Appeal No. UKEATPA/0315/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 March 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR W LEMA — APPELLANT

DHL SUPPLY CHAIN LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MR ANDREW ALLEN (of Counsel) Appearing under the Employment Law Appeal Advice Scheme

HER HONOUR JUDGE STACEY

1. This case comes before this Appeal Tribunal on the Appellant's entitlement, pursuant to Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** ("EAT Rules"), to an oral hearing to consider whether the Notice of Appeal discloses any reasonable grounds for bringing the appeal. I remind myself that by section 21(1) of the **Employment Tribunals Act 1996** this Tribunal is restricted to a consideration of questions of law. It is the role of the Employment Tribunal to make findings of fact on the evidence before it, which it is best placed to do, since it has the advantage of seeing and hearing the evidence and, in this case, also had the benefit of sitting as a tripartite panel.

2. I give permission for the proposed grounds of appeal to be amended by substitution of the original grounds at pages 48 to 51 with the amended grounds at pages 62 and 63 in the bundle.

3. The proposed Appellant was the Claimant in the Employment Tribunal and I shall continue to refer to the parties by their status at the Employment Tribunal.

4. In a Reserved Judgment by the Employment Tribunal sitting at Watford before Employment Judge Heal, Mrs S Low and Mr S Bury, heard over eight days, with a further day in chambers, and sent to the parties on 6 April 2017, the Tribunal found that the Claimant's complaint of unpaid accrued holiday pay was well-founded. However, the remaining claims of unfair dismissal, unfair dismissal for public interest disclosure, breach of contract, unauthorised deduction of wages contrary to Part I **Employment Rights Act 1996**, disability discrimination, victimisation, and disability harassment were dismissed.

5. The Employment Tribunal succinctly identified the issues before it (see paragraphs 14 to 29) and set out a concise and accurate statement of the law (see paragraphs 30 to 58). The Tribunal made clear and comprehensive findings of fact concerning events commencing from May 2015 to 20 March 2016 based on the live evidence before it, which included the evidence of both the Claimant and a number of the Respondent's managers together with contemporaneous documentary evidence.

The Facts

6. In brief summary - and at the risk of doing an injustice to the Employment Tribunal's comprehensive Judgment - the facts were these. The Claimant was employed by the Respondent as a warehouse team member from 8 August 2010 at the Respondent's Enfield site. The Respondent company provides warehouse and distribution services to various large organisations, including major retailers such as Iceland Frozen Foods. After developing a back problem, and as an adjustment, the Claimant was moved to a day shift and onto administrative work. He sought a number of changes to his shift and working hours during the course of 2015. His request to move to night work was refused for a number of reasons, which the Tribunal decided did not relate to his disability: the Claimant was not performing satisfactorily at that time and there was more support available for him during the day and the necessary training that the Claimant was undergoing was not available at night.

7. The Claimant had a number of grievances and grievance appeals during the course of 2015 concerning the treatment, and alleged treatment, of him by his colleagues and also his line manager, Mr Lawford, and Mr Lawford's manager Mr Law. From 21 October 2015 the Claimant was off sick with work-related stress and back pain, which continued until 23 November, and was then signed off sick again thereafter. He had a constructive and supportive

back-to-work meeting and also a one-to-one meeting with Mr Law. The Claimant was allocated to work in an area known as "ambient issue", which I take to mean goods at room temperature as opposed to frozen or chilled. However he refused to work in ambient issue, as he considered it was too fast for him, and in deference to his request he was allocated to the frozen section instead, which was apparently less busy.

8. Shortly before Christmas 2015, on 23 December, a meeting took place in the canteen. By that stage the Claimant was refusing to do the job he was employed to do. He asked if he was suspended and it was explained that if he was not going to do his duties, he would be sent home unpaid, but if he was willing to return to work, he would be welcomed back at any stage. The Claimant claimed that he felt that he was being discriminated against, victimised, and harassed, and that his grievances were being dealt with in a capricious and calculated manner, but that he was not refusing to be paid his salary.

9. The grievance process continued, and the Claimant remained at home, unpaid. He raised further grievances in January 2016 and complained about not being paid on 25 January. The Tribunal found that Respondent was within its contractual rights not to pay him since he was not attending work because he was refusing to come in to work. On 1 February the Claimant provided details of the shift he would be willing to work on, which was not satisfactory from the Respondent's point of view. Both parties behaved in a way consistent with the contract subsisting, the Claimant pursuing various grievances and appeals, and the Respondent reminding the Claimant that he could return, and correspondence between them continued concerning the various adjustments sought.

