Appeal No. UKEATPA/0911/10/SM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 1 December 2010

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

(SITTING ALONE)

MR M BENNEY — APPELLANT

DEPARTMENT FOR ENVIRONMENT FOOD AND RURAL AFFAIRS — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MS KARON MONAGHAN (One of Her Majesty's Counsel) (Appearing under the Employment Law Appeal Advice Scheme)

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THE HONOURABLE MR JUSTICE LANGSTAFF

Introduction

1. This is an application effectively for permission to appeal to the Employment Appeal Tribunal brought under rule 3(10). The decision which Mr Benney, the Appellant, seeks to appeal is that of Employment Judge Byrne sitting at Reading on 5 May 2010. The decision I am reminded was given orally at the hearing with the reserved Reasons later.

2. The Appellant had claimed that he had been unfairly dismissed and that the grounds for his dismissal were that he had made disclosures which were protected by the public interest disclosure provisions of the **Employment Rights Act 1996**, thus his dismissal was automatically unfair.

The Facts

3. The factual background to the claim was described by the Tribunal Judge at paragraph 6.1 in what he said were neutral terms as this:

> **"In April 2008 the Respondent proposed introducing a new individual performance management (IPM) system. The Claimant submitted an internal grievance on 16 December 2008, alleging that the decision to implement the IPM with effect 1 April 2008 amounted to breach of the implied mutual duty of trust of confidence which must subsist in any employment relationship. He subsequently communicated his feelings about the system to other staff at the Respondent."**

4. Thereafter the judgment recounts the sending of a number of emails by the Appellant which formed some of the disclosures of which there were a number upon which reliance was placed. The Respondent wrote to him, as the Tribunal Judge recorded, on 24 November, after he had had a period of time off work unwell stating that his return to work was conditional upon his complying with the reasonable instruction of management, namely to conduct himself in accordance with the requirements of the performance management system. They told him that the department would no longer tolerate in any form whatsoever his continuing campaign against the system and/or those

who were involved in its introduction. He was asked to give an undertaking to that effect. Earlier he had been suspended and been given a final written warning.

5. The issues at trial before the Employment Tribunal, currently set for February although this date may change, are plainly the reasons for the dismissal and whether the Appellant was dismissed, as he claims, because he made protected disclosures, or whether, as management claimed, he was dismissed for failing to observe a reasonable and lawful management instruction. In conclusion on his application for interim relief pending the hearing, pursuant to section 129 of the Employment Rights Act, the Tribunal Judge expressed himself in these terms, which have given rise to the two heads of appeal.

> **"It is clear to me, having considered the material put before me that there are substantial areas of argument and dispute between the parties, both as to the interpretation of documentary material and to the underlying reasons for the conduct of the individuals in the course of this dispute. The numerous fundamental areas of dispute of this case are to be determined at a final Hearing. It is possible that the Claimant may be successful in establishing that the protected disclosure was the sole or principal reason for his dismissal, notwithstanding the Respondent's assertions to the contrary. It is, however, equally possible that the Tribunal will come to the conclusion that it was his conduct in failing to comply with the reasonable instruction which was the principal cause of his dismissal. In those circumstances I simply cannot come to the view that it is likely that, on determining the complaint of automatically unfair dismissal under Section 103A ERA that the Tribunal will find that the reason for dismissal was that the Claimant had made protected disclosure or disclosures. For all those reasons, applying Section 129 ERA and the relevant case law, I dismiss the application for interim relief."**

6. The relevant case law was set out at the start of his decision and includes in particular two cases which have featured heavily in the arguments of Ms Monaghan QC who appears under the ELAAS scheme and for whose submissions I am indebted. They are **Taplin v Shippam Ltd** [1978] ICR 1068 and **Raja v Secretary of State for Justice** [2010] UKEAT 0364/094, a decision of HHJ Birtles sitting alone.

7. The criticisms which are made are these. First, it is said that the Employment Judge ducked the issue. What he was expressing in the paragraph I have quoted in full was that the case was simply too difficult for him to resolve there and then at the hearing. That, if he had done that, was

an error of law. If, however, the alternative reading of what he said is adopted, he was asserting that a claim of which the prospects of success were 50% did not meet the **Taplin v Shippam** test or more properly the test applied by section 129 of the Employment Rights Act. Section 129 is in these terms so far as material:

> **"...where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find -**
>
> **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in section... 103A."**

8. That section is in materially identical terms to section 78 of the **Employment Protection Act 1975**, which fell for consideration in **Taplin v Shippam**. As Miss Monaghan acknowledges, this case has been followed ever since as setting the standard, but her complaint was that the central paragraphs in that decision admit of more than one interpretation and are unhelpful in the present situation on her interpretation. She submits that, in effect, a claimant does not have to satisfy a Tribunal Judge that he is more than 50% likely to succeed on a broad brush evaluation of the sort that might be made at the time that an interim relief matter comes for hearing.

9. In my view this authority needs to be seen, and would have to be seen by any court, in the context of the appeal which gave rise to it. The headnote in the Industrial Cases Report, which is not in the same terms as that in the Industrial Relations Report, in my view properly encapsulates what was being said by Slynn J for the majority of the Employment Appeal Tribunal, although on this particular point it would appear the Tribunal were unanimous.

10. The Tribunal chairman there had adopted the approach which he himself had used in an earlier case. He focussed upon the word "likely" and tried to make sense of it in the context of an application for interim relief. He adopted a sliding scale. At the bottom of the scale he placed the word "possible" in contra-distinction to the word "likely". He described "possible" as being when

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the Tribunal considered that there would be a less than 50% chance of success. In the middle of the scale he placed "probable", which he regarded as being more likely than not when the chance of success would be more than 50%. At the top end of the scale he put the word "likely", where the

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Tribunal said that this meant the chances had to move a degree nearer certainty than would be the case if the word "probable" had been used. (See the judgment of the Employment Appeal Tribunal at 1072 A - D.)

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11. The argument before the Employment Appeal Tribunal by counsel Mr Hand was that that imposed too high a standard of proof upon the employee. That argument was rejected. The headnote reads,

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> **"Dismissing the appeal by a majority, that having regard to the exceptional nature of the remedy for interim relief under section 78 of the Employment Protection Act 1975, it was necessary for an employee when establishing that his complaint was 'likely' to succeed, within the meaning of section 78(5), to show a greater likelihood of success in his main complaint than either proving a reasonable prospect or a 51% probability of success and that an Industrial Tribunal should ask themselves whether the employee had established a 'pretty good' chance of succeeding in his complaint of unfair dismissal; that accordingly, although the chairman was wrong in differentiating between the meanings of 'probable' and 'likely', he had not erred in law in his interpretation of section 78(5)."**

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12. They then went on to consider the second matter in contention as to which the majority found that the Tribunal chairman was entitled to reach the decision he did.

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13. At page 1072 in the judgment, Slynn J sets out the arguments which were put before the Tribunal by Mr Hand. He noted that the word "likely" had different meanings in different contexts.

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He drew attention, as the headnote suggests, to the exceptional form of relief, 1073D – F and the fact that an application may require to be made on very little evidence. At 1074 the Appeal Tribunal unanimously expressed the view that the lesser test which Mr Hand proposed, of "reasonable prospect of success" should not be adopted. Then he said this between letters B and F:

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> **"We consider that the Tribunal is required to be satisfied (of more than reasonable grounds) before it can appear 'that it is likely' that a Tribunal will find that a complainant was unfairly dismissed for one of the stated reasons.**
>
> **On the other hand we are not persuaded that there is a dichotomy between 'probable' and 'likely' as expressed by the chairman of the Industrial Tribunal. We find it difficult to envisage something which is likely but improbable or probable but unlikely, and we observe that the *Shorter Oxford English Dictionary* definition does define 'likely' as 'probable'. Nor do we think that it is right in a case of this kind to ask whether the applicant has proved his case on the balance of probabilities in the sense that he has established a 51% probability of succeeding in his application, as has as one stage been contended before us. Nor do we find Mr Hand's alternative suggestion of a real possibility of success to be a satisfactory approach. This again can have different shades of emphasis. It seems to us that the section requires that the employee should establish more clearly that he is likely to succeed than that phrase is capable of suggesting on one meaning. On the other hand it is clear that the Tribunal does not have to be satisfied that the applicant will succeed at the trial. It may be undesirable to find a single synonym for the word 'likely' but equally, we think it is wrong to assess the degree of proof which has to be established in terms of a percentage as we have been invited to do.**
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> **We think that the right approach is expressed in a colloquial phrase suggested by Mr White. The Industrial Tribunal should ask themselves whether the applicant has established that he has a 'pretty good' chance of succeeding in the final application to the Tribunal."**

14. That merited some discussion between the bench and the bar in this application as to precisely what it was that Slynn J was saying. It was suggested that if it was not right to adopt the test of 51% probability, then one was not looking to see any percentage evaluation of the case, merely whether or not there was a likelihood - that is something more than a real prospect of success but not to be evaluated in percentage terms - that had to be shown; that one could not say therefore that a 50% chance of success, so evaluated, would not fall within that test.

15. I confess that I cannot read this paragraph in that way, nor do I think that that could be the proper reading. Although it seems to me one paragraph puts it beyond doubt, to which I shall come, I note that the tenor of what is said is, in the light of the comments which had been made previously by the Judge, exactly as the headnote expresses it. Here the Tribunal are, in my view, rejecting as insufficient a standard, a "51% or just over 50%" test, or the test of "real possibility of success"; they are too low a hurdle. This is not simply my view. It is the view too of Lightman J, see the case of **Bank of Credit and Commerce International SA v Munawar Ali and Others** [2001] All ER 961, at paragraph 54(4), in which he considered **Taplin v Shippam** when suggesting that the word "likely", although in a slightly different context, required a higher degree of certainty

than did "reasonable prospect" or indeed a 51% probability (which was not "likely") and reflects what might colloquially be termed a "pretty good chance". He was adopting there a view of **Taplin v Shippam** which entirely corresponds with my own.

16. The paragraph which seems to me to put it beyond doubt is that which comes between F and G. At page 1074 it reads thus:

> **"Although the chairman of the Industrial Tribunal expressed the burden of proof differently from the way which we have done we do not consider that there is any real difference of emphasis. He thought that 'likely' meant more than 'probable' and he regarded 'probable' as being '51% or more'. Accordingly we are not satisfied that he erred in law in his interpretation of the section."**

That is, he was not wrong to apply a standard which was higher and more testing than simply being over 50%.

17. The phrase "looks like a winner" was used by Wood J in the case of **Derby Daily Telegraph v Foss** [1991] UKEAT631/91. The words adopted by Slynn J, "pretty good chance of succeeding", and the words used by Wood J, "looks like a winner", are not statutory words. The word which has to be applied is the statutory word, that is, "likely". The difficulty with such a word is that it may mean different things in different contexts. Context is what established the reading which the Tribunal gave in **Taplin**. It is plain from reading the report of that case - see 1073D-E - that the court considered that policy considerations meant that the hurdle should be placed high. There is a counter-argument, which was articulated before me by Ms Monaghan, that because the rights at issue require protection and require protection quickly, a quick and summary remedy should lean in favour of supporting the status quo in employment terms rather than the opposite, but it is plain that the court's view of the policy considerations was that adopted in **Taplin** and in the light of knowing how it had been interpreted by the courts, Parliament

did not change the wording, though it might have done, when the Employment Rights Act was later enacted.

18. In the case of **Raja v Secretary of State for Justice** HHJ Birtles saw no reason to depart from **Taplin**. He however declined the invitation put to him by counsel in that case to make it more onerous than it already is by requiring an applicant for interim relief to show "some other factor or factors which permit a Tribunal to conclude that this is one of those exceptional cases in which interim relief will be granted", leading counsel to argue that he should show specific reasons why the case was such an exceptional one, it being common ground then as it was in **Taplin** that the remedy is an exceptional remedy.

Conclusion

19. Accordingly I am not convinced that the construction of the test for which Mr Benney would argue is properly arguable before an Appeal Tribunal. Whatever the infelicities in expression that there may be, and there are some, in Slynn J's formulation of the test, and however modern eyes may look at the test with a view to its application, it seems to me clear how the standard was placed. In that light, if the Tribunal Judge here, having looked at the facts, came to a predictive evaluation that he could not say that there was more than a 50% chance of success, the claim would necessarily fail, so far as interim relief was concerned.

20. That brings me to the first point which Ms Monaghan took. She argued, as I have said, that the chairman here simply ducked the issue. That is not something which a Tribunal Judge may do, see **Raja** paragraph 6, setting out the judgment of the Employment Judge in that case, and the decision on that part of the argument, paragraphs 16 and 17. That is a case where the Employment Judge had simply not read a bundle of documents on either side; he had not read a relevant witness

statement; and HHJ Birtles confessed himself unable to see how, not having done that, he could form any view of the merits of the application.

21. In the present case the Judge did have in front of him material; no claim is now advanced to me that he did not consider the material that was placed before him by both sides. It is right that he expressed himself somewhat tersely, but the question for me is whether it is arguable that in doing so in paragraph 7.1 he was ducking the issue. It is not the way I read the paragraph. I consider that the Judge was being careful here not to say too much about the rival merits of the claims as they might appear to him because he was conscious that the claim itself had yet to be heard. The job of deciding an interim relief application is one which does require reasons, but it is necessary to have regard to the nature of the exercise. It is a predictive one in which a broad brush judgment is necessary. It is unlikely that the Employment Judge would hear much evidence orally if indeed he hears evidence at all. If evidence is heard, it is almost certain that such evidence will not be fully tested, for if it were there would be nothing to distinguish the application for interim relief from a full hearing, and the application is not a substitute for a trial; it is necessarily very much an interim stage.

22. Accordingly one cannot complain about a conclusion expressed in fairly bland terms in the same way, it may be, as many advisors will discuss the prospects of success, for instance in litigation, with their clients at a stage before the litigation ever takes place but when something in some detail is known about what the parties may say and their rival contentions. It is often very difficult to place significant weight upon particular factors when what is called for is a judgment in the round.

23. The Judge here appears to be saying that there were substantial areas of argument in dispute as to interpretation of material and as to the reasons for the conduct of the individuals in the course

of the dispute. He is saying, in effect, that those arguments appear to him to be finely balanced. So viewed, applying the test as I have regarded it unarguably to be, the conclusion to which he came was entirely right on the application which was made. For that reason, having given the submissions of Ms Monaghan I hope the anxious consideration they deserve, I have concluded first that the Employment Judge's approach is not one in which he was simply ducking the issue, secondly, that he applied the right standard, but thirdly, and perhaps more importantly given the nature of the present application, that that is unarguably so, in the sense that there is no reasonable prospect of success in arguing before an Employment Judge on appeal to the contrary.