Appeal No. UKEAT/0053/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 April 2018

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR A WOLLENBERG — APPELLANT

(1) GLOBAL GAMING VENTURES (LEEDS) LIMITED
(2) MR A W HERD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PATRICK HALLIDAY (of Counsel) Instructed by: Brahams Dutt Badrick French LLP Monument Place 24 Monument Street London EC3R 8AJ
For the Respondents	MR ALEXANDER ROBSON (of Counsel) Instructed by: Fieldfisher LLP 37 Peter Street Manchester M2 5GB

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The Employment Judge's reasons for refusing an application for interim relief did not sufficiently explain his decision to meet the legal standard for reasons. **Al Qasimi v Robinson** UKEAT/0283/17 at paragraph 59 applied.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Anthony Wollenberg ("the Claimant") against an Order of Employment Judge Henry sitting in the Watford Employment Tribunal ("ET") dated 23 January 2018. By his Order the Employment Judge refused an application by the Claimant for interim relief pursuant to section 128 of the **Employments Rights Act 1996** ("ERA").

The Background Facts

2. I can state the background to this appeal quite shortly. Related litigation in the Chancery Division has recently been the subject of an appeal to the Court of Appeal: **Global Gaming Ventures (Group) Ltd & Wollenberg v Global Gaming Ventures (Holdings) Ltd & Herd** [2018] EWCA Civ 68 (30 January 2018). The judgment of Patten LJ contains a detailed account of the dispute; see especially paragraphs 2 to 21 and 42.

3. Global Gaming Ventures (Leeds) Ltd ("the Respondent") was formed to open and run the Victoria Gate Casino in Leeds. The Claimant was its part-time Executive Chairman; Mr Andrew Herd, its Chief Executive Officer. The Respondent's immediate owner was Global Gaming Ventures (Developments) Ltd. This company was in turn owned by Global Gaming Ventures (Holdings) Ltd, and this company was in turn owned as to 75% by Global Gaming Ventures (Group) Ltd, a vehicle of the Claimant, and as to 25% by Mr Andrew Herd; so the Respondent was ultimately owned as to 75% by the Claimant and as to 25% by Mr Herd.

4. Finance was required to open and run the casino. An investment fund, Summit Partners (GGV) Sarl ("Summit"), lent some $41 million pursuant to a Facilities Agreement in February 2016 with Developments. As part of its security Summit obtained a debenture by which

Holdings charged its shares in Developments and Developments charged its shares in the Respondent by way of fixed first charge. The debenture entitled Summit, if there was a default in repayment, to appoint a Receiver over the shares.

5. The casino was opened on time and on budget in January 2017. Thereafter it began to have cash flow difficulties. Over the same period there was a breakdown of relations between the Claimant and Mr Herd, which was as Patten LJ noted bound to be a matter of concern to Summit and any other potential investor in the business. The Claimant made serious accusations against Mr Herd. In August 2017, he purported to remove Mr Herd as an employee of the Respondent and filed notice of his removal as Director. Summit reacted adversely to these actions. It served a notice of default under the Facilities Agreement and appointed Receivers over the shares in Developments. The Receivers took steps to remove the Claimant as Director of Developments and the Respondent. So by the end of August Mr Herd was the sole Director of these companies.

6. At this stage the Claimant remained an employee of the Respondent. The Respondent instituted an investigation into his conduct. By 26 September the Claimant sent an email to the Respondent's Company Director stating explicitly that he regarded himself as having made and as by that letter continuing to make a series of protected disclosures for the purposes of the **ERA**. Disciplinary charges were formulated against him.

7. A firm of solicitors, Hill Dickinson, instructed a Human Resources professional, Mr Steve Beck, to deal with the disciplinary proceedings. It also instructed him to treat the letter dated 26 September as a grievance and to investigate the grievance. The Claimant did not accept that Mr Beck's appointment was valid. In particular, he alleged that there was a conflict

of interest, which ought to have prevented Hill Dickinson from making any such appointment. He did not meet with Mr Beck although he made written submissions.

