Appeal No. UKEAT/0237/19/BA (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 July 2020

Before

THE HONOURABLE MR JUSTICE CAVANAGH

(SITTING ALONE)

MR M JONES — APPELLANT

BT FACILITY SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADAM OHRINGER (of Counsel) Direct Public Access
For the Respondent:	MR BEN DYLAN WILLIAMS (of Counsel) Instructed by: BT Legal, Faraday Building, Ground Floor, 1 Knightrider Street, London EC4V 5BT

SUMMARY

PRACTICE AND PROCEDURE

UNFAIR DISMISSAL

The Appellant, the Claimant below, challenged the fairness of his dismissal, which the Respondent said was for redundancy, on three grounds. These were (1) the purported redundancy reason was a sham; (2) there was no redundancy situation; and (3) even if the dismissal was by reason of redundancy, the dismissal was unfair. The Employment Tribunal fully addressed grounds (1) and (3) but, in relation to ground (2), the Tribunal simply stated its finding that there was a genuine redundancy situation, and did not explain or give reasons for its conclusion.

The appeal is allowed on this ground and the issue of whether there was a genuine redundancy situation is remitted to a differently-constituted Employment Tribunal.

The second ground of appeal, perversity, is dismissed.

THE HONOURABLE MR JUSTICE CAVANAGH

1. This is an appeal by the Appellant (whom I shall call "the Claimant") against the judgment of the Employment Tribunal at Nottingham (Employment Judge Blackwell, sitting alone), entered in the Register and sent to the parties on 21 March 2019, that the Claimant had not been unfairly dismissed by the Respondent, BT Facility Services Limited. The judgment was a Reserved Judgment, which followed a hearing over four days, in February 2019.

2. The Claimant had been employed by the Respondent, which is a wholly-owned subsidiary of BT plc, as a member of the Customer Improvement ("CI") team. The team members, including the Claimant, were known as Customer Improvement Coaches. The role of the team members was to lead a continuous improvement methodology and approach across the business. In 2017, the Respondent, which was dissatisfied with the current arrangement, decided upon a reorganisation as a result of which the standalone CI Coach roles were replaced with CI/CE Lead roles. "CE" stands for "Customer Experience". Instead of seven CI Coach roles, there were to be, in future, eight CI/CE Lead roles. The existing CI coaches were told that they were at risk of redundancy and were invited to apply for one of the new CI/CE Lead roles. The Claimant applied both for the Head of CI/CE role and one of the CI/CE Lead roles, but was unsuccessful. He appealed and submitted a grievance, but these were unsuccessful. The Claimant was also unsuccessful in obtaining alternative employment within the Respondent or the wider BT Group. He went off sick, and was made redundant with effect from 31 October 2017.

3. The Claimant claimed unfair dismissal on a number of grounds. He claimed that the redundancy exercise had been a sham, designed to get rid of the Claimant and others. In addition, the Claimant contended that the reason for his dismissal did not fit within the statutory definition

of redundancy. In the Claim Form, which he drafted himself, he said, "I am claiming unfair dismissal through redundancy on the grounds that a true redundancy situation did not exist." The Claimant also contended, if the real reason for dismissal had been redundancy, that his dismissal had been unfair.

4. The Respondent set out the potentially fair reason, on which it relied, at paragraph 60 of the Grounds of Resistance, and addressed the contention that there was not a true redundancy situation, in paragraph 61.1, as follows:

> **"60. The Respondent denies that the Claimant was unfairly dismissed as alleged or at all. The Respondent asserts that it dismissed the Claimant for a fair reason in accordance with section 98(2)(c) ERA, namely redundancy.**
>
> **61.1. There was a genuine redundancy situation. As a result, in the changing focus from continuous improvement to a customer experience based approach, this led to a reduced requirement for the work undertaken by the CI Coaches and an increased requirement for work relating to customer experience and using initiative to drive change."**

5. At the Employment Tribunal, the Claimant represented himself. Paragraph 5 of the Judgment, recorded that the Respondent advanced redundancy as the potentially fair reason for dismissal, and identified at paragraph 8 that one of the issues in the case was whether the Respondent had proved a potentially fair reason for dismissal. The Employment Judge said that the Claimant's case was that the redundancy exercise to which he was subjected was a sham.

