Appeal No. UKEAT/0134/12/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 November 2012

Before

HIS HONOUR JUDGE BIRTLES

MRS L S TINSLEY

MR B WARMAN

MR T PYBUS — APPELLANT

GEOQUIP LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR N SIDDALL (of Counsel) & MS L DANIELS (of Counsel) Instructed by: Gosschalks Solicitors Queens Gardens Dock Street Hull HU1 3DZ
For the Respondent	MR N GRUNDY (of Counsel) Instructed by: Hill Dickinson LLP 1 St Paul's Square Liverpool L3 9SJ

SUMMARY

UNFAIR DISMISSAL – Compensation

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

Appeal allowed on the ground that the Employment Tribunal did not consider a submission of constructive dismissal at a remedies hearing or its application to the facts of the case. Case remitted to same ET.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the Judgment and reasons of an Employment Tribunal sitting at Hull on 27 September 2011. The reserved Judgment was sent to the parties on 22 November 2011.

2. This morning the Appellant, Mr Pybus, is represented by Mr Siddall and Ms Daniels of counsel and the Respondent by Mr Grundy of counsel. We are grateful to Mr Siddall and Mr Grundy for their submissions.

History

3. This case unfortunately has a lengthy history. The Claimant was dismissed from the Respondent's employment on 9 September 2008 on grounds of gross misconduct. He had previously been the owner and I think major if not sole shareholder in Geoquip Limited but had sold that company to the Respondent. He was retained by them on a three-year contract at a salary of £60,000 plus bonus. Having been dismissed on 9 September 2008 during the course of his employment he brought a claim for unfair dismissal by an ET1 dated 6 March 2009. By an ET3 dated 6 April 2009 the Respondent admitted dismissal but asserted the matter had been fair. The case was heard before the Hull Employment Tribunal on 20 July to 23 July 2009.

4. By a written Judgment sent to the parties on 25 August 2009 the Employment Tribunal concluded the Claimant had been unfairly dismissed with remedy to be determined. The Respondent sought a review of the Judgment of the Employment Tribunal by a letter dated 8 September 2009 asserting erroneous approaches to the issues of (a) section 98A(2) of the **Employment Rights Act 1996** and (b) **Polkey**. It further appealed the decision by a Notice of Appeal dated 1 October 2009, which appeal was dismissed at a preliminary hearing on 6 May

2010 by Underhill J. The remedies hearing was on 19 October 2009, the judgment was again reserved and sent to the parties on 12 November 2009. That hearing was also a review hearing. The Employment Tribunal reviewed its previous decision and concluded that a 35% **Polkey** reduction was appropriate and the Claimant's employment would not have continued for more than another nine months from the date of his dismissal.

5. By Notice of Appeal dated 21 December 2009 the Claimant appealed against that judgment. That appeal was heard on 6 December 2010 by myself sitting with lay members. A written Judgment was promulgated on 14 April 2011. The Claimant's appeal was successful as regards the 35% **Polkey** deduction on the limitation of the period of loss. Those matters were remitted to the same Employment Tribunal for reconsideration.

6. The remitted hearing took place on 27 September 2011 and the reserved decision, as I say, was promulgated on 22 November 2011.

7. Following clarification from the EAT the Tribunal made no **Polkey** reduction but they determined that the Claimant's employment would have ceased within nine months of the date of termination. The Claimant appealed that Judgment by means of a Notice of Appeal dated 22 December 2011, the matter came before HHJ Peter Clark on the sift and he put the matter through to a preliminary hearing on the basis that it was not clear whether or not the issue of constructive dismissal had been argued before the Employment Tribunal on the remitted remedies hearing.

8. The preliminary hearing was heard by Wilkie J on 31 May 2012 and he put it through to a full hearing which is what we have heard this morning.

The grounds of appeal

9. The Notice of Appeal contains two grounds: what Mr Siddall has called the irrationality issue and the perversity issue. In his skeleton argument Mr Siddall raised a third issue and he submitted to us this morning that the third reason, the reasons issue, was covered by the first two issues but if it was not he sought permission to amend the Notice of Appeal to argue the reasons issues. We took the view that the reasons issues was not covered by the original Notice of Appeal and we granted permission to amend the Notice of Appeal to argue the reasons issue for the reasons we gave earlier this morning. I will therefore start with the reasons issue.

