Neutral Citation Number: [2024] EAT 167

Case No: EA-2023-000581-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 August 2024

Before :

HIS HONOUR JUDGE BARKLEM

- -

Between :

CARNIVAL PLC (t/a CARNIVAL UK)

Appellant

- and –

LAURA HUNTER

Respondent

- -
- -

MS NICHOLAS MOORE (instructed by **Outset Ltd**) for the **Appellant**
The **Respondent** did not appear and was not represented

Hearing date: 15 August 2024

- -

JUDGMENT

SUMMARY

Unfair Dismissal

The claimant was on maternity leave when a redundancy exercise took place in which 21 team leader posts were reduced to 16.

The Employment Tribunal erred in holding that those 16 remaining roles amounted to suitable alternative vacancies within the meaning of Reg 10 of the Maternity and Parental Leave Regulations 1999, "MAPLE".

The Tribunal had held that the redundancy exercise with which it was concerned was one in which there was a reduction of the total number of individuals holding the same roles and not one where there was an amalgamation of roles resulting in any newly created position(s). The finding of automatic unfair dismissal was quashed.

The finding of "ordinary" unfair dismissal was also quashed. The Tribunal had variously substituted its own findings in relation to another candidate, and failed to explain how the flaws which it identified would have altered the claimant's ranking and selection for redundancy.

The case was remitted to a fresh Tribunal for rehearing.

HIS HONOUR JUDGE BARKLEM:

1. In this judgment, I will refer to the parties as the Claimant and the Respondent as they were before the employment tribunal.

2. This is an appeal by the Respondent which is represented by Mr Bromige of counsel, who appeared before the employment tribunal.

3. The claimant has taken no part in the hearing of this appeal as a matter of choice, which she is, of course, perfectly entitled to do. A necessary consequence is that I have heard submissions about the appeal from the Respondent alone. Time did not permit my giving a judgment immediately after the hearing, hence this deferred oral judgment.

4. The Respondent is a well-known operator of cruise lines operating a number of brands, including Cunard and P&O. The Claimant had worked for the Respondent for about 13 years and had become a team leader at a contact centre, one of 21 team leaders working across the business. She became pregnant and commenced maternity leave on 6th April 2020, although she had earlier taken annual leave, which ran into that maternity leave. The COVID 19 pandemic had an immediate effect on the cruise ship industry, and on 29th April 2020 the Respondent notified its employees that there would be a wide-ranging redundancy exercise. The Claimant, together with other team leaders, was formally placed at risk of redundancy.

5. The written reasons of the Tribunal set out the process which then took place. In the event, the Claimant was one of five team leaders out of the pool of 21 who were selected for redundancy based on the scores which were applied to them in the redundancy exercise. The Claimant, having been made redundant, brought a claim. The boxes in the Form ET1 para.8.1 marked "Unfair Dismissal" and "Discrimination on Grounds of Pregnancy or Maternity" being ticked. In box 9.2, the narrative section of her claim, the Claimant complained as to the way in which her scoring had been carried out. She said:

> "I was asked to contribute to my team scoring as Jayesh (Gunatra) who was covering my maternity leave, had only managed them for a short amount of time and said it would not be fair if their scoring was done solely by him."

She was under the clear understanding that Jayesh was simply taking over the team as maternity cover for her. In fact, this was incorrect as Mr Gunatra had in fact been substantively promoted to team leader before taking on the Claimant's team.

6. Following the hearing over 8th to 10th November 2023, the Tribunal held as follows: (1) that the Claimant was unfairly dismissed, (2) that the Claimant was automatically dismissed contrary to, and it was erroneously stated, s.23 and s.10 of the MAPLE Regulations 1999, (3) that the claim of discrimination, contrary to s.18(2) and 18(4) of the Quality Act, were dismissed. Written reasons were sent to the parties on 2nd May 2023. I shall refer to them as "the Reasons".

7. Grounds 3, 4 and 5 accompanying the Respondent's Notice of Appeal were permitted to proceed to a full hearing at the initial sift by Mr Michael Ford KC, sitting as a deputy High Court Judge. Ground 1 of the appeal was allowed to proceed to a full hearing by HHJ Auerbach following an EAT r.3(10) hearing. That ground concerns the question whether Regulation 22 of the Maternity and Parental Leave Regulations 1999, which I will refer to as "MAPLE" were validly before the Tribunal. Although Ground 1 took up the bulk of Mr Bromige's written and oral submissions I shall deal first with Grounds 3 to 5.

