Appeal No. UKEAT/0238/12/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 November 2012

Before

MR RECORDER LUBA QC

MRS C BAELZ

MS G MILLS CBE

MR P TANSELL — APPELLANT

HENLEY COLLEGE COVENTRY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR J LADDIE (One of Her Majesty's Counsel) Instructed by: UCU Legal Services University and College Union Carlow Street London NW1 7LH
For the Respondent	MR A KORN (of Counsel) Instructed by: Hallett Employment Law Services Ltd Liverpool House 15 South Avenue Ullesthorpe Lutterworth Leicester LE17 5DG

SUMMARY

UNFAIR DISMISSAL- Reasonableness of dismissal

Fixed term contract expires, not renewed. Claim for Unfair Dismissal. Respondent says reason for dismissal was 'redundancy'. Claimant says dismissal was by reason of making a protected disclosure or was disability discrimination. ET says dismissal was because the contract expired. Appeal for failure to find what the actual reason for dismissal was.

Appeal allowed. Expiry of the contract *was* itself the dismissal (s95 ERA) and not the reason for it. The employer must offer a s98 ERA complaint reason and the Tribunal must find the true reason.

Remitted to fresh Tribunal.

MR RECORDER LUBA QC

Introduction

1. This is an appeal by Mr Paul Tansell from the unanimous Judgment of the Employment Tribunal sitting at Birmingham. The Judgment was of a Tribunal comprised of Employment Judge van Gelder and members Mr Barley and Mr Bell. The Judgment was given on 23 January 2012.

2. By their Judgment, the Employment Tribunal dismissed Mr Tansell's claims brought against the Henley College of Coventry who were his former employers. Those claims were for unfair dismissal, automatically unfair dismissal, detriment following a protected disclosure, direct disability discrimination and failure to make reasonable adjustments, as well as victimisation.

3. By this appeal, Mr Tansell contends that the Employment Tribunal erred in law in relation to its disposal of his claim for unfair dismissal and consequently it likewise erred in law in rejecting those of his other claims which were contingent on the circumstances of and reasons for his dismissal. As will be seen, in essence this is an appeal arising from what is said to have been a fundamental failure by the Employment Tribunal to give reasons for its decisions.

The background

4. Henley College is an educational institution in Coventry. It employs both teaching and support staff. Many of its staff were employed on fixed-term contracts and those staff were known as sessional staff. Mr Tansell was such a member of staff. He began working for the college in November 2007. Like other sessional staff he was employed for each academic year on a fixed-term contract expiring at the end of the next summer term. Whether a sessional

worker would be re-engaged for the following academic year and on what terms would be at least in part determined by what courses would be offered by the college that following year and what number of students would take up those courses.

5. For the 2009/2010 academic year, Mr Tansell's contract was to work as a Sessional Communication Support Worker. In that role Mr Tansell, who is himself deaf, provided support services to hearing impaired students such as interpreting, note-taking and lip speaking. To put matters very shortly, there were differences of view between Mr Tansell and the college about the way in which support services for hearing impaired students were being delivered in 2009/2010 and, in particular, over certain assessment tests (and by whom those tests should be undertaken).

6. In early July 2010, following a disciplinary investigation and a disciplinary hearing, Mr Tansell was issued with a final written warning in respect of certain alleged inappropriate behaviour and a failure to comply with a reasonable management instruction, which matters were themselves related to the fundamental difference of opinion just mentioned. He lodged an appeal against the written warning. His appeal was unsuccessful and in October 2010 he was told that the decision to issue the written warning had been upheld by an appeal tribunal.

7. In respect of a further and separate matter, another disciplinary investigation had been put underway in mid-July 2010. By then Mr Tansell was suffering with ill-health and it appears that the new disciplinary process may never have been concluded.

8. In the meantime, Mr Tansell's latest fixed-term contract of employment had become time expired on 28 May 2010. By an agreement reflected in a letter signed by both parties, that term was extended to expire on 16 July 2010. However, on 11 June 2010 the college gave notice to

the relevant recognised trade union representative of certain proposed redundancies. Although the notice referred in terms to those sessional staff who were lecturers, the Employment Tribunal were satisfied that the notice was intended to, and did, embrace other sessional staff such as Mr Tansell.