8. Mr Beck produced a report dated 3 November 2017. Of the five charges, he upheld two as charges of gross misconduct and decided that the Claimant should be summarily dismissed. He did not address the letter dated 26 September as a grievance, stating that the Claimant had refused to attend a grievance meeting or engage in such a process. He said that his decision was taken by reason of the Claimant's misconduct not by reason of any protected disclosure.

9. In the meantime, in early October 2017, the Receivers had sold the shares in Developments to an associated company of Summit for a nominal consideration of £1 leaving the existing indebtedness in place.

The Employment Tribunal Proceedings

10. The Claimant instituted ET proceedings on 12 November 2017. His claims included a claim for automatic unfair dismissal contrary to section 103A with an application for interim relief under section 128. This came on for hearing on 4 December 2017. The Claimant represented himself. The Respondent was represented by leading counsel, Mr Tatton-Brown QC.

11. The Employment Judge's task was not enviable. Both parties adduced, in addition to the witness statements of the Claimant and Mr Beck, bundles containing many hundreds of pages. The Respondent produced a skeleton argument; the Claimant did not but he asked for and was granted at the end of the hearing time to make written submissions. There followed, during December, an exchange of written submissions running to more than 50 pages.

12. The Claimant's case appears in writing from two main documents. The first is his claim form, which runs to some 55 pages. In this claim form he criticises in detail the conclusions reached by Mr Beck. He asserts Mr Beck's appointment was invalid and he asserts that the true reason for dismissal was the making of protected disclosures about Mr Herd, many of which he set out in that document.

13. The second is his written submission dated 11 December 2017. He stated as follows:

> **"9. It is submitted that:**
>
> > **a) Beck's dismissive and oppressive attitude to serious allegations raised by C relating to the integrity of the disciplinary process ab initio (pages 468-472);**
> >
> > **b) his determination to proceed in the face of C's objections which went to the heart of his alleged independence, (pages 468-472) and R's bundle P 72-4) [sic];**
> >
> > **c) the lack of an engagement letter in relation to a matter with such obviously grave implications for the concerned parties (page 468 and Para 11 Beck WS);**
>
> **is compelling evidence of an outcome predetermined and directed by Rs and entirely unrelated to the specious allegations against C.**
>
> **10. Further, Beck offers no explanation for failing to enquire as to the necessity for his appointment when the previous investigation by Anne Pomfret had produced an interim report (430-453) which concluded that none of the allegations had been proved. This was after C had offered to meet Ms. Pomfret on a number of different occasions (Paragraph 11 of Beck's WS)."**

14. By this time also the Claimant was aware of the decision in **Royal Mail Ltd v Jhuti** [2017] EWCA Civ 1632. He stated:

> **"15. C's submission is that the conduct of Beck goes well beyond an Iago - type scenario and the type of manipulation situation referred to by Royal Mail. This arises as a result of the compelling evidence that in this case:**
>
> > **a) the alleged decision maker was not the real decision maker at all;**
> >
> > **b) even if he was, that decision was heavily influenced by R's;**
> >
> > **c) Beck was complicit in that process because, unlike the position in Royal Mail, he had been provided with full details of C's Protected Disclosures at least up to and including 11th October and he had dismissed them as an irrelevance."**

15. The Claimant set out conclusions in the latter part of his reasons. These included, in paragraph 114, an assertion that the Claimant's actions in removing and dismissing Mr Herd

A and communicating the same were themselves protected disclosures. Since his dismissal was one of the acts of gross misconduct which Mr Beck relied on, there was he submitted "*an inescapable causative link*".

B

16. The Respondent's case was set out succinctly in its skeleton argument and written submissions. It did not accept that the alleged disclosures were protected, contending in particular that the Claimant did not have reasonable belief that they were made in the public

C interest. It argued that the public interest disclosure claim was inherently implausible. Mr Beck was the decision maker whose conduct had to be considered; see **Royal Mail Ltd v Jhuti**. He was an independent professional with no axe to grind. There was no smoking gun which

D might lead an ET to conclude that he was motivated by public interest disclosures.

The Employment Judge's Reasons

E 17. The Employment Judge briefly summarised the contentions of the parties and confirmed that he had read and considered their written submissions. In one respect his summary of the Respondent's case ought to be mentioned. He suggested that it was part of the Respondent's case that the disciplinary officer had not been privy to the Claimant's disclosures. It is true of

F course that Mr Beck had no prior involvement with the case and this may be what the Employment Judge meant, but before he began work the Respondent referred Mr Beck to the Claimant's letter dated 26 September and asked him to investigate it. It was not part of the

G Respondent's case that Mr Beck was not privy to the Claimant's disclosures from an early stage of his involvement in the case.

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18. The Employment Judge set out the effect of section 103A and sections 128 to 129 in a manner to which the parties take no exception. The Employment Judge stated his conclusions in the following paragraphs:

> **"15. In addressing the issues arising in this application, I am asked to considered [sic] first, whether the claimant has made a protected disclosure and on a finding of a protected disclosure then having been made, to consider the further question whether the protected disclosure was the reason or if more than one reason, the principal reason for the dismissal, and is the logical approach. Despite this, I have approached the determination of this application for interim relief on a pragmatic footing, of determining whether the decision of dismissal was premised on the claimant making any of his alleged disclosures, or if more than one reason, whether the principal reason for the dismissal was the claimant making any of his alleged disclosures, and if the answer thereto is in the affirmative, to then address the respondent's further contentions that the claimant has not, by his alleged disclosures, made a protected disclosure; the factual nature to the disclosures being of a complex nature, a determination on which, being some 30+ disclosures, where the reason for dismissal does not meet the threshold of "likely that" to engage the order for interim relief, would then be otiose.**
>
> **16. On the claimant's challenge to the disciplinary hearing being advanced on the grounds that, the body who engaged the hearing officer for the purposes of the disciplinary case against him, had a conflict of interest, premised on the instructing body having a professional/client relationship with the claimant, which challenge is not premised on the claimant having made any protected disclosures where, save for the engagement of the hearing officer, there was then no further relationship between those bodies.**
>
> **17. On the appointment of the individual to chair the disciplinary hearing to all intents and purposes, subject to the above being an independent person, where there is no suggestion that the claimant had prior to that officer's appointment had any relationship therewith or made any disclosures thereto, for the claimant to then challenge that individual's appointment, stating that, he had made protected disclosures, there is no basis upon which the claimant's disclosures were then before the chair to bring the disclosures into question, where the allegations being determined were premised on conduct of the claimant, which the claimant accepts having done, albeit with justification, again not premised on him having made any disclosures, there is presented to the tribunal nothing from which it is "likely" as amplified by President Underhill, in *Ministry of Justice v Sarfraz*, that the reason or if more than one, the principal reason for the dismissal was the claimant having made protected disclosures."**

Submissions

19. On behalf of the Claimant, Mr Patrick Halliday makes two submissions. Firstly, he argues that the Employment Judge did not give adequate reasons for his decisions; he did not comply with Rule 62 of the **Employment Appeal Tribunal Rules 1993** ("EAT Rules"); he did not meet the minimum requirement of indicating the essential gist of his conclusion. Paragraphs 15 and 16 did not state conclusions. Paragraph 16 was obscure. It had not been the Claimant's case that the dismissal contravened section 103A merely because Mr Beck had not been validly appointed. Paragraph 17 was wholly inadequate to meet the Claimant's case concerning Mr Beck and was in any event obscure.

