Neutral Citation Number: [2024] EAT 107

Case No: EA-2022-000574-AT

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 June 2024

Before:

JUDGE KEITH

- -

Between:

MR M BIRKETT

Appellant

- and -

INTEGRAL UK LTD

Respondent

- -
- -

EMMA DARLOW STEARN (instructed by the **FRU**) for the **Appellant**
SUSAN CHAN for the **Respondent**

Hearing date: 18 June 2024

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL – adequacy of findings

1. The Employment Tribunal erred in law in two respects: (1) in making insufficient findings in respect of the respondent's process of searching for alternative jobs, at the time of the claimant's dismissal; and (2) in making insufficient findings in relation to the circumstances in which the claimant was unsuccessful for a specific vacancy, for which he had been interviewed. Both issues were relevant to the fairness of the claimant's dismissal for the purposes of **section 98(4) of the Employment Rights Act 1996.**

2. The matter was remitted to the same Employment Tribunal, if possible, subject to availability and as directed by the Regional Employment Judge. This decision does not disturb the Employment Tribunal's judgment to dismiss the claimant's claims for discrimination; or its finding that the respondent had shown a fair reason for dismissal, namely that the claimant was dismissed by reason of redundancy. The narrow issue on which the remaking is remitted is in relation to findings on the process in relation to general vacancies, and the specific vacancy for which the claimant was interviewed, when considering **section 98(4).**

JUDGE KEITH:

1. These written reasons reflect the full oral reasons which I gave to the parties at the end of the hearing.

2. I refer to the parties as they were below, namely "the claimant" and "the respondent". The claimant appeals against the decision of the Employment Tribunal sitting in Mold, (the "ET") which, in a decision sent to the parties on 6 April 2022, dismissed the claimant's claims of unfair dismissal and discrimination. The claimant appeals only the dismissal of his claim for unfair dismissal.

3. Permission on the papers was initially refused but, at a rule 3(10) hearing before Deputy High Court Judge Crowther KC, she granted permission on two specific grounds: (1) that the ET arguably erred in the adequacy of its findings in relation to suitable alternative vacancies within the respondent; and (2) that the ET arguably erred in the adequacy of its findings about why the claimant was not appointed to the one vacancy brought to his attention, for which he was interviewed.

4. I refer to the bundle throughout as "CB" or "the core bundle". Whilst I am not bound by Judge Crowther's views on the merits of the grounds beyond their arguability, of particular note, her concern was in relation to paragraph [51] of the impugned decision, which stated:

> "By the time of that hearing there was a vacancy for an engineer in Manchester. Mr Betts ensured that the claimant was interviewed for that post even though his employment had ended. The Tribunal feels, as does C, that credit was due to Mr Betts as he did not accept initial reluctance from the Manchester site; he wanted it to be looked into as to why they were initially not prepared to interview C and he gave a guarantee there would be an interview. The interview was conducted and at least one of the two managers who interviewed C was complimentary about his work and quite properly gave him credit for his experience and expertise. We did not hear evidence from those managers as to why they did not

> ultimately appoint C. There is no evidence before us as to the age or race of the successful applicant for the post; we infer that being English was unlikely to have been held against C in Manchester. We find that R did its best, through Mr Betts, to ensure that C had every opportunity to seek alternative employment within the company."

5. Judge Crowther was concerned that it was arguable that, in its analysis, the ET had failed to consider whether the process had been fair and that the reasons for failing to offer the role were within the band of reasonable responses. It was arguably not sufficient that Mr Betts secured an interview if, in the event, the respondent did not properly consider the claimant's application for that role. She also concerned about the ET's findings on the reasonableness of the respondent's searches more widely. Arguably, the ET did not appear to have considered the quality or depth of the respondent's searches for alternative roles. The claimant claimed to have identified at least two further roles which he says he would have been more than qualified to do and would have considered in preference to redundancy.

6. I have considered the respondent's answer to the grounds. I turn to the parties' competing cases and submissions, which I summarise.

The Claimant's Case

7. The claimant argues that the ET failed to make the findings of fact necessary to decide whether the respondent had taken reasonable steps to find the claimant suitable alternative employment. The only relevant test was **section 98(4)** of the **Employment Rights Act** ("**ERA**"), as confirmed by this Tribunal in **Morgan v The Welsh Rugby Union** [2011] IRLR 376, para [36]. This Tribunal also confirmed in **Williams v Compair Maxam** [1982] ICR 156 (para 162F) that an employer must seek to see whether, instead of dismissing an employee, he could offer him alternative employment. Instead, the ET had asked itself at para. 55.6, whether reasonable consideration was

given to the availability of alternative work. It had limited its findings at para. 49 to stating that there were no vacancies in the north of Wales or close to where the claimant could have been redeployed. There was nothing in the findings at paras.15 to 51 about what steps, if any, the respondent had taken in this regard beyond the findings in para. 49.

