Appeal No. UKEAT/0241/18/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 6 March 2019

Before

HIS HONOUR JUDGE SHANKS

MS K BILGAN

MR M WORTHINGTON

MS U CANNING — APPELLANT

NATIONAL INSTITUTE FOR HEALTH AND CARE EXCELLENCE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CANNING (The Appellant in Person)
For the Respondent	MR ANDREW ALLEN (of Counsel) Instructed by: DAC Beachcroft LLP The Walbrook Building 25 Walbrook London EC4N 8AF

SUMMARY

REDUNDANCY - Fairness

AGE DISCRIMINATION

The Claimant/Appellant had worked for many years in the NHS, latterly for NICE. As part of a re-organisation her sub-team was to be reduced from nine to six members. It was decided that an interview process would be used to decide who would be made redundant. The Claimant performed poorly in interview and was dismissed. She and the other two selected for redundancy were the oldest in the pool.

Her claims of unfair dismissal and age discrimination were rejected by the ET. The Claimant appealed on both unfair dismissal and age discrimination.

The appeal against the ET's finding on unfair dismissal was brought on the basis that the criteria for selection for redundancy did not satisfy the requirement of objectivity required by **Williams & Ors v Compair Maxam Ltd** [1982] IRLR 83 and that the case was not like **Morgan v The Welsh Rugby Union** [2011] IRLR 376 where a pool were competing for new jobs and a subjective element was therefore more acceptable. The EAT rejected the appeal: the essential question was always that raised by section 98(4) **ERA** and previous cases only laid down guidelines; the Claimant had not raised any objection to the interview process as such; although there were valid criticisms to be made of the details of the process and there was a degree of subjectivity, the ET had considered these in detail, noted the "checks and balances" involved in the existence of a five member panel marking each interviewee independently, and had considered the right question and their conclusion that the dismissal was fair overall was not perverse.

On age discrimination, the ET had assumed in the Claimant's favour that the burden had shifted to the Respondent to show there was no discrimination; their finding that the Respondent had provided an acceptable explanation for the decision against the Claimant could not be challenged on appeal: it was based on findings of primary fact which went against the Claimant to the effect that the chair of the interview panel had acted in good faith and that the Claimant had performed badly in interview.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by Ms Canning, the Claimant below, against the Judgment of the Employment Tribunal (Central London) Employment Judge Hodgson, Ms Breslin and Mr Carroll, which was sent out on 16 February 2018. The Employment Tribunal ("ET") dismissed claims of unfair dismissal and sex and age discrimination brought against her employer the National Institute for Health and Care Excellence, commonly known as NICE. That was after a five-day hearing at which the Claimant represented herself and Mr Allen represented NICE.

2. I allowed the appeal to proceed at a Rule 3(10) hearing, at which the Claimant also represented herself, very ably as she has today. In subsequent correspondence, I clarified that the appeal was limited to the points made in her Notice of Appeal at paragraphs 1 to 7 and 13.

3. Ms Canning has put in an impressive, cogent and long skeleton argument which runs to some 50 pages. It is right to say that it goes well beyond the scope of the anticipated appeal, in particular by referring to indirect discrimination and victimisation and raising detailed evidential points in relation to discrimination and the evidence given by NICE's witnesses at paragraphs 85 to 142. Although I had encouraged her to address the point, she did not suggest that the ET had been wrong to record that she took no issue with the use of a competitive interview process to decide who should be retained from a redundancy pool. The significance of that will become clear later.

4. I turn then to the facts. The Claimant was born in 1961 and is now 57 years old. She was employed by NICE from 1 April 2005 and had continuity of employment with the NHS from 1

June 1988. She was a Senior Technical Assistant in the Public Health Internal Guideline Development team at NICE. She worked from home.

5. As part of a reorganisation, it was proposed in July 2016 to reduce the number of STAs in her sub-team. Ultimately, she became part of a pool of nine employees who were competing in effect to retain six posts. It was decided that there would be an interview process to decide who should be made redundant. The Claimant was offered specific training in interview technique but declined that offer. All the candidates were competent and appointable to the remaining posts in the reorganised sub-team.

6. The interviews took place on 2 February 2017. There were five senior experienced individuals on the panel, which was chaired by Ms Nolan who gave evidence at the ET. The panel prepared six questions which were asked of each of the individuals being interviewed and each of the panellists scored the answers and then ranked the nine individuals. The Claimant received the lowest score from all five panellists and was therefore ranked ninth by all of them.