9. The proposal notified was to dismiss all 103 sessional staff with effect from whichever was the later of the expiry date of their extant contracts or 31 July 2010. In Mr Tansell's case, as already noted, his contract expired on 16 July 2010. Mr Tansell was not re-engaged by the College for the academic year 2010/2011. By his claim made to the Employment Tribunal Service, later in 2010, Mr Tansell asserted that he had been unfairly dismissed.

10. His claim form gave lengthy particulars of that claim and his other associated claims and read in part as follows:

> **"The claimant avers that the reason for the final written warning and the dismissal was as a result of the fact that he raised protected disclosures regarding the legal obligation of the college to ensure non-discrimination to students."**

11. The answer given by the college on form ET3 was a rejection of the claims. In respect of the claim for unfair dismissal the form ET3 said this:

> **"5.2.28 Mr Tansell's sessional contract ended on 16th July 2010, as is standard in education settings, due to the temporary cessation of work during the summer holiday period. He was subsequently paid for work carried out in July, plus outstanding holiday pay, on 31st August 2010 (i.e. one month in arrears) as it is usual practice. He was not paid for any work, nor for being available for work, for the month of August (as he alleges).**
>
> **5.2.29 It is accepted that Mr Tansell was asked, along with other former sessional staff, in September 2010 if he would be available for work at the College from September. However, there was no contract of employment in existence after the 16th July 2010, and no continuity of employment (as was made clear to Mr Tansell and the other sessional staff in the letter of the 11th June 2010)."**

12. Later, in the same form ET3, the college said this:

> **"The College maintains that Mr Tansell's employment with the College came to an end on the 16th July 2010 with the expiry of his fixed term contract. The College maintains that this is a fair reason for dismissal, and that the process of dismissal and decision to dismiss was fair and reasonable in the circumstances. The respective Trade Unions were notified and consulted with over the expiry and resulting redundancy of the sessional staff arising with the end of the**

academic year. No complaint has been received over this matter from any of the Trade Unions or any other employee representative."

The Tribunal's Judgment

13. The Employment Tribunal's Judgment follows a familiar structure. It first identifies the issues. It then sets out a very full narrative of the history of Mr Tansell's employment and the Employment Tribunal's extensive findings of fact about that history. The Judgment next recites certain statutory provisions relevant to the claims and, in a short summary, recounts the opposing submissions of each of the representatives of the two parties. The Tribunal's Judgment concludes with succinctly stated reasons and conclusions.

14. As to the claim made for unfair dismissal, the Employment Tribunal say this at paragraph 8.1 of their Judgment:

> **"The claimant's contract expired by effluxion of time when the extended fixed term expired on 16 July 2010. The termination was part of a process which the College had following in previous years in relation to their fixed term contracted sessional workers who had varying hours. The termination of the contract was co-terminus with the relevant course. In the claimant's case it was the specific date in the contract as the support work provided by him with other CSWs was not course specific but student specific. The fact that the claimant had been involved in disciplinary proceedings and was subject to a disciplinary investigation at the time of the expiration of the fixed term had no bearing on the process. The tribunal were satisfied that the process by which the contract came to an end was an entirely legitimate and fair process and had not been affected by the events culminating in the disciplinary proceedings which had been brought against the claimant."**

15. As to the dismissal having been automatically unfair because of the making of a protected disclosure, the Tribunal say this at the end of paragraph 8.2:

> **"In any event, the finding of the tribunal was that the dismissal was by reason of the expiry of the fixed-term and was unrelated to any potentially protected disclosure."**

16. In that quotation we highlight the word, "reason". As to the claim of direct disability discrimination by virtue of the dismissal, the Tribunal says this at paragraph 8.5:

> **"For the reasons previously given the tribunal has found that the reason for the claimant's dismissal was the expiry of the fixed term."**

