Appeal No. UKEAT/0115/19/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 September 2019
Judgement handed down on 19 March 2020

Before

HIS HONOUR JUDGE BARKLEM

(SITTING ALONE)

MS MEENA AGARWAL — APPELLANT

CARDIFF UNIVERSITY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARK SUTTON (One of her Majesty's Counsel on behalf of the Appellant) Instructed By: Gateley PLC Ship Canal House 98 King Street Manchester M2 4 WU
For the Respondent	MR DAVID MITCHELL (Of Counsel) Instructed By: Eversheds Sutherland (International) LLP 1 Callaghan Square Cardiff CF10 5BT

SUMMARY

REDUNDANCY

The ET was entitled to find that the Claimant was validly dismissed by reason of redundancy, and its reasons adequately explained its decision. Its rejection of the evidence of one potential witness was justified in the circumstances of the case and its failure to mention evidence of a relatively peripheral nature from another witness did not amount to an error of law.

HIS HONOUR JUDGE BARKLEM

1. This is an appeal against the decision of an Employment Tribunal ('the ET") sitting at Cardiff (EJ P Cadney sitting with Members Mrs M Walters and Mrs Humphries) following a Hearing lasting 16 days over October and November 2017. I shall refer to the parties as they were before the ET.

2. The ET rejected all of the Claimant's claims under the heads of automatic and "standard" Unfair Dismissal, Direct Race Discrimination, Harassment, Victimisation and Breach of Contract. Other claims had been disposed of at an earlier stage.

3. Written Reasons ("the Reasons") were provided dated 27th April 2018. They run to 93 paragraphs in 25 pages.

4. Mr John Cavanagh QC, as he then was, sitting as a Deputy Judge of the High Court rejected all of the Claimant's grounds of Appeal on the Sift. However, following a Rule 3(10) Hearing, at which the Claimant appeared in person, Choudhury J (President) permitted limited aspects of the Appeal to go forward based on amended grounds, which appear at pages 26 to 28 of the Appeal bundle. He held that the remaining grounds were unarguable.

5. The Claimant was represented at the Hearing before me by Mr Mark Sutton QC, who comes fresh to the case, the Claimant having been represented by Mr Bousfield of counsel below (on a Direct Access basis), and grounds of appeal having been variously settled and amended by (so Mr Sutton tells me) at least three other members of the Bar. Mr Mitchell has represented the Respondent throughout.

6. Each has served a comprehensive and helpful skeleton argument, augmented by oral submissions. Unfortunately, these took the entire day allocated for the Appeal, which had been intended to include time for preparing and delivering judgment. This judgment was, consequently, reserved.

7. I was conscious that extensive mention was made in his skeleton argument and at the Hearing by Mr Sutton of the case of **Royal Mail Group Ltd v Jhuti** [2018] ICR 982 CA, which was recently reversed by the Supreme Court – see 2019 UKSC 55. Consequently, I invited submissions from both counsel. Mr Sutton sent a relatively lengthy note, reprising some of the arguments already advanced, and also drawing my attention to the EAT case of **Cadent Gas Ltd v Singh**, UKEAT/2019/0024, which had been handed down on 8th October. Mr Mitchell forwarded a brief note in reply. I have had full regard to the contents of those notes, for which I am grateful. Ultimately, the point has proved of limited relevance.

8. I shall set out the background as briefly as possible: full details are set out in the Reasons. The Claimant was employed by the Respondent as a Clinical Senior Lecturer in urology, her services also being proved to the Cardiff Vale University Health Board, where she practiced as a consultant urological surgeon.

9. There is a lengthy history to the events underpinning the claims brought by the Claimant, which go back to 2011, when the Claimant raised a grievance. Thereafter there was a period of long-term sick leave followed by the raising of further grievances and complaints. An ET claim was brought by her asserting wrongful deduction of wages. This claim has yet to be determined by an ET, the Court of Appeal having recently ruled on a jurisdictional matter permitting it to proceed. This is relevant to the "automatic unfair dismissal" claim the Claimant

contending that (among many other reasons) the redundancy was "for bringing the tribunal proceedings…"

10. Under a Project named "Medic Forward", a series of changes were proposed which, at one stage, involved a potential for 69 redundancies across the School of Medicine. Eleven business areas were initially identified. So far as the Claimant was concerned, the relevant business case was for the closure of a research area entitled "Surgery Research". The Claimant took issue with this being a legitimate entity in any event. The first iteration of this document marked as authored by Professor John Bligh was dated 12th May 2015. The recommendation involved disinvestment in the area, with two affected individuals, the Claimant and a Dr Mansell, who, in the event took voluntary severance.