8. Ground 3 asserts that the Tribunal erred in law in concluding that there was a suitable alternative vacancy within the meaning of Regulation 10 of Maple. The Tribunal held at paras.49 and 50 of the Reasons that the redundancy exercise with which it was concerned was one in which there was a reduction of the total number of individuals holding the same roles and not one where there was an amalgamation of roles resulting in a newly created position that is not a vacancy. Regulation 10 of MAPLE reads as follows:

> "10(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.
>
> (2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contact) alternative employment with her employer or his successor, or an associated employer, under a new contact of employment which complies with (3) (and takes effect immediately on the ending of her employment under the previous contract).
>
> (3) The new contract of employment must be such that-
>
> (a) the work to be done under it is a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
>
> (b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract."

9. Regulation 10 of MAPLE is engaged only where an employee would otherwise have been made redundant. In that situation, under Regulation 10(2), an employee is entitled to be offered alternative employment under a new contract of employment, which takes effect immediately on the ending of the employment under the previous contact. That entitlement arises only where there is a suitable alternative vacancy.

10. Mr Bromidge submits that the Tribunal misdirected itself in law by failing to appreciate that in **Sefton Borough Council v Wainwright** [2015] IRLR p.90, which it discussed at paras.194 to 201 of the Reasons, the Claimant and a colleague had effectively competed for a new position. Mrs Justice Eady, President, held that each of them became redundant within the meaning of Regulation 10 when their individual existing posts ceased to exist. The new role was a suitable vacancy which Regulation 10 required the employer to offer to the Claimant if no other suitable vacancy was available.

11. That case involved two existing roles ceasing to exist and a new vacancy arising. However, in the present case the Tribunal had expressly found this not to have been the situation. Consequently, its finding at paras.217 and 221 that the 15 posts which remained following the redundancy exercise were suitable alternative posts was, in my judgment, an error of law. Each of those posts pre-existed

and could not have constituted a "suitable alternative vacancy" which the Claimant would have been entitled to have been offered "under a new contact of employment".

12. In the present case there were no new roles created and Regulation 10 could not have been in play until after the redundancy process had been completed. There is no evidence as to any other roles being available, and indeed the evidence was that the redundancy exercise applied across other employees within the business. I note, too, that at para.217 of the Reasons the Tribunal concluded that the Claimant was at risk of redundancy as soon as the consultation exercise commenced. **Sefton** concluded (see para.43) that it was only after an employee's position is redundant that the obligation under Regulation 10 arises. It may be that the Tribunal was confusing an actual redundancy, as was held to have occurred on the facts of **Sefton**, with a risk of redundancy. In the latter case, in my view, Regulation 10(1) is not engaged until the process of the selection of the people who will remain in the reduced number of generic posts is known.

13. Ground 4 is interwoven with Ground 3, and it asserts, in the alternative, that the Tribunal has failed adequately to explain its reasons for concluding that the 16 team leader roles which remained post redundancy were vacancies within the meaning of Regulation 10. The analysis begins with the statement at para.42 of the Reasons, which makes the finding that as early as 11th May 2020 the Respondent was aware that they had at least 15 vacant team leader posts, and that their method for filling each of those posts was to carry out the redundancy selection exercise to decide who would get them. At para.43 they note that all team leaders were competing for one of the 15, later 16, generic vacant posts. At para.17 the Tribunal notes that any of these vacant posts would have been suitable employment for the Claimant. It added that the Respondent was very clear in all its documentation that it was not the Claimant's role that was being made redundant but the five team leader posts, which were generic and which were being made redundant.

14. Taking the two grounds together, I agree that the Tribunal's findings of the applicability of Regulation 10 are either wrong, or unexplained, or both. I agree with Mr Bromige's submission that

where there is a conventional redundancy, in which there is simply a reduction in existing roles, Regulation 10 does not override a valid selection process requiring, in effect, a woman eligible for Regulation 10 protection but who scored lower than others to bump someone who would otherwise have retained his or her job following the reduction in roles by having scored higher.

15. The concept of and repeated use of the term "vacant posts" is at odds with the finding that the posts were generic and that no one was competing for his or her own job. On the face of it, there were no vacant posts. The 21 were all filled, but five were being removed. If I am wrong in that finding, then I would hold that the Tribunal has failed to explain adequately the basis upon which it concluded that with 21 individuals in generic posts being reduced to 16 similar posts, those 16 posts became vacant such as to enable them to be offered to the Claimant as suitable alternative vacancies under a new contract of employment under Regulation 10. For those reasons, Grounds 3 and 4 succeed. The finding of automatic unfair dismissal, expressed to be contrary to s.23 and s.10 of Maple, but which I believe was intended to read contrary to 21(b) and Regulation 10 of MAPLE, is quashed and must be remitted to the Tribunal for a new hearing.

16. Ground 5 is in relation to the unfair dismissal claim. There are a number of heads. It is helpful to start at the Tribunal's conclusions.

> "226. We conclude that the Respondents did have an objective set of criteria, and some guidance as to when each score would be awarded. However, we also find that there was a lack of objectivity when it came to scoring, and in numerous instances there was opportunity and risk of a subjective assessment by managers. We conclude that in the case of the Claimant in particular, subjectivity was a factor in a number of her scores, and was influenced by her not being in work, or by the fact that before she went on maternity leave she had been less available, because of her pregnancy, her health and her impending maternity leave.
>
> 227. In practical terms, we conclude that the Claimant , who was not and had not been in the office doing the work on a daily basis, was disadvantaged because she had not been able to build up a portfolio of positive work which her new manager could review and assess, whereas those who were in the workplace had been able to do this and more importantly were immediately and at the forefront of Ms Dunn's mind .
>
> 228. We have not made any findings that suggest that Miss Dunn or any one else consciously or unconsciously intended to disadvantage the Claimant in the scoring

> process. Looking at all the evidence before us we do find that she did not give any particular credit to the Claimant or investigate her own views when they were less than positive about the Claimant and overly positive about other members of staff
>
> 229. We conclude that this was not conscious or deliberate, but we do find as fact that this was what happened. Setting aside the obligation to offer her a vacant post, in this selection process, the only reason the Claimant was dismissed as redundant was because she was scored in the lowest five during a redundancy selection exercise and the principal reason for her lower scores in at least 3 factors, arose directly from the fact that she took or availed herself of ordinary and or additional maternity leave.
>
> …
>
> 235. In practical terms, we find that the Claimant was disadvantaged because she had not been able to build up a portfolio of positive work which her new manager could review and assess, whereas those who were in the workplace had been able to do this and more importantly were immediately and at the forefront of Ms Dunn's mind .
>
> 236. We conclude that Miss Dunn did not consciously or unconsciously intend to disadvantage the Claimant in the scoring process; but looking at all the evidence before us we do find that she did not give any particular credit to the Claimant or investigate her own views when they were less than positive about the Claimant and overly positive about other members of staff .
>
> 237. We conclude that overall, the Respondent did not operate an objective redundancy selection process and that the Claimant was disadvantaged by this. We would therefore have found her dismissal to have been ordinarily unfair on this basis.
>
> 238. We have found that the Respondent did not consider alternatives to the Claimant's dismissal in May 2020. We conclude that it was not reasonable for the Respondent to have dismissed the Claimant at the date that they dismissed her. The Respondent had not taken all necessary steps to seek to avoid Redundancy. There was a step they could take, and which they took for at least one other woman, but not only was it not taken, it was not even suggested to the Claimant.
>
> 239. We conclude on this basis that the dismissal was unfair."

17. There are, therefore, two strands. The first being the objectivity of the selection process, and the second the difference in treatment between the Claimant an un-named woman in terms of the deferral of redundancy. In **Eaton Limited v King** [1995] IRLR, the Employment Appeal Tribunal sitting in Scotland heard an appeal in which four employees complained of their selection for redundancy. Only one person who was involved in the marking process gave evidence, and it emerged from his evidence that there was an error in the marking of one employee under the head of qualifications, and that in some other areas employees should perhaps have been marked higher. However, as the witness was not the person who had carried out the assessment, he was unable to say

with certainty why particular marks had not been awarded. The Tribunal held that in the absence of evidence as to why the applicants were marked as they were, it was impossible for it to decide that the selection criteria were fairly applied.

