Appeal No: UKEATS/0028/19/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 13th March 2020

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

ARAMARK (UK) LIMITED — APPELLANT

MR R FERNANDES — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Rad Kohanzad (of Counsel) Instructed by: Peninsula Business Services Ltd Legal Services Department Victoria Place Manchester M4 4FB
For the Respondent	Mr Michael Dempsey (of Counsel) Instructed by: Messrs Mackinlay & Suttie Solicitors 48 Cross Arthurlie Street Barrhead G78 1QU

SUMMARY

UNFAIR DISMISSAL-REASONABLENESS OF DISMISSAL

In this case, the Employment Appeal Tribunal (EAT) was asked to interpret Section 98(4) of the **Employment Rights Act 1996** (the 1996 Act) and decide whether in failing to place an employee whose post had become redundant on a list of workers whose services could be called upon if required, the employer had acted unreasonably within the meaning of s.98(4)(a). The EAT held that since placing the employee on the List would not avoid the redundancy, the failure was not within the scope of the section. The EAT allowed the appeal.

THE HONOURABLE LORD SUMMERS

1. In this case, Mr Fernandes (hereafter "the Claimant") was dismissed by Aramark (UK) Ltd (hereafter "the Appellants"). He claimed unfair dismissal. The Appellants defended the claim on the basis that his position was redundant and that the dismissal was therefore fair. It was accepted by parties at the Employment Tribunal that a redundancy had arisen. The issue that divided the parties was whether or not the Appellants had complied with s. 98(4) of the **Employment Rights Act 1996** which states that the fairness of the dismissal -

> **"a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **b) shall be determined in accordance with equity and the substantial merits of the case."**

2. The Appellants maintained a list of people they could turn to if they had a labour shortage. The list was referred to variously as the "bank" or "pool". I shall refer to it as "the List". It included about 120 people with a variety of skill sets. The evidence demonstrated that the Appellants had regular recourse to the List and that those on it had reasonable prospects of obtaining work on an ad hoc basis. At about the time of dismissal, the Appellants had sought to drive up the number of people on the List. Those on the List were not employed by the Appellants. There was no obligation on the Appellants to provide work to those on the List.

3. The Claimant argued that the Appellants should have put him on the List when he was being considered for redundancy as it offered him the chance of employment which was better than no employment. The Employment Judge accepted that the Appellants' failure to put him on the list was unreasonable and in breach of s.98(4). He held that the Claimant had been unfairly dismissed.

4. The resolution of this appeal depends on the proper construction of s. 98(4) of the **1996 Act**. Section 98(4) deals with the reasonableness or otherwise of the decision to dismiss. The Employment Tribunal must be satisfied that there is a sufficient reason for dismissing the

employee. It focusses on the availability of other reasonable alternatives to dismissal. In this case, placing the Claimant on the List would not have obviated dismissal. Being placed on the List opened the prospect of work but did not secure work. In my opinion, therefore, the Employer's decision not to place the Claimant on the List is not a decision that falls within the scope of the section. This is because the mischief s.98(4) seeks to address is the mischief of dismissal. It does not provide a statutory right to an alternative that might have had the potential to mitigate the adverse effects of dismissal.

5. Mr Dempsey, Advocate for the Respondent, sought to persuade me that the prospect of employment should be equiparated with actual employment and urged me to avoid reading the section in a narrow or technical way. I was referred to **Williams v Compair Maxam Ltd** [1982] ICR 156. There Browne-Wilkinson J (as he then was), sitting in the Employment Appeal Tribunal set out a number of principles that would guide a reasonable employer in the circumstances now covered by s. 98(4) of the Employment Rights Act 1996. He stated –

> **"The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment… The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim (p 162 F-H)."**

6. Towards the end of his judgement he stated –

> **"…these are not immutable principles which will stay unaltered forever. Practices and attitudes in industry change with time and new norms of acceptable industrial relations behaviour will emerge. Secondly the factors we have stated are not principles of law, but standards of behaviour (p. 167 E-F)."**

7. A similar point is made in **Vokes Ltd v Bear** [1974] ICR 1 at 4A-B.

8. I consider, however, that giving the words of the statute their ordinary or natural meaning compels me to the conclusion that the Appellants were not obliged to offer the Claimant a place on the List. The only purpose of the List was to provide the prospect of work. Mr Dempsey acknowledged that placing the Claimant on the List would not obviate dismissal. He acknowledged that a place on the List was not new employment in a different or subordinate role. This would be the position whether or not there was suitable ad hoc work available for

persons such as the Claimant on the List at the time of dismissal. I acknowledge the evidence summarised by the Employment Judge at paragraphs 63-65 of his Judgement. Some ad hoc workers were doing work on short term contracts at the material time. For some of them this work lasted for a protracted period. Section 98(4), however, is constrained by its wording. If placing him on the List did not entail the provision of alternative employment then failing to place him on the List did not involve a breach of s. 98(4).

9. Mr Kohanzad, Counsel or the Appellant, had an alternative argument. He submitted that if I was satisfied that the failure to place the Claimant on the List was unfair, I would further require to be satisfied that there was a job available to the members of the List that the Claimant was in a position to do. He argued that there was no evidence that ad hoc work was available that the Claimant that he was in a position to do. In that situation, he argued that there was no evidence that the Appellants had failed to offer him suitable alternative employment and that there was no unfairness in the dismissal. I prefer not to address this argument. It rests on the state of the evidence. The evidence as to what was or was not available at the time of dismissal was not fully explored. In these circumstances I prefer to rest my decision on the proposition of law identified above.

10. In the light of my conclusions, the appeal is upheld and the claim is dismissed.