11. Consultations took place, with the Claimant's union representative, Dr Graves, being present throughout.

12. On 6th May 2015 the Claimant had been warned that she was at risk of redundancy. A process was commenced and, as the Claimant's chronology sets out, on 18th November 2015 a redundancy committee recommended that her contract be terminated. This was confirmed by Dr. Gabe Treharne on 26th November 2015. An Appeal Hearing, chaired by Mr Alex Lock took place on 28th April 2016. Both parties were represented. The Appeal was unsuccessful. There were certain formalities required by the University's Statues, such as the redundancy being confirmed by the Council, but these do not, in my judgment, detract from the essential position that the decision to dismiss was made by the committee chaired by Dr Treharne and confirmed on Appeal by Mr Lock.

13. A lengthy "Rider" to the ET 1 was produced setting out multiple challenges to the validity of the redundancy, and raising many issues dealt with in the ET's judgment which are not the subject of this Appeal. It is of note that neither it, nor the amended version subsequently produced made any reference to Professor Bligh, then Dean and Head of School, far less any complaint about his conduct.

14. Professor Bligh left the Respondent's employment prior to the Hearing. As no issue relating to his conduct or involvement appeared to be in issue, and as evidence relating to the background and the decision of the panel which ultimately made the Claimant redundant was available from other witnesses, it is, in my view, not surprising that no witness statement was taken from Professor Bligh.

15. The potential importance of Professor Bligh's relevance to the Claimant's case first emerged in the Claimant's opening note dated 16th October 2017 (the first day of the Hearing) when (under the heading "Ordinary Unfair Dismissal") it was asserted that there was "no convincing reason at all as to why he has restricted the pool to 2 individuals...". The opening continues "Indeed, strangely the respondent does not intend to call the key witness in this case, Professor Bligh who constructed the pool and it is understood he left the University in protest over other matters". Elsewhere it is said "it is, of course, telling that the Respondent do not propose to call Professor Bligh, and have therefore advanced no positive, evidence-based case, to counter the Claimant's case on [Professor Bligh's] motivations". Mr Bousefield, who was the author of this document, made clear, at para 32 of the note, that he was instructed "largely for trial appearances" with the Claimant "acting in person as her own solicitor".

16. A document entitled "Claimant's list of issues" was produced, dated 22nd October, some days into the Hearing. It makes no mention of Professor Bligh.

17. In the course of the Hearing an application was made (I assume by Mr Bousefield) for a witness order for Professor Bligh. This is dealt with at para 6 of the ET's reasons, which follow:

> **"6. In course of the hearing itself the Claimant sought to obtain a witness order for Professor John Bligh. The essential basis of the application was that the evidence of other witnesses, in particular that of Professor Pepper, had led claimant to the conclusion that she believed that the guiding force behind the acts of discrimination in relation to her selection for redundancy was Professor Bligh. She believed that the whole process had been manipulated by somebody, who she now believed and to ensure that her own employment was terminated. Accordingly she initially applied for a witness order to her to allow her to call Professor Bligh. The difficulties of this courses, that if she were to call Professor Bligh she would be bound by any evidence that he gave and as her witness that she would not be allowed to cross-examine him, were pointed out to the claimant. As a result, she altered her position and withdrew the application for a witness summons to call him herself, but sought to persuade the tribunal that we should call Professor Bligh ourselves.it was paid that this would be proportionate in that it would allow both parties to cross-examine Prof Bligh ourselves. It was paid that this would be proportionate in that it would allow both parties to cross examine Prof Bligh on this part in the redundancy selection process. On the basis of the evidence before us we could not find any evidence in support of the theory that the process had been manipulated, and equally none that if it had been that that person was Professor Bligh. In our view we had sufficient evidence as to the redundancy selection process to draw fair conclusion as to it were not persuaded that we should call professor Bligh ourselves."**

18. Mr Mitchell says, in his skeleton argument, which has not been disputed, that this application took place at the start of week three of the Hearing.