10. The authorities are well known. **Meek** has been cited many times in this Tribunal and it is not necessary for us to repeat it. Perhaps the most recent statement is that of HHJ Hand QC sitting in this Tribunal in **Greenwood v NWF** [2011] ICR 896 at paragraphs 62 and 63. He said this:

> **"62. Meek said something about content. There must be an outline of the story leading to the complaint, there must be a summary of factual conclusion and reasons as to why those conclusions have been reached on those facts. All this must be in sufficient detail to enable the parties to know why each has won or lost and to allow the Appellate Tribunal to see whether or not an error of law arose.**
>
> **63. Since 2004 Rule 30(6) has set out what the contents of a decision should be. In our view the continuing utility of Meek relates to issues as to whether there has been substantial compliance of the rule. It seems to us that is why Buxton LJ kept it in mind when considering whether there had been substantial compliance with Rule 30(6)(c) and (e) in Balfour Beatty. Substantial compliance with the rule can only be achieved by sufficient detail in respect of each of its components so as to enable a party to understand the conclusions reached and how their application has resulted in the outcome. It seems to us that however closely Meek may resemble English the Tribunal would be better to refer to Meek which is the Court of Appeal decision relevant to this jurisdiction. Furthermore, without attempting to lay down any rigid guidance and mindful that all cases are different, we think most cases are likely to call from rather more explanation than was envisaged by last sentence of paragraph 19 in English."**

11. He then goes on to say this:

> **"If the critical issue is one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."**

12. In this case Mr Siddall submits that the issue for the Tribunal of whether or not Mr Pybus would have resigned and claimed constructive dismissal was argued before the Employment Tribunal at its second remedies hearing but not considered at all in the reasons of the Employment Tribunal. The Respondent's written Answer concedes that the issue of constructive dismissal was raised and argued by both counsel appearing before the Employment Tribunal. Mr Siddall goes on to submit that if one goes through the Employment Tribunal reasons (and he specifically referred us to paragraphs 9, 6, 13, 15, 22, 23, 24 and 25) one finds no reference at all to the concept let alone the test of constructive dismissal. The test for constructive dismissal is set out in paragraphs 4-6 of his skeleton argument. Mr Grundy agrees with it, we do not need to set it out. It is well known. So if one stands back from the reserved Judgment and the reasons of the Employment Tribunal, one finds no mention of the concept of constructive dismissal at all let alone the application of the principle to the facts of the case. What the Tribunal did was to consider three possibilities in this case, none of which was constructive dismissal.

13. By contrast, Mr Grundy submits that if one reads the Tribunal reasons carefully one can see that although the Tribunal does not use the term "constructive dismissal" or indeed set out the test for constructive dismissal, it did in fact consider it and reject it and found that the Claimant would have resigned, a voluntary resignation, and not, as Mr Siddall argued, a constructive dismissal.

14. We have listened carefully to the submissions made by counsel and compliment Mr Grundy on his manful attempts to persuade us that the Employment Tribunal had the concept of constructive unfair dismissal in mind but we are unable to agree with him. We have read and re-read these reasons and we simply cannot see that the Tribunal flagged up the issue which had been argued before it by counsel. It is simply not there. If it was a question of interpretation of

particular passages in the reasons we may have some sympathy for Mr Grundy's submission but there is no discussion at all of the concept of constructive unfair dismissal and whether it applied in this case.

15. We think the answer to this may be the fact that this was a reserved Judgment which was not sent to the parties until some two months after the hearing, but be that as it may we are satisfied that the reasoning of the Tribunal does not tell Mr Pybus why the Employment Tribunal rejected the submission of his counsel that constructive unfair dismissal operated in this case, and on that basis that he was entitled to the full compensation up to the period of three months after the end of his three-year contract.

16. We can deal briefly with the other grounds of appeal. They are irrationality and perversity. Irrationality is defined as a judgment which no reasonable Tribunal properly directing itself on the law could have come to. We do not think that is this case, this is not a case of irrationality, it is a case of omission. The test of perversity is well known: see **Yeboah v Crofton** [2002] IRLR 634 at paragraphs 92 to 95 per Mummery LJ. As he pointed out the hurdle is a very high one. This is not a case of perversity, it is a case of omission. So the appeal is allowed on the reasons issue and dismissed on the irrationality and perversity issues.