Appeal No. UKEATS/0058/12/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 14 June 2013

Before

THE HONOURABLE LADY STACEY

MISS J GASKELL

MR P HUNTER

MARGARET BLACKWOOD HOUSING ASSOCIATION — APPELLANT

(1) MRS PAULENE MONAGHAN
(2) MRS JILLIAN THOMSON — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	MR G O'HARE (Solicitor) Law at Work Limited Kintyre House 205 West George Street Glasgow G2 2LW
For the Respondents	MS C McCROSSAN (Solicitor Advocate) Quantum Claims Compensation Specialists Ltd 70 Carden Place Queen's Cross Aberdeen AB10 1UL

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Unfair dismissal due to redundancy. The Claimants were made redundant by the Respondents along with four other employees. All six made claims of unfair dismissal. The Employment Tribunal held that the dismissal of the two Claimants was unfair but that of the dismissal of the other four employees was fair, holding that the Respondents failed to explain the options properly to the Claimants, leaving them no choice but to accept redundancy. The Respondents argued that the ET judgment was perverse as the same explanation had been given to all employees and was adequate. The Claimants argued that the judgment was sufficient in its reasoning and that the appeal should be refused. It was held that the ET judgment was inadequate as it did not explain properly the way in which the decision had been reached. Thus the ET had erred in law. The appeal is allowed and the case remitted to a fresh tribunal to be reheard.

THE HONOURABLE LADY STACEY

Introduction

1. In this appeal the Appellant is the Margaret Blackwood Housing Association and the Respondents are Mrs Paulene Monaghan and Mrs Jillian Thomson. We will refer to them as the Claimants and the Respondents. The Respondents are a housing association which operates services across Scotland and provides care and support services for disabled tenants. They operate in two premises in Aberdeen, Raeden Court and Eday Gardens. The Claimants worked for the Respondents as support workers in their premises in Aberdeen until 2011 when they were made redundant. Due to difficult economic circumstances the Respondents required to implement cost saving measures. The Respondents recognised the trade union Unite for the purposes of negotiating changes to terms and conditions with staff. The Respondents wished to alter the way in which they provided services in Aberdeen during 2011. They proposed to alter the terms and conditions of care workers and to restructure the posts held by care workers. In the restructuring, 33 support worker roles were to be removed and replaced with 24 support assistant roles and nine key worker roles. All of the support workers, including the Claimants, were placed at risk of redundancy and a period of consultation commenced. The role of key worker was approximately equivalent to the old role of support worker in pay, whilst the support assistant would have reduced responsibilities and would be remunerated at a lower level.

2. The six Claimants who made claims originally were employed as support workers, but carried out different roles in that four of the Claimants worked during the night. The two Claimants who succeeded with their claims worked during the day. The post of key worker would have no night working, and all those who became support assistants would require to do some night work. The pay for a key worker would be broadly equivalent to that paid to support workers. The pay for a support assistant would be less, and some pay protection would be put

in place for up to 18 months. Separately from the restructuring, changes in terms and conditions affecting for example pensions for dependents following death in service, holiday pay, and night allowances were proposed and discussed between management and union.

Forms ET1 and ET3

3. The ET1 form lodged on behalf of each of the Claimants was in essentially identical terms, except for dates which applied to each individual. Each narrated that she received a letter on 9 November 2010 advising that there were to be spending cuts because of the difficult economic environment. In February 2011 each Claimant together with the other staff at the residential units was called to a meeting with the area manager, Diane Allan, and the unit manager, Linda McKay. The Claimants, together with their colleagues, were advised that things were changing. They were told that there would be a 30 day consultation. Each Claimant was advised that there would be a further meeting on 28 February 2011 when the formal period of consultation would begin and that the Respondents would provide the Claimants with paperwork. The employees were advised that the position was "non-negotiable" and that the amendments to contracts would take place from 1 July 2011. According to paragraph 7 in the form ET 1, each Claimant stated that she was told that she would be:

> **"Allowed to apply for the position of key worker and if she was offered that position the hourly rate of pay would be £9.50. There was no guarantee that the claimant would be offered that position. The claimant would lose her position as senior support worker and accordingly would no longer be paid at a rate of £10.62. The claimant would lose overtime benefit whereby she was paid at time and a 3rd."**

4. Each Claimant stated that she had meetings with Tony Carruthers of the human resources department and Diane Allan the regional manager. Each stated that she was advised what her options were by way of either accepting the changes to her contract or alternatively taking redundancy. Each stated that she came to the conclusion that she would be financially worse

off as a result of the changes and she would lose benefits. She understood that she would be doing substantially the same job but would be categorised as a support assistant or key worker. The Claimants understood that these changes would be implemented on 1 July and felt that they had no option other than to accept that the position they held was redundant and therefore accept the statutory payment. Both Claimants' employment ended before 1 July 2011. Each complained in her form that it transpired that the changes as outlined to her by the Respondents which were to be implemented by 1 July were not in fact implemented until October 2011. In the final paragraph each stated that she was therefore made redundant on flawed information. It was her position that the redundancy process was flawed and that she was not properly consulted during her period of redundancy. It was therefore her position that she had been unfairly dismissed or unfairly selected for redundancy.