19. In his skeleton argument Mr Sutton asserts that the Respondent's case was that Professor Bligh, who was dealing with the claimant's grievances and had knowledge of her tribunal proceedings, was not involved in the process leading to the Claimant's redundancy Instead, he says, the Respondent maintained that the process was conducted by the project team, comprised of Professor Pepper and Ms Richardson and that they took no account of the Claimant's complaints. Paras 4 and 26 are cited. With respect, I think that a mischaracterisation. The Grounds of Resistance merely stated, in neutral terms, Professor Bligh's role in setting up Medic Forward (para 4) and - entirely separately - that there was no link between the bringing of the earlier Tribunal claim and the decision to make the Claimant redundant (para 26). There

was no positive assertion that Professor Bligh was not involved in the process leading to the redundancy, which is unsurprising since the Claimant had made no allegation that he had been.

20. Mr Sutton's argument in relation to Ground 1 focusses first on his submission that the ET erred in failing to identify the decision maker. This, it is said, led to further errors of law. The first is in ground 1(a) in which it is said that, consequent upon the failure to identify the decision makers, the "mental processes" of those persons could not be subjectively examined. As such it could not be determined whether the decision was motivated by race, and the ET thereby erred in law. Mr Sutton amplifies this saying that the enquiry mandated by authority requires an ET first to identify and then to carry out a subjective enquiry into the mental processes of the person or persons who took the decision to dismiss. He relies on recent dicta in **Royal Mail Group Ltd v Jhuti** 2018 ICR 982 CA, at p 24. However, in that passage Underhill LJ is doing no more than setting out what he described as "well established" law. The effect of Mr Sutton's submission is that, where a decision is taken by a panel, the investigation must necessarily involve the mental processes of all those who took part. In response to my question, he accepted that this submission must mean that, in a case when a panel made a decision to dismiss, each must necessarily give evidence before an ET, as each person's mental processes could not otherwise be subjectively determined.

21. The submission that the ET had failed to identify the decision makers was rejected at the sift stage by John Cavanagh QC who pointed out that the present case concerned a multi-stage process at which group decisions were made. He pointed out that it was implicit in its reasons that the ET concluded that there was more than one decision maker.

22. The relevant passages in the reasons are as follows:

"60. The process itself was very extensive. It lasted from 14th November until 18th September 2015. There are some sixteen collective meetings. As set out above at the start of the process some twelve areas of existing activity were identified for "disinvestment" potentially placing sixty-nine members of staff at risk of redundancy, although by the this had reduced to five. In respects of each area potentially to suffer disinvestments a "Business Case was prepared, which subject to revision as the process continued. One of the area identified for disinvestments was "surgery Research". The reasons for that is that it did not satisfy the criteria set out above. In particular it did not have resilience in that there was no cohesive team creating a critical mass, no common strategic vision; no evidence of research being translated into "impact"; and no financial resilience essentially as the research projects depends upon key individuals.

61. The claimant attended four consultation meetings; an informal consultation meeting on 19th March 2015, and formal consultation meetings on 23rd June 2015, 2nd October 2015, and 16th October 2015. A final decision was taken on 1st October 2015 to disinvest in seven areas of research activity including surgery research. As no alternative alignment with a research projects to be funded going forward had been identified the claimant's role was identified which on 2nd November 2015 recommended that the claimant dismissed by reasons of redundancy. This recommendation was approved by the Chair of the Council On 24th November 2015. The claimant appealed and the appeal was heard by Lock on 29th April 2016, but was unsuccessful.

68.If the respondent is correct this also answers the claimant's submission that the process was one of performances management, not redundancy (see above). We accept the respondents/s evidence in respect of this. In our view unless we were to come to the conclusion that the whole Medic Forward process was gigantic conspiracy designed for the sole purpose of engineering the dismissal of the claimant (which we have not) it is inevitable that the respondent's evidence as to this is accepted as it reflects the whole underlying ethos and purpose of medic forward.

77. in summary therefore we are satisfied that:-

a) This was a genuine redundancy selection procedure;

b) That the identification of the pool for selection was a logical one which it was open the respondent to adopt;

c) The members of the pool were correctly identified in the process;

d) the selection did not depend upon personal characteristic or research output but was based entirely on the area of research;

e) The conclusion that the claimant's research was not aligned with either of the other areas identified before us is a reasonable and rational conclusion open to the respondent.

