Appeal No. UKEAT/0134/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 October 2016

Before

THE HONOURABLE MR JUSTICE WILKIE

(SITTING ALONE)

MR P THOMAS APPELLANT

BNP PARIBAS REAL ESTATE ADVISORY AND PROPERTY MANAGEMENT UK LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS GEORGIA HICKS (of Counsel) Instructed by: Magrath LLP Solicitors 66-67 Newman Street London W1T 3EQ
For the Respondent	MS ALICE CARSE (of Counsel) Instructed by: Osborne Clarke 2 Temple Back East Temple Quay Bristol BS1 6EG

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

AGE DISCRIMINATION

The Employment Tribunal failed to understand or to apply its finding of fact that consultation was perfunctory and insensitive when it, nonetheless, concluded that consultation was reasonable and dismissal fair.

The Employment Tribunal adequately explained its conclusion that the Respondent discharged the burden on it to show that the dismissal was not tainted by age discrimination.

THE HONOURABLE MR JUSTICE WILKIE

1. This is an appeal by Peter Thomas against a Decision of the Employment Tribunal sitting at London (Central) between 2 and 6 February 2015 which, for Reasons provided on 29 April 2015, dismissed his claims of unfair dismissal, age discrimination and disability discrimination brought against his erstwhile employers, BNP Paribas Real Estate Advisory and Property Management UK Ltd. The appeal is brought in respect of the direct age discrimination and unfair dismissal claims.

2. The Claimant was employed by the Respondent in 1972 and, thereafter, was continuously employed by it. In 2004 he achieved his final role, as Director in the Property Management Division. Thus, by the date of his dismissal, he had been employed by them for in excess of 40 years. The Respondent, in July 2013, engaged Paul Abrey as Head of Property Management. Mr Harber became Head of Real Estate Property Management in June 2013. The Property Management business, by July 2013, contained three groups, one of which was the Portfolio Management Group, which had a number of senior Directors and, within which, the Claimant was the Director in charge of Private Client work, with two members of staff working to him. Mr Abrey on his appointment decided that a strategic review had to be conducted. The outcome of that review was that the business within that particular group contained more Director and Senior-Director roles than the nature of the business and volume of work warranted. This meant that a number of persons were identified as at risk of redundancy. Two of them were in Bristol. Of the other four: the Claimant, aged 59, was one; Mr Mather, nearing 60, was also identified as at risk; one of the younger members of staff, Emma Bradley, who works in the Private Client Section was identified as at risk; and a Secretary, Ms Henry, who was in her mid-50s was also at risk. Another man, Mr Forbat, who

was nearing 60, was in a different part of the business, Residential Consulting, and he too was at risk.

3. The Tribunal heard evidence from Mr Harber of consideration by him and Mr Abrey on whether there should be a pool for selection. His evidence is summarised at paragraph 16 of the Tribunal's Decision. He gave a detailed explanation, which the Tribunal accepted, of the reasoning behind the conclusion that the Claimant would be in a pool of one. Shortly after the strategic review had concluded, on 6 January 2014, Mr Harber wrote to the Claimant inviting him to attend a consultation meeting the following day. On 6 January there was a brief meeting at which the Claimant was told about the findings of the strategic review and that he was at risk of redundancy. He was immediately put on paid leave and told that he should not contact clients or colleagues.

4. On 7 January there was a formal consultation meeting with Mr Harber and Ms Ryan. At that meeting the Respondent had a crib sheet, which was read out. Within that document was the following:

> **"The purpose of the consultation period … is to provide an opportunity for us to consider with you any alternatives to redundancy and for you to raise any questions or concerns you may have regarding the proposed redundancy and the impact this may have on you. At the end of this period we will be meeting formally to discuss the outcome. …**
>
> **I confirm that with immediate effect the company has opted to place you on paid leave for the duration of the consultation period until 6 February 2014.**
>
> **Therefore, from today the Company will cease to provide you with work, and accordingly you should not access the Company's premises or the premises of any group company or contact any clients, customers, suppliers or employees unless specifically required to do so by me. …**
>
> **I also confirm that with immediate effect you will not have any access to company systems or email but continue [sic] use of your company mobile telephone number. …"**

5. As a specific point of emphasis the crib sheet went on:

> **"The Board is naturally aware of the proposal and your immediate senior team members will be informed shortly that we are entering into a period of consultation with you and that this matter should remain confidential including interim arrangements during the consultation process."**

6. The Tribunal recorded the evidence that the Claimant had made a suggestion that his redundancy could be avoided were he to carry out the Director-level role in relation to a particular account, the Henderson account, but it received evidence, which it accepted, that changes in relation to who was to handle that account had been made prior to the conclusion of the strategic review and that, accordingly, as of 7 January 2014 there was no role open on that account and therefore that, as an alternative, was a non-starter.