5. The form ET3 in respect of each Claimant was in identical terms, apart from dates. The Respondents set out their position to the effect that as a result of economic difficulties, changes in terms and conditions were required, as well as and independently from the requirement to reorganise the structure of the care and support services. The Respondents stated at paragraph 7 of the form that the organisation was aware that some employees were confusing the two separate elements of their ongoing consultations being those which related to proposals to change terms and conditions across the entire workforce and secondly those which relate specifically to the structural reorganisation within the Respondents' care and support services. They decided to introduce the proposed new structure in the Aberdeen area first before adopting it throughout the rest of their business. The Respondents commenced formal redundancy consultation in February 2011 and outlined to all employees at risk of redundancy that the anticipated date for implementing the new structure would be July 2011. The effect of the restructuring would be that the role of support worker was identified as a role that could be removed from the Respondent's structure. Elements of the night support worker role that

required greater technical skill and responsibility would be distributed to a new role of key worker. Key workers would not, however, require to work night shifts. The fundamental aspects of the support worker role would be undertaken by support assistants. At paragraph 16 the following is stated:

> **"The claimants were offered the option to be considered for either a day shift key worker role or to continue in employment as a night support assistant with a protected pay period. Both options were declined by the claimants."**

6. The Respondents state that it is disputed that the Claimants were dismissed unfairly, the reason for the dismissal being that the employees were redundant which is a potentially fair reason for dismissal provided for at section 98 (2) (c) of the **ERA 1996**. The Respondents narrated that the implementation of the reorganisation took place 1 July 2011. The consultations with the union however continued in connection with the changes to the terms and conditions of employment across the workforce. The Respondents made an offer to reinstate the Claimants to the role of support assistant with an agreed period of pay protection as offered to them during the course of the redundancy consultations.

7. It was therefore plain from the initiating forms and the response to them that the question of the reorganisation was seen by the Respondents as separate from the question of the changing of terms and conditions. It was also clear that there had been some confusion by some of the Claimants about the two matters. It was further clear that the Respondents offered to show that they had offered redeployment to all their support workers as either key workers (though as there were fewer jobs as key workers not all could be guaranteed such a post) or as support assistants. It was clear that the Respondents did not regard the post of support assistant as a suitable equivalent to the existing post of support worker and therefore redundancy was available to any worker who chose not to take, even if offered, the post of either key worker or support assistant.

The ET Judgment

8. The judgment of the ET notes that they heard evidence on behalf of the Respondents from Mr Carruthers and Ms Allan and from each of the six Claimants. They also considered documentary productions. At paragraph 5 of the judgment they say that the facts were by and large agreed or not disputed. It is apparent from paragraph 11 and paragraph 13 that the Tribunal had before it the letters of 9 November and the joint statement from the Respondents' senior management team and the union. In paragraph 18 the Tribunal found that the proposed new structure was the outcome of lengthy negotiations between the Respondents and the union. Both the restructuring and the proposed changes to terms and conditions were discussed between the union and management. The Tribunal found as a fact that the Aberdeen employees were provided with copies of all of the documents. At paragraph 22 the Tribunal found that the date for completion of the restructuring was fixed for 1 July, having been extended from an earlier date. They found at paragraph 29 that the restructuring was put into effect on 1 July when the support workers were replaced by key workers and support assistants. In paragraph 30 they found that while the Respondents had hoped to implement the changes to the terms and conditions at the same time that did not prove possible and did not actually take effect until 1 October 2011. The Claimants' employment had ended prior to 1 July 2011.

9. The Tribunal then made findings about the individual consultations with the various Claimants. With regard to Mrs Monaghan the Tribunal found that the consultation procedure with her was the same as with everyone else as regards what she was told by management. She received the same letters as others. At paragraph 53 the Tribunal finds as follows:

> **"Significantly, so far as she was concerned, she was also advised that there were only a set number of key worker roles, (9), and if she applied and was not selected she would automatically revert to the lower support assistant post. Her salary at the time as a support worker was equivalent to that of the key worker but the support assistant salary was lower. However, despite the 3 options being explained to her, she was never advised of the application**

process for a key worker post. There were only to be 9 key workers between Raeden Court and Eday Gardens and at that time there were 33 support workers."

10. In paragraph 54 they say the following:

"At the meeting Mrs Monaghan also asked what would happen if she applied for the key worker role only to be told that the consultation process had to be concluded at the end of June with a view to the restructuring taking effect on 1st July and the key worker appointments would be made in July. Mrs Monaghan did not consider the support assistant post to be a serious option as it was a demotion with a lower salary and involved night work."

11. At paragraph 58 they state as follows:

"However, having decided that she did not wish to apply for the support assistant post, Mrs Monaghan was in a dilemma as key workers were not to be appointed until after 1st July and she understood that if she applied for the key worker post and was unsuccessful she would revert to the support assistant post and would lose or not have the option of a redundancy payment. She was not aware of any application process for the key worker post and yet she was told that she had to make a decision by 1st July."

12. In Mrs Thomson's case there were similar findings. At paragraph 61 at the ET found the following:

"Mrs Thomson had worked for the respondents for 17 years and when she heard about the proposed changes to the structure and terms and conditions at the meeting with Diane Allan on 24th February she was understandably concerned about future employment prospects within MBHA. She spoke subsequently and on a number of occasions to Diane Allan about this and asked how she went about applying for the key worker position only to be advised that it would not be sorted out until mid-July.

However she was advised that she had to decide on one of the 3 options before 1 July even though her 12 week notice period would take beyond that. (She opted for a redundancy payment and her employment ended 30 June before the expiry of her notice period. She received a payment in lieu of notice.)"

13. At paragraph 63 the ET found:

"Mrs Thomson found the situation very confusing as on the one hand she was advised that the new structure had to be in place by 1st July and yet the appointment of the Keyworkers was not going to take place until mid-July. She thought that the interviews for the Keyworkers posts should have been conducted and decisions made before the 1st July."

14. The Tribunal found that none of the Claimants appealed against their dismissals.

Submissions to the ET

15. The Tribunal note the submissions on behalf of the Respondents to the effect that Mr Carruthers and Ms Allan should be accepted as credible and reliable. It was submitted that the documents relied on showed that the changing of the terms and conditions on the one hand and the restructuring of the delivery of the service on the other were separate processes. The formal consultation process presented claimants with three options namely:-

1. the key worker post
2. the lesser support assistant post
3. a voluntary redundancy payment.

It was submitted that the Respondents recognised that the support assistant post was not an offer of suitable alternative employment and that was why the Claimants were offered the three options. It was submitted that redundancy was the reason for the dismissals. Reference was made to the case of **Safeway Stores plc v Burrell** [1997] ICR 523.

16. On behalf of the Claimants it was submitted that there were no issues of credibility arising in respect of any of the material aspects of the case. It was submitted that there was evidence that in the past new appointments would be put up on the notice board but that had not happened in this situation and the question of who might be eligible for appointment to the key worker post was only touched on at the general meeting held on 24 February. The Claimants' solicitor submitted that the Claimants' understanding was that "redundancy would not always be on the table". He submitted that the Claimants were told that the decision on applications for the key worker posts would not be made until 15 July but notwithstanding the shortfall there was no further mention of this, and nor were there reminders to the Claimants. By that he made

reference to the fact that by 1 July there were fewer applicants for the key worker post than there were posts. Only four people had expressed an interest and there were nine posts.

17. It appears from the quoted submissions of the Claimants' solicitor that the matter was presented as though there was no conflict between the evidence of the Respondent's managers on one side and the Claimants on the other. That does not appear to be accurate as the Claimants appear to have been saying that they did not understand that redundancy would be available to them if they did not succeed in getting a key worker post whereas the Respondents seemed to be clear that such a position would be available to any support worker who did not get a key worker post, and if they did not want to take it, then they could get a redundancy payment. There also seems to have been confusion about whether application for the posts was necessary.

The ET Judgment

18. The Tribunal set out the issues and their decision in paragraph 91 and onwards. They noted that the reason for dismissal, being redundancy, was not an issue between the parties. They correctly give the statutory definition of redundancy. At paragraph 94 they noted that having reached that decision the remaining question which they had to determine under section 98 (4) of ERA was whether the Respondent had acted reasonably in treating the reason for dismissing the Claimants as a sufficient reason, and that question had to be determined in accordance with equity and the substantial merits of the case.

19. The Tribunal quoted from Lord Bridge's speech in the case of **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 to the following effect: "The employer will not normally act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select from redundancy and take such steps as may be reasonable to

avoid or minimise redundancy by redeployment within his own organisation." The Tribunal then said that they could distinguish the Claimants, from the others. They came to the view that the Claimants who worked the night shift did have a choice; the various options were clearly explained to them, and they decided that it was in their own interests to accept the redundancy payment. That they found to be in contrast to the Claimants' position. The Tribunal note at paragraph 102 that the Respondents accepted that the support assistant job was not suitable alternative employment, (although employees could accept that post if they wanted to). The Tribunal found at paragraph 103 as follows:

> **"This left a straight choice for them, therefore, between the key worker post and a redundancy payment. But in making that choice, these claimants were faced with a dilemma. They were not advised as to how they should go about applying for the key worker post; they were only told that those who had applied for the key worker post would be interviewed after 1st July; the key worker post was not advertised on the notice board as other vacancies had been in the past; not only were they not told about the application process, neither Mr Carruthers nor Ms Allan encouraged them to apply although they were suitable, or indeed, as 1 July approached, to advise them that only 4 of the 9 vacancies had been filled; the picture for them was confusing."**

20. At paragraph 104 they make the following vital findings:

> **"These claimants' understanding was that they had to apply for the key worker post before the new structure came into place on 1st July; they also understood that if they applied unsuccessfully, then the redundancy payment option would be lost and they would be appointed support assistants, a position which was not acceptable to them. That was their understanding from what they were told. If that was a misunderstanding, there was a lack of clarity; there was no reassurance that the redundancy payment option would still be open to them after 1 July if the application proved unsuccessful. A reasonable employer would have made the position clear during the consultation process and advised the claimants that they could apply for the key worker post and how to go about it and made it clear that if the application was unsuccessful the could still opt for the redundancy payment. However for whatever reason, perhaps because of time constraints and the pressure they were under, neither Mr Carruthers nor Ms Allan did so and did not either encourage them to apply or even tell them how to go about it."**

21. At paragraph 106 the Tribunal made the following finding:

> **"We were at a complete loss to understand why they were not told about the application process and encouraged to apply, particularly when it became clear that there was to be a shortfall in the number of applications and extra costs were going to be incurred; why the timing was this way; and why the claimants were led to believe that if they applied for a key worker post they would lose their entitlement to redundancy payment."**

22. The Tribunal go on to find that these were not the actings of a reasonable employer. The Tribunal said that understandably Mrs Monaghan and Mrs Thomson were not prepared to run the risk of losing out on the redundancy payment and ending up in the demoted post of support assistant at a lower salary and having to work nights. The Tribunal therefore decided that that they were unfairly dismissed.

23. Thus the Tribunal found that the employees were led to believe that they would risk their redundancy payment if they applied for the key worker job and did not get it. In doing so they accepted the evidence of the Claimants and must have rejected the evidence of the witnesses for the Respondent. They found that it may be a misunderstanding, due to a lack of clarity for which the Tribunal blame the employer. In that they have also favoured the evidence of the Claimants over that of the witnesses for the Respondents. The witnesses for the Respondents together with the documents lodged on their behalf give evidence to the effect that the jobs of key worker and the jobs of support assistant were available as a redeployment.

Submissions on behalf of the Respondent

24. Mr O'Hare lodged a written skeleton argument which was helpful. He argued that the Tribunal made contradictory findings in fact which he said no tribunal acting reasonably would have made from the evidence before them. He noted that all of the Claimants were doing the same job and were employed as support workers. The only difference between them was that four workers worked at night and two workers work during the day. He pointed out that paragraphs 31, 32 and 33 of the ET judgment showed that consultation with all of the six workers was the same. That was reinforced by paragraphs 51 and 59. He submitted that raised the question as to how the Tribunal could then to conclude that four of the dismissals were unfair whilst the other two were unfair. He argued that the Tribunal found that the consultation followed with each of the Claimants was the same and if the various options were clearly

explained to the four unsuccessful Claimants then it follows that it was clearly explained to the two successful Claimants. He submitted that was an error in law as either the dismissals were fair or unfair and all that stood or fell together. On enquiry of Mr O'Hare if there was a difference between what was in the ET1 and the evidence at the Tribunal, he said there was not. He did however submit that the ET1 forms make it clear that the reason that the Claimants wished to take voluntary redundancy was because they were not interested in the support assistant job because of financial reasons. He submitted that there is nothing in the Tribunal judgment to explain what they made of what is on the ET1. He argued that the evidence of the new posts not being implemented by 1 July is something of a red herring. He noted that the Tribunal itself at paragraph 29 found that the restructure took effect on 1 July 2011. He suggested that the Tribunal may have fallen into error by confusing two different strands of changes which were being implemented at the same time, being the restructuring and the contractual changes. The Tribunal's decision was flawed, as the treatment of the facts before it amounted to an error of law, being perverse. He relied on the case of **Yeboah v Crofton** [2002] IRLR 634 as authority for the proposition that the EAT must only overturn a tribunal decision when the decision is one which no reasonable tribunal correctly applying the law to the facts could make. He argued that this was such a case. He argued that the Tribunal had based its decision on the fact that the Respondents failed to consult properly with the Claimants whilst at the same time acknowledging that the consultation process followed in respect of all of the other Claimants was the same. He argued that it was perverse for the Tribunal to find that four of the Claimants were fairly dismissed and two were unfairly dismissed when the same consultation process was followed with them all. He argued that we had sufficient facts before us to enable us to allow the appeal and find that the Claimants were fairly dismissed. If we were not with him on that then, he argued that the case should be remitted to be heard by a new tribunal.

Submissions on behalf of the Claimants

25. Ms McCrossan's submissions were firstly that the Tribunal judgment did make sense and that we should not interfere with that. She argued that the grounds of appeal do not begin to raise a question of law and that all that has been done is to selectively quote parts of the ET judgment. She argued that at the ET it was clear that there was a difference between the night and the day workers and that was a vital difference. She argued that it was a careful judgment and recognised the process in which the Respondents were engaged. She submitted that the evidence at the ET was different from the assertions made in the ET1. Neither she nor Mr O'Hare had conducted the proceedings at the ET, but it was clear that the evidence had been led without objection. The ET was in those circumstances entitled to find that the Claimants were confused to the extent that they thought they had to apply for the key worker jobs, but did not know how to go about it; that they were reluctant to do so because they were led to believe that if they did not get a key worker post, they would be given a support assistant post. They found that unsatisfactory because the money would be less and some night working would be needed. Further, they believed that they would forfeit their right to take redundancy if they followed that course, because that is what they believed they had been told. Ms McCrossan accepted that the ET had found that all six Claimants had been given the same materials and had attended the same meetings. There were however one to one meetings and some of the unsuccessful four were found to have made up their minds at an early stage that they would take redundancy. They had not sought any more information. In contrast the two Claimants had asked questions and were left in the state of belief outlined above. It was therefore not perverse for the ET to find that some dismissals were fair and others were unfair.

Discussion and Decision

26. The decision of this Tribunal is that the ET judgment does not give sufficient reasoning nor sufficient detail of the evidence before it. The judgment does not state what evidence was

given by the witnesses for the Respondent and it does not explain why the Claimants apparently gave evidence about their fears of forfeiting the redundancy payment when that was not mentioned in the ET1. We appreciate that no objection appears to have been taken to that evidence and it was therefore before the Employment Tribunal. That being so, the Tribunal should have recognised in its judgment that there was a conflict of fact before it and should have explained why it came to view the Claimants' evidence as acceptable and the evidence led on behalf of the Respondents as unacceptable. We do not know why the Tribunal accepted the evidence of the Claimants, which was apparently contradictory of their own forms ET1, over the evidence of the Respondent's managers given in oral testimony and from the written documents. While the ET had the advantage of hearing the evidence, which of course we do not have, we expect the ET to recognise that there is a conflict of fact; to narrate the essential parts of the evidence, and to give reasons for accepting some witnesses and rejecting others. It may be that parties did not address the ET fully on the conflict in the evidence thereby not assisting the ET to focus matters. We accept that the Respondents do have an obligation to tell employees of their options in a comprehensible fashion. We accept that if misunderstandings occur, that may be the fault of the employer. Thus it is possible that consultation is fair as regards one employee and not another. There is insufficient detail in this judgment to enable us to decide if that was the situation here. We cannot tell from the ET judgment what they found the employer said or did that was misunderstood. We are particularly concerned to note that there seems to have been an assumption that the facts were not controversial.

27. We considered carefully whether or not this should be remitted to the same Tribunal for further reasons. We took the view that the lack of understanding of the Respondent's process evidenced by the Tribunal's findings that the Claimants would have to apply for posts for which they would be considered in any event; and by the lack of any discussion of the controversy between the parties was such that the case requires to be heard by a new tribunal.

28. We allow the appeal and remit the case to a newly constituted tribunal to be heard afresh.