86. Prior to the current proceedings the claimant had, in case number 1600692/2015 Brought a claim against the current respondent and Cardiff University Health Board in respect of a claim for unlawful deduction from wages. The basis of the claim of automatic unfair dismissal is that the true reasons for dismissal was the bringing of evidence is genuine honest and reliable and that the claimant's selection for redundancy was for the reasons given by the respondent. There is in reality no evidence supporting this claim

87. For the reasons set out above we are satisfied that the claimants dismissal was genuinely by reason of redundancy and accordingly the respondents has satisfied the burden of showing a potentially fair reason for dismissal. We do not accept that the claimant's criticism of the process were well founded, for the reasons set out above and nor was the any element of the process discriminatory. Put simply the respondent had identified the field of surgery research, to which the claimant was reasonably allocated, for disinvestment, and was not able to find an alternative area to which to allocate the claimant. In those circumstances the decision to dismiss by reason of redundancy was in our Judgement fair."

23. It is true that names were not given in the reasons of the participants in the formal redundancy process. However, the parties knew who they were. The panel was chaired by Professor Treharne, who gave evidence. The Appeal Officer was Alex Lock a partner in DAC Beachcroft. He also gave evidence.

24. In closing submissions before the ET, the Claimant's case as advanced was that that Dr Treharne "had little information before him and the Committee other than the business cases". It followed, the submission went on, "that the decision makers were the authors of the business case, and it is those decision makers who are tainted by race".

25. It is implicit in the finding of the ET that it rejected the Claimant's case, as developed only during the hearing itself, that Professor Bligh was the guiding force behind her redundancy, manipulating the process to ensure that her employment was terminated. As Mr Mitchell points out in his submissions, having made the application to call Professor Bligh, the Claimant withdrew it when (as must have been apparent all along to Mr Bousefield, if not to the Claimant herself) it was pointed out that a party calling a witness cannot cross-examine him or her. However, that does not mean that the witness cannot answer questions about the process, merely that those answers cannot be suggested to be untrue.

26. As to the argument advanced by Mr Sutton as to the requirement for decision makers to be identified and their individual mental processes examined I agree with the view expressed on the sift by John Cavanagh QC that the decision makers were adequately identified in the Reasons - there was no need to name each member of the committee. I also reject the submission that each such person is obliged to given evidence in order that a subjective assessment of their reasoning is carried out. Here, the chair of the committee explained the

position to the ET and gave reasons which the ET accepted. In finding (1) that there was no evidence that the process had been manipulated and (2) that, if there had been, there was no evidence that it was by Professor Bligh, the ET gave an adequate explanation as to why it did not consider his involvement in the process to have been significant. Having regard to the realities of a situation in which the participants were senior members of the medical profession at a University, the ET's categorisation (and rejection) of the Claimant's case at para 68 as necessarily involving "a gigantic conspiracy designed for the sole purpose of engineering [her] dismissal" bolsters my view that the ET's conclusions in relation to an absence of anything malign in Professor Bligh's involvement was adequately explained.

27. For these reasons I also dismiss Mr Sutton's description of this case being analogous to that of **Jhuti** and others in which the malign involvement of an "Iago" figure is to be imputed to those actually (and innocently) carrying out the dismissal process. The findings set out above make clear that the ET dismissed any such scenario.

28. Given my findings above, in relation to "decision makers" Ground 1(b), relating to the claim for automatic unfair dismissal (see reasons para 86, set put above) inevitably fails.

29. I turn to Ground 2. This concerns the ET's omission in the reasons from what the grounds of Appeal describe as "relevant and probative evidence from Dr Graves" and the exclusion of evidence from Ms Santamaria.

30. I turn first to Dr Graves. I was told at the hearing that Dr Graves is not a medical doctor. I mention this only because of the many medical doctors named in the case. Dr Graves is a case worker with the Cardiff branch of the University and College Union, and (as his

witness statement records) had worked as the Claimant's caseworker since 2013. His statement deals with a variety of matters and meetings in which he had supported the Claimant. Unsurprisingly he comments adversely on the processes which were followed in the Claimants' case over time.

31. The Ground of Appeal asserts that Dr Graves had given evidence, not mentioned in the ET's Judgment, that another individual, who was white, with an outstanding grievance had been removed from the Medic Forward redundancy process thus avoiding redundancy. Mr Sutton argues that this was "self-evidently a matter which the Tribunal was bound to consider in order to determine whether it's supported an inference of race discrimination and raised questions as to the integrity of the redundancy process generally".

32. Mr Mitchell refers me to paras 14 and 15 of Dr Graves' witness statement in the supplementary bundle, and, in particular to the comment made that the person concerned, whom Dr Graves had provided casework support to when she had been a victim of harassment, was described as being "on the list of 69 staff at risk" as part of the process also involving the Claimant. However, he says that after Dr Graves gave evidence it transpired that the individual had not in fact been at risk of redundancy. This emerged, he said, from a letter disclosed by the Claimant only after the close of evidence. The comparison which Dr Graves was seeking to draw was thus invalid.