17. Again, we emphasise the words "reasons" and "reason". In respect of the claim for wrongful dismissal the Tribunal at paragraph 8.7 of their Judgment record that:

> **"The claimant's employment terminated entirely in accordance with contractual requirements on the expiry of the fixed term."**

The appeal

18. Mr Laddie QC, appearing for Mr Tansell, made a simple and short submission. It was that the Employment Tribunal had not met its statutory obligation, when dealing with an unfair dismissal claim, to identify what was the "reason" for the dismissal. It had been common ground that the effective date of termination in this case was 16 July 2010. It had also been common ground that the contract of employment had determined by effluxion of time and had not been renewed. Accordingly, there had been a dismissal. That much is clear from the terms of section 95 of the **Employment Rights Act 1996** which provides:

> **"(1) For the purposes of this part an employee is dismissed by his employer if […] he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract."**

19. The unfair dismissal claim, Mr Laddie submitted, required by the Employment Tribunal to determine two very basic, indeed, fundamental questions; first, what was the "reason" for the dismissal and; secondly, if the dismissal was for a permissibly fair reason, was there in all the circumstances a fair dismissal? Mr Laddie argued cogently in writing and in his oral submissions that in so far as the Employment Tribunal had undertaken the task of asking what was the reason for dismissal at all, it had confined itself to repeatedly stating that the reason was the expiry of the fixed term. If, he submitted, that was really their finding on the reason for dismissal, rather than being simply an acknowledgement of the fact of a dismissal, it was not a potentially fair reason because expiry of fixed term is not included in the list of potentially fair reasons set out in the statute.

20. The Employment Tribunal, he submitted, had conflated the identity of the mechanism by which the employment had ended with the reason for its having ended. That, submitted Mr Laddie, was the exact error that had been highlighted by the Court of Appeal in **Lee v Nottinghamshire County Council** [1980] IRLR 284. That case draws a clear distinction between the fact of expiry of the term of a fixed term contract and a reason for a dismissal. By way of example, Mr Laddie drew our attention to the terms of paragraph 8.1 of the Tribunal's Judgment which we have already set out. Mr Laddie submitted that in that paragraph the Employment Tribunal had simply skipped an essential stage. They had found a dismissal, they had found a fair procedure, but they had missed the need to identify a legitimate reason for the dismissal.

21. Mr Anthony Korn, for the college, invited us to uphold the Employment Tribunal. He acknowledged that the Employment Tribunal's Judgment could have been clearer in the criticised respect, but he said that the Employment Tribunal must be taken to have accepted the college's case that the reason for dismissal was "redundancy", which is a potentially fair reason.

22. Mr Korn reminded us of the Judgment of this Appeal Tribunal given by HHJ McMullen QC in the case of **Korashi** [2012] IRLR 4. In that case at paragraph 31(4) of his Judgment, HHJ McMullen had in a distillation of earlier authorities stated that:

> **"The approach to an Employment Tribunal's reasons must be non-fussy, non-pernickety and must not be hyper critical."**

23. Mr Korn submitted that a true reading of the Judgment of the Tribunal in this case necessarily carried the inference that the Employment Tribunal had adopted the reason for dismissal as advanced by the college. His well crafted argument ran as follows. First, the relevant contemporaneous documents spoke of redundancy as the reason for dismissal. He took us to the terms of two letters dated 11 June 2010. The first was the letter to the official trade

union representative to which we have already referred. That said in terms, "The number of employees whom it is proposed to dismiss as redundant is 103."

