Appeal No. UKEAT/0049/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 9 July 2019

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR C IKEJIUBA — APPELLANT

WM MORRISON SUPERMARKETS PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ALEXANDER MCMILLAN (Of Counsel) Instructed by: The Pharmacists' Defence Association & the PDA Union The Old Fire Station 69 Albion Street Birmingham B1 3EA
For the Respondent	MR NICHOLAS SINGER (Of Counsel) Instructed by: Eversheds Sutherland Sutherland LLP 70 Great Bridgewater Street Manchester M1 5ES

SUMMARY

UNFAIR DISMISSAL – Automatically unfair reasons

The Claimant ('C') claimed that he had been automatically unfairly dismissed for opting out, or proposing to opt out, of working on a Sunday. The Employment Tribunal ('the ET') dismissed that claim. The Employment Appeal Tribunal held that, on the evidence, it was open to the ET to find that the reason or principle reason for the Claimant's dismissal was not that he had opted out, or proposed to opt out, of working on a Sunday.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from the Employment Tribunal sitting at Leeds ("the ET"). The ET consisted of Employment Judge Lancaster and members Mr Wilks and Mr Corbett. In the judgment, written reasons for which were sent to the parties on 17 October 2018, the ET dismissed the Claimant's claim for automatic unfair dismissal and allowed the Claimant's claim for breach of contract.

2. This appeal was allowed to a full hearing by His Honour David Richardson after a hearing pursuant to Rule 3(10) of the **Employment Appeal Tribunal Rules of Procedure**. On this appeal, the Claimant has been represented by Mr McMillan, and the Respondent by Mr Singer. I am grateful to both counsel (who also represented the parties at the ET hearing) for their written and oral submissions. I am particularly grateful to both of them for their helpful responses to an email which was sent yesterday, as I made clear in the course of the hearing. Paragraph references are to the ET's judgment unless I say otherwise. I will refer to the parties as they were below.

The Facts

3. The ET explained the procedural history of the claim at paragraphs one to six of the judgment. The ET decided it was too late to allow an amendment to the claim and that it should proceed as a claim for automatic unfair dismissal. The ET characterised that claim as a claim that the Respondent had withdrawn an offer of employment from the Claimant because the Claimant had either opted out of Sunday working by email, if that email was to be taken as having been signed and dated, or that, in the terms of that email, the Claimant had indicated that

A he proposed to opt out of Sunday working on due notice. The ET considered that it was too late to amend the claim because there would be prejudice to the Respondent even though the Respondent's witnesses were at the Tribunal, and because the Claimant had been put on notice on 25 July that he should amend and clarify his claim.

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4. The ET found that the Claimant was offered a job by the Respondent as a pharmacist at a branch in Hampshire. He had been interviewed in September 2017. An offer was confirmed on 15 September. The Claimant accepted that offer on 18 September. At some point he returned signed contractual documents; the ET has not had copies of those. From the date when the offer was formally accepted the Claimant was under a contract of employment, the ET found (see paragraph 10). The start date of the employment was delayed until 4 December 2017. Three days before the Claimant had been due to start work, that offer was withdrawn. The ET recorded that the Respondent accepted that that amounted to a dismissal.

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5. In paragraphs 20 to 32 of its Judgment, the ET considered the contractual documents and the discussions that there had been about Sunday working. In paragraph 19, the ET found that the contractual documents sent on 15 September had stipulated that the minimum contractual weekly hours were 43, which were to be worked over a typical flexible pattern scheduled over seven days. The ET noted that the contract was stated to be set out in an annexed summary document which the Claimant had been sent, and also in a handbook (see paragraph 20).

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6. There was a section in the handbook about Sunday working which is said, in the handbook, to have contractual force. That section is in the bundle. It reads:

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> **"Sunday is a key trading day for us and your contract includes Sunday working as a standard provision.**

If you do not wish to work on Sunday, put your request in writing to your HR representative/Personal Manager. Three months' notice is required from the date of your letter.

Once three months have passed you will no longer have to work on Sundays. We will try and reschedule your hours to a different time of the week although this cannot be guaranteed and there is no legal obligation on us to provide you with alternative hours to make up for the shortfall of no longer working Sundays.

....."

7. The position, the ET found, was that the Claimant had agreed to work a flexible and varied shift pattern which included Sundays. That is an important finding. The Claimant had agreed to work a 43-hour week. His wish not to work on Sundays could not be accommodated within the full 43 hours which he agreed in the contract (see paragraph 36). The ET described the disputed evidence about what happened next in paragraphs 33 to 37. They preferred the Respondent's evidence about that for the reasons which they gave in paragraphs 38 to 40.

8. The dispute concerned whether or not when the Respondent offered the Claimant reduced hours to accommodate his wish not to work on Sundays, the Claimant had initially accepted that offer. The ET found that he had initially accepted that offer but had then withdrawn his acceptance to that offer. The ET said that the final position was that the Respondent offered 37 hours (see paragraph 41). In paragraph 42, the ET noted that the Respondent had written a letter retracting the initial job offer, and that the reason for that had been that the Claimant was not willing to accept the revised hours. The Respondent was happy to accommodate the Claimant not working on Sunday if he worked 37 hours but not if he worked 43 hours.

9. Earlier on in the decision, in paragraph 24, the ET had referred to the fact that the Respondent had not communicated the Claimant's work pattern to him until some point after 21 November, and that it appears only to have been at that stage that the Claimant realised that he would have to work on Sundays. The ET in paragraph 14 referred to the email which the

Claimant sent the Respondent on 28 November in which he had said, "Can't do Sundays at all for religious reasons. I can't do Sundays and I do not intend to reduce my hours. I understand there is an opt-out form if one doesn't want to work on Sundays… I hope you'll understand, many thanks. Chiemeka."

10. The ET noted that Miss Sagar of the Respondent had replied by email saying that she understood that the Claimant had stated that he was unable to work on Sundays, which the Respondent would be unable to accommodate on the full 43 hours. The ET further noted that Miss Sagar had not said that the Respondent would be unable to accommodate the Claimant not working on Sundays nor had the Respondent said that, "had we known that this was the position we would not in fact ever have offered you the position at the Verwood store" (see paragraph 28). The implication was that the Respondent could accommodate the Claimant not working on Sundays but not to the extent of enabling him to work 43 hours a week.

11. In paragraph 42 of the judgment, the ET referred to the retraction letter which was sent by email at 2.01pm of 1 December. The ET then said this:

> **"42. …. We ask ourselves the somewhat rhetorical question why did Miss Sagar, who took the decision to retract the offer, change her mind? She had known the Claimant's insistence that he would not work on Sundays from his email and she had taken no action then. She had not as we say, stated that that meant that he had obtained the job under false pretences and would he not [have] been offered it had that been known. She had in fact indicated quite clearly that she was prepared to accommodate Sunday working but not on 43 hours. It is also quite clear, and indeed it is common ground, that there was a final proposal on the table that the Claimant should be allowed not to work Sundays but on a 37-hour contract. It is not simply the fact of having expressed his objection to Sunday working or indicated a proposal to opt out that was the trigger for the retraction letter. There was something else and we are satisfied that that was the change in position by the Claimant."**

12. Paragraphs 43 to 45 are important:

> **"43. Miss Sagar had been led to believe, either in telephone discussion with Natalie Pickles or by being copied into the email that Natalie had sent Miss Howsell at 10.51, that the Claimant had agreed the variation only then to be told that there had been a change of mind. And that is why she instructed the email to be written. It seems to us quite clear that that, as set out at the time, was the reason. The email at 14.01 says: "as we have not been able to agree a suitable alternative regarding your working hours we are now in a position where there is no other option but to retract the offer. As you are unable to work Sundays we have offered an alternative working pattern which you have advised would not be suitable for you". So we are**

> **quite satisfied that the reason as stated to the Claimant at the time was his refusal to accept the revised working pattern to exclude Sundays which had been a proposal that the Respondent had been prepared to put on the table.**
>
> **44. That is a position that is reiterated by Miss Sagar in a subsequent email that she sent to the Claimant in response to a letter from him. Again this is only shortly after the event in question, on 12 December. She then stated: "The contract has not been retracted because you are unable to work Sundays. The offer was retracted as you are unable to fulfil requirements you had applied for. The Sundays were negotiated by reducing those hours as you requested. However this was the decision you were not in agreement with which meant that the offer had been retracted". That follows on the back of a statement earlier in that same letter where she acknowledges that it is quite correct that he has a right to opt out of Sunday working.**
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> **45. The Claimant has not established, and the burden we remind ourselves is upon him, that the reason or principal reason for the retraction of employment on 1 December was that he proposed to opt out of Sunday working. It was, as is clearly stated in the contemporaneous documents supplied to him by or behalf of Arvinder Singh, who took that decision, the fact that he had rejected the alternative offer. The Claimant had signed up to a contract which included seven-day working. Then just a week before he was due to start he made it clear that he wished to vary that so that he was not required to work on Sundays. The Respondent sought therefore to vary terms of that offer in advance of him starting work so the position could be clarified. Miss Sagar had understandable reasons for adopting a hard negotiating stance at that stage, so that it was 37 hours or nothing. She had gone over her staffing budget by offering the Claimant 43 hours (ideally she had only 30 hours available), she was still over budget in offering him 37 hours and she would have also then incurred additional locum cost to cover the shortfall in Sunday hours. That was no different to what would have happened had the Claimant started work and then exercised his opt-out so that after the three-month notice period there would have been an unenforceable provision that he work on Sundays. Under the contract the Respondent would still then have been able to re-negotiate the hours if appropriate and there was no reason to think that Miss Sagar's position would have altered. In actual fact the Respondent, acting admittedly quickly, had come to a conclusion before the commencement of work on 4 December as to what proposal they were prepared to put forward as an alternative and the Claimant had not accepted that. Had he done so he would have been able to work on a 6 day only contract from the outset, or at least from the end of the first rota, which was less than the 3 months' notice under which he could still have been required to work on Sundays. So that we accept is the reason why Miss Sagar caused the offer to be retracted and not because the Claimant was proposing to opt out. He has not established and automatically unfair reason."**

The ET's Reasoning

13. In paragraph 17, the ET said that there was a moot point about whether the Claimant could give a notice validly as at 28 November. The ET explained why that was possibly problematic but it also explained that it was a moot point because even if the Claimant had not, by email, validly exercised the right to opt out of Sunday working, he was clearly proposing to give a notice to opt out of Sunday working and that was enough to engage the protection of section 101(3) of the **Employment Rights Act 1996** ("the ERA").

14. The ET noted that the Claimant was claiming automatically unfair dismissal and summarised the effect of section 101(3) of the **ERA**. The ET considered whether or not there

had been a validly-made notice pursuant to section 40 of the **ERA**. It was inclined to the view that even though there was no "wet" or electronic signature, the requirements of section 40 were nonetheless satisfied (see paragraph 16). As I have already indicated they found, in any event, that the Claimant was within section 101(3) because, on any view, he proposed to serve a notice under section 40.

15. In paragraph 45, which I have already read, the ET directed itself correctly about the relevant test and concluded that the Claimant had not shown (the burden being on him) that the reason or principal reason for his dismissal was that he proposed to opt out of Sunday working. The ET in effect found that the reason for the Claimant's dismissal, as clearly stated in the contemporaneous documents, was that he had rejected the alternative offer which had been made to him by the Respondent. He had said he did not want to work on Sundays and so wanted to vary the contract so as not to work on Sundays. In response the Respondent "sought to vary the terms of that offer in advance of him starting so that the position could be clarified." The ET found that the Respondent had understandable reasons for taking a hard negotiating stance so that the offer was 37 hours or nothing. The ET referred to the business reasons in paragraph 45, which I have already read.

16. The ET correctly observed that the Claimant was in no different a position than had he started work and exercised his right to opt out having started work. Indeed, in some ways he was in a better position because the Respondent was, in effect, offering to revise the contract so as not to require him to work on Sundays before the three-month notice period required by the statute had elapsed. It would have been perfectly open to the Respondent to renegotiate the contract had a contracting out notice been served and had the Claimant started employment, and

there was no reason, the ET held, to think that the Respondent's position would have been any different.

The Law

17. A shop worker is defined in section 232 of the **ERA.** Section 232 provides:

> **"(1). In this Act "shop worker" means an employee who, under his contract of employment, is or may be required to do shop work.**
>
> **(2). In this Act "shop work" means work in or about a shop F1…on a day on which the shop is open for the serving of customers.**
>
> **(3). Subject to subsection (4), in this Act "shop" includes any premises where any retail trade or business is carried on.**
>
> **(4). Where premises are used mainly for purposes other than those of retail trade or business and would not (apart from subsection (3)) be regarded as a shop, only such part of the premises as—**
>
> > **(a)is used wholly or mainly for the purposes of retail trade or business, or**
> >
> > **(b)is used both for the purposes of retail trade or business and for the purposes of wholesale trade and is used wholly or mainly for those two purposes considered together,**
>
> **is to be regarded as a shop for the purposes of this Act."**

18. Part Four of the **ERA** is headed, "Sunday working for shop and betting workers." Part Four confers various protections on protected shop and protected betting workers, on opted-out shop and betting workers, and on shop and betting workers. Section 40(1) gives a shop worker to whom section 40 applies the right at any time to give his employer a written notice signed and dated by him to the effect that he objects to Sunday working. An "opting-out notice" means a notice given under section 40(1), i.e., by a shop worker to whom section 40 applies (see section 40(2)). Section 40 applies to any shop worker who under his contract of employment is or may be required to work on Sunday (whether or not as a result of previously giving an opting-in notice) but is not employed to work only on Sunday (see section 40(3)).