20. Secondly, he argues that there is a perverse finding in paragraph 17 of the Employment Judge's reasons. The Employment Judge stated that there was "*no basis upon which the claimant's disclosures were then before the chair to bring the disclosures into question*". The Claimant's disclosures, however, were before Mr Beck. He was well aware of them. He had been asked to investigate the letter dated 26 September. It was part of the Claimant's case that he had not done so and his failure to do so was indicative of this mindset as in reality the puppet of the Respondent, especially Mr Herd. It was, Mr Halliday submitted, plain from Mr Beck's own witness statement that the disclosures of the Claimant were before him.

21. On behalf of the Respondent, Mr Alexander Robson readily accepts that the Employment Judge's reasons are poorly drafted. He argues however that the issue is not whether the Claimant or the EAT can identify obvious shortcomings in the reasons; rather it is whether they set out the essential gist of the Employment Judge's reasoning. He submits that, in the context of a correct statement of the law in paragraphs 11 to 14, the reasoning in paragraphs 15 to 17 was sufficient. Indeed, he submitted that the reasoning in the last four lines of paragraph 17 would suffice on its own, but he also took me through paragraphs 16 and 17 in an endeavour to show that they sufficiently set out the Employment Judge's reasoning.

22. Mr Robson further submits that the Employment Judge did not fall into error in paragraph 17 of his reasons. The word "then" must mean "at the time of appointment". It cannot mean at the time of the disciplinary proceedings or dismissal for Mr Beck had made it plain he was aware of at least some of the communications. It would have been a knockdown point for the Respondent if Mr Beck had not been aware of the disclosures at all.

23. Further or alternatively, Mr Robson argues that the Employment Judge, if he applied the law correctly, could have reached only one conclusion; namely, that the claim of automatic unfair dismissal was not "likely" to succeed in the section 129 sense. He has taken me through what he says are formidable difficulties which the Claimant faces in his application. He emphasises in particular that Mr Beck was an independent HR professional who produced a detailed report justifying his conclusions. He argues that his thought processes alone are relevant (see **Jhuti**) and there is no reason to suppose that he would risk his reputation to provide a false account of his reasons for dismissal. Mr Halliday, however, submits that if the Employment Judge has not provided proper reasons, the matter must be remitted for rehearing in obedience to approach laid down by the Court of Appeal in **Jafri v Lincoln College** [2014] ICR 920.

Discussion and Conclusions

24. Section 103A of the **ERA** provides that if the sole or principal reason for a dismissal is that the employee made a protected disclosure, the dismissal should be regarded as unfair. Section 128 makes provision for an application for interim relief, which will keep the contract of employment in force for limited purposes until determination of the claim of unfair dismissal. Section 129(1) sets out the test which must be satisfied before the application is granted. It must appear to the ET that it is likely that on determining the substantive complaint the reason for dismissal will indeed be the reason alleged by the employee. The application must be made urgently and the ET must determine the application as soon as practicable after it is received; see section 128(3)-(5). The ET will not hear oral evidence unless it makes a positive decision to do so; see Rule 95 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules").

25. **Taplin v C Shippam Ltd** [1978] ICR 1068 and **Ministry of Justice v Sarfraz** [2011] IRLR 562 are leading cases on the tests to be applied by the ET. Put shortly, an application for interim relief is a brief urgent hearing at which the Employment Judge must make a broad assessment. The question is whether the claim under section 103A is likely to succeed. This does not simply mean more likely than not. It connotes a significantly higher degree of likelihood. The Tribunal should ask itself whether the Applicant has established that he has a pretty good chance of succeeding in the final application to the Tribunal.

26. Reasons must of course be given for the decision on an application for interim relief; see Rule 62 of the **ET Rules**. As to reasons generally, the requirement is that reasons should enable the parties to see why they have won or lost and should enable an appellate court to see that the law has been correctly understood and applied. The nature and extent of the reasoning required will depend on the issues. Thus, Rule 62(4) provides that the reasons given for any decision shall be "*proportionate to the significance of the issue and for decisions other than judgments may be very short*".

