Appeal No. UKEAT/0235/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 August 2020

Before

HIS HONOUR JUDGE BARKLEM

(SITTING ALONE)

MRS J GARDNER — APPELLANT

THE COOPERS COMPANY & COBORN SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING & CROSS - APPEAL

APPEARANCES

For the Appellant

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SUMMARY

REDUNDANCY

An employee was contractually entitled to a minimum period of notice of termination of employment upon redundancy, such termination being required to take place on stