Appeal No. UKEAT/0307/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 & 11 December 2020

Before

HIS HONOUR JUDGE MARTYN BARKLEM
(Sitting Alone)

MR E SMITH — APPELLANT

INTELLING LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NAOMI CUNNINGHAM (of Counsel) Instructed by: Suffolk Law Centre 46a St Matthews Street Ipswich Suffolk IP1 3EP
For the Respondent	MR RAD KOHANZAD (of Counsel) Instructed by: Peninsula Business Services Ltd The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4FB

SUMMARY

Disability Discrimination

It was not perverse for an ET to make findings as to the true reason for the dismissal which were entirely at odds with the case that the Respondent had originally advanced. The Respondent's case had been prepared chaotically but the ET had been able to establish the true reason for the Claimant's dismissal which was not connected with his admitted he disability. Although it was unfortunate that the ET made no reference to s136 of the Eq A, dealing with the shifting burden of proof, there is no formal requirement for it to do so. Contrary to the Claimant's submissions there was an evidential basis for the ET's findings.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal against a decision of an Employment Tribunal sitting at Manchester, Employment Judge Rice-Birchall sitting with members Miss S Howarth and Ms B Hillon. In this judgment I shall refer to the parties as they were below.

2. The Appeal was allowed to proceed on amended grounds following a Preliminary Hearing by HHJ Auerbach, who also directed that the Employment Judge produce her notes on evidence in relation to certain findings.

3. At the original hearing, the Claimant was represented by his mother, and the Respondent by a Consultant, Miss L Hasall. The Claimant was represented today by Miss Cunningham and the Respondent by Mr Kohanzad, both of Counsel. I am grateful to them both for their Skeleton Arguments and submissions at the hearing.

4. Prior to the original hearing, it had been determined that the claimant was disabled within the meaning of the **Equality Act 2010** ("Eq A") because of anxiety/depression.

5. The Claimant worked for the Respondent from 22nd February 2016, supposedly as an apprentice working on a campaign (I have no further details) on behalf of a client named "Missguided". In January 2017 his employment was terminated, limited reasons being given, but he was reinstated on appeal albeit not as an apprentice. He continued as a "customer service adviser" on the Missguided campaign. However, in April 2017 he was moved to work on a different contract, this time for O2, which was more sales-based. His anxiety levels increased and he was off work until 20th June 2017. During his sickness absence he was visited twice by a member of the Respondent's HR team. He duly returned to the Missguided campaign, on what

he acknowledged was a "glidepath" designed to ease his way back into work. The ET found that there were no relevant performance issues in relation to the Claimant.

6. On 14th July 2017 the Claimant's employment was terminated without prior warning. The ET records the Claimant as having been aware of other colleagues having lost their jobs too, and to his having been leaving work early as there was insufficient work in the days prior to dismissal. There were minutes of the termination meeting which described the reason for dismissal in generic terms as being:

> **"… due to performance, attendance, or unauthorised absence, behaviours, probation, work volume".**

This was, the ET held:

> **"a flagrant disregard of the truth as the Respondent now puts it".**

The *real* reason, the ET was to conclude, was that there was a requirement for fewer employees. It mentioned that the letter of termination was "almost identical" to that sent to the claimant on the first occasion that he was dismissed.

7. At para. 7 of the Reasons the ET said as follows:

> **"The respondent's evidence was evasive, confusing and contradictory. By way of example, the witnesses were not able to clearly enunciate the reason for the claimant's dismissal. In the pleadings, the Respondent relied on capability as the reason for dismissal, but explained that, because the claimant had under two years' service, no process had been followed. That reason was also given in the witness statements of both Catie O'Mahoney and Liam Radford. However, the respondent's case, put both at the hearing and in submissions, was that the claimant was dismissed because of his length of service and the respondent's requirement for fewer employees, a totally different state of affairs to what was pleaded and what information was given to the claimant at the time of his dismissal. There was a lack of documentary evidence to back up the respondent's assertions of addressing performance issues, for example, or making adjustments as alleged. The respondent was also unable to answer basic questions, including who the claimant's line manager was".**

8. This point was repeated at para. 28 of the Reasons. As para. 33 constitutes the second Ground of Appeal, it is helpful to set out paras. 28 to 33 to set this in context:

> **"28. It is noteworthy that the respondent's amended grounds of resistance and the witness statements of both Catie O'Mahoney and Liam Radford state that the claimant's employment was terminated due to his capability. However, throughout the respondent's oral evidence, and with reference to the documentation produced to the Tribunal at the outset of the hearing, the position put forward by the respondent Tribunal (sic) is that, in fact, this was a redundancy situation. The statistics produced to the Tribunal for inclusion in the Bundle were, it was alleged, quality and absence statistics, though no plausible explanation was given to how they were obtained, what they meant or how they were taken into account. Despite being informed by the respondent that he obtained the statistics, the dismissing officer, Mr Radford, was unable to explain what they meant and how they had been applied.**
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> **29. Having pieced together the information provided, the Tribunal made a finding of fact that the real reason for the termination of the claimant's employment was a headcount reduction, as there was a requirement for fewer employees on the Missguided Campaign. That was evidenced not only by the respondent's oral evidence but by the claimant stating that he was aware that there was less work (as he had been leaving work early on some occasions) and that some of his colleagues had also left at the same time.**
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> **30. The Tribunal also tried to understand how the claimant was selected but this proved very difficult on the documents and with the evidence available.**
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> **31. The statistics produced included some quality statistics which could not be explained, and also absence information as well as start date. The respondent could not explain to our satisfaction how the claimant's period on the O2 campaign or how his absence for anxiety would have impacted on his statistics, or was or was not taken into account.**
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> **32. The Tribunal was also troubled that some employees who appeared to have less service than the claimant were not dismissed and that some of those with less service appeared to have similar quality statistics to the claimant. Further, although the claimant had less than two years' service, he had the longest continuous employment of those "selected" for dismissal, but that may have been because there was an error in that his start date was calculated from March 2017 (when he was reinstated) rather than from his original start date of February 2016.**
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> **33. The Tribunal made a finding of fact that the decision to terminate the claimant's employment was made on the basis of certain rankings which were articulated in an email from Catie O'Mahoney in April 2017, albeit in relation to a different reduction in headcount. The respondent first identified those with under two years' service and then considered such things as whether an employee had a specific language skill that is required for the business going forward. Nonetheless, the key criterion was length of service, most notably whether or not the employee had under two years' service".**

The ET then went on to consider the relevant provisions of law.

9. This appeal is concerned only with section 15 of the **EqA**. Having set out the terms of the section and discussed its findings, the ET concluded (para. 61) that it was satisfied that the Claimant's dismissal was not affected by "something arising" from his disability as alleged or at

all. It went on to find (para. 62) that the reason the Claimant was not considered for a sales job was not affected by something arising from his disability. The Claimant was one of a number of employees who were dismissed for redundancy and there was no evidence to suggest that any was offered a sales role.

10. Ground 1 of the Appeal asserts that the ET failed to have regard to or apply s.136 of the **EqA** when reaching its decision that the decision to dismiss the Claimant was not "something arising" from his disability. Ground 2 asserts that the ET's finding at para. 33 above that the decision to terminate the Claimant's employment:

> **"was made on the basis of certain rankings which were articulated in an email from Catie O'Mahoney in 2017"**

was perverse in that it was unsupported by any evidence and contrary to such evidence as there was. In his note explaining why this ground was permitted to go forward to this hearing, HHJ Auerbach noted Ms Cunningham having pointed to an inconsistency between that paragraph and para. 28.