27. The requirement to give reasons in the context of an application for interim relief has been considered by the EAT; see **Dandpat v University of Bath** UKEAT/0408/09, **Parsons v Airplus International Ltd** UKEAT/0023/16 and **Al Qasimi v Robinson** UKEAT/0283/17. The learning from those decisions was helpfully summarised by Her Honour Judge Eady QC in **Al Qasimi** in paragraph 59:

> **"59. I start by reminding myself of the exercise that the ET had to undertake on this application. By its nature, the application had to be determined expeditiously and on a summary basis. The ET had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. The ET3 was only served during the course of the hearing and it is apparent that points emerged at a late stage and had to be dealt with as and when they did. The Employment Judge also had to be careful to avoid making findings that might tie the hands of the ET ultimately charged with the final determination of the merits of the points raised. His task was thus very much an impressionistic one: to form a view as to how the matter looked, as to whether the Claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his**

reasoning, sufficient to let the parties know why the application had succeeded or failed given the issues raised and the test that had to be applied."

28. Against that background, I turn to the first ground of appeal, which relates to the sufficiency of the Employment Judge's reasoning. I will immediately reject the submission of Mr Robson that it would have sufficed for the Employment Judge to state the conclusion in the last four lines of paragraph 17. Those four lines contain no more than a conclusion. They do not explain, even succinctly, why the conclusion was reached and why the Claimant's case was rejected. Mr Robson sought to draw confirmation from **Dandpat**, but in **Dandpat** - a constructive dismissal case - the ET had placed emphasis on the terms of the resignation letter and it was plain that this was an important part of its reasoning; see paragraphs 14 and 17 of the judgment of the EAT in that case.

29. Some further reasoning was therefore required to set out the gist of the Employment Judge's reasons for dismissing the application. I do not underestimate the task the Employment Judge had to distil briefly his reasons from the mass of the material put before him. I have however reached the conclusion that it is not possible to find reasons within the balance at paragraphs 15 to 17 which properly explain his conclusion.

30. Paragraph 15 states no conclusion at all. It simply parks the question whether the disclosures in question were likely to be found to be protected disclosures. This was a permissible course for the Employment Judge to follow; but it means that the subsequent paragraphs must bear the whole weight of explaining his conclusions.

31. Paragraph 16 is not at all easy to follow. The "*body who engaged the hearing officer*" appears to mean the solicitors Hill Dickinson. It was part of the Claimant's case that there was

an obvious conflict of interest, which ought to have prevented Hill Dickinson's involvement but it had nevertheless pressed ahead and made the appointment despite this obvious conflict of interest. The conflict of interest, which the Claimant alleged included his dispute with Mr Herd, which on his case involved protected disclosures and his earlier criticisms of the solicitors; see especially paragraphs 146 of the ET1 details of claim.

32. Despite the attempts of Mr Robson, I have been unable to understand what point of importance the Employment Judge was making in this paragraph. The phrase "*which challenge is not premised on the claimant having made any protected disclosures*" is problematic given the nature of the Claimant's case. The last sentence is difficult to follow. It is not clear who the second "body" is. It might be Mr Beck but I think it more likely means the Claimant. The words "*save for the engagement of the hearing officer*" take out of the reckoning the point which really mattered. The Claimant was saying that the engagement of the hearing officer by Hill Dickinson when he had made public interest disclosures and complaints which clearly showed that they should not be acting was important in showing what the drivers were for his dismissal. In the end, I have reached the conclusion that paragraph 16 simply does not explain what point the Employment Judge was making or how it figured in his reasoning.

33. I turn then to paragraph 17. It is convenient before reaching conclusions about paragraph 17 to address the second ground of appeal. There are competing explanations for the phrase "*there is no basis upon which the claimant's disclosures were then before the chair to bring the disclosures into question*". Mr Robson's explanation suffers from at least two difficulties. Firstly, the Claimant's disclosures were before Mr Beck from the very first time papers were sent to him on 2 October. It is true there had been telephone conversations with Hill Dickinson prior to that time; but from the moment Mr Beck received anything which could

be described as formal instructions engaging him, the protected disclosures were in question. Secondly, the Employment Judge had already made the point earlier in that paragraph that Mr Beck had not received any protected disclosures prior to his appointment, so he would simply be repeating what he had already said. While this is possible, I think it is unlikely and it would hardly be an important point.