24. The second of the letters he showed us, also of 11 June, was a letter addressed, "Dear colleague…" which was sent to members of staff. It indicated that the dismissal of sessional staff was proposed on grounds of redundancy and indicated that, "You may have a right to claim a statutory redundancy payment." Secondly, he reminded us that the Employment Tribunal had not only had those documents before them, but they had recorded in their Judgment that the despatch of such documents represented usual practice and that Mr Tansell himself had been one of those sent the second, or "Dear Colleague", letter. Thirdly, Mr Korn reminded us that the Tribunal had found that exactly the same notice and process had been followed in respect of all 103 staff; see paragraph 4.47 of their Judgment. Fourthly, Mr Korn invited our attention to the Tribunal's own summary of the way in which the case had been put by the Respondent college. He told us that the list of issues identified by the Tribunal in the early parts of its Judgment had come from a list prepared by the college's representative. That had included under the heading, "Unfair Dismissal" the following entries, "Potentially Fair Reason, section 98 Employment Rights Act 1996" followed by, "Was the Dismissal (For Redundancy) Fair?" With that entry in the list of issues, he invited our attention to the distillation of the Respondent's oral and written arguments given by the Employment Tribunal in their Judgment at paragraph 7.2 and 7.3. From those, as he fairly indicated, it was clear that the Respondent's case was that the dismissal was by virtue of "redundancy".

25. In sum, Mr Korn invited us to hold that it was obvious that the Employment Tribunal had adopted the Respondent's submission. That was not least because they were essentially faced with two starkly alternative cases as to the reason for dismissal. On the one hand, the college's case that the dismissal had been way of redundancy and on the other hand Mr Tansell's case

was that he had been dismissed by virtue of discrimination directed against him on grounds of disability (or, alternatively, because he had made a protected disclosure). Mr Korn submitted that it must follow from the express rejection of Mr Tansell's case in paragraphs 8.1 to 8.5, in particular, that the college's case as to the reason for dismissal had been accepted.

Discussion

26. It is, in our unanimous Judgment, absolutely fundamental that an Employment Tribunal hearing a claim for unfair dismissal should set out clearly the terms of section 98 of the 1996 Act which applies to such cases or at least it should offer a distillation of the questions that the section requires it to decide. It should then show, in its Judgment, that it has decided those questions, what answers it gives to them, and what are the reasons for those answers.

27. The structure of section 98(1) clearly provides that where the fact of dismissal is not in issue, as it was not in issue in this case, the burden is on the employer to show what the 'reason' for the dismissal was. The question for the Employment Tribunal is then whether the employer has met that burden. Section 98(2) provides that the reason must be one of those listed or some other substantial reason. The question for the Employment Tribunal is whether the reason proven by the employer is among those listed. An Employment Tribunal dismissing an unfair dismissal claim does not discharge its statutory responsibility to give reasons unless it states: firstly that it is satisfied that the employer has proved a reason for the dismissal; secondly, what that reason is; and, thirdly, that the reason is one of those provided for by the statute. In this case, and in acceptance of the thrust of Mr Laddie's submission, we are satisfied that this Employment Tribunal has failed in its task.

28. This Employment Tribunal has simply elided the mode of dismissal, that is to say the termination of a fixed-term contract by expiry and without renewal, with the reason for that dismissal. It has not, in terms, stated what it found to be the reason, if any, for the dismissal.

29. As attractively as Mr Korn framed his attempt to shore-up that central omission, the attempt in our Judgment fails. If, as Mr Korn submitted, the Employment Tribunal were finding that the reason for dismissal was redundancy as advanced by the college, it is extraordinary that the Tribunal did not say that it was accepting that reason in express terms. His invitation to us to hold that the Tribunal impliedly did so must be rejected in the circumstances of this case. We note that in the Employment Tribunal's own recital of the terms of section 98 and in particular in its recital of section 98(2) it omitted reason (c); that is to say, "That the employee was redundant". That is an extraordinary omission if the Tribunal were finding that this was a dismissal for redundancy. Likewise, the Employment Tribunal does not recount or even summarise the statutory definition of redundancy, nor does it apply that definition or give any reasons as to why it found that there was a genuine redundancy in this case. If it was accepting that the reason for dismissal was redundancy it would have at least done that much.

30. In essence, Mr Korn was suggesting that to hold that the Employment Tribunal had failed to identify the true reason for dismissal would be to take unduly technical approach to the Employment Tribunal's Judgment. We could not more forcefully disagree. In an Employment Tribunal Judgment, rejecting a claim for unfair dismissal, the finding by the Employment Tribunal as to the 'reason' for dismissal should virtually leap from the page, such is its significance.

31. This Employment Tribunal Judgment is unusual in the extent to which it offers exceptional detail in relation to the factual history but concludes with a single paragraph,

paragraph 8.1, encapsulating both its reasons and conclusions on the unfair dismissal claim. As Mr Laddie rightly points out, the fact that it manages to address the fairness or otherwise of the dismissal in a single sentence in that paragraph illuminates the extent to which this Judgment falls short of the standard to be expected.

Disposal

32. It follows that on this single, narrow but important, ground the appeal succeeds. We accept, having considered the opposing cases, that Mr Laddie is right that the reason for, and the fairness or otherwise of, the dismissal infuses the majority if not all of Mr Tansell's other claims before the Employment Tribunal services. They must all therefore in our Judgment be remitted and re-determined (see the Rider below).

33. In the circumstances of this case, that task can only be undertaken by a differently consisted Tribunal since, whatever else it did, this Tribunal appears to have taken a particular view of the merits of the claim. Mr Laddie urged us to go further and to take the opportunity to give directions to the Employment Tribunal as to the specific way in which it should handle the remitted unfair dismissal claim. There was, he said, a real issue arising in practice as to whether an Employment Tribunal dealing with an expired fixed term contract case should confine its attention to the date of dismissal, as this Employment Tribunal had seemingly done, or whether it should consider the potentially later date on which a decision was taken by an employer not to renew the contract. That approach was, Mr Laddie submitted, mandated by the wording of section 95.

34. We do not accept that this is a case in which it is necessary or appropriate to give general guidance. We would be doing so in a context where neither party had advanced the point previously before the Employment Tribunal and where there is already a significant body of

precedent. There is certainly an issue joined now between the parties in the present case as to how the question is best approached, but we consider that this Appeal Tribunal should only seek to give guidance in a case in which the propositions and issues have been canvassed in argument in an Employment Tribunal, have been applied to specific facts and have generated a Judgment on the relevant points. That approach ensures that any guidance given is given on a firm foundation.

35. In the light of the terms of the Judgment just delivered, which is the Judgment of us all, this appeal shall be allowed and the Claimant's claims shall be remitted for determination to a fresh Employment Tribunal.

Rider

36. In our Judgment on the substantive appeal, in those passages dealing with disposal, we indicated that we would remit to the Employment Tribunal all the dismissal-related aspects of the employee's claim. Very properly upon our delivery of that Judgment, Mr Korn for the college invited our attention to the fact that there were aspects of the claims which could be said to be not related to the dismissal finding. We heard argument therefore, briefly, on the extent to which a remission should take place and in relation to which claims. As to the claim for victimisation, that had been dismissed by the Employment Tribunal largely by reason of non-compliance with certain directions. Mr Laddie for Mr Tansell indicated that the victimisation claim was no longer pressed and in those circumstances it shall stand dismissed. There was a free-standing claim for failure to make reasonable adjustments. That was unsuccessful and appears to relate to an aspect of the disciplinary process. It does not touch on the question of the ultimate dismissal. In those circumstances, Mr Laddie did not press that claim further and it too shall stand dismissed.

37. There is a third and separate contractual claim for wrongful dismissal. Again, Mr Laddie accepted that that should not be pressed further and in those circumstances that too shall stand dismissed. That leaves, we understand, only three potential claims; the first for unfair dismissal. We have already indicated that must be remitted. The second is the question of automatically unfair dismissal. It is said by Mr Korn that the question of whether or not there was a protected disclosure has been settled by the Tribunal and was not subject to any express ground of appeal. We prefer, however, Mr Laddie's submission that the question of whether there was qualifying disclosure is very much bound up with the way in which the Tribunal dealt with the whole question of automatically unfair dismissal in paragraph 8.2 of its Judgment. We are satisfied that the matter should be remitted. Thirdly, it is quite clear that there is a claim for disability discrimination which touches on the dismissal, and as we have indicated we remit that also.