10. The grievance outcome was sent on 24 March 2016. Shortly before that, on 20 March, the Claimant lodged an ET1 claim which included an allegation of unfair dismissal (this was his second claim form, the first having been lodged in 4 November 2015 (pages 65 to 81) which raised matters other than dismissal) and the Tribunal found that it was only when the Respondent received the claim form of 20 March 2016 that the Respondent first learnt that the Claimant considered himself to have been dismissed. Unsurprisingly, the Tribunal found that the dismissal claim was presented before the effective date of termination and was thus premature, pursuant to section 111(3) of the **Employment Rights Act 1996**, and dismissed the claim for unfair dismissal.

11. The Tribunal went on to find in the alternative that in any event, there had been no fundamental breach of contract by the Respondent, the implied term of trust and confidence remained intact and if the Claimant had resigned (which he had not) it would not have amounted to a constructive dismissal. His complaint of unfair dismissal and public interest disclosure dismissal therefore failed.

12. The Tribunal also dealt with each issue in the breach of contract, unauthorised deductions, disability discrimination, victimisation and harassment allegations and, apart from the complaint of accrued holiday pay which was well founded, found, on the facts, that they were not well-founded. It was a case that largely turned on the factual findings which were for the Tribunal to make. They found that the Claimant had received a great deal of support from the Respondent. For example, at paragraph of 180 of their Judgment they explain that the Respondent had changed the Claimant's role to a sedentary position to accommodate his disability and his back condition. The Claimant had performance difficulties, but the Respondent accommodated these, in particular by allowing the Claimant to work only in the

freezer department, which he could cope with. The Claimant made mistakes for which was not disciplined. Mr Lawford provided support to the Claimant when he could, including two specific occasions referred to in the Tribunal's Judgment. His managers did their best to hear his request for a change to the night shift as soon as possible, because they understood that the Claimant considered it to be urgent. When the Claimant refused to work, he was not disciplined, but was repeatedly encouraged to return and offered support. When the Claimant refused to work in the ambient area, he was listened to and his manager did not insist that he should work in that area. The Tribunal was entitled to conclude from its findings of fact that the mutual obligation of trust and confidence subsisted between the parties, and that the Respondent was not in fundamental breach.

Grounds of Appeal seeking to re-open the facts found by the Tribunal

13. The grounds of appeal largely seek to reargue the facts of the case. It is sometimes the case that a party who is not successful in all respects considers that an Employment Tribunal has been wrong to find against them and wishes to challenge a finding. However, an Employment Tribunal's role is to make decisions, and that may involve preferring the evidence of one witness over that of another, when the evidence is in conflict. That can often lead to one side or the other feeling aggrieved, but it is the Employment Tribunal's job to decide those disputes of fact. In broad terms, provided that the Tribunal has taken proper account of the evidence: neither ignored relevant evidence, nor taken into account matters that they should not have done; and provided that they have reached findings based on the evidence, rather than speculate; provided they have not acted perversely; and, provided they have adequately set out their reasons for their findings, a challenge to an Employment Tribunal's factual findings is unlikely to be successful.

14. When an Employment Tribunal is presented with a case which largely turns on its facts, it can be helpful for it to explain why they have accepted the evidence of one witness over that of another. In relation to the lay evidence the Tribunal did just that in its Reasons. As explained in paragraphs 60 and 61 of the Tribunal's Decision, the Claimant was found not to be a reliable witness for the reasons they set out: he was evasive; he paid scant attention to detail; he was not transparent with his employer during the course of his employment, and nor with the Employment Tribunal in answering questions. In contrast, the Respondent witnesses' evidence was consistent with the contemporaneous documentation and was given with "openness, reflection and care" and appropriate concessions were made.

15. The Employment Tribunal found that none of the allegations of discrimination, victimisation, and harassment were factually well-founded. The Tribunal also found that the Claimant had not been dismissed either actually or constructively, nor had he resigned and he remained an employee when he initiated proceedings. The Tribunal found that the first the Respondent learnt that the Claimant said he no longer worked for them was on 5 April 2016, when they received his claim form from the Tribunal making an allegation of unfair dismissal.

16. The Tribunal addressed each issue carefully and reached a clear conclusion in respect of each of the listed and agreed issues. They accepted that the Claimant was disabled within the meaning of the **Equality Act 2010** and that the Respondent had knowledge of his back problems at all material times and knowledge of his anxiety and depression, which also were disabling, from 25 November 2015 onwards.

17. The grounds of appeal seeking to re-open the facts do not identify any error of law or perversity, and the grounds are not sustainable, and I shall not go through each and every one.

18. However, three matters were said to raise potential errors of law and have been very ably put before this Tribunal by Mr Allen today. The Tribunal wishes to record its gratitude to Mr Allen, who has given his time and services as a volunteer under the ELAAS scheme, and his skilful advocacy today can only have been achieved with many hours of preparation.