19. An employer must give a person who becomes a shop worker under a contract of employment and who is or may be required to work Sunday a written statement which tells him

A that he can object to working on Sundays by giving an opting-out notice. That statement must be given before the end of two months after the person becomes a shop worker (see section 41B). Section 42 also requires an employer to give a person who becomes a shop worker an explanatory statement in accordance with section 42.

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20. Section 43 provides:

> **"(1). Where a shop worker or betting worker gives his employer an opting-out notice, the contract of employment under which he was employed immediately before he gave that notice becomes unenforceable to the extent that it—**
>
> **(a)requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday after the end of the notice period, or**
>
> **(b)requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday after the end of that period.**
>
> **(2). Subject to subsection (3), any agreement entered into between an opted-out shop worker, or an opted-out betting worker, and his employer is unenforceable to the extent that it—**
>
> **(a)requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday after the end of the notice period, or**
>
> **(b)requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday after the end of that period.**
>
> **…."**

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Section 41(1) explains in what circumstances a shop worker is to be regarded as opted out for the purpose of any provision of the **ERA.**

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21. Section 101 of the **ERA** is headed "Shop workers and betting workers who refuse Sunday work." In so far as is relevant, it provides:

> **"…..**
>
> **(3) A shop worker or betting worker who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the shop worker or betting worker gave (or proposed to give) an opting-out notice to the employer."**

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H Section 230(1) of the **ERA** defines "employee" as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."

Submissions

22. The Appellant has two grounds of appeal. The first is that the ET misapplied the law and the second is that their decision was perverse. Mr McMillan submitted, in relation to ground one, that there was a link between the Appellant's proposed opting out and what he described as "The fallout" of that proposal. He submitted that the fallout was "absolutely related" to the opt-out or proposed opt-out. What he described as "the fallout reasons", the employer's business reasons, had to be "folded back into the root cause." He submitted that there was a sufficient link between the Claimant's proposed opt-out and the offer by the Respondent of the alternative contract which the Claimant declined. There was certainly an arithmetical link; the new contract which was offered was the old contract minus the Sunday hours.

23. The Claimant's refusal to accept the new contract was intimately linked with his proposed opt-out. Mr McMillan did not challenge the ET's finding that the contract to which the Claimant had originally agreed required him to work 43 hours including Sundays. He submitted that there was a distinction without a real difference between the proposed opting out from working on Sundays and the Claimant's refusal to accept the revised contract. The reference in paragraph 43 of the t to a "trigger" was a finding that the proposed opt-out was part of the reason why the Claimant was dismissed. Mr McMillan accepted, however, that a finding that the proposed opt-out was part of the reason for the dismissal is not enough to enable the Claimant to succeed in his appeal. He submitted that the correct approach is to apply a "but-for" test. I suggested that that was difficult to reconcile with the statutory language which is the same, for example, as the language used in section 98(1A) (in relation to unfair dismissal) and as the language used in a range of analogous provisions conferring protection against dismissals for a variety of reasons.

24. In support of ground two, Mr McMillan submitted that it was perverse of the ET to find that the reason for the dismissal excluded the proposed opt-out. The finding that what he described as "a contractual reason" was the reason or principal reason for dismissal had to be, he submitted, related to or distinguished from the Claimant's proposed opt-out of Sunday working. He accepted that the ET had expressly directed itself in accordance with the correct test in paragraph 45, but he submitted that the ET had failed to address fully how the two reasons were related or co-ordinated. He submitted that if one were to dig down, the only reason for the dismissal was that the Claimant chose to opt-out of Sunday working. He submitted that the phrase "principal reason" meant the "cardinal reason" on which the other reasons hang. The principal reason in this case was the proposed opt-out from Sunday working and what he described as the "but for that reasons" were a consequence of that. Any other approach would dilute this important statutory protection.

25. Mr Singer relied on the decision of the Court of Appeal in **Abernethy v Mott, Hay and Anderson** [1974] ICR 323. He submitted that it is clear from that decision that the test is not a "but-for test". The test, rather, is a test of what is in the employer's mind when the employer dismisses the employee. He submitted that the ET's reasons on this point are utterly clear. The reason or principal reason for the dismissal was not the Claimant's proposed opt-out from Sunday working but his refusal to accept the revised hours which the Respondent offered him. He submitted that it was important that the new offer expressly took account of and respected the refusal to work on Sunday precisely because the requirement to work on Sunday had been removed from the contract. Further, he submitted, the business reasons referred to by the ET show that the reason for the dismissal was a genuine, and not a concocted, reason. The employer was not simply trying to force the Claimant out for refusing to work on the Sunday

A but was rather trying to accommodate the Claimant's desire not to work on a Sunday within the constraints of the employer's existing business.

B 26. He further submitted that this appeal consisted of dressing up what was purely a question of fact for the ET as a question of law. It was clear, he submitted, from section 101(3) and other analogous provisions that Parliament has trusted the ET to decide, as a matter of fact, what the reason or principal reason for the dismissal is in a wide range of different C circumstances and to see through concocted or false reasons which might be advanced by an employer for a dismissal. That was the true extent of the statutory protection which Parliament had conferred in this wide range of different provisions.

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27. One effect, he submitted, of the Claimant's argument, which was to equate the Claimant's refusal to accept the new contract with the proposed opting out-notice would be to E entitle the Claimant to work the same hours as he had initially agreed to work, that is 43 hours, without working on a Sunday. Mr Singer submitted that an express statutory provision would be required to achieve such a startling result and if one examined the relevant statutory provisions, there is no trace of any such provision at all. He submitted that the thrust of the F statutory provisions was that in certain circumstances, an employee could not be required to work on a Sunday but that the employee was not entitled to work the same hours as he would have been entitled to work had he continued to accept Sunday working.

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28. The ET, he submitted, had distinguished carefully in its reasons between the trigger for the offer of the varied contract and the reason for the dismissal (see the language of the H penultimate sentence of paragraph 42 in which the word "trigger" is used and the remaining paragraphs 43, 44 and 45, in which the ET consistently uses the phrase "reason or principal

reason"). He submitted, in sum, that the ET had made the clearest possible finding that the Claimant had not shown that the reason or principal reason for dismissal was his proposal to opt out of Sunday working. That, he submitted, was the simple answer to both grounds of appeal.

Discussion

29. I have described the ET's reasons, the statutory background, and the parties' submissions in some detail. I can therefore give my own reasons relatively briefly. In short, I reject the Claimant's submissions and accept the Respondent's submissions. In my judgement, it is clear, on the ET's findings, that the Claimant proposed to opt-out of working on Sunday and the Respondent knew that he had proposed to opt out. If he had opted out, then once the three-month notice period was over, any provision of his contract of employment requiring him to work on Sundays would not have been enforceable, nor would he have been entitled to insist on working a 43-hour week. The question posed by section 101(3) is whether the reason or principal reason for the dismissal was that the employee had served or proposed to serve a notice opting-out of Sunday working. The sequence of events, in short, is that the Claimant either served an opt-out notice or made clear that he proposed to opt-out notice. The Respondent then made a revised contractual offer which was accepted by the Claimant but then, after a short period, rejected by the Claimant. It was only then that the employer withdrew the original offer of employment.

30. I consider that the ET understood perfectly well that, on the facts, the rival possibilities were either that the reason or principal reason for the dismissal was that the Claimant had opted-out or proposed to opt out of Sunday working or that the employer dismissed the Claimant for some other reason or principal reason. Those were the two possibilities. The ET considered very carefully, in the passage which I have quoted in full between paragraphs 42 and

45, which of those two rival contentions was correct. The ET gave a number of reasons which were rooted in the contemporaneous documents, and in the sequence of events, for their conclusion that the Claimant had failed to show that the reason or principal reason for his dismissal was that he proposed to opt-out of Sunday working. At the end of the day, I accept Mr Singer's submission that this was a pure question of fact for the ET. There were various factors in the evidence before them and to which they referred expressly which entitled them to come to the conclusion that the reason or principal reason for the dismissal was not that the Claimant intended to opt-out of Sunday working but that the Respondent, having respected that proposal and having offered a revised contract which would have enabled the Claimant not to have worked on Sundays, the Claimant refused that revised offer. I consider that that was a finding which was open to the ET on the evidence. I do not consider that the ET either erred in law in reaching that conclusion or reached a perverse decision. It was a question of fact for them, and there was ample evidence supporting their factual conclusion.

31. For those reasons, I dismiss the appeal.

32. I have just dismissed the Appellant's appeal in this case and Mr Singer, on behalf of the Respondent, has applied for costs.

33. He reminds me that the fact it was an appeal that had been let through on the sift is relevant to the exercise of discretion to award costs but not decisive. I nonetheless consider that it is very relevant and although I have not accepted Mr McMillan's arguments on the appeal, I do not consider that the test for awarding costs at this level is met, particularly given the fact that His Honour David Richardson let the case through on sift.

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34. I therefore refuse Mr Singer's application.

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