Neutral Citation Number: [2022] EAT 187

Case No: EA-2021-000563-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 November 2022

Before:

HIS HONOUR JUDGE MARTYN BARKLEM

- -

Between:

MRS ANJUM SARAH **Appellant**
- v -
AETOS CAPITAL GROUP (UK) Ltd **Respondent**

- -
- -

A Kamara for the **Appellant**
J Fairclough-Haynes for the **Respondent**

Hearing date: 24 November 2022

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JUDGMENT

SUMMARY

Redundancy

The claimant was one of two employees one of whom would, but for an unfair procedure, have been successful in taking the sole role following a redundancy exercise. The tribunal commented that she would have had "at least a 50% chance of being the successful candidate". It went on to reduce compensation award by precisely 50%.

The EAT held that the tribunal had failed to explain its reasoning for alighting on 50%, when the words "at least 50%" contemplated that being the minimum figure.

The case was remitted on that point.

HIS HONOUR JUDGE MARTYN BARKLEM:

Introduction

1. This appeal was sent to a full hearing following a preliminary hearing by HHJ Tayler. It concerns a very narrow point. The claimant was held to have been unfairly dismissed by the respondent which sought to consolidate two existing positions into one. Each of the existing postholders was made redundant and a new employee was engaged.

2. The ET found the redundancy exercise to have been a sham including as it did a requirement, held by the tribunal to be unnecessary, that the new postholder should be able to speak Mandarin. Neither of the postholders were able to speak Mandarin.

3. At paragraph 13 of the reasons, the tribunal held as follows:

> **"I bear in mind that it is not for the Tribunal to second guess an employer, or to substitute its own judgment as to what should have resulted but, had a reasonably fair redundancy selection procedure been adopted, then two things seem reasonably clear to me: first, that the claimant had at least a 50% chance of being the successful candidate for the combined role, and the percentage will be reflected in the compensation which is payable to her, and secondly that it is likely that the annual salary for the combined role would have reflected the range of salaries then being paid for the accountant and office manager/HR officer roles - £46,000 and £34,000 respectively. Doing the best I can, I consider that an annual salary figure of £40,000 for the new combined role would not have been unreasonable."**

4. The tribunal went on to assess the appropriate compensation, £23,812.32, which it reduced by 50 per cent before making other deductions for earnings during the relevant period following dismissal and a redundancy payment over and above the statutory sum.

5. Mr Kamara appeared on behalf of the claimant at the Rule 3(10) hearing and again before me. I am grateful to him for his written and oral submissions. Ms Fairclough-Haynes, a consultant, also appeared this morning on behalf of the respondent as she did below. She, too, has submitted a skeleton argument which for some reason did not reach me earlier, but I was able to read it just

before this morning's hearing and I am grateful to her for that. Each of them has set out in some detail the evidence before the tribunal which ought, each submitted, have caused the tribunal to conclude that the relevant chance was in truth very much more than 50 per cent (on the claimant's behalf), and why it should be no more than 50 per cent and arguably even less, on the respondent's side. Whilst acknowledging the force of each argument it does not seem to me that much would be gained by my seeking to analyse the point in any detail because it is not open to me to make those findings. Both Mr Kamara and Ms Fairclough-Haynes agreed with that proposition.

6. There are two issues which have been permitted to go forward to this hearing. The first is whether the tribunal erred in law in awarding compensation of exactly 50 per cent on the basis that there was an equal chance that the claimant would have secured the combined role if a fair process had been followed. The second is whether the tribunal's explanation as to why it concluded that the appropriate deduction was specifically 50 per cent is **Meek** compliant. That is a reference to a case called **Meek v City of Birmingham District Council** [1987] IRLR 250. In essence, do the reasons enable the parties to understand the basis for the decision? The evaluation of the chance of an event happening in hypothetical circumstances can never be an exact science. But the use by the tribunal of the expression "at least a 50 per cent chance" must mean that it had not determined that it was impossible to say more than that each candidate had simply an equal chance. As "at least 50 per cent" admits of the possibility of a greater than 50 per cent chance, in my judgment the tribunal erred in law in alighting on a figure, which whilst plainly the lowest it thought appropriate, was not the highest. In such circumstances the tribunal was required to give a reasoned basis for that assessment. As it is not possible to know from the findings whether the tribunal did no more than attribute an equal chance on the two candidates, the finding is not **Meek** compliant.

7. The matter must therefore be remitted to the same ET for a more detailed evaluation as to the appropriate percentage by which the compensatory award should be reduced pursuant to the Polkey principle. It is a matter for the tribunal to consider whether it is necessary to seek additional evidence for submissions before so doing. To that extent the appeal is allowed.