8. At para. 51 of the Judgment, the ET had referred to Mr Betts ensuring that the claimant had been offered an interview. In relation to ground (1), it was not possible for the ET to have reached a proper conclusion as to the reasonableness of any steps taken to find suitable alternative employment, without adequate consideration of what those steps were, and the quality or depth of the respondent's search for alternative roles. In relation to ground (2), the ET had failed to make findings on whether the interview process was objective; on what grounds the assessment was made about which candidate would perform best in the new role; and why the decision was taken to offer the job to somebody other than the claimant. All of these potential findings were relevant to whether the respondent's procedure was fair in appointing someone other than the claimant.

9. In elaborating on these grounds, Ms Darlow Stearn pointed to the context of a relatively large employer with a thousand mobile engineers. The ET had made no findings about vacancies beyond the north of Wales and had instead simply stated conclusions. The same was true of the recruitment process for a particular vacancy and the decision not to appoint the claimant, namely the ET reached a conclusion but did not set out its findings, at para. 65. This could not be sufficient, as an employer could absolve itself of liability simply by offering an interview. This was illustrated by the guidance at para. 36 of **Morgan**:

> "The Tribunal was entitled and no doubt will consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds."

10. No further analysis other than that under **section 98(4) ERA** was required, but that required findings which had not been made. To rely on the finding of an interview alone was not adequate. This was illustrated by the ET's reasoning at para 51, in which it noted that it had not heard any evidence on why the claimant had not been appointed, but concluded that the respondent had done its best, presumably because it had interviewed the claimant.

11. The respondent had referred in its skeleton argument to a number of factors which it said rendered the claimant's appeal academic, in the sense that any Tribunal would have reached the same conclusion; or were factors in which the ET's findings had to be contextualised. These related to the claimant's apparent previous unwillingness to accept a role on less money or in a different geographic location. These arguments ignored the entirely different question, left unanswered by the ET, as to whether, under threat of dismissal by reason of redundancy, the claimant would have changed his mind and accepted a job further afield, in a different, perhaps less conducive, work location and on less money. For the respondent to submit that there was only one answer on the evidence was not sustainable and was no more than speculation. The ET had failed to make findings on at least six relevant questions. The first was whether the respondent had taken reasonable steps to look for jobs either in North Wales or beyond. The second was whether the claimant had been asked in the time up to his dismissal and during the appeal process whether he would be willing to relocate or take a pay cut and what his answer would be. The third was whether the respondent knew, in reaching its decision to dismiss the claimant, that the claimant had two residences, in Manchester and Wrexham. The fourth was whether, and if so, why, the respondent decided to restrict

job searches to Wrexham. The fifth was whether any vacancies within Manchester and outside Wales for which the claimant could have applied, were advertised prior to the claimant's dismissal. A sixth question was whether the vacancy appointment process for the Manchester job was fair.

12. There were simply insufficient findings. The ET's Judgment was not "**Meek**" compliant (see **Meek v Birmingham City Council** [1987] IRLR 250). Ms Darlow Stearn submitted that if this Tribunal were to allow the appeal, remaking should be remitted to a different Tribunal, on the basis of the passage of time since the ET's Judgment and the fact that it may result in a delay if remittal were limited to the same ET.

The Respondent's Case

13. In its answer and skeleton argument, the respondent argues that the ET had been entitled to focus on job searches in the area of Wales in which the claimant had been contractually obliged to work (para. 22 of the Judgement). There was no evidence before the ET that any job vacancies other than those identified had arisen before the termination of the claimant's employment. With regard to the particular vacancy for which the claimant had been interviewed, the ET's findings were sufficient. An analysis of an employer's process needed only to consider whether it was within the "band of reasonable responses" (see **Gwynedd Council v Barratt** [2021] IRLR 1028, para. 43). The claimant had previously raised strong concerns about moving to Manchester. The ET had before it evidence of the respondent's redundancy policy. That policy made clear that redeployment was at the discretion of a manager (see p. [57]/CB). Any redeployment would require agreement on relevant pay and other terms and conditions, including work location (p 58/CB). Not only had the claimant

expressed concerns about working in Manchester, because he regarded his home as now being in North Wales, but also, he had fallen out with another manager, which was relevant to his willingness to be redeployed. In relation to his earnings, the claimant had queried the fact that annual salary for the vacancy was £6,000 less than his current job. All that meant that, in reality, the ET was bound to reach the same conclusion, if it were found that its findings were deficient.

