Appeal No. UKEAT/0393/12/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 May 2013

Before

MR RECORDER LUBA QC

MR C EDWARDS

MRS A GALLICO

DR S TAJUL- ARFEEN — APPELLANT

HEALTH PROTECTION AGENCY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	DR S TAJUL-ARFEEN (The Appellant in Person)
For the Respondent	MS ANNA BEALE (of Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS99 7UD

SUMMARY

AGE RELATED DISMISSAL

The Claimant was dismissed at age 65 consistently with the employer's retirement policy. The Employment Tribunal found that he had been given proper notice of retirement and of the right to request that he be kept on for a further period. Such a request had been properly considered and had not been unfairly dismissed.

After the Employment Tribunal's order had been made, the Court of Appeal gave judgment in **R & R Plant (Peterborough) Ltd v Bailey** [2012] EWCA Civ 410 (02 April 2012) in which it held that an employer was required to expressly tell an employee that he has a right to make a request not to retire pursuant to paragraph 5 of schedule 6 of the **Employment Equality (Age) Regulations 2006**.

It was common ground that precise statutory reference had not been made in the notice given in the instant case and that the finding of unfair dismissal had to be reversed: **Employment Rights Act 1996** section 98ZG

The issue of compensation did not require remission. The basic award was agreed. No compensatory award was payable. It was inevitable, on the findings of fact, that the Claimant could (and would) have been fairly dismissed for retirement on the date he was dismissed.

DEDUCTION FROM WAGES

The Employment Tribunal had rejected a claim that the Claimant had been paid less that his full salary. It had resolved against him an issue of disputed fact.

The appeal was dismissed. The Claimant could not be permitted to run a different factual case on appeal from that put to the Tribunal below. On the case that he had run below, the findings of fact made by the Employment Tribunal were matters for them and disclosed no error of law.

MR RECORDER LUBA QC

Introduction

1. This is an appeal by Dr Syed Tajul-Arfeen ("Dr Arfeen") from a Judgment of the Employment Tribunal at Reading (Employment Judge Gumbiti-Zimuto and members). The Employment Tribunal decided that Dr Arfeen succeeded in a claim for disability discrimination brought against his former employer, the Health Protection Agency, hereafter "HPA". No appeal arises from that decision. However, the Employment Tribunal also decided that Dr Arfeen's claims of unfair dismissal and unlawful deduction from wages were not well founded, and it dismissed them. It is from the rejection of those claims that Dr Arfeen appeals to us.

Background facts

2. Dr Arfeen was employed by HPA, ultimately as an associate specialist doctor based at Heathrow Airport. His functions involved screening and diagnosing passengers arriving at that airport. In 2009 Dr Arfeen was approaching his 65th birthday. The HPA's retirement policy was that its staff would retire at 65. In November 2008 the HPA wrote to inform Dr Arfeen that his employment would end by reason of his retirement in June 2009 on his reaching 65 years. In February 2009 Dr Arfeen put in a written request to continue working beyond 65. That request was discussed at a meeting between Dr Arfeen and his line manager, but the request was declined. Dr Arfeen exercised a right to appeal against that decision. Pending the resolution of the appeal, Dr Arfeen continued to be paid.

3. The appeal was heard by a Dr Turbitt. On 3 August 2009 she dismissed the appeal. Dr Arfeen's employment was terminated with effect from the end of August 2009. By his claim to the Employment Tribunal, Dr Arfeen asserted that he had been unfairly dismissed. That claim also raised an issue about the calculation of Dr Arfeen's salary and was framed as a claim for

unlawful deduction of wages and consequential underpayment of holiday pay. As already indicated, all of these particular claims failed before the Employment Tribunal.

This appeal

4. The Notice of Appeal filed by Dr Arfeen was given initial consideration by another division of this Employment Appeal Tribunal at an oral hearing on 12 December 2012. The Employment Appeal Tribunal on that occasion constituted the President, Langstaff P, sitting with Mr Beynon and Mrs McArthur. They decided that two grounds of appeal should proceed to a full hearing. That is the hearing that we have conducted. We heard Dr Arfeen in support of the two grounds, and we heard Ms Beale of counsel, for the HPA, in response to them. We had skeleton arguments from both Dr Arfeen and Ms Beale, and Dr Arfeen also provided, in the course of his oral address to us, several further additional documents. We have considered the skeleton arguments and those additional documents, and we are grateful for them.

5. We shall set out each of the two grounds, and our conclusions upon them, in turn.

Ground 1: unfair dismissal

6. Dr Arfeen was dismissed at a time when age/retirement dismissals were regulated by the terms of sections 98ZA-98ZH of the **Employment Rights Act 1996** (ERA). In particular, the fairness of such dismissals was governed by section 98ZG. A dismissal would be unfair for the purposes of those provisions if it failed to comply with the procedural requirements contained in Schedule 6 to the **Employment Equality (Age) Regulations 2006** SI No. 1031. Those provisions have all since been repealed.

7. The Employment Tribunal found that the provisions of the statute and the Regulations had been complied with, not least because Dr Arfeen had been given a notice of his right to make a request that he not be retired. Such a notice was required by Schedule 6 paragraph 2 of the 2006 Regulations. However, after the Employment Tribunal had heard Dr Arfeen's claim, the Court of Appeal promulgated a Judgment in **R&R Plant (Peterborough) Ltd v Bailey** [2012] EWCA Civ 410, reported at [2012] IRLR 503. Put shortly, the Court of Appeal decided that a notice would be deficient for the purposes of paragraph 2 unless it specifically identified the statutory right of the employee to request non-retirement pursuant to paragraph 5 of Schedule 6 of the 2006 Regulations. That development in the jurisprudence led the Employment Appeal Tribunal presided over by the President in this case to identify as the first of two permitted grounds of appeal the following:

> **"Whether the Employment Tribunal erred in law in failing to determine whether the respondent complied with the procedure set out in paragraph 2 and paragraph 4 of schedule 6 of the Employment Equality (Age) Regulations 2006 and whether the Employment Tribunal would be bound by section 98ZG of the Employment Rights Act 1996 to regard the dismissal as unfair."**

8. On this appeal it is common ground between the parties that, in the light of the Court of Appeal decision in **Bailey**, the paragraph 2 notice given in this case was deficient. There was accordingly a failure to comply precisely with the requisite statutory procedures. The consequence of that deficiency was to trigger a finding that the dismissal for retirement in this case was unfair; see section 98ZG. It is therefore conceded by Ms Beale for the HPA that this ground of appeal must succeed. Moreover, that this aspect of the Employment Tribunal's Judgment must be set aside and that we must, for our own part, allow the claim for unfair dismissal.

9. The only live issue argued before us, in those circumstances, has been whether we should decide the question of remedy ourselves or remit it to the Employment Tribunal at Reading. As to the question of remedy, the parties were agreed as to what would be the basic award of compensation for this necessarily unfair dismissal. Dr Arfeen had in excess of ten years of employment, and each of those was served while he was over the age of 41. For each such year he is entitled to 1½ weeks' pay. The maximum weekly payment at the relevant time was £350. So, one takes £350 per week, multiplies it by 10 and then multiplies it by 1.5 to achieve a figure of £5,250 by way of basic award. That figure was put forward by Ms Beale in her skeleton argument. Dr Arfeen accepted before us that it was correct. There is therefore no dispute as to the basic award.

10. That reduced the only issue suitable for any remission to the Employment Tribunal to one in relation to a compensatory award. Dr Arfeen submitted before us that the Employment Tribunal could or should have awarded him compensation for loss of earnings. He put the figure initially at one year's loss of earnings but conceded that a six-month loss of earnings assessment might have been fair. His claim for compensation assessed in that way was put on the basis that, had he not been unfairly dismissed, he would have remained in the employer's employment for between six months and a year before being required to finally retire.

11. For her part, Ms Beale accepted that if there were in truth a live issue as to the compensatory award, this case would have to be remitted. But her core submission was that it was plain from the Employment Tribunal's findings that even if they had found there had been an unfair dismissal for want of the giving of a statutorily compliant notice, they would have made no award of compensation because there was no prospect that the employer would have agreed to defer retirement. On this matter we accept Ms Beale's submission. It seems to us

necessarily to follow from the very findings that the Employment Tribunal itself made. The Tribunal found that the employer had a policy of all staff retiring at 65; see paragraph 7.2 of their Judgment. They found that the dismissal in this case was initiated and concluded pursuant to that policy; see paragraph 15. They found that Dr Arfeen was given over six months' written notice of his impending retirement and was given the right to request that he not be retired; see paragraph 20. Moreover, they found that he had made such a request and that it had been properly considered; see paragraph 22. He was offered a right of appeal, which he pursued, but which was considered and determined against him; see paragraph 24. As to the fairness or otherwise of that appeal process, the Tribunal said this at paragraph 26:

> **"In considering the Claimant's appeal Dr Turbitt was conscientious and in our view scrupulous to ensure fairness."**

12. In those circumstances and on those findings we accept that it is inevitable that if this matter was remitted to the Employment Tribunal, the Employment Tribunal would hold that no compensatory award was to be made because it was inevitable that Dr Arfeen would have been dismissed when he was. There is, in those circumstances, no point in our remitting the matter.