7. She was accordingly selected for redundancy and in due course she was dismissed with effect from 5 June 2017. She filed a grievance claiming that she had been discriminated against on the basis of that she was a part-time worker. On appeal she also alleged age although not sex discrimination. In due course she bought proceedings in the ET alleging unfair dismissal, sex discrimination and age discrimination.

8. The ET record that she accepted that there was a true redundancy situation and that she did not take issue with the use of a competitive interview to decide who should be dismissed and who should remain employed. Her case on unfair dismissal was based according to the ET really

on two matters; 1) that the procedure was unclear and allowed for inappropriate subjectivity and; 2) that Ms Nolan, the Chair of the panel, had personally discriminated against her and deliberately marked her down and got other panel members to do the same. Underlying her case was an assertion that she had performed well in interview and given good answers.

9. The ET at paragraph 7.19 made criticisms of the procedure used by NICE. They said; 1) there was a failure to be clear about the specific competencies that were in issue to be tested; 2) there was no clear consideration of how the questions chosen would identify the relevant competencies; 3) there was a failure to adequately address how the answers should be evaluated. Instead it was left to the subjective judgement of individuals; that is the five panel members. If there was a requirement that the subjective view of managers should be avoided, it is difficult to see how the process adopted would be seen to be fair. However, they said, there is no such requirement.

10. In the preceding paragraph 7.18 the ET had recorded that the subjective elements in the process had been countered by appropriate checks and balances and that involved them finding first that the panel were appropriate people to be on the panel, sufficiently senior and so on; that there was a good number of them and that they independently reached their ranking and that the results of each of their rankings were put together to come to the final result. They record that not every criticism of a process means that it is unfair. They roundly rejected the notion that the Claimant had performed well in the interview.

11. Overall, they found that the NICE's approach was within the band of reasonable responses. They rejected the notion that Ms Nolan had viewed the Claimant negatively or interfered with the process inappropriately. Therefore, they found that the dismissal was fair.

12. On discrimination they found that there was no evidence to suggest this was a case of sex discrimination. So far as age discrimination was concerned they found that the fact that the three oldest interviewees were the ones selected for redundancy and some suggestion that the Claimant was regarded as a dinosaur were sufficient arguably to give rise to an inference of age discrimination. However, without deciding that finally they went on to consider whether there was a non-discriminatory explanation for what was done. At paragraphs 7.41 and 7.42 they decided that there was indeed such an explanation and rejected age discrimination.

13. I turn therefore to the appeal. The main ground of appeal advanced by Ms Canning today is that the ET failed in considering whether the dismissal was fair to properly take account of the guidelines in the well-known case of **Williams & Ors v Compair Maxam Ltd** [1982] IRLR 83. Those guidelines, so far as relevant today, say as follows:

> **"The two lay members of this appeal tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:**
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> **…**
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> **2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.**
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> **3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**
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> **4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations from the union …"**

The Claimant says that the Respondent failed to carry out an adequate consultation and in any event failed to establish objective criteria for the decision which had to be made. She also referred to case of **Morgan v The Welsh Rugby Union** [2011] IRLR 376 and the distinction drawn in that case between a choice from an existing pool as to who should be made redundant and who

should retain their job and a choice being made from among existing employees as to who should get new jobs following a reorganisation. In the latter case, i.e. where new jobs are available, an interview process is more likely to be appropriate and the assessment will inevitably involve greater subjectivity. She says that this case was a **Williams & Ors v Compair Maxam Ltd** case as opposed to **Morgan v The Welsh Rugby Union** case.

14. Mr Allen for the Respondents drew our attention to paragraph 35 in the **Williams & Ors v Compair Maxam** case which re-emphasises a theme which I have already referred to when I dealt with the principles, which is that the principles were not immutable and that they are not principles of law but standards of behaviour. Paragraph 35 says in particular:

> **"... in future cases before this appeal Tribunal there should be no attempt to say that an Industrial Tribunal which did not have regard to or give effect to one of these factors has misdirected itself in law. Only in cases such as the present where a genuine case for perversity on the grounds that the decision flies in the face of commonly accepted standards of fairness can be made out, are these factors directly relevant…."**

He also referred to subsequent cases where it is stressed that the test is always the one laid down by section 98(4) of the **Employment Rights Act 1996**, namely whether the employer has behaved reasonably or unreasonably in all the circumstances and if unreasonably, whether he has gone outside the range of reasonable responses. The cases all stress that the guidance to be found in them do not amount to principles of law.

