Appeal No. UKEAT/0469/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 April 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR T HAYWOOD

MRS L S TINSLEY

MR P BIRD — APPELLANT

UNIVERSITY OF BRISTOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LAURA PRINCE (of Counsel) Bar Pro Bono Unit
For the Respondent	MS SARAH EMBLETON (Solicitor) Messrs Burges Salmon LLP One Glass Wharf Narrow Quay Bristol BS2 0ZX

SUMMARY

PRACTICE AND PROCEDURE - Perversity

The Claimant's case was that he was offered work for a minimum 5 year period. The Tribunal rejected this case on the facts. It was argued that the Tribunal's conclusion was perverse.

Held: it was not perverse. **Yeboah v Crofton** [2002] IRLR 634 applied.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Mr Peter Bird ("the Claimant") against part of a Judgment of the Employment Tribunal sitting in Bristol, Employment Judge Mulvaney presiding, dated 16 January 2012. Following a three-day hearing, the ET dismissed his claims of unfair dismissal, age discrimination and entitlement to a redundancy payment. At a hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993** the appeal was permitted to proceed to this full hearing on a single ground.

2. The ET rejected the Claimant's case that there was an agreement when he was employed that his minimum term of employment would be five years. The Claimant argues that the ET was perverse to reject his case on this point. He says it was supported by an email dated 7 April 2008, which the ET had no legitimate ground for doubting; he says that the ET discounted for no good reason two later emails from members of the interviewing panel which also supported his case.

3. It is important, in order to understand the submissions that we received, to see how the case for each party was put during the proceedings before the ET. We shall first outline this, then turn to the ET's reasons, then set out the submissions of the parties and our conclusions.

The parties' case before the ET

4. The Claimant was employed by the University of Bristol ("the Respondent") from 28 April 2008 until 31 July 2011 when he was 65 years of age. He was a contracts engineer within the Respondent's estate services department. Prior to his appointment he was interviewed by a panel of three members of the Respondent's management. The panel

consisted of Mr Haddrell, head of administration and system manager; Mr Harvey, who was to be the Claimant's line manager; and Mr Sammonds. Following this interview the Claimant was sent, and signed, a letter of appointment dated 8 April 2008 with attached terms and conditions. The Claimant says that this letter arrived on 18 April 2008; he signed and returned it. The letter makes no reference to any minimum term of employment.

5. In April 2010 the Claimant expressly mentioned the existence of a minimum-term contract in a letter to the Respondent. He referred to "a detailed interview and subsequent email and telephone conversations". He said:

> **"It was therefore agreed that I would work a minimum of five years with possible further extensions (subject to ill health or senility not becoming a problem). This promised term of office was one of the principle factors [sic] in my acceptance of the offered post."**

6. The Respondent replied to this letter; it did not give the confirmation he sought. It said that there was no guarantee that working beyond 65 would be agreed and that no manager would be able to agree this at the recruitment stage.

7. In 2011 the Claimant emailed both Mr Harvey and Mr Sammonds seeking their support for his position. His emails to them did not go so far as to say that during the interview there was an agreement for a minimum term of five years; rather, that:

> **"[…] I was looking for a five year term anyway and this appeared to be more acceptable to you."**

8. Mr Harvey emailed in reply, saying:

> **"You were advised by me, that providing there were no issues regarding your performance, that [sic] at age 65 your contract of employment would be extended in one yearly extensions to a maximum of 2 years, taking you to age 67.**

This was also a factor in your appointment, allowing the University to have a period of stability within the role, as the post was tasked with introducing new systems and updating the existing processes.

The policy of extending contracts of employment was successfully utilised within the department."

9. Mr Sammonds confirmed what Mr Harvey said. He added:

"Due to the nature of the role I expected a need of at least 5-years not just for the considerable learning time involved but also time to formulate a strategy to accommodate new systems and ideas to cope with the ever changing University requirements and the so called regulatory issues. In my opinion a term of just 3-years would not have been adequate."

10. In his claim form the Claimant put his case in the following way:

"1. I attended for interview on 4-Apr-08 (Chair – Tony Harvey, with Gordon Sammonds and Ian Haddrell".

2. My age and possible service length were discussed in depth, and it was agreed that I would work for a minimum of five years until 31-Jul-13, with annual extensions thereafter subject only to my ability to continue to work.