33. Looking at Dr Graves' statement as a whole, the allegation being made in relation to the individual in question is of limited relevance to the issues before the ET. But if I am wrong in that, Mr Mitchell's unchallenged point that Dr Graves was in error about that individual having been at risk of redundancy provides a satisfactory explanation for the ET's failure to make

reference to the evidence even if, as to which I am far from satisfied, the ET erred in law by failing to mention a point which was, in the context of a complex and multifaceted case, of very limited relevance.

34. I turn to Ms Santamaria. The reasons given by the ET for excluding Ms Santamaria's evidence are set out at paras 4 and 5.

> **"4. There was one witness whose evidence the claimant sought to call which we did not admits, Ms Isabella Santamaria. The purpose of Ms Santamaria's evidence, as was set out explicitly in the application for a witness order was that she was said to be an expect in relation to Equality Impact Assessments (EIA). The respondent had conducted an EIA in respect of the redundancy selection exercise which had ultimately resulted in the dismissals of the Claimant. The claimant asserted that it had not been properly or adequately carried out, in particular. It had failed to take into account the impact on the ultimate users of the claimant's and others services whilst performing duties as practising clinicians for CVUHB. This is one the pieces of evidence which are not directly related to the claim but from which the claimant invites us to draw inferences. For the reasons set out below this is not proposition we in the final analysis have accepted, and thus even had we admitted the evidence of Ms Santamaria it would have had no bearing on our decision.**
>
> **5. However at the point at which we determined not to admits the evidence of Ms Santamaria we had not yet reached that conclusion and so far, the sake of completeness we set out reasons at the time for our decisions. The basis for excluding her evidence was that we were not satisfied that she was in truth an expert a conclusion we drew following preliminary question from the respondent. She certainly did not satisfy the requirements of r35CPR. As she had no factual evidence that she could give as she had been involved in the preparation of the equality impact assessment there was no admissible evidence that she could give to the tribunal. In addition, had we permitted her evidence we took the view that we would have been bound to have allowed the respondent the opportunity to call expert we evidence, and that given that this was tangential at best that it would be disproportionate to allow the evidence of Ms Santamaria to be admitted. In the end we determined that the evidence of Ms Santamaria even if admissible was insufficiently probative of ant issue in the case to make it proportionate to admit it with the potential of the case going part heard to admit evidence from the respondent."**

35. Ms Santamaria's statement is in the supplementary bundle. She says in that statement that in January 2015, in her role as Equality and Diversity Officer, she advised the Deputy Vice Chancellor of the need to carry out an EIA (Equality Impact Assessment) when restructuring and redundancies were made. She says that thereafter she was "excluded" from conducting the EIA, and expresses her opinion that the EIA undertaken did not show that a rigorous process

had been followed. She says that this did not surprise her as (among other reasons) the decision makers "were all white people".

36. She went on to say that she was aware of allegations of racism within the student body and workforce of the Respondent and that she herself had suffered racism whilst working at the Respondent, though did not feel it necessary for the ET to hear about the circumstances of her leaving the Respondent. She described knowledge of an HR practice whereby HR would "manage out" people who raised grievances.

37. Mr Sutton complains that the ET disregarded without explanation the factual evidence Ms Santamaria was able to provide as to her exclusion by the respondent from conducting the EIA. Also, the evidence which I have summarised above which, he says, was potentially material to the claimant's case in pointing to a discriminatory culture and an intolerance of those who raise grievances.

38. Mr Mitchell points to the application for Ms Santamaria's attendance having been procured on the basis of a purported expertise of which she had none. He says that, following the ET's refusal to admit her evidence due to her not being an expert, no application was made for her to be called as a lay witness.

39. It does seem to me that this was a sensible and permissible case management decision, which cannot readily be challenged other than for an error of legal approach or perversity, neither of which is apparent, in my judgment. Ms Santamaria was manifestly not an expert in relation to EIAs. With respect to her, the rest of her evidence can be categorised (in the context of this case) as little more than tittle-tattle. This was not a scenario in which, on the Claimant's

A case, HR was "managing her out". Her case involved a "gigantic conspiracy" among senior clinical and academic staff to engineer her dismissal. The ET, seised as it was of the issues before was perfectly entitled to reach the conclusion that it did.

B 40. It follows from the above that I reject both Grounds of Appeal and dismiss this Appeal.

C

D

E

F

G

H