18. Lord Coulsfield held that there was nothing in the findings which suggested that the assessment process was not carried out honestly and reasonably, while the Tribunal's view came to its logical conclusion that there could be no alternative but to require the employer in each case to produce all the evidence bearing upon all the assessments as to which the redundancy decision arose. It is essential, he said, to remember that what was is required of the employer is that he should act reasonably.

19. In **British Aerospace PLC v Green & Others** the Court of Appeal endorsed the EAT's conclusions in **Eaton v King**. Lord Justice Waite commented at para.13 that if a marking system is to function effectively it is workings are not to be scrutinised officiously, nor subjected to an over minute analysis. It overturned the Tribunal's order for disclosure of the assessment of all individuals involved in a redundancy exercise.

20. Mr Bromige complains about a comment regarding Mr Gunatra at para.36, when the Tribunal commented that all the feedback about him pre-dated him taking on the team leader role. The relevant documents are in the supplementary bundle, and it seems to me that the feedback in each of the documents relates to Mr Gunatra acting as a team leader, which so far as I can see was validly taken into account contrary to the Tribunal's conclusion that this feedback was not in relation to a team leader role. I see no distinction between a person acting up as a team leader and holding the role substantively. The point made by the Tribunal that this was a scoring based on an earlier role, and thus implicitly not a team leader role, must be wrong.

21. Mr Bromige also complains that the Tribunal has improperly substituted its own view at para.41 of the reasons when it states as a finding of fact:

> "We are surprised that Giesh Gunatra, who had only been in the team for a relatively short period of time, was able to score more than the Claimant in respect of a number of areas. This is not to suggest that he may not have been good at his job, but it is hard to see how he could have demonstrated any significant expertise or experience in such a short time."

22. Mr Bromige also complains that the Tribunal held at para.229 that the Claimant had been unfairly scored on at least three factors which it did not itemise. At para.213 it had said that she had been scored down "in at least two areas for reasons which we have found to be directly linked to the fact of her being on maternity leave." It is difficult to reconcile these two statements, and nowhere are the specific heads of scoring set out, nor what the correct score, as the Tribunal apparently found it, should have been.

23. So far as the comment regarding Mr Gunatra, who was not a witness, I find it difficult to see what place it could properly have had in an objective assessment as to whether the Claimant was treated unfairly. The Tribunal members could have had no knowledge of Mr Gunatra, nor as to whether he was fairly scored in the process by people who knew him and his capabilities. At para.233 the Tribunal reminded itself in an unfair dismissal claim it must not substitute its own view for those of the Respondent, nor enquire into great detail in the scoring itself. Earlier, at para.85, the Tribunal noted that the Claimant received a total score of 23.6, placing her in the lowest five scorers. They noted that an increase in her score of just two points would have put her in the top 16. Having criticised the objectivity of the process in a number of respects, it does not explain how or why a fair analysis of her work would have made up the two points. Unless a scoring which the Tribunal regarded as fair would have pushed her into the top 16, the outcome would have been the same. In failing to establish or state such a conclusion the Tribunal erred, in my judgment, in holding the dismissal unfair.

24. At para.99 of the Reasons, the Tribunal noted that it had heard evidence about another woman who was absent on maternity leave at the time of the redundancy selection process. She did not work in the same area as the Claimant. In her case the Tribunal found the Respondent decided to defer the implementation of the decision on redundancy until the end of the maternity leave. It said:

> "We find that part of the reason for doing this was so that the review could be carried out as to whether or not by that time any suitable available vacancy might be available. We were provided with no explanation at all as to why this was not suggested or considered for the Claimant. We find that it should have been."