3. This agreement therefore became a verbal contract which is wholly binding on both parties.

4. Both Tony Harvey and Gordon Sammonds have given email confirmation of this agreement. These will be amended into statements prior to any Employment Tribunal Hearing.

5. An offer letter dated 8-Apr-09 was received and states 'the terms are set out in the offer letter … and particular terms appended to it, form your contract of employment'. I signed and returned the offer letter on 18-Apr-08. These documents make no mention of an enforced retirement age of 65."

11. Pausing for a moment, it will be seen that the Claimant's case as put in his claim form relied on a verbal contract made at the interview on 4 April 2008. It was not suggested that the agreement was made in writing or that it was made after the interview. When the Claimant subsequently disclosed the documents on which he relied, he produced for the first time a copy of an email dated 7 April 2008 which on its face appeared to have been sent to him from Mr Harvey. The email confirmed an offer of the post of contracts engineer. It said that the terms of employment would be sent by personnel services "based on the following details already agreed with you at your interview". One of those details reads as follows:

"End Date

A five year period is agreed, subject to the initial probationary period being completed satisfactorily with possible further extensions as and when agreed"

12. The email continued:

"I trust that with the issue of this email you will be able to terminate your present employment in an orderly manner, so as to join us on the 28th April 2008 as agreed."

13. In his witness statement the Claimant did not say that he was offered or accepted a five-year minimum term during interview. He said, rather, that Mr Harvey and Mr Sammonds "were happy to accept a five year target period" to achieve the objective of reforming the Respondent's maintenance contracts. He said that there was no subsequent telephone call between him and Mr Harvey that led to the email offer on 7 April. He said he telephoned Mr Harvey back and on the basis of the offer agreed a start date of 28 April. This remained the Claimant's position at the hearing. He confirmed in cross-examination that he was not saying that the agreement for a minimum term was made during the interview.

14. The Respondent did not accept that there was any agreement for a minimum period of five years. The Respondent called Mr Haddrell, the one remaining member of the panel in their employment, who said he had no recollection of any discussion along those lines at the interview. In a witness statement from Mr Pretty, served before the hearing, it was made clear that the Respondent was sceptical about the email. The Respondent did not call Mr Harvey; nor did the Claimant.

The ET's reasons

15. The ET dealt with this issue at some length. We think it is necessary to set out an extensive passage from the ET's Reasons:

> **"4. The claimant's employment started on 28 April 2008. He had attended for interview on 4 April 2008. The claimant's evidence at this appeal against dismissal and in the statement in his claim form for these proceedings was that it was agreed at interview that his employment would be for a minimum term of 5 years. In the course of the hearing the claimant's case changed and he did not rely on an oral agreement having been made at interview that his appointment would only be for a minimum 5 year term. We accepted that there was discussion at interview of the fact that at 62 the claimant was nearing retirement age and that it would be preferable for both him and the respondent if he were to work for more than three years. Mr Haddrell's evidence to the tribunal was that he did not recall that discussion at the claimant's interview, at which he was present, but that it could nevertheless have taken place. In addition, the claimant produced emails written at his request in 2011 from the two other interviewers, Mr Harvey and Mr Sammonds, which said that it would be possible for the claimant under University policies and procedures to work beyond the age of 65. Those emails did not confirm that there was a binding agreement that the claimant would work for a five year period. We found on the basis of the evidence that we heard that there was no agreement made at interview that the claimant's minimum term of employment would be 5 years.**
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> **5. Mr Harvey was the claimant's line manager prior to his retirement and the subsequent appointment of Mr Hyde. The claimant's evidence was that following his interview he had a series of email exchanges with Mr Harvey which culminated in an email contained in the Bundle at page 35, purportedly sent by Mr Harvey to the claimant on 7 April 2008. The email confirmed the offer to the claimant of the post and stated that the terms of the employment would be sent to him by personnel services based on the details already agreed with the claimant at his interview. A list of terms followed that statement and included: 'end date; a 5 yr period is agreed subject to the initial probationary period being completed satisfactorily, with possible further extensions as and when agreed'.**
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> **6. The claimant relied on his email as evidence of the binding agreement he had with the respondent to work for a minimum period of 5 years. The respondent's evidence was that it had no record of the email disclosed by the claimant and that it was extremely unlikely that Mr Harvey would have made such an agreement with the claimant as it would have exceeded his authority. Ms England's evidence was that the respondent had strict procedures on fixed term contracts which it entered into only in limited and specified circumstances. It was her evidence that such an agreement would not have been followed by or endorsed by personnel. It was Ms England's evidence which we accepted that personnel had no knowledge of the email or of the agreement.**
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> **7. The respondent doubted the authenticity of the email from Mr Harvey produced by the claimant, for a number of reasons. Firstly, it was inconsistent with the form completed by Mr Harvey at the end of the claimant's interview, which noted the claimant's appointment as permanent as opposed to fixed term and did not indicate any of the limited circumstances that might have applied for a fixed term contract to be agreed. Secondly, the other terms detailed in Mr Harvey's email relating to hours and salary review were inconsistent with the standard terms that would apply to someone of the claimant's grade. Thirdly, the existence of the email had not been referred to by the claimant at any point in the course of his employment to the five year term agreement he claimed to have, he made no reference to a written agreement. In fact he used equivocal terms when referring to the minimum 5 years term, such as 'target period' and 'preferred period'. The email in question was only produced at disclosure. Fourthly, when emailing Mr Harvey to ask him to confirm the agreement in 2011, the claimant did not refer to an email but to discussions at interview. He said in the email to Mr Harvey that he had stated at interview that 'in fact I was looking for a 5 year terms anyway and this appeared to be more acceptable to you'. There was no reference a firm agreement that that was the case [sic].**
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> **8. The Tribunal concluded on the evidence that it heard that the email disclosed by the claimant from Mr Harvey dated 7 April 2008 could not be relied upon. The reasons that it**