Ground of Appeal: Lack of Interpreter at the Hearing

19. I will deal first with the issue of whether the Tribunal failed to provide a Spanish interpreter, and it is suggested to me that I should exercise my powers under the **Burns/Barke** principle to ask of Employment Judge Heal what consideration was given to the provision of an interpreter in this case.

20. The proposed ground of appeal was couched in terms of bias or apparent bias: "I didn't get a fair hearing because the Employment Tribunal was against me from the start for the arbitrary reason on failed to provide me with an interpreter. Despite my request to have one before the hearing and during the hearing I have requested over and over, there were grounds on which I could reasonably fear that it might be I did not have a fair Hearing by the barrier of the language."

21. It is an essential part of a fair hearing, compliance with the over-riding objective and Article 6 ECHR, for those who need language interpreters to participate effectively at the hearing to be provided with one free of charge and a failure to do so is an error of law. The case of **Hak v St Christopher's Fellowship** [2016] IRLR 342 provides useful guidance. The crucial question is whether the litigant's command of language is sufficient to enable him or her to give the best account to the Tribunal which s/he would wish to give relating to the matters in dispute.

22. In this case the Claimant indicated in the form completed prior to the first Preliminary Hearing that he would like an interpreter. However, the request does not appear to have been discussed at any of the three Preliminary Hearings prior to the Full Hearing, or the Full Hearing itself. There is no record in the case management Orders that followed those hearings before Employment Judge Smail and Employment Judge Henry (twice) and it was not raised again by the Claimant in correspondence although other matters were raised by him. It does not appear to have been raised at the 8-day hearing before Employment Judge Heal with her two lay members since there is no mention of it in the Judgment. The Tribunal was able to make comprehensive findings of fact, many of which were based on the Claimant's own evidence, and some of which supported some of his contentions. The lack of provision of an interpreter was not mentioned in the grounds of appeal in their original form. The Claimant and Mr Allen were unable to identify any specific misunderstanding or aspect of the case that would have improved or been different had an interpreter been present assisting the Claimant at any of the hearings before the Tribunal. In his covering letter to this Tribunal seeking to amend his grounds of appeal he states:

> **"Regarding my request to have a Spanish Interpreter, I must say that English is not my first language and I need a native speaker. For the tribunal hearing that took place in Watford Employment Tribunal on January 2017 [the Judgment under appeal] … I was not granted with one and then I was accused of giving evasive answers. That obviously happened because of my misunderstanding the questions and asking the questions to be repeated."**

23. The difficulty for the Claimant however is the disconnect between the lack of an interpreter and the Tribunal's conclusion that the Claimant was not an honest witness. An evasive witness is one who understands, but deliberately seeks to avoid answering the question asked of him, not one who does not understand the question. It is not arguable that the Tribunal failed to notice over an 8-day period with the Claimant representing himself, that he had language difficulties that required an interpreter in order for him to have a fair hearing.

A

24. At the first Preliminary Hearing on 27 January 2016 Employment Judge Smail should have addressed the Claimant's request for an interpreter raised in the agenda form under the heading "other preparation", in section 9.4 at page 5 of 5 (see page 95) which the parties are asked to complete in advance of the hearing. It appears that no mention was made of it during the hearing itself and the matter was not pursued by the Claimant thereafter. There has been no appeal, application for review, request for clarification or any other mention of an interpreter apart from the isolated reference on the agenda for case management.

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25. There is no absolute right to an interpreter just because one has been requested (see **Hak v St Christopher's Fellowship** Langstaff P paragraph 41), but I note the caution with which a Tribunal should proceed where English is not the mother tongue of the litigant (see **Hak** paragraph 40). However, on the facts in this case, there appears to have been an absence of a decision by Employment Judge Smail that has been overlooked by the Tribunal and the Respondent. It weighs heavily against the Claimant - who is articulate, thorough, and tenacious in his written communications with both the Employment Tribunal and this Tribunal - that the matter was not raised again by him until one year and 10 months after the first Preliminary Hearing when it should have been addressed, and 10 months after the lengthy substantive hearing. He cannot identify a particular handicap that he was placed under by not having an interpreter at the hearing and the Tribunal's reasons for not accepting the Claimant's evidence are unconnected to English not being his mother tongue. I am strengthened in my conclusion by noting that it was not mentioned in the original grounds of appeal first submitted to this Tribunal.

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26. I therefore conclude that nothing would be gained by asking further questions of the Employment Judge and the Claimant has not established there are reasonable prospects of success and this ground of appeal is dismissed.