11. Before turning to Ground 1 I set out the provisions of s.136 of the **Eq A 2010:**

> **"Section 136**
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

12. I shall turn first to Ground 1. For the Claimant, Ms Cunningham contends that, whilst it is not obligatory for an ET to go through the 2-stage process set out in **Igen Ltd v Wong** [2005] IRLR 258, reaffirmed recently in **Efobi v Royal Mail Group** [2019] IRLR 352, it is an error of law to overlook the effect of s.136 entirely. She submits that there is nothing in the Reasons to suggest that the ET had given any consideration to the section or the case law surrounding it. She

points out that the section was enacted because of the acknowledged difficulty for Claimants of proving facts about a Respondent's reasons for acting and says that is the whole reason *why*, if there are facts from which discrimination could properly be inferred, it falls to the Respondent to prove that it has not discriminated. In response to a question from me, she accepted that there is no authority which requires an ET to mention s.136, in the sense of having to confirm that it has been considered but found not to be relevant.

13. She also points to the numerous occasions on which the ET expressed dissatisfaction with the Respondent's evidence and argues that, if it had found that the burden had passed to the Respondent, it is difficult to see how the Respondent could possibly have been said to have discharged it.

14. Miss Cunningham submits that the finding of the ET that the Claimant was, to the knowledge of the Respondent, disabled, such disability having caused him to have taken absences from work, taken together with the Respondent's untrue explanation for his dismissal; the fact that he had been moved to the task in which a headcount reduction was required as a result of his disability; and some employees affected by the headcount reduction but with shorter service than the Claimant *not* having been dismissed, meant that the ET should properly have inferred that there had been a contravention of the **Eq A**. As there was no credible basis on which the Respondent could have *proved* the true reason, the ET would have been *bound* to uphold the Claimant's complaint.

15. In the circumstances, she argues, it was incumbent on the ET to have considered whether the Respondent had discharged the burden on it to show that the Claimant's dismissal was "in no sense whatsoever" because of something arising in consequence of his disability. It was wrong

for the ET to have gone straight to the second stage, ignoring the possibility that more than one reason was operating.

16. Mr Kohanzad submits that, although the Respondent presented an inconsistent case before the ET as to the Claimant's dismissal, the ET nonetheless saw though the inconsistencies and was able to draw a firm conclusion as to the reason of the dismissal, as set out at para. 29 of the Reasons, which is not challenged. He referred me to **Martin v Devonshires Solicitors** [2011] ICR 352 EAT. In that case, as in the present, the ET had made no reference to the equivalent of s.136 – the "reverse burden of proof", and the Appellant had submitted that the ET had failed to deal properly with the burden of proof and had

> **"failed to have due regard to the guidance in Igen Ltd v Wong".**

17. At para 39 Underhill P said as follows:

> **"39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the fact necessary to establish discrimination – generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head – "the devil himself knoweth not the mind of man". But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the Respondent's motivation and what is in issue is its correct characterisation in law."**

18. Mr Kohanzad also relies on a dictum to like effect of Elias LJ in **Fecitt & Others v NHS Manchester** [2012] ICR 372:

> **"Once an employer satisfies the tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation - that necessarily discharges the burden of showing that the prescribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal has been given something less than the whole story that it is legitimate to infer discrimination in accordance with the principles of Igen Ltd v Wong."**

19. In the present case, he argues, whilst it would have been open for the ET to infer discrimination on the basis of the inconsistency, there is no rule that, merely because of inconsistent accounts given in a case in which discrimination is alleged, the shifting burden of

proof provisions come into play. In response to a point made by Ms Cunningham, he argued that his concession that the ET *could,* on the facts, have concluded that s.136 became engaged does not mean that it was *bound* to. The question is one of fact for the individual ET to determine.

20. I turn now to Ground 2. Ms Cunningham points out that the ET does not identify on what evidence the ET made the finding at para 33, and submits that there is nothing in the notes of evidence which have been supplied by the Employment Judge ("EJ") and of the relevant papers from the original bundle which explain it. She points to para 28 of the Reasons and argues that it is unclear as to whether the statistics referred to in *that* paragraph are the same or different from those referred to at para 33. However, she says that on any view the ET's conclusion at para. 33 are unsupported. If the statistics are the *same*, then the dismissing officer's inability to say what they meant or how they had been applied should have been fatal to a conclusion that they had formed the basis for the dismissal. If the statistics are *different*, then the ET does not say how or whether they operated on the dismissing officer's mind at all.