> **reached that conclusion were those put forward by the respondent, which I have just summarised, and also the fact that the claimant was unable to provide any further evidence to authenticate the document. For instance, he said in evidence that it was part of series of emails but when asked to produce the other emails, he saud [sic] they were deleted and so he was unable to produce them. He was asked to produce metadata to establish the provenance of the email. The claimant is proficient in computer software so this request should not have created a problem but he was unable to produce any authenticating information. The claimant's evidence about the email was inconsistent. He said he had a hard copy of the email in his file of documents relating to his employment but had not been able to find that document in the file prior to its disclosure in these proceedings. When asked in the Tribunal if he could find it in the folder which he had brought to the tribunal, he was able to locate it very quickly.**
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> **9. For all these reasons, we found the claimant's evidence on this point to have been unconvincing and we were therefore not satisfied that the purported email from Mr Harvey dated 7 April 2008 could itself be relied upon."**

16. The ET went on to hold that the Claimant was bound by the offer letter that he signed on 18 April 2008. That offer letter incorporated by reference terms and conditions, including a retirement age provision that the ET found was contractually binding upon the Claimant. In its conclusions the ET said (paragraph 26):

> **"We firstly considered what were the terms of the claimant's employment contract? On the basis of the facts that we found we concluded that the terms of the claimant's contract were as set out in the claimant's offer letter of 8 April 2008 and the standard terms and conditions referred to in that offer letter. There was therefore no concluded agreement that the claimant would work for a minimum term of 5 years, although this was discussed by Mr Harvey and the claimant at interview and we accepted that he was told that working beyond his normal retirement age might be a possibility."**

Submissions

17. We should record that in a skeleton argument prepared before Ms Laura Prince came into the case it was submitted that it was perverse for the Tribunal to have found that the Claimant had not been offered on 4 April 2008 a minimum period of five years' employment with the Respondent. Ms Prince developed submissions on the Claimant's behalf. She argued that the ET was perverse to reject the Claimant's evidence that the email dated 7 April was authentic. She pointed out that this was a serious finding for the Tribunal to make and that there was no specific evidence to contradict what the Claimant said. She took us through the Tribunal's reasoning in an attempt to convince us that it was perverse in the legal sense of the word.

18. She further argued that the Tribunal did not make any sufficient reference to the later emails of Mr Harvey and Mr Sammonds. She submitted that there was no proper basis for rejecting them as important supporting material for the Claimant's account and that the Tribunal's reasoning in this respect was inadequate. She pointed out that the allegation against the Claimant was in effect a serious allegation of dishonesty.

19. We called upon the Respondent only briefly. Ms Embleton had relied in her written submissions upon familiar authority concerning perversity and had explained, in ways that we have ourselves already outlined, how the allegation concerning the 7 April email came to be made.

Discussion and conclusions

20. The difficulty of succeeding on a perversity appeal before the EAT is well known. A perversity appeal is essentially a complaint about a Tribunal's finding of fact. Because Parliament has expressly provided that there is only to be an appeal to the EAT on a question of law, there is only the most limited scope for a perversity appeal. Thus in the leading case, **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93, Mummery LJ said:

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision that no reasonable tribunal, on a proper application of the evidence and the law, would have reached. Even in cases where the appeal tribunal has 'grave doubts' about the decision of the employment tribunal, it must proceed with 'great care',** ***British Telecommunications PLC v Sheridan*** **[1990] IRLR 27 at para 34."**

21. He went on to explain the following:

> **"94. Over the years there have been frequent attempts, consistently resisted by the Employment Appeal Tribunal, to present appeals on fact as questions of law. The technique sometimes employed is to trawl through the extended reasons of an Employment Tribunal, selecting adverse findings of fact on specific issues on which there was a conflict of oral**

evidence, and alleging, without adequate particulars, supporting material or even proper grounds, that these particular findings of fact are perverse and that therefore the overall decision is perverse. An application is often made to obtain the notes of evidence made by the chairman in the hope of demonstrating that the notes are silent or incomplete on factual points, that the findings of fact were not therefore supported by the evidence and that a question of law accordingly arises for the determination of the Employment Appeal Tribunal.

95. Inevitably there will from time to time be cases in which an Employment Tribunal has unfortunately erred by misunderstanding the evidence, leading it to make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence. In such cases the appeal will usually succeed. But no appeal on a question of law should be allowed to be turned into a rehearing of parts of the evidence by the Employment Appeal Tribunal. I am, of course, well aware that this is easier said than done, especially when, as here, neither side was legally represented on the first level of appeal. As the Employment Appeal Tribunal was well aware, unrepresented litigants have understandable problems in separating questions of law from proof of facts and in distinguishing the making of legal submissions from submissions of fact, even giving evidence in the course of submissions."

22. In our judgment, the Employment Tribunal's reasoning cannot be described as perverse by reference to this test.

23. In the first place the Tribunal cannot possibly be considered to have reached a perverse conclusion in rejecting the Claimant's case that the minimum term was agreed at the interview. This had been the Claimant's case in his claim form; but by the time of the hearing he had put forward a different case in his witness statement, which he confirmed when he gave evidence.

24. Nor do we think that the Tribunal can be considered to have reached a perverse conclusion as regards the email dated 7 April. It is a remarkable feature of this case that the email was first produced and relied on by the Claimant when he disclosed his documents. In 2010 the Respondent had denied that he had a guaranteed minimum five-year term of employment. One might have thought that he would produce the email to them. Likewise, there is no mention of it in his emails in 2011 to Mr Harvey and Mr Sammonds; likewise, there is no mention of it in his claim form, which, rather, alleged an oral agreement reached on 4 April. To our mind, there is very considerable force in the reasoning that is set out by the Tribunal in paragraphs 7 and 8 of its reasons.

25. We do not think the ET can legitimately be criticised for the limited extent to which it mentioned the emails of Mr Harvey and Mr Sammonds. It must be recalled that those emails were written in response to an email that related to the interview. By the time of the hearing it was the Claimant's own case that the agreement was made after the interview. We think the ET dealt with the emails in their proper context as material concerned with what happened or might have happened on 4 April. They were not contemporaneous documents; how much weight to give to them was a matter for the ET. We do not think that the ET's reasoning on this point was insufficient, nor do we think that there was anything perverse about the ET's conclusion.

26. We accept that the only direct evidence concerning a minimum-term agreement came form the Claimant. However, given the change in the way he put his case and the late and surprising production of the email dated 7 April, we do not think the ET was bound to accept his evidence. It was entitled, having heard him give evidence and listened to his cross-examination, to reject the account that he gave. He was given a proper opportunity to put his case; not only was he on notice before the hearing that the Respondent was sceptical about it, but he was also asked during the hearing, as paragraph 8 of the reasons makes clear, for further material concerning the email, and, as paragraph 8 also makes clear, his response was regarded by the ET as unsatisfactory.

27. In our judgment, therefore, reasons that the ET has given are tenable reasons for the conclusions it reached. We do not think that they can be characterised as perverse. The appeal must be dismissed.