15. In this case the ET recorded, as I have already said, that the Claimant took no issue with the consultation process and she has not suggested otherwise today. In fact, we were shown a document which showed that a competitive interview process was what was suggested long before as part of the consultation. However, in any event, it seems to us that the point is not open to the Claimant on this appeal, given that it was not raised below.

16. On subjectivity, i.e. the opposite of establishing objective criteria, the ET considered the issue at length at paragraphs 7.6 to 7.26 of their Judgment. They accepted that the process which NICE undertook involved a degree of subjectivity. They took that into account in their assessment of fairness and they noted, as I have already mentioned, the existence of checks and balances introduced by the five-member panel and the way the panel dealt with the interview.

17. They rejected the allegations of bias and improper interference made against Ms Nolan. They rightly said that the existence of subjectivity is not in itself fatal to the Respondent and that there should not be unrealistic expectations. Although we accept that another procedure could have been adopted and the one adopted was not necessarily the one we would have chosen, the ET asked itself the right question and came to a conclusion which is supportable. Its decision was certainly not perverse and we are quite satisfied that they gave adequate reasons for their conclusions which deals incidentally with the so-called **Meek** point.

18. That brings us to the appeal in relation to discrimination. Ms Canning reminded us of the guidelines from the case of **Igen Ltd & Ors v Wong** [2005] IRLR 258 which are set out in the annex to the Judgment. She also reminded us of the two-stage approach to the question of whether there has been discrimination which is set out in that guideline.

19. So far as the question of sex discrimination is concerned the ET said that they did not find that there were facts from which an inference of sex discrimination could be drawn. We asked Ms Canning to identify any such facts and she was unable to do so. We are quite satisfied that the Tribunal were right to reject a case of sex discrimination at stage one.

20. In relation to age discrimination as we have already said, the ET assumed in Ms Canning's favour that she had got through stage one of the two-stage process based mainly on the fact that the three people who were selected for redundancy were the oldest in the pool. The ET then considered stage two at paragraphs 7.41 and 7.42 of their Reasons. What they said was this:

> **"7.41. We do not have to finally resolve whether the burden shifts. This is not a case which depends on a consideration of burden of proof. It is appropriate for us to consider the Respondent's explanation. Here there is a clear explanation. There was a redundancy situation. It was decided to reduce the number of grade 8as. The pool was selected. The Claimant was in that pool. The respondent adopted a procedure of competitive interview in order to decide who should be offered the available post. That procedure was based broadly on a competency interview. That procedure was communicated to all in the pool. Assistance was given to allow those candidates to prepare. There were five panel members who marked on the basis of answers received on the day. They took into account nothing else. Whilst there was a degree of subjectivity, that did not undermine the fact that they were considering only the answers on the day. There is clear objective evidence the Claimant's answers on that day were poor. There is therefore supporting evidence demonstrating why she did not achieve good scores at interview. It is said she was selected on the basis of interview score alone.**
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> **7.42. It is only necessary to establish the explanation on the balance of probabilities. In considering that explanation, it is necessary to consider whether the Respondent should have cogent evidence and whether that evidence has been produced. It is clear that the cogent evidence has been produced and on the balance of probability, the explanation has established that the respondent in no sense whatsoever contravened the relevant provision."**

(i.e. the prohibition on discrimination because of age).

21. Ms Canning has set out a series of facts at paragraph 7 of her Notice of Appeal which she says in effect undermined the notion that there was an acceptable explanation which was not discriminatory for the fact that she was selected for redundancy. What her paragraph 7 (and what she also said at the hearing) really amounted to was a further attack on the fairness and integrity of the interview process and in particular the good faith of Ms Nolan, along with her assertion that she did do well in the interview.

22. Unfortunately for her, all those matters were the subject of findings of primary fact by the ET who found the procedure had been carried out properly and Ms Nolan behaved properly and that she did not do well in interview. Given those findings of fact the ET were entitled to find

A that any inference of age discrimination had been disproved by the Respondent for the reasons given in paragraphs 7.41 and 7.42.

B 23. We appreciate the Claimant's strength of feeling about this and her honest perception that she has been treated unfairly by her employers after many years' service, but we cannot discern any error of law in the ET's decision and accordingly the appeal must be dismissed.

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