14. In oral submissions, Ms Chan emphasised that the test was the band of reasonable responses, and the reasons needed to be sufficient, not ideal. The ET had asked itself the correct question at para. 2.5 of the Judgment. Any difference in the reasoning at para. 55.6 was a distinction without a difference. Crucially, the ET had made findings of the evidence it had accepted, in particular at para. 21, the evidence of the witnesses who had confirmed that job searches that had been carried out. The ET's analysis of the recruitment process for the Manchester role was suffcient, and even if, as here, there was not evidence as to why the claimant was unsuccessful for a role, that was because of the evidence that was before the ET, and the ET could not be criticised for failing to make findings where there was no evidence. By analogy to the case of **Quinton Hazell Ltd v W C Earl** [1976] IRLR 296, para. 7, the ET had considered whether the respondent had asked itself whether the claimant could be placed somewhere else; and had considered the possibility of a lower paid job. It was not necessary for the ET to consider, instead, why a rival job applicant was successful for the role for which the claimant had applied. It was no error of law for the ET not to have done so.

15. In terms of any remittal, if this Tribunal were to find that the ET had erred in law, Ms Chan urged me to remit the matter to the same ET. Delay alone was not a good reason to remit to a different Tribunal. There had been no challenge to the Tribunal's

professionalism. The value of the claim, one of the factors set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, was relevant, given that the value of the claim was relatively minor and, where otherwise, it would be a question of a new Tribunal having to acquaint itself where the original claim had taken up three days of a Tribunal's time.

The Claimant's reply

16. In reply, Ms Darlow Stearn reiterated that there was a step missing in the analysis. This was not a question of the Tribunal needing to produce ideal reasons, but was, instead, an error in stating conclusions, namely that there had been adequate job searches and that the claimant had been interviewed for an alternative role, but without an analysis of the fairness of those processes for the purposes of **section 98(4).**

Conclusions

17. I accept the claimant's challenge that the ET erred in the adequacy of its findings for the purposes of **section 98(4) ERA** only. It is right to be cautious about inferring that the ET did not consider relevant facts, but that does not eclipse the requirement to make sufficient findings, so that the parties know why they won or lost on a particular point. Put another way, as Ms Darlow Stearn submitted, the basic underlying facts upon which a conclusion is reached need to be clear. Merely to state a conclusion on a disputed point that there were, for example, no vacancies, without any analysis of, and findings on, the respondent's enquiries, is not sufficient. Similarly, the ET did not provide sufficient reasons for concluding that the recruitment process for a vacancy was within the band of reasonable responses. The findings were limited to the fact that the claimant was interviewed. I am conscious that the employer is not generally obliged to recruit a potentially redundant employee in preference to other candidates, but I also do not

accept that the ET was bound to accept that the recruitment process was fair because it had no other evidence on the process. It is at least open to an ET to draw adverse inferences from the absence of evidence which might otherwise be readily available. I express no view in this case about whether such evidence is readily available. To give a practical example, if, as here, an ET does not make findings on the basic fairness of the recruitment process, the risk is that it would be open to any employer to absolve itself of liability by offering an interview, without a wider analysis of the fairness for the purposes of **section 98(4) ERA**.

18. In conclusion, I am satisfied that the ET erred in the adequacy of its findings in relation to the two points outlined. Nothing in what I have decided disturbs the ET's conclusion that the claimant's dismissal was not discriminatory. Similarly, there is no challenge to the ET's finding that the claimant's dismissal was for the reason of redundancy, and redundancy alone.

Disposal

19. I have considered **Sinclair Roche & Temperley**. The ET's decision was in 2022, so that memories may have faded. On the other hand, there is no challenge to the ET's professionalism, and I do not consider that there is a risk of the ET being tempted to reach the same conclusion (the so-called "second bite of the cherry" risk). This Tribunal has made clear where there were gaps in the findings, and which the ET can now fully consider. I have expressly maintained parts of the ET's decision in relation to dismissing the discrimination claim and its findings on the reason for dismissal. As a consequence, the findings of fact which are necessary for a fair disposal are narrow. They relate to the job search and the vacancy interview process at the time of the claimant's dismissal.

20. I also bear in mind, without diminishing the importance to the claimant, the relatively limited value of this claim and the proportionality of remitting to a different Tribunal. This is because the claimant later obtained alternative employment. In the circumstances, I am satisfied that it is appropriate that, if possible, the remaking is carried out by the same ET, unless, because of the lack of availability of ET members, the relevant Regional Employment Judge decides otherwise. I therefore remit remaking to the same ET, with the preserved findings and only on the two issues identified for the purposes of **section 98(4) ERA**.