25. The Respondent's case is this simply did not happen, and the Tribunal's notes of evidence supporting this were sought following an order of this Tribunal. The order referred to the relevant ground of appeal which made clear that this finding was challenged and why. The note provided by the Tribunal simply identified an individual named Ailish whose redundancy was deferred. The ground made clear that what had actually happened was that the person named Ailish was someone who, like the Claimant, was in fact unsuccessful in obtaining one of the relevant posts, although she was in a different area. However, as one of the successful person in her exercise was on maternity leave at the time, Ailish's redundancy was deferred only in the sense that her contract of employment was not terminated until the successful individual returned to work. The Reasons offer no explanation as to why, other than conjecture based on a misunderstanding. The Tribunal found that part of the reason for this was to consider whether a suitable vacancy might later be found.

26. At para.231, when moving from automatic unfair to ordinary unfair dismissal, the Tribunal noted that it had made findings of fact that the way the scoring was applied to the Claimant was not strictly objective and was inherently unfair to her, but also added:

> "We have also found as fact that the Claimant was treated differently to the way another woman was treated. No consideration was given to the possibility of her deferring her redundancy dismissal date."

It went on to say at para.232 that:

> "The Respondent had not provided an explanation for not deferring the decision on redundancy as they did for at least one other person."

It went on to note that:

> "The Respondent always intended to and had re-started its operation successfully following the end of the pandemic, but although accepting that at the time it was not foreseeable when or whether this would happen, since the deferral was implemented for one other person, and taking into account the Claimant's service and experience, it should

> have been offered to the Claimant, who would have accepted the offer of such a deferment."

27. This finding was again raised, the Tribunal holding that it was not reasonable for the Respondent to dismiss the Respondent at the date that they did, noting that:

> "There was a step which they could have taken, which they took for at least one other woman, but not only was it not taken, it was not suggested to the Claimant."

28. It seems from para.237 that the Tribunal would have found the dismissal unfair on the scoring basis, although at para.239, following the conclusion based on the misunderstanding about the deferred redundancy, it said that it concluded: "…. on that basis that the dismissal was unfair". Although ambiguous, I accept that it meant that this was an additional separate head on which the dismissal was unfair. However, giving the clear misunderstanding as to the situation regarding a deferral, that secondary finding of unfair dismissal was also an error of law.

29. Having therefore allowed Grounds 3 to 5 of the appeal, I turn briefly to Ground 1, which in fact occupied much of the appeal hearing. Mr Bromige submits that the Respondent had always understood the Claimant's case, in respect of MAPLE, was under Regulation 21 and not Regulation 22. He points out that the Tribunal made only a passing comment as to the issues in the case at para.2 of the Reasons, which said only that a draft list of Reasons was agreed at a telephone case management hearing on 22nd October 2021. Paragraphs 1(b) and (c) of that list of issues reads:

> "Was the reason, or principal reason, for a dismissal a reason specified in Regulation 23, Maternity and Parental Regulations, namely, pregnancy, childbirth, or maternity leave, and did the Respondent comply with any obligations under Regulation 10 of the MPL"

30. It is evident to me that para.1(b) of the list of issues is simply a re-writing of Regulation 21. There is nothing within it that encompasses Regulation 22. Mr Bromige notes what when setting out the law at para.188 of the Reasons the Tribunal did not distinguish between Regulations 21 and 22, indeed setting out only matters which related to 21. However, at para.230 of the Reasons, the Tribunal concluded that the dismissal was automatically unfair, contrary to sections, it must have meant Regulation 22.

31. In his submissions, Mr Bromige submitted that the real mischief averted to in Ground 1 was to demonstrate the confused approach which the Tribunal took in relation to a number of legal issues which were before them. He points too to the concept of unfavourable treatment appearing in para.213, which does not appear in Regulation 20, and which appears to be a reference to the test under s.18 of the Equality Act. He makes clear that the submissions in relation to Ground 1 were inexorably linked to and a pre-cursor to Ground 5. Given the conclusions I have reached on the other grounds, it seems to me that the only possible relevance of this Ground is as to disposal.

32. Mr Bromige submits that given the Tribunal's difficulties in grappling with some of the legal concepts which are engaged, and its firm conclusions as to mis-scoring, the case should be directed to be heard by a fresh Tribunal. Quite aside from these considerations, the passage of time means that the previous members are likely to have no detailed recollection of all of the case, and it may well take time for them to be reassembled. It is far better, it seems to me, for a Tribunal comprised of different members to hear the matter afresh.