6. The Employment Tribunal rejected the Claimant's primary argument that his dismissal for redundancy had been a sham. The Employment Judge accepted the sworn evidence of all five of the Respondent's witnesses to the effect that the redundancy exercise was genuine (Judgment, paragraph 17). Their evidence was to the effect that the existing service performance structure was not delivering the desired outcomes in terms of improved service levels (paragraph 10). He accepted the evidence of the Respondent that at the heart of the restructuring was a dissatisfaction with the existing CI Team in that it had tended to be reactive rather than proactive, and that there

needed to be a greater focus on business improvement, and the Team needed to take responsibility to see through improvement, rather than just recommending it (paragraphs 11 and 12).

7. An unusual feature of this exercise was that the number of employees in the reorganised team was going to increase, not decrease, from seven to eight. At paragraphs 18 and 19 of the Judgment, the Employment Judge set out his conclusions as regards the reason for dismissal:

> **"18. Most redundancy exercises have the primary objective of cost saving and BTFS's policy envisages that. But having regard to paragraph 3 at page 72, it is clear that the policy does envisage the type of restructuring that took place here. I am also satisfied that it falls within the meaning of s139(1)(b).**
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> **19. On balance therefore I am satisfied that BTFS have proved a potentially fair reason for dismissal."**

8. The finding at the end of paragraph 18 to the effect that the exercise falls within the meaning of section139(1)(b) was a finding that there was a genuine redundancy situation, for statutory purposes, on the basis that the Respondent's requirements for employees to carry out work of a particular kind had ceased or diminished. The reference in paragraph 19 to paragraph 3 at page 72 was to a paragraph in the Respondent's Redundancy Policy, which stated:

> **"It is BTFS's policy to act with integrity and to avoid redundancy situations where possible, however, the needs of the business may from time to time require a reduction in the overall number of roles due to economic, organisational or technical changes that may result in some colleagues in the business being made redundant."**

9. The Employment Tribunal judgment then went on to consider whether the dismissal was fair. The Employment Judge found that the consultation process was fair and that the selection criteria were ones which were open to the Respondent to use. He then found that the selection was made fairly in accordance with the adopted criteria and that the Respondent had properly considered the representations made by the Claimant. He also found that the Respondent had made reasonable and genuine efforts to find alternative employment for the Claimant, but, by this

stage, the Claimant had lost all trust against the Respondent. The Claimant was granted two internal appeals against the decision to dismiss him. The Tribunal found that, in all of the circumstances, the Claimant's dismissal for redundancy was fair (Judgment, paragraphs 20-65).

10. The Claimant appealed to the Employment Appeal Tribunal by a Notice of Appeal dated 24 April 2019. At this stage, he was still representing himself. In the Notice of Appeal, the Claimant set out a large number of grounds of appeal. At the paper sift, HHJ Auerbach struck out all but two of the grounds, and referred the remaining grounds to a Preliminary Hearing. At the Preliminary Hearing, on 15 January 2020, at which the Claimant was represented by an ELAAS Representative, Choudhury P set down the appeal for a full hearing on two grounds. These are:

(1) The Employment Tribunal simply failed to decide whether the situation which the Respondent termed a "redundancy situation" did in fact fit within the statutory definition of redundancy in section 139 of the **Employment Rights Act 1996** ("ERA"); and

(2) Alternatively, the conclusion that the reason for dismissal was redundancy as defined in section139 **ERA**, was perverse, as being one that no reasonable Employment Tribunal could have come to.

11. The appeal hearing before me was conducted by skype, as a result of the Covid-19 Pandemic. The Claimant was represented by Mr Adam Ohringer, of counsel, and the Respondent was represented by Mr Ben Dylan Williams of counsel, who represented the Respondent before the Employment Tribunal. I am grateful to them both for their helpful and concise submissions.

12. I will first summarise the relevant law, which is not substantially in dispute, and will then address in turn the two grounds of appeal.

The law

The test for redundancy

13. In order for a dismissal to be fair, it must come within the list of potentially fair reasons for redundancy set out in section 98, **ERA**. One of these potentially fair reasons is, of course, redundancy: section 98(2)(c). The burden of showing that the dismissal was for a potentially fair reason rests with the Respondent. As I have said, the Respondent in this case relies upon redundancy as the potentially fair reason for dismissal.

14. The statutory definition of redundancy is to be found in section 139(1), **ERA**, as follows:

"139. **Redundancy**

(1). For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a)the fact that his employer has ceased or intends to cease—

(i)to carry on the business for the purposes of which the employee was employed by him, or

(ii)to carry on that business in the place where the employee was so employed, or

(b)the fact that the requirements of that business—

(i)for employees to carry out work of a particular kind, or

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

15. The relevant part of this definition for present purposes is that set out in section 139(1)(b)(i). This provides that an employee will be dismissed by reason of redundancy if his or her dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished.

16. The Respondent's contention was that its requirement for employees to work as CI Coaches had ceased. It is true that the Respondent had a continuing requirement for employees to work as CI/CE leads, but this was a different job, and so the increased requirements for employees to do a different job should not detract from the conclusion that the definition of redundancy in section 139(1)(b)(i) had been satisfied for CI Coaches. The Claimant's position was that the job descriptions demonstrate that the CI/CE Lead role is essentially the same job as the CI Coach role, and so there was no reduction in the requirements of the business for employees to carry out work of that particular kind.

17. The question whether the requirements of the business for employees to carry out work of a particular kind has ceased or diminished, or is expected to cease or diminish, whether at all, or in the location where the Claimant was employed, is a question of fact: **Murray v Foyle Meats Ltd** [1999] ICR 827 (HL), at 829, per Lord Irvine of Lairg LC. It is also a question of fact and degree as to whether a new job, with a new job title, is really a continuation of work of a particular kind, which was previously done under a different job title. In **Martland v Co-Operative Insurance Society Ltd** (UKEAT/0220/07, Unrep), Elias P said, at paragraphs 51-52:

> **"51 …. This is classically an area for the Tribunal to determine…. The Tribunal has to consider whether the change in the nature and quality of the tasks and the way in which they were being carried out is sufficient to justify an inference that the work could now be described as being of a different kind or not.**
>
> **52. There is no single right or wrong answer to that question; it involves assessing all the relevant evidence and reaching a judgment. We have to remind ourselves that it is not for us to make that assessment…."**

18. It is trite law that, in deciding the question whether a redundancy situation exists, the Tribunal is not concerned with deciding whether the employer acted with commercial good sense: **Moon v Homeworthy Furniture (Northern) Ltd** [1977] ICR 117; **James W Cook (Wivenhoe) Ltd v Tipper** [1990] ICR 716. It is not a requirement that the dismissal of the employee actually

achieves a cost saving for the employer. Similarly, a particular employee may be dismissed for redundancy if there is a reduction or cessation of the requirements for employees to carry out the type of work that s/he is employed to do, even if there is an increase in the requirements for employees to carry out other work, and the employer is generally expanding.

19. The label that the employer places on the dismissal is not determinative. In particular, if the employer purports to dismiss the employee on the ground of redundancy, but this is not the real reason at all, and the reason for dismissal is a "sham", then the reason for dismissal is not redundancy. By the same token, if the employer genuinely believes that there is a redundancy situation and dismisses the employee as a result, but the employer is mistaken, the reason for dismissal is not redundancy: the test is an objective one, and the decision as to the whether the reason for dismissal is one of the statutory potentially fair reasons for the purposes of section 98(1) rests with the Tribunal, not the employer.

Adequacy of reasons

20. The first of the two grounds of appeal relied upon by the Claimant, as Mr Williams pointed out in his oral submissions, is essentially a complaint that the reasons given by the Tribunal for its conclusion that the reason for dismissal was redundancy were inadequate, and/or that the Tribunal failed to deal with a relevant issue in its judgment.

21. The relevant principles in relation to adequacy of reasons and the requirement to deal with issues in the judgment are well-established, and can be summarised as follows, for present purposes:

(1) The duty to give reasons is a duty to give sufficient reasons so that the parties can understand why they had won or lost and so that the Appellate Tribunal/Court can

understand why the Judge had reached the decision which s/he had reached: **Meek v City of Birmingham District Council** [1987] IRLR 250 (CA), at paragraph 9;

(2) The scope of the obligation to give reasons depends on the nature of the case: **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409 (CA), at paragraph 17;

(3) There is no duty on a Judge, in giving his or her reasons, to deal with every argument presented by a party in support of his case: **High Table Ltd v Horst** [1997] IRLR 513 (CA), at 518; and

(4) The Judge must identify and record those matters which were critical to his decision. It is not possible to provide a template for this process. It need not involve a lengthy judgment; **English,** at paragraph 19.