7. Following the meeting on 7 January, on 8 January the Respondent wrote to the Claimant. The letter, no doubt particularly hurtfully, was addressed to, "Dear Paul", whereas his name is Peter. The Tribunal characterised this as "insensitive". On 13 January the Claimant was sent an updated list of vacancies. On 28 January he asked for details of the Property Management Surveyor vacancy, which turned out to be too junior. Because the Claimant was on holiday for part of the period, on 16 January Mr Harber wrote proposing that the consultation meeting, which would be the end of the consultation, should take place on 13 February, the day following his return from holiday. On 23 January the Respondent was approached by a customer, Holby Turner, who potentially had a vacancy of interest and put the Claimant in touch with them.

8. On 13 February the final consultation meeting took place. Mr Harber told the Claimant that there were no alternative vacancies and there was no alternative to making the Private Client Director role redundant. By that stage the Claimant had run out of suggestions, and made none. On 14 February a letter of dismissal was sent, which referred to a termination date of 6 May, which was, again, inaccurate, as the consultation period had been extended to 13 February, giving rise to an appropriate end date of 13 May. So, that had subsequently to be corrected.

9. The Claimant appealed against the decision to dismiss him on 19 February. He raised a number of issues, challenging the findings of the review, arguing the consultation process was a sham with a predetermined outcome, complaining about the Henderson position not being offered to him, complaining about the timing of the dismissal and raising concerns about his age, indicating that he was forced to conclude that the motive for making his position redundant had nothing to do with the strategic review and that it was not coincidental that a number of named colleagues had been dismissed at about the age of 60, which was clear evidence that age was the predominant reason.

10. The appeal hearing was conducted by Mr Ruthven and, for the reasons summarised at paragraphs 30 and 31 of the Tribunal's Decision, Mr Ruthven rejected the appeal, having dealt with the issues that the Claimant had raised. In the ET1, dealing with age discrimination, the Claimant contended that his dismissal under the cover of redundancy was in keeping with the Respondent's practice of dismissing members of staff who were nearing the age of 60.

11. The Tribunal set out the law in its Decision. It started off with section 139(1) of the **Employment Rights Act 1996** ("ERA"), which defines the circumstances in which a person may be dismissed by redundancy. Erroneously, it characterised as section 139(1)(a) what, in fact, is section 139(1)(b), namely the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish. That was the category within which the Respondent contended that the Claimant's dismissal by reason of redundancy fell. Consistent with that initial error, throughout the decision the relevant subsection of the **ERA** on this issue was misdescribed as section 139(1)(a). This is relied on as a substantive ground of appeal, apparently as evidence of the Tribunal's failure to come to grips with the true nature of the issue on the redundancy question.

A In my judgment, that is not right. It is an initial error that has been repeated, but it is clear that the Respondent's case was in substance made under section 139(1)(b). There is no merit in this ground.

B

12. The Tribunal reminded itself of the main authorities - **Williams v Compair Maxam Ltd** [1982] IRLR 83, which includes the obligation to undertake appropriate consultation; and **R v British Coal Corporation** [1994] IRLR 72, where, albeit in the context of collective C redundancy, it was indicated that the consultation required: proposals at a formative stage; adequate information on which to respond; adequate time to respond; and conscientious consideration in response to the consultation, and reminded itself of the relevant authorities in D relation to the pool. In its conclusions on unfair dismissal, it concluded at paragraph 39 that it was satisfied that, following the strategic review, there was a redundancy situation pursuant to "section 139(1)(a)", as it described it, namely a diminution in the need for employees to E undertake the role that the Claimant held. They considered, at paragraph 41, the issue of the pool and, having considered the evidence that they had received in detail, concluded that it was reasonable to focus on the Claimant as a single employee within that pool. Although some criticism is made of that finding it is not at the forefront of the appeal.

