

In the Supreme Court of St. Helena

Citation: SHSC 1/2014

Civil

Ruling on Appeal

Attorney General

-v-

Nicola Chapman

Ruling dated 9th April 2014

The Chief Justice Charles Ekins

1. This is an appeal by the Attorney General against a decision of the Labour Regulator that the Respondent (the Claimant in the proceedings) had been unfairly dismissed by the Appellant (the Respondent to those proceedings). For the purposes of this judgement I shall refer to the Claimant and Respondent as they were referred to in the proceedings at first instance.
2. I have been provided with and have read the documents which were before the Regulator. I have also been provided with and have read a transcript of the evidence heard by the Regulator and a copy of the Regulator's judgement. Both the Claimant and the Respondent have invited me to deal with the Appeal on the basis of written submissions, and to that end I have received and considered the written submissions of both parties. I am satisfied that I am able to deal with the Appeal on that basis as provided for by Section 46 (1A) of the Employment Rights Ordinance.

FACTS

3. These are fully set out in the judgement of the Regulator and I do not need to rehearse them again, except to the extent that it is necessary to do so within the main body of this judgement.

GROUND OF APPEAL

4. The Respondent's grounds of appeal are set out in the Respondent's written submissions at Headings A - F inclusive. Headings A - E attack the Regulator's rulings that the Respondent was in breach of its contract of employment with the Claimant in five specific respects. Under Heading F the Respondent submits that the Regulator in any event erred in ruling that the Respondent should re-instate the Claimant. I shall deal with each individually.
5. **A.** The Respondent submits that the Regulator was wrong to conclude that the requirement for the Claimant to undertake an interim role away from Essex House

focusing on research and funding for EMD and for the wider ENRD was a breach of the Claimant's contract of employment.

6. The Claimant is a highly qualified marine biologist. She has a Bsc in Marine and Fresh Water Biology, an MRes in Marine and Coastal Ecology and Environmental Management and a PhD. In November 2011 the Claimant was employed by the Respondent as Manager of Nature Conservation. In April 2012 the Claimant's role was enlarged. She became "Nature Conservation Division Manager". As such the Claimant became a line manager responsible additionally for the supervision of up to 20 staff and volunteers and interns.
7. The Claimant's contract of employment stipulated inter alia:
 - that the Claimant's role and responsibilities would "be as set out in the attached job description except that [the Claimant] may be required to undertake other work associated with [her] function and of a similar level of responsibility";
 - that the Respondent had the right to update the Claimant's job profile from time to time to reflect changes in or to the post;
 - that the Claimant "may be required to serve in any other post appropriate to your grade, qualifications and/or experience and at such other place of employment in the service of the SHG, as may reasonably be required. SHG will transfer its staff within and between Directorates to meet service needs as appropriate."
8. Following a grievance procedure initiated against her by six people, including three for whom the Claimant had line management responsibility, the Respondent transferred the Claimant to the interim role of Research and Funding Officer. This was not a role which had existed previously. It carried no line management or budget responsibility. It purported to require the Claimant to liaise across ENRD with a number of different divisions including roads, housing, environment and utilities. The Regulator found however that it removed the Claimant from "the key marine mapping research for which the Claimant had the relevant skill set and expertise and had previously led on that project" - see para 130 of the Regulator's judgement. The Claimant's office was relocated from Essex House to a room in a building which was otherwise entirely empty.
9. The Regulator's reason for reaching the decision that he did are recorded at paras 248 to 254 of his judgement. The essence of the Regulator's findings are set out in para 252 where in particular he found
 - that there was no proven requirement for a post of this nature,
 - the new post was created with the purpose of avoiding potential conflict,
 - the purpose of the post was to avoid having to address the Respondent's contractual obligations to determine grievances fully and fairly.
10. These were findings of fact made by the Regulator. They were findings which in my view he was entitled to make on the evidence he heard - see the evidence on this issue of the Claimant herself and Mr I Rummery. The Regulator was not bound to accept Mrs Pelembe's evidence as to the nature of this purported post. Indeed it is clear he had considered her evidence carefully and rejected it - see para 237 of the judgement. Furthermore I am satisfied that the Regulator was entitled to

have regard to the fact that this role had never before existed; and no-one had been appointed to replace the Claimant once she had resigned from the role.

11. On the findings of fact that he made I am satisfied that the Regulator was entitled both as a matter of law and fact to reach the conclusions that he did at paras 249 - 251 of his judgement and to hold that in requiring the Claimant to undertake this role the Respondent was in breach of the Claimant's contract of employment. This ground of appeal therefore fails.
12. **B.** The Respondent further submits that the Regulator erred in finding that the handling of the grievance submitted by six employees was a breach of the Claimant's contract of employment. In particular the Respondent asserts that the Regulator misled himself in finding a requirement that the person heading the grievance should make "findings" and either "uphold" the grievance or otherwise.
13. The grievances raised by the six employees were numerous, detailed and as the Respondent recognises, serious. The Claimant was the line manager for three of the six. The remainder were all less senior than the Claimant. For the Claimant therefore, the grievances went to the heart of her capabilities as a manager and her competence to act within a senior management role.
14. The grievance procedure was incorporated into the Claimant's contract of employment. The Respondent was therefore obliged to comply with the procedure provided for.
15. The Respondent submits that the grievance procedure is principally designed to resolve disputes within the workplace informally if possible but speedily and sensitively. The Respondent submits that the process is not a quasi-judicial process.
16. Once the formal stage of the procedure had been reached the Respondent was obliged to conduct a hearing and having done so to give

"a written decision with reason within 7 days, explaining the decision"
17. Mr Tony Earnshaw, the Director of ANRD, conducted the grievance procedure. It was conducted over several days spanning a period of little under four weeks. During the course of that period the Claimant herself made a complaint against two of those who were signatories to the grievances - Mrs Clingham and Mr Malam, alleging gross misconduct in the form of bullying. This complaint was subsequently to be subsumed within the grievance procedure heard and conducted by Mr Earnshaw.
18. Mr Earnshaw advised the Claimant of his recommendation in April 2013 which was that the Claimant's role be redefined as already outlined. In giving his reasons Mr Earnshaw reported that there had been a fundamental and long-standing breakdown in the relationship between the Claimant and those she managed; that the problem had become so developed and entrenched that it could not be resolved; and that it was now too late to improve the situation. Mr Earnshaw did not indicate whether the grievances were justified or not. The

upshot however was that the Claimant was moved to her new role.

19. It is right, as the Respondent submits, that the wording of the grievance procedure does not specifically state that the person conducting the hearing must uphold or otherwise a stated grievance. It does require that a decision be given with reasons. In this case serious allegations had been raised against a senior manager by members of staff junior to her. The decision made by Mr Earnshaw had the effect of stripping the manager of any managerial responsibility. I am satisfied in those circumstances that the Regulator was justified in finding that by failing to give reasons for that decision in terms of specifying what if any grievances were justified, the Respondent was in breach of contract. At the very least the Claimant must have felt that the grievances had in effect been upheld.
20. It is clear that this is a matter of concern to the Respondent - see para 30 of the Respondent's written submissions. I do not see that the Regulator's decision imposes any general restriction. Any grievance will turn on its own facts. Most will be capable of informal resolution. But where a grievance raises allegations as fundamentally serious as these then I am satisfied that the Respondent is obliged contractually, in giving reasons for the decision, to grasp the nettle and make findings justifying the decision reached. The Claimant in these circumstances was entitled to know why she was the one who was purportedly being restructured into a role with no apparent managerial responsibility. This ground of appeal therefore also fails.
21. C. The Respondent further submits that the Regulator erred in holding that the Respondent's response to the Claimant's complaints against Mrs Clingham and Mr Malam was a breach of contract. The Respondent submits that the Regulator has fallen into the same trap as befell him on the previous ground of appeal. For exactly the same reasons I am satisfied that the Regulator was entitled to reach the conclusion that he did. The Regulator made it plain that he found the Claimant a credible witness and accepted her evidence - see para 219 of his judgement. It is clear therefore that he accepted the Claimant's evidence of the long history of the problems she had encountered particularly with Mrs Clingham and Mr Malam; and the steps she had taken to resolve those problems including numerous discussions with those senior to her employed by the Respondent. The Regulator then went on to hold:
 1. that in every contract of employment there are to be implied mutual rights and obligations of trust and confidence including an obligation not unreasonably to permit a senior employee persistently to be undermined by his/her subordinates;
 2. that the Claimant's complaint of 4th February 2013 was but just one in a long line of complaints she had made;
 3. that Mr Earnshaw, although recognising the history, failed, specifically when giving his decision, to address the validity or otherwise of the Claimant's complaint;
 4. and that this failure, in the light of the findings he did make taken in conjunction with the recommendation that the Claimant's role be restructured amounted to a breach of the implied term referred to at (1) above.
22. I am satisfied that the Regulator was correct to hold that the implied term of

the type identified is properly to be implied into a contract of employment; and upon the findings he made I am also satisfied that the Regulator was entitled to reach the conclusion he did. This ground of appeal thus also fails.

23. **D.** The Respondent then submits that the Regulator erred in concluding that the Respondent was in breach of contract for failing to deal with a grievance; or was wrong to conclude that such breach was sufficiently serious to amount to constructive dismissal.
24. On 24th April 2013 and thereafter the Claimant requested that the decision to restructure her role be the subject of a grievance. She did not, it seems reduce that request into writing.
25. The grievance procedure provides for an informal and formal procedure. Only a formal procedure needs to be made in writing. Whether formal or informal, grievances must be heard fairly and speedily. A formal grievance should only be initiated where an informal grievance has failed to resolve the matter.
26. The Regulator accepted that the Claimant had “repeatedly” requested to take a grievance. Nothing had been done by 15th May 2013 when the Claimant resigned. I am satisfied that this was not a speedy response. It seems to me that the Regulator was entitled to find that it constituted a breach of contract. Taken in conjunction with the other breaches, it was also sufficient to amount to a constructive dismissal. I do not see that the Regulator has misconstrued the Claimant’s reason for leaving. Given the evidence he heard and clearly accepted, the Regulator was entitled to conclude that this failure was one of a number of reasons for the Claimant’s decision to resign.
27. **E.** The Respondent then submits that the Regulator erred in finding that the disciplinary process involving the Claimant was a breach of the Claimant’s contract of employment; or erred in finding that any such breach was sufficiently serious to amount to constructive dismissal.
28. This ground of appeal can be dealt with shortly. I am satisfied that the Regulator’s analysis as set out in paras 294 - 312 of his judgement is impeccable and beyond criticism. Chapter 25 of the Code of Management is clear. The procedures to be followed are specific as would be expected of something as serious as a disciplinary process. Whether the relationship between SHG and JMCC and DEFRA was sensitive is frankly irrelevant and the Regulator was quite correct to ignore it ever assuming that he was ever addressed on this issue. Having heard the evidence the Regulator was entitled to find - as he did - that the disciplinary proceedings appeared to have commenced with the call from The Castle. In those circumstances it was clearly quite contrary to the disciplinary process for the Chief Secretary (Ag) to have involved herself in the investigation, as the Regulator found her to have done. Again, he was quite entitled on the evidence he had heard to make that finding.
29. The Respondent’s submission that the actions taken by the Chief Secretary (Ag) were justified by reason of the concern felt by SJG are, I am afraid, misconceived, and again irrelevant to the contractual relationship between the

Respondent and the Claimant. Indeed it could well be said that the greater the level of concern, the greater the care that should have been taken to ensure that the disciplinary process was followed with precision. As the Regulator found, and was entitled to find, the whole process was in fact flawed from first to last - in the Claimant's words "wrongful and unacceptable". The Regulator's conclusions are beyond reproach and this ground of appeal fails as well.

30. It follows that the appeal against the Regulator's determination that the Claimant was unfairly dismissed fails. For the avoidance of doubt I make it plain that I accept the Claimant's written submissions at para 1.3 of her written submission in their entirety.
31. **F.** The Respondent also appeals against the Regulator's order that the Claimant be re-engaged by the Respondent as the Nature Conservation Division Manager. Under the Ordinance and where the Regulator declares that a claimant has been unfairly dismissed, the Regulator may order the employer to reinstate the claimant. In exercising that discretion the Regulator must take into account the following: whether the claimant wishes to be re-instated; whether it is practicable for the employer to comply with an order for re-instatement; and whether it would be just to do so in circumstances where the claimant had him/herself caused or contributed to his/her dismissal.
32. The Regulator dealt with this aspect of the case at para 317 of his judgement. He found as a fact that the Claimant wished to be re-engaged. He then said "It is practicable for the Respondent to comply with an order for re-engagement, in that the Claimant's position remains unfilled according to the evidence heard. There was no evidence led that it was impractical to do so".
33. As to Mr Earnshaw's findings referable to a serious breakdown in relationships, the Regulator said "It is wholly inappropriate for the Respondents to again abrogate their responsibilities to properly manage any difficulties which may arise between employees".
34. The Regulator found as a fact, as he was entitled to do, that the Claimant had not caused or contributed to her unfair dismissal.
35. I note the Respondent's written submissions at paras 54 and 55. It is not however suggested that the Regulator's findings in this regard were findings made in the face of the evidence. Indeed I have not seen evidence from the transcript which could give rise to criticism of the Regulator. If this evidence was available at the time it should have been led. If not, it is too late to admit new evidence.
36. An appellate court should be slow to interfere with the exercise of discretion. I am satisfied in this case that the Regulator carefully considered all those matters which the Ordinance required him to consider; and reached a decision that was eminently open to him on a proper construction of the evidence he had heard. I see no reason therefore to interfere with the discretion exercised by the Regulator, or to overrule the decision that he reached as a result.
37. The appeal is thus dismissed in every respect.

38. I am aware that the Public Solicitor may wish to make an application for costs. If any such application is to be pursued then it should be made in writing within 14 days of today's date. The Attorney General will then have 7 days within which to respond, also in writing. If either party wishes for the application to be made orally by telephone hearing then that should be indicated in the written submissions. I will then consider whether to deal with the application in writing or orally.

Charles Ekins, The Chief Justice
9th April 2014