21. Mr Kohanzan points out that there are two elements to this ground; first, that the finding was unsupported by any evidence; and second, that no reasonable ET could have reached the finding that it did on the evidence before it.

22. He argues that para 33 should not be read in isolation but in the context of the surrounding paragraphs. On that basis, he submits, the ET's conclusion was based *not* on the April 2017 e-mail, but on the broad policy set out in the e-mail; namely, that the Respondent first eliminated from consideration those who, despite having less than two years' service, had skills or attributes which were necessary to the business.

23. In his Skeleton Argument he set out in full the notes of evidence recorded by the EJ and contends that these make clear that oral evidence was given by Mr Radford, Miss O'Mahoney (the author of the e-mail) and Ms Massey as to the nature of selection process which was carried out, and from which the ET drew the conclusions that it did. What is clear from the notes, he says, is that the key determinant for headcount reduction was length of service, with other factors then being applied to meet the business need.

24. I turn to my conclusions. It is unfortunate that the ET did not at least make reference to the provisions of section 136 of the **EqA**, but I do not consider that I must therefore assume that this means that the ET was not aware of them, and of their potential relevance. This was plainly an unusual case. The Respondent's case had, judging by the ET's Reasons, been put together chaotically. It seems that it was only very shortly before the ET hearing that the correct documents and the true reasons behind the dismissal were identified. It is easy to sympathise with the Claimant's argument that s.136 should have been brought into operation, or at least referred to. However, the mere fact that a case was initially advanced on an incorrect basis does *not* prevent an ET – and this was a three-person tribunal – from being able to 'sort the wheat from the chaff' and arrive at a clear conclusion.

25. In my judgment, a fair reading of para. 28 is that the oral evidence before the ET was consistently that the dismissal arose because of a redundancy situation. Documentation and statistics relating to performance issues which had been put in the bundle could not be explained by the dismissing officer because they were irrelevant and had not formed any part of the reason for the dismissal. This led to the finding of fact as to the true reason for the dismissal as articulated at para 29. It is an oddity that, having made that finding of fact, the ET should set out uncertainties in paras. 30 to 32. Logically they should have preceded para 28.

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26. Ms Cunningham pointed out that Ground 2 of the appeal is freestanding. I accept that, but that does not mean that the paragraph has to be read in isolation. Indeed, it makes sense only when read in the context of the preceding paragraphs.

B

27. The e-mail referred to at para 33, dated April 2017, clearly related to a *previous* headcount reduction. It refers to "removing" employees. I accept from the context that this means removing from the pool of those to be considered for redundancy. Among the criteria are those with tenure over 100 weeks; those who are multi-lingual; those who are apprentices, etc. There is then a set of criteria to be applied to those remaining in the pool. I read para. 33 as being an expansion of the reasoning set out in paras. 28 and 29; namely that the Respondent had been applying a similar process to that set out in the first part of the April e-mail. The paragraph explains, in effect, why, notwithstanding the reservations expressed at paras. 30 to 32, the ET had reached the conclusion that it did.

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28. There are sufficient references in the EJ's note of evidence relating to criteria around language skills, special skill-sets needed and night shift advisers, as well as repeated references to tenure (under two years), to draw a link to the April e-mail, which was, in my judgment, mentioned because, unlike in the present dismissal, there was no documentation. It was by way of analogy.

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29. However, if I am wrong in that conclusion, it does seem to me that, were para. 33 excised, the findings within paras. 28 and 29, taken with the conclusions at paras. 61 to 63 are such that the decision *could* validly stand.

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30. For the reasons set out above, I dismiss this appeal.

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