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13. In relation to consultation, the Tribunal summarised its conclusions at paragraphs 42 to 44 in the following terms:

G

> **"42. In relation to consultation, the first meetings on 6 January and 7 January were held as soon as possible after the conclusion of the strategic review at the end of the previous year. Mr Thomas was told he had an opportunity to consider alternatives. He did not engage with the process of considering alternative employment. His limited involvement was to ask about the post LON242 and to say that he would contact Max Shepherd. He said that he was shocked and upset, which the Tribunal recognises, but he did not become more proactive in the latter stages of the consultation period, at a time when the initial shock may have abated.**
>
> **43. We heard about Tony Forbat who negotiated a consultancy, but Mr Thomas did not raise such a possibility and says that the Respondent did not raise it either. The fact that the Respondent said he should not talk to the clients would not have stopped him from raising the possibility of some sort of consultancy and discussing it with the Respondent.**

H

> **44. We are satisfied that the consultation was reasonable. We do note that it was insensitive for the Respondent to get Mr Thomas' name wrong and to insist that the consultation ended on 6 February, when in fact it ended on 13 February, but that does not make the consultation unreasonable. For a valued employee with 41 years service, the process was handled in a perfunctory manner with a lack of sensitivity, but we are satisfied that the consultation did fall within the range of reasonable responses."**

14. On the issue of whether the decision was predetermined and, consequently, the consultation was a sham, the Tribunal said at paragraph 46:

> **"46. Mr Thomas raises an allegation that the outcome was predetermined based on a number of factors, including that he was escorted out of the building (about which the Tribunal has made no finding), that he was not allowed to work although he was on paid leave, and that he was not allowed to have contact with clients or colleagues. …"**

15. They also referred to a number of other issues that had been raised, including the fact that the position of the Claimant and another person had been leaked to the Estates Gazette. Mr Ruthven's evidence was that he had investigated this on the appeal and found no evidence that there was any leak from the Respondent. The Tribunal concluded that they could find no evidence from which they could conclude that the redundancy was predetermined. In those circumstances, they unanimously concluded that the dismissal was fair.

16. The grounds of appeal in relation to the unfair dismissal - leaving aside the question of the citation of the wrong subsection, which, in my judgment, has no substantive merit - attacked the Tribunal for concluding that it was satisfied that the consultation was reasonable in paragraph 44 without giving any reasons for this conclusion. It is said that the Tribunal had failed to consider whether the consultation was conducted when the proposals were still at a formative stage and whether the Claimant was given adequate information on which to respond; further or alternatively, the Tribunal failed to explain its reasoning with regard to the reasonableness of the consultation process. In dealing with the appeal on the sift, HHJ David Richardson, on ground 3, said this:

> **"Speaking for myself, I find it surprising that an employer should find it necessary, if it is really at the beginning of a genuine consultation process which it has started "at the formative**

> **stage", to put a long serving employee on gardening leave with no work, no contact with clients and no contact with fellow employees even before the consultation process has started. Be that as it may, I consider it reasonably arguable that the Employment Tribunal has not sufficiently engaged in its reasons with the issues it had to decide concerning consultation: this can only sensibly be explored at a hearing."**

17. This is, in my judgment, a troubling decision by the Tribunal. It has quite carefully made a series of findings of fact in relation to the existence of a redundancy situation arising out of the strategic view and the construction of the appropriate pool, which in this case was a pool of one. When it has dealt with the consultation period it has been critical of the Respondent - and, in my judgment, was entitled to be so - on a number of factual issues, and its description of the manner of consultation is strong criticism. It describes the consultation as conducted in a perfunctory manner with a lack of sensitivity. What it appears to have failed to address in relation to that criticism is what, on the face of it, appears to be a particularly insensitive approach to the question of consultation, namely: sending him on gardening leave and prohibiting any contact with any colleagues or clients. It records, unsurprisingly, that the Claimant was shocked and upset and that this may have affected, at least initially, his ability to put forward certain suggestions, although it did not prevent him putting forward the suggestion in relation to the Henderson account, nor expressing interest in at least one of the vacancies of which he had been notified. What is particularly troubling, however, is that the Tribunal at one and the same time can call the manner of consultation perfunctory and insensitive and yet can conclude that it was a reasonable consultation, the burden of proof being neutral. It appeared not to consider the initial treatment of the consultee as relevant to any argument other than his assertion that the outcome was predetermined.

18. In my judgment, the way in which the Tribunal has dealt with the question of reasonableness of the consultation demonstrates that it has failed to grapple with the consequences of its strong finding, critical of the consultation process as being conducted in a

perfunctory and insensitive manner. A consultation process that is described in those terms is not necessarily to be characterised as not reasonable, but one would expect to find, in an otherwise full decision such as this, some form of reasoning to explain why the matters, that give rise to this stern criticism and the further insensitivity of gardening leave and so on, were not such as to render the consultation unreasonable. The Tribunal has failed to appreciate or address the potential consequences of its findings, critical of the Respondent's process of consultation. In my judgment, for that reason, the Tribunal's finding that the consultation was reasonable and that, consequently, the dismissal was fair cannot properly be allowed to stand. I therefore uphold the appeal in respect of the finding of unfair dismissal.

19. I now turn to the appeal in respect of age discrimination. The Tribunal reminded itself of the relevant provisions of the **Equality Act 2010**, in particular section 136(2) and (3), which provides:

> **"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

20. This has been described as a two-stage process. The Tribunal reminded itself, though without expressing them, of the principles and the guidance provided in **Igen Ltd v Wong** [2005] IRLR 258 and **Madarassy v Nomura International plc** [2007] ICR 867, and they summarised their effect at paragraph 48 as follows:

> **"48. … The Claimant must prove facts from which the Tribunal could conclude in the absence of an adequate … explanation that the Respondent had committed the unlawful act. If he proves such facts and if the Tribunal could infer discrimination, then it is for the Respondent to prove that it did not commit the act in question."**

21. The Tribunal briefly set out its conclusions in respect of direct discrimination. It first considered the evidence of the Claimant that there were a number of named individuals all of

whom had been dismissed when approaching the age of 60. The Tribunal dismissed these individuals' examples as irrelevant but appeared to consider that the Claimant was relying on them as comparators, whereas they were in fact relied upon by him as exemplars. Although some mileage has been sought to be taken by the Claimant of that erroneous characterisation of them, in my judgment that is of no weight.

22. The detriments relied on were his inclusion in the pool of employees for redundancy selection and his dismissal for redundancy. The Tribunal appears to have concluded that the Appellant satisfied the first step as described in statute and in **Igen**, because, at the beginning of paragraph 50, they say:

> **"50. … He was included in a pool and he was dismissed and therefore it is for the Respondent to show that this was not age discrimination. …"**

23. They then described, what they regarded as, the only evidence that they had on this issue. They described evidence, from different sources, about the age profile of the Respondent and linked companies, which came from the Claimant, from the evidence of Mr Ruthven and from documentation provided by the Respondent. At the end of paragraph 50 they said:

> **"50. … We have already found that the reason for the dismissal was redundancy. We are not satisfied that the reason for the dismissal was age."**

24. This is at the heart of the Claimant's attack on the decision of the Tribunal to reject his complaint of age discrimination. He contends that the Tribunal has erred in law by continuing to place the burden of proof on the Claimant when they had already concluded that the burden had shifted and that it was for the Respondent to show that age discrimination played no part in the decision. In particular, it is said that the words, "We are not satisfied that the reason for the dismissal was age", comprise a statement that is only consistent with the Tribunal assuming that the burden had not yet shifted and, accordingly, there is a confusion in the Tribunal's mind.

25. Reliance is placed on **Igen**, in which it is emphasised that the question, at the second stage, is whether the Respondent has proved on the balance of probabilities that the treatment complained of was in no sense whatsoever on the grounds of the discrimination complained against. The mere fact that one of the reasons for dismissal may have been redundancy is not enough. The Tribunal had to consider whether or not there was a multiplicity of reasons and to be satisfied that the Respondent had shown, on the balance of probabilities, that none of the reasons or factors was that of age.

26. The Respondent contends that to argue that the sentence, "We are not satisfied that the reason for the dismissal was age", is, on its own, sufficient to identify an error of law on the part of the Tribunal is putting the matter too high. My attention has been drawn to a number of authorities, including **Laing v Manchester City Council** [2006] ICR 1519 and **Brown v London Borough of Croydon** [2007] ICR 909, where it has been emphasised that the approach in **Igen** is not to be regarded as if it were a statute, that the Tribunal is not obliged in every case to go through the full two-stage process and that there can be circumstances in which the findings on the two stages are so inextricably linked that it will not be an error of law for the Tribunal to run them together and not to run the two stages separately. It is suggested that, in this case, the Tribunal was doing precisely that. It had, in the first 47 paragraphs of the Decision, addressed the question: "what was the reason for the dismissal?" and had concluded that the reason for the dismissal was redundancy. The Respondent says that, against that background and given that the Claimant's case was that: the redundancy was not genuine; the consultation had been a sham; and the Respondent was applying a practice of dismissing employees when they were approaching the age of 60; the Tribunal properly addressed his case by establishing what the reason was for the dismissal - redundancy - and by concluding, on the evidence in relation to the age profile, that there was no sensible basis upon which it could be

argued that there was any practice on the part of the Respondent to get rid of people as and when they approached the age of 60. The Respondent contends that the Tribunal was entitled to say, as evidencing their dealing with the second stage of the two-stage process, that they were not satisfied that the reason for the dismissal was age. The use of the phrase "the reason" demonstrates that they were excluding any secondary reason for the dismissal and that, as this was not a case of unconscious bias, but the application of a conscious practice, the Tribunal's reasons were sufficient to satisfy the legal requirements of the **Act**.

27. The question for me is whether the Tribunal, in expressing themselves as they did and not formally going through the two-stage process as envisaged in **Igen**, has done sufficient, given that there is no single required way of doing it, to demonstrate that it has applied the law correctly. In my judgment, the Tribunal has done sufficient to satisfy the legal requirements. It was very clear in its own mind at the start of paragraph 50 that it was placing the burden of proof on the Respondent to show that this was not age discrimination. It had previously come to a conclusion, upon evidence that it was entitled to accept, that the reason for dismissal was redundancy. It was entitled, in my judgment, to have regard to the evidence of age profile, as the Claimant, on his part, was inviting the Tribunal to draw an inference from the examples of colleagues who had been dismissed when they were getting towards the age of 60. The Tribunal, having taken the age profile evidence into account, were entitled to come to the view that the reason for dismissal was redundancy and no other. The fact that they chose to express themselves in the way that they did - "We are not satisfied that the reason for the dismissal was age", which, technically, is more appropriate if the burden is on the Claimant to establish something - is, in my judgment, no more than an awkward way of expressing what they plainly were intending to express - that the Respondent had demonstrated that this was not age discrimination, which was the question they had posed at the beginning of paragraph 50.

28. Paragraph 51 is not a happy paragraph. On the face of it, it seems to address a detriment that it has already addressed in paragraph 50, namely the inclusion of the Claimant in the pool of employees, and I find it a little difficult to understand what the Tribunal is saying about the Respondent's lack of preparedness to address this issue when it repeats the same evidence about the age profile. Similarly, at the end of paragraph 51, the language seems to reflect that they were declining to conclude that stage one of the two-stage process had been satisfied, contrary to what they had said in paragraph 50. In my judgment, paragraph 51 is a confused aberration. It is clear that the reasoning on this part of the claim is encapsulated in paragraph 50, and, given that there is no single proper approach, I find that the way that the Tribunal has approached the issue and the way they have expressed themselves at paragraph 50 is sufficient to demonstrate that they have applied the law correctly. Accordingly, I do not uphold ground 1 of the appeal, relating to age discrimination.

29. On the unfair dismissal claim, given my reasons for upholding the appeal, in my judgment, it would be inappropriate for this case to be remitted to the same Tribunal. The hearing was a long time ago, some 20 months, and the concerns that I have are such that, in my judgment, there would be an undue risk that the same Tribunal would not be able properly to reconsider the issue.

30. In summary, I uphold the appeal against the dismissal of the unfair dismissal claim on the issue of the reasonableness, or otherwise, of the consultation as described above and remit the case to a differently constituted Tribunal to consider that claim. I dismiss the appeal against the dismissal by the Tribunal of the claim of age discrimination,