34. I am not without sympathy with the Employment Judge who was faced with two bundles of papers and many submissions, both oral and in writing, but I think he has fallen into error at this point. On any ordinary usage of the words "*the claimant's disclosures were then before the chair*" and in issue; it was part of the Claimant's case that Mr Beck's failure to engage with them was indicative of a lack of independence from Hill Dickinson and Mr Herd.

35. If I am wrong about my conclusion in respect of ground 2, I would still reach the conclusion that paragraph 17 does not sufficiently explain the Employment Judge's reasoning. I have real difficulty not only in understanding the phrase I have already discussed but the subsequent sentence where the Employment Judge says that the allegations determined were not premised on the Claimant having made any disclosures. It is of course true that this is what Mr Beck said in his report; but the Claimant is entitled to point out that underlying key findings relating to his purported dismissal of Mr Herd and appointment of an administrator were his allegations that Mr Herd was incompetent and in breach of fiduciary duty. Whether these allegations were truly protected disclosures was of course in dispute, but the Employment Judge had expressed no view on the likelihood of the Claimant's success on that point.

36. In the end, as I say, I have reached the conclusions that these paragraphs do not sufficiently explain the Employment Judge's reasoning - even the gist of it. I have therefore reached the conclusion that the Employment Judge's reasons cannot stand.

37. Contrary to Mr Robson's submissions, I have reached the conclusion that it would not be permissible for me to carry out my own assessment of the material before me in order to decide whether the appeal should be dismissed.

38. The leading case is **Jafri v Lincoln College** [2014] ICR 920. In paragraph 21, Laws LJ said the following:

> **"21. I must confess with great respect to some difficulty with the "plainly and unarguably right" test elaborated in the *Dobie* case. It is not the task of the Employment Appeal Tribunal to decide what result is "right" on the merits. That decision is for the employment tribunal, the industrial jury. The appeal tribunal's function is (and is only) to see that the employment tribunals' decisions are lawfully made. If therefore the appeal tribunal detects a legal error by the employment tribunal, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the appeal tribunal is able to conclude what it must have been. In neither case is the appeal tribunal to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the employment tribunal, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."**

39. This is not a case where there is a knockdown point of law which can enable the EAT to reach its own conclusion on the basis of findings by the ET supplemented by undisputed or indisputable facts. Some factual assessment by the EAT would be necessary. **Jafri** says that that is not permissible. It follows that the case must be remitted.

40. When the EAT decides whether to remit the case to the same or to a different Tribunal it takes into account the overriding objective and criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. Mr Robson submits that I should remit the matter to the same Employment Judge, pointing out that this would be a proportionate course having regard to the

amount of expenditure which has already taken place on the interim relief application and which might have to be duplicated if there were a hearing in front of a different Employment Judge. I have borne that point in mind. It would favour a remission to the same Employment Judge but I have reached the conclusion, having regard to the deficiencies in the Employment Judge's reasons which I have described, that this case ought to be remitted to a different Employment Judge who will look at it afresh.

41. I should finally say that nothing in this Judgment should be taken as expressing any conclusion one way or the other as to the outcome of any remitted hearing. I express no such conclusion.

42. I would however urge the parties carefully to consider preparation for any remitted hearing. Such hearings are intended to be short. They are, as the cases make plain, intended to be broad assessments by an Employment Judge who cannot be expected to grapple with vast quantities of material. Contrary to something which Mr Halliday said to me on instructions, no great reputational importance can be invested in the outcome of an interim hearing application. It is only a preliminary view taken by an Employment Judge in a case which will have to be in due course the subject the detailed investigation.

43. The appeal is allowed and the Order set aside. The case is remitted to a different Employment Judge.