the reason for dismissal was not established is not challenged. Such a finding leads to a finding of unfair dismissal. But the finding of 'ruse' goes further than this. What was the 'ruse' and what was the improper motive behind the decision to dismiss? Why was the Claimant dismissed? These are important questions which are not answered in the Employment Tribunal's Judgment. In our judgment, they are necessary questions to be asked and answered to support the conclusion expressed by the Employment Tribunal that the dismissal for purported redundancy was a 'ruse'. The fundamental decision of the Employment Tribunal that the dismissal for purported redundancy was a 'ruse' is not compliant with the requirement to give proper reasons for a decision. The Judgment on remedy and on costs depends upon the finding of 'ruse' in the Liability Judgment. Accordingly, in our judgement, neither the Remedy Judgment nor the Costs Judgment is compliant with **Meek** in this regard. The appeal is allowed on this ground.

30. Turning to the second ground of appeal, perversity. Ms Gower rightly acknowledged the difficulty in advancing this ground because the Employment Tribunal did not identify the basis for their conclusion that the purported redundancy dismissal of the Claimant was a ruse. Ms Gower referred to a number of other matters on which she relied to advance the perversity ground of appeal. However, having regard to the fact that we are allowing the appeal on the **Meek** ground, it is not necessary to consider the perversity ground. Not only is it not necessary but it is also not possible to consider and properly decide the perversity ground given the absence of reasoning on the point at issue in this appeal.

31. This matter is to be remitted to a differently constituted Employment Tribunal. We will invite final consideration by the parties of the terms of that remission. In directing that the matter goes to a differently constituted Employment Tribunal. We have in mind, the unreported review of the judgment in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 in EAT/0637/05 in which an initial decision to remit to the same Employment Tribunal was reversed.

32. This Employment Tribunal was given an opportunity to explain the basis for their key finding which is under challenge in this appeal. That was done by the very proper review request by the Respondent. That request was turned down on the basis that the Tribunal Judge said that the key finding was **Meek** compliant. We have found that it was not **Meek** compliant. Further, it is clear from paragraph 4 of the Remedies Judgment that a further attempt was made to obtain clarity as to the meaning of the key passage in the Liability Judgment which, in our respectful judgment, was inadequately explained. In those circumstances, it would not be just or appropriate to send the matter back to the same Employment Tribunal. Accordingly, it is to be remitted to a fresh Employment Tribunal on the basis that the finding of unfair dismissal stands with the finding that redundancy was not established to be the reason for dismissal. Those findings remain in place.

33. What will be material for the fresh Employment Tribunal to consider and decide upon is the real reason for dismissal. Ms Gower has set out in her skeleton argument four questions to be asked by the Tribunal on a remission but we would like to canvass with both counsel a precise formulation of the terms of remission.

34. The orders against the Respondent on remedy and costs are set aside. Those matters are remitted to a fresh Employment Tribunal to decide remedy and costs in light of a decision to be taken by them on the reason, which has been held not to be redundancy, for the Claimant's dismissal. All other findings of fact to stand save for the words from "we regret to say" up to and including "extracting the relevant emails that" in paragraph 21.1 of the Liability Judgment, paragraphs 3 and 4 of the Remedies Judgment and paragraph 12 of the Costs Judgment.