Ground of Appeal: Unfair Dismissal Finding

27. The submission and ground of appeal was that there was a lacuna in the Tribunal's reasoning and an error in its finding that the Claimant had not been dismissed which was counter to the evidence including the minutes of a grievance meeting on 14 March 2016 which had been summarised by the Tribunal in paragraph 161 of its Decision: "The Claimant told Mr Dockree that he wanted to know his status, that is, whether he had been dismissed and how". Mr Allen sought to weave an argument that the Tribunal had been in error in some way by not going into more detail from the agreed notes taken of the meeting of 14 March that were before the Tribunal and put before me in the bundle at page 242. The argument is not sustainable for a number of reasons. Firstly, it represents the error that is so easy to fall into, of overanalysing and nit-picking and applying a legal microscope to what is, on its face, an extraordinarily balanced, clear, cogent, and well-structured decision. Secondly, even if I was tempted to stray down that route, a close reading of those notes shows that the Claimant's questions at the grievance meeting of wanting to know his status and if he had been dismissed were not answered by Mr Dockree and the notes record that he said: "I have a lot of work to do, link 115 questions in relation to these pages, I will give you a response as quickly as possible. If I can't in 14 days I will write to you".

28. The assertion in the skeleton argument that the clear evidence of the agreed minutes of the meeting of 14 March 2106 established that the Claimant had informed the Respondent that

he had resigned, is wrong. The minutes do not say that. Accordingly, no error of law can be identified.

29. But even if I am wrong about that, the Employment Tribunal Judgment dealt with the matter in the alternative, and stated: "If we are wrong about the premature application point let us look at the substance of the allegation of a fundamental breach of contract". The Tribunal panel then considered each of the allegations the Claimant had raised in support of his constructive dismissal complaint and found that, neither collectively nor individually, nor as a series of events, did the matters amount to a fundamental breach of contract.

30. Mr Allen again, today, very skilfully, picks out what he considers to be the one cherry in the pudding, which is the fact that the Respondent did not refer the Claimant to Occupational Health, and he asserts that from that alone it must follow that there was a fundamental breach by the Respondent. The difficulty for the Claimant is twofold: (1) these matters are fact and context-sensitive: you cannot construct a general principle to be applied in a one-size-fits-all approach to the question; (2) the Employment Tribunal conclusively dealt with the Occupational Health referral argument in paragraphs 175, 181, 182 and 183 of their Decision, and they explained why they had found that it was not a fundamental breach for the Respondent not to have referred him to Occupational Health and their reasoning is impeccable.

31. Therefore, on both those two grounds the proposed ground of appeal is unarguable and is dismissed.

Ground of Appeal: Medical Evidence

32. Ground A of the Amended Grounds of Appeal state that the Employment Tribunal erred in failing to take into account the medical evidence before them, and if they did take that medical evidence into account they failed to pay proper regard to it in coming to their conclusion.

33. At the time of the Preliminary Hearing before Employment Judge Henry on 9 June 2016, the Respondent had not accepted that the Claimant had a mental impairment or that it had a substantial adverse effect on his ability to carry out normal day-to-day activities or that it was long lasting (see paragraph 8 of the Case Management Summary, page 148). In order to assist the Tribunal to decide whether the Claimant was disabled within section 6 **Equality Act 2010**, directions were made for the commissioning of a joint expert medical or psychiatric report (paragraph 6 of the Orders section of the Decision, page 154). The questions to be put to the medical expert were to be agreed between the parties but the rationale for the Order is set out at paragraph 6.1 which states as a pre-amble "On disability as to the Claimant being disabled by reference to depression and anxiety not being conceded …" followed by the directions as to the selection and commissioning of an appropriate medical expert. Dr Liam Parsonage was duly instructed and prepared a report.

34. On receipt of the report of Dr Liam Parsonage, consultant psychiatrist, the Respondent made the concession that the Claimant's mental health problems amounted to a disability. There is no reference to his report in the Tribunal's Judgment, presumably since it was thought unnecessary, disability in relation to anxiety and depression having been conceded. What Mr Allen submits today is that at paragraphs 65 to 74 of Dr Parsonage's report (pages 181 to 184), he expresses a view about the effect of the Claimant's medical condition on his ability to work

which could be said to be inconsistent with some of the Employment Tribunal's findings that the Claimant was unwilling rather than unable to attend the workplace in the autumn of 2015 and early 2016. That in turn would call into question the Tribunal's conclusion that the treatment was not in consequence of something arising from disability (section 15(1) **Equality Act 2010**).

35. Authorities such as **Brighton v Tesco Stores Ltd** UKEAT/0165/15 set out the uncontroversial proposition that whilst a Tribunal is not bound to accept agreed medical evidence put before it, it should have due regard to it and if it does not accept it, explain why not. Given that the Tribunal makes no reference to the medical evidence in its lengthy and otherwise comprehensive Judgment, it is arguable that it amounted to an error not to do so. On that ground only, I allow this matter to proceed to a Full Hearing.