22. In **Anya v University of Oxford** [2001] ICR 847 (CA), Sedley LJ said:

> **"26. … The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."**

The first ground

23. On behalf of the Claimant, Mr Ohringer submits that the Employment Judge simply failed to decide whether the situation which the Respondent described as a "redundancy situation" did in fact fit the definition in section139, **ERA**. He did not look at the nature and quality of the tasks to be done by the CI/CE Leads and compare them with the nature and quality of the tasks that had been done by the CI Coaches so as to work out whether or not they were work of the same kind, or work of a different kind. In particular, the Employment Judge did not consider the similarities between the old and new job descriptions.

24. On behalf of the Respondent, Mr Williams says that this ground is nothing more than a criticism that the Claimant wanted the Tribunal to perform a compare and contrast exercise of the two roles in the judgment, but the Tribunal was not bound to do this. He also says that the Claimant is seeking to conflate the determination of the work of a particular kind, with the number of people required to fulfil the new role, and that the Claimant is seeking to entice the Appeal Tribunal into substituting its own view of whether the competing jobs descriptions were so similar as to suggest that there was no genuine or new role.

Discussion

25. In my judgment, it is clear from the Claim Form (and recognised in the Grounds of Resistance) that the Claimant was advancing three arguments which each had to be addressed by the Employment Tribunal. These were:

(1) Whether the purported redundancy exercise was a sham?;

(2) Whether, even if there was no sham, there was no genuine redundancy situation?; and

(3) Whether, if there was a genuine redundancy situation, the Claimant's dismissal was nevertheless unfair?

26. It is clear from the judgment that the Employment Judge addressed issues (1) and (3) and gave adequate reasons for his conclusions. He resolved the issues in the Respondent's favour.

27. In my judgment, however, the Employment Judge failed to deal in sufficient detail in his judgment with issue (2), namely, whether, even if the redundancy exercise had been undertaken in good faith by the Respondent, and the Respondent genuinely believed that there was a redundancy situation, there was, nevertheless, no redundancy situation.

28. I have considerable sympathy with the Employment Judge. It is clear that the primary case that was advanced by the Claimant before the Tribunal was that the whole exercise was a sham. This had been the Claimant's firm belief. It is clear that this was the main thrust of the Claimant's case before the Employment Tribunal. It is not surprising, therefore, that the judgment focused on the "sham" allegation. However, the Claimant had also advanced the argument that there was no genuine redundancy situation, and, at paragraph 13 of the Judgment, the Employment Judge noted that the Claimant had pointed to the similarities between the job description of the role he already held, of CI Coach, and the job description of the new role, that of CI/CE Lead. Indeed, he provided the Tribunal, on the first day of the hearing, with a document which compared the two job descriptions, point by point.

29. The argument that there was no genuine redundancy situation did not depend on acceptance of the submission that the Respondent had acted in bad faith, or that the Respondent had an ulterior motive for the purported redundancy exercise. Even if the Respondent had genuinely believed that there was a redundancy situation (as the Tribunal found it had), there still remained an issue as to whether, objectively speaking, there was a true redundancy situation, as defined in section 139(1)(b)(i).

30. This issue is not adequately addressed in the Tribunal's Judgment. Having found that there was no sham, and having found that the redundancy exercise fell within paragraph 3 of the Respondent's Redundancy Policy, all the Judgment says, at paragraph 18, is this, "I am also satisfied that it falls within the meaning of section139(1)(b)." The Judgment does not give any explanation for this conclusion. The Judgment does not address in any detail at all the contention that, when one looks at the job descriptions and the nature and quality of the tasks of the old and new roles, they are essentially the same job, so that the requirement of the Respondent for employees to carry out work of the particular kind done by the Claimant had not ceased or

diminished. As I have said, the finding that there was no sham does not also resolve the separate question of whether the requirement for employees to carry out work of a particular kind had ceased or diminished.

31. The case law, as summarised above, emphasises that it not necessary for the Tribunal to address every point that is taken by a party, and it need not make findings of fact on every disputed issue, but in my view the Tribunal was obliged to consider the "genuine redundancy" issue and to provide reasons for its conclusions in greater detail than appears in the Judgment. This does not mean that the Appeal Tribunal is substituting its own view for that of the Employment Tribunal; rather, the problem is that the Employment Tribunal did not do more than set out its conclusion.

32. For these reasons, in my judgment, the Claimant is right that the Tribunal erred in law in relation to ground 1.

The second ground

33. The second ground is a type of perversity challenge. It can be dealt with briefly. The starting point, in my judgment, is that it cannot be said, on the basis of the Tribunal's judgment, that it was perverse for the Tribunal to conclude that there was a genuine redundancy situation. It is clear that there was evidence before the Tribunal which meant that there was a real issue as to whether or not the requirement for employees to carry out work of the kind done by the Claimant had ceased or diminished. It cannot be said, in my judgment, that the only possible decision open to a reasonable Employment Tribunal was that there was no genuine redundancy situation.

34. In his submissions, Mr Ohringer did not go that far. He said that if the Tribunal had been right to assess whether there was a genuine redundancy situation by reference to paragraph 3 of

A the Respondent's Redundancy Policy, the Employment Judge was wrong to say that the situation which existed came within the definition in the Respondent's policy. This was because the employer's own definition of redundancy applied only where the overall headcount has reduced.

B

35. In my judgment, this issue did not arise. I do not read the Tribunal's judgment to mean that the Employment Judge fell into the obvious trap of thinking that the applicable definition of redundancy, for the claim of unfair dismissal, was that which was set out in the Respondent's

C Redundancy Policy, rather than in section 139, **ERA**. In paragraph 18 of the Judgment, the Judge says that the situation amounted to a redundancy situation under the Respondent's Redundancy Policy and "also", to take the word from the Judgment, amounted to a redundancy situation under

D section 139(1)(b).

36. The terms of paragraph 3 of the Respondent's Redundancy Policy were irrelevant to the

E question whether there was a redundancy situation for the purposes of the law of unfair dismissal. The test to be applied to determine if there is a genuine redundancy situation is that set out in section 139, **ERA**, not in the employer's Redundancy Policy, if that differs from section 139. As Mr Williams said, the Policy is potentially relevant to section 98(4), the fairness of the dismissal,

F but it is not relevant to the prior question of whether the reason for the dismissal comes within the statutory definition of redundancy.

G 37. In any event, in my view, it would be to read too much into paragraph 3 of the Respondent's Redundancy Policy to regard it as a promise not to make anyone redundant unless the overall headcount reduced. The paragraph was just a shorthand way of saying that the

H Respondent would try not to make redundancies, but that there may be circumstances in which a redundancy situation would arise.

38. So far as the statutory test applies, the fact that there was, overall, an increase in the headcount did not necessarily mean that there was no genuine redundancy situation, for the purposes of the law of unfair dismissal. Such a state of affairs may arise in a genuine redundancy case, if the requirement for employees to do a particular kind of work has ceased or diminished.

39. It follows that there was no error of law in the judgment, as is contended for in Ground 2.

Disposal

40. As a result of the error of law by the Employment Tribunal, referred to in Ground 1, the Employment Judge's conclusion that the reason for dismissal was redundancy must be set aside. Quite rightly, Mr Ohringer does not invite me to substitute my own view. This is a matter for evidence and so it must be remitted to the Employment Tribunal. I must emphasise that the only outstanding issue for determination by the Employment Tribunal is whether there was, on the facts, a genuine redundancy situation for the purposes of section 139(1)(b). It is not open to the Claimant to re-open the question whether the reason given by the Respondent for his dismissal was a sham, or whether, if there was a genuine redundancy situation, his dismissal was unfair.

41. The only remaining question is whether I should remit the case to the same or a different Employment Tribunal. I have decided that I should remit to a different Employment Tribunal. I don't think that this is a suitable case for simply remitting the matter to the Employment Judge to elaborate on his reasons, applying the **Burns-Barke** approach, as the omission to deal with a key matter in the judgment was too fundamental. There will have to be a rehearing on the issue of whether there was a genuine redundancy situation.

42. As for whether it should go to the same judge or a different judge: The previous decision in this case was in March 2019, almost 18 months ago, and given the impact of the Pandemic, it

may be some time before the hearing can be relisted. In those circumstances, I think that any advantage that might have resulted from the previous Employment Judge being familiar with the case would have dissipated. In particular, whoever deals with the case, it will be necessary to have fresh evidence, limited to evidence relevant to the "genuine redundancy situation" issue. It would not be safe for the original Employment Judge to rely on his recollection of a hearing over 18 months before. If this case is remitted to a different Employment Tribunal, rather than to the original Employment Judge, then the chances of obtaining an early rehearing date will be increased.

Conclusion

43. For the reasons I have given, the Claimant's appeal is allowed on Ground 1, and dismissed on Ground 2. The case is remitted to a different Employment Judge, with the re-hearing limited to the question as to whether the reason for dismissal amounted to a genuine redundancy situation.