13. Accordingly, we set aside the Tribunal's order rejecting the unfair dismissal claim; we ourselves allow that claim and in respect of it we award compensation in the sum of £5,250.

Ground 2: deduction from pay

14. The starting point for any claim for unlawful deduction from pay is to find what the agreed salary was and whether all of it was duly paid. In this case that is not entirely straightforward, because of what occurred in the years immediately prior to Dr Arfeen's retirement. Dr Arfeen was absent from work from November 2007 to October 2008 on account

of his ill-health. During that absence Dr Arfeen's post was assimilated to a new post of associate specialist in public-health medicine. The HPA took the view that his new post-assimilation salary was £83,934.50. How that came about, following negotiations by a BMJ representative on Dr Arfeen's behalf with HPA officials, is traced in detail in paragraphs 7.21 to 7.33 of the Employment Tribunal's findings of fact. Dr Arfeen has not accepted that this figure is his correct salary figure. As late as 17 July 2009, in a letter of that date to the chief executive to which we shall again refer later, he was protesting that his salary needed to be agreed at a higher level by inclusion of payment for one SPA equivalent to four hours each week, lifting his annual salary towards or slightly beyond £90,000. An SPA is a time allocation for "supporting professional activities".

15. Dr Arfeen's case before the Employment Tribunal was that it had always been agreed that as part of the assimilation he would be paid for at least one such SPA. He showed the Employment Tribunal extracts from the medical press indicating that a minimum of one SPA was the contractual norm, and he relied on a job plan that he countersigned in 2008 with his line manager and the terms of a draft contract, never finally agreed, that passed between the parties in 2009. That, as we say, was the case as presented to the Employment Tribunal. The reasons that his claim failed at the Employment Tribunal are given by the Tribunal at paragraphs 27-33 of their Judgment. In short, the Employment Tribunal accepted the HPA's account of what was payable, and it identified the narrow reach of the dispute as it was being pursued before them. They say this (paragraph 31):

> **"The Tribunal accept the Respondent's evidence in respect of the way that the Claimant was paid. The Claimant also agrees that the amount he was paid matches the manner in which the Respondent says his pay was to be calculated. The Respondent contends that the Claimant's pay was based on 11 PA's the Claimant that he ws [sic] paid on the basis of 11 PA's. The dispute between the parties is on the question whether the Claimant was to be paid for a further SPA."**

16. And then, at paragraph 32:

> **"The Claimant's claim fails because even on the Claimant's own evidence he is not able to show that he is entitled to be paid for the extra SPA. The Job Plan, on which the Claimant relies, shows that the Claimant is to receive 11 PA's plus 1 SPA. ! SPA [sic] as time off in lieu. The Job Plan on its face does not suggest that the Claimant is to be paid for the extra SPA but is to receive time off in lieu. As the Claimant accepts that he was paid 11 PA's the Claimant cannot show, on his own version of events, that there was a failure to pay him what he was entitled to receive."**

17. Two points of fact are taken by Dr Arfeen about that account. First, he submits that the paragraphs I have just read are predicated on a misunderstanding of the draft contract because at paragraph 30 the Employment Tribunal has mis-referred to irrelevant paragraphs in the draft contract rather than to the correctly numbered paragraphs. Second, that at the end of paragraph 32 the Tribunal restricts the claim for unpaid wages to the period 2009/2010, whereas the claim was 2008/2010. In our judgment, those errors of fact, if they be errors of fact, are not material to the appeal before us. The only ground of appeal before us is that which was permitted through to this full hearing by the previous constitution of this Tribunal, and that is expressed in the following terms:

> **"Whether the Employment Tribunal misunderstood the Job Plan where at paragraphs 31 & 32 of the Employment Tribunal decision they recorded that the parties agreed that the Appellant's pay was based on 11 Programmed Activities and determined that the Appellant was not to be paid for a further Supportive Programmed Activity."**

18. The reasons why the Employment Appeal Tribunal identified that point as an arguable point of law is given in paragraph 13 of its Judgment. The Employment Appeal Tribunal on that occasion said:

> **"It may well be that the difference between his position and that of his employers was that by a misreading of the job plan they had understood that the 1 SPA first referred to in the manuscript note at the bottom of the page was an SPA which the employer had to choose to accept or to reject rather than one he was already due to and did work."**

19. The ground of appeal identified by the Employment Appeal Tribunal was re-cast by Dr Arfeen as paragraph 12 of his additional Notice of Appeal served following the Appeal Tribunal's Judgment at the preliminary hearing. Paragraph 12 reads as follows:

> **"The Tribunal rightly characterised the dispute before them as being whether there was an additional SPA for which the Appellant was entitled to be paid, it being agreed that the Appellant had been paid for 11 PA's. However, they simply misread […] the Job Plan as referring to one extra SPA when it in fact refers to two. This proved that the Appellant was required to carry out an SPA and to be paid for it because the total number of PA and SPAs agreed under the contract was 13 (of which one compensation by time off in lieu) not […] 12. The Tribunal erred in law in not so holding. As to the binding nature of the Job Plan, this was clearly set out on the last page [of the Job Plan]."**

20. In order to understand the ground as formulated by the Employment Appeal Tribunal at the preliminary hearing and as re-cast by Dr Arfeen as paragraph 12 of his additional grounds of appeal, it is necessary to go to the job plan document itself. The job plan document is a typescript template with a series of boxes. The material part upon which issue has focussed in the grounds of appeal is a manuscript entry at paragraph 10 of the document. The manuscript reads as follows:

> **"11 PA plus 1 SPA to go into new contract to maintain the health control unit cover at present level. 1 SPA may be considered for time in lieu, with consultation medical staffing director HPU."**

21. On the version of the job plan included in our bundle a further manuscript entry appears after the words we have quoted, and that manuscript entry simply states "13th". That has been added by someone subsequent to the preparation of that initial document and certainly since the documents were presented to the Employment Tribunal. We are satisfied that the entry "13th" did not appear on the original.

22. Before us Dr Arfeen pressed this ground of appeal in relation to unlawful deduction of pay. It was his contention that the Employment Tribunal had erred in law in rejecting it. In her

reply Ms Beale made three distinct submissions. Her first submission was that this point about 11 PAs plus 2 SPAs had not been taken before the Employment Tribunal at all; it had never been suggested to the Employment Tribunal that the job plan envisaged 13 PAs, that is to say 11 ordinary PAs plus 2 SPAs. Ms Beale submitted that this point was advanced for the first time in this appeal to the Employment Appeal Tribunal and ought not to be entertained. We accept that submission. This Employment Appeal Tribunal does not entertain wholly new points to which written and oral evidence could and should have been directed at the hearing before the Employment Tribunal. It is plain from the way in which the Employment Tribunal have cast their findings of fact and expressed their reasons that this point – that is to say, the point identified by the Employment Appeal Tribunal and re-cast in the additional Notice of Appeal was not pursued before them. Dr Arfeen was unable to take us to any document suggesting that it had been.

23. That ordinarily would be the end of this ground of appeal, but it is not right to dispose of this ground on that summary basis alone. Firstly, a former constitution of this Appeal Tribunal has been persuaded to allow the point through, and it has been argued before us. Moreover, in the course of pursuing it, Dr Arfeen's submissions began to develop more reliance on the case as originally argued before the Employment Tribunal rather than that argued in his additional Notice of Appeal.

24. We turn, then, to Ms Beale's second submission in answer to this ground of appeal. It was that whatever the job plan should be understood to be saying no reliance could be placed upon it by Dr Arfeen as establishing his right to a particular level of salary. That was because the job plan itself was non-contractual. Ms Beale submitted that the document had been prepared and indeed signed in 2008 prior to the contract itself between the parties being drawn

up. As the quote from the extract that has already been read indicates, it was specifically envisaged that the actual terms between Dr Arfeen and the HPA would be reflected in a subsequently drawn and formal contract. That contract was never signed, because the parties could not agree its terms. In those circumstances, Ms Beale submitted, Dr Arfeen could not rely on whatever had been contained in the job plan as an identification of the framework for his actual post-assimilation salary. That raised the prospect, of course, that there might have been no agreement at all between the parties as to the post-assimilation salary, but Ms Beale met that proposition by taking us through the documents that show how agreement to the salary of £83,000-odd was achieved, with the assistance of negotiations through the BMA in 2009, precisely in the way that the Employment Tribunal had recorded in its findings of fact. That salary figure was not expressed in the draft contract or in the job plan. It was common ground, indeed, before the Employment Tribunal that there was no contract made out by the draft contract or the job plan. That is why the Tribunal say at the end of paragraph 29 of their Judgment:

> **"It is agreed by both parties that there never was a contract produced which was signed by both parties that reflected the terms of the Job Plan."**

25. True it is that Dr Arfeen continued to protest that this £83,000 figure was not the full picture and that he was entitled to more; not least by his letter to the chief executive dated 17 July 2009 to which we have already referred. He protested that further and additional payment was due. But by its response the HPA indicated in a letter dated 13 August 2009 that it simply did not agree with him. The letter sent on that date includes the following text:

> **"I have checked the Job Plan that you have signed on 30 December 2008 […] and it quite clearly states that the 12 PA in respect of supporting activities was at that time under discussion […]."**

26. The balance of the letter indicates that, on reflection, it had been decided that provision did not explicitly need to be made for the SPA there mentioned because the necessary supporting activities could be carried out during quiet periods of the 24-hour shift at Heathrow Airport, that is to say during periods when flights were neither landing nor taking off.

27. Quite simply, Ms Beale submitted, Dr Arfeen could not demonstrate to the Employment Tribunal and has been unable to demonstrate to us that there was ever a concluded agreement to pay for the 12th performance activity, that is to say the one mentioned in the case plan. That is certainly what the Employment Tribunal decided as a matter of fact. Facts are for that Tribunal and not for us. Dr Arfeen has taken us to a host of documents in the bundle before us and to additional documents that he has put up, but in none of those has he been able to identify a passage in which the HPA have agreed with what he was asserting as to his salary. We accept that second submission of Ms Beale. It accords with the documents we have been shown, and it satisfies us that the conclusions reached by the Employment Tribunal were conclusions of fact that they were entitled to reach on the evidence before them.

28. Ms Beale's third submission is that even if she is wrong as to the first two, which we have decided she is not, the point made in the ground of appeal as reflected in the additional Notice of Appeal fails on its own terms. She drew our attention to four matters that demonstrated that it had never been agreed, as asserted in the amended Notice of Appeal, that there would be 11 PAs and 2 SPAs, totalling 13. First, she took us to that part of the job plan itself that is in typescript. On the fourth internally numbered page of that document it is recorded that the proposed number of programmed activities would be 72.5 PA per 6 weeks. An arithmetical division of that figure – that is to say, dividing 72.5 by 6 to get the relevant weekly equivalent – produces a weekly equivalent of 12, not 13. Furthermore, on page 10,

using its internal pagination, the job plan has the typescript heading at item 10 "Additional programmed activities i.e. Programmed Activities above 10". Two lines further, the question "If yes, how many?" is answered by the typescript, "Two Programmed Activities per week". That is Ms Beale's second rejoinder to the proposition that 13 were envisaged, i.e. the document itself envisages 12. Her third response took us to a letter dated 13 August 2009, from which we have just quoted, in which the question of "The 12th PA" was discussed. That clearly indicates that the reference to time being needed for an additional SPA was time needed for the 12th PA rather than any 13th PA. Fourthly and finally, on this aspect Ms Beale took us to Dr Arfeen's own letter of 16 June 2009, which, after referring to a salary figure of £83,000-odd, contains this text at the end of its first page: "This is excluding 1 SPA not yet decided. This salary is duties done in 37 hours". Again, the reference there is to one rather than two PAs, and it is quite plain, from the terms of that letter that it is itself referring to the negotiations conducted by the BMA representative that were all premised on 11 PAs. For those four reasons, Ms Beale was able to submit that there was nothing in the additional Notice of Appeal as drawn or as formulated by the Employment Appeal Tribunal. For our part, we accept that those submissions are well-made and that on that basis also there is a complete answer to the appeal as pursued on this ground.

29. In short, this Employment Tribunal dealt with the question of unlawful deduction from pay as it was presented to them. They made the necessary factual findings, the details of which are not challenged and cannot now be disturbed. They did not make the error suggested in the only ground of appeal that is open to be pursued before us in relation to unlawful deduction from pay. It must follow, therefore, that this aspect of the appeal fails, and accordingly the appeal in respect of ground 2 of the grounds of appeal will be dismissed.

Conclusion

30. Our order will therefore be that the appeal is allowed on ground 1, the claim for unfair dismissal succeeds, and we will award compensation of £5,250. The appeal on ground 2 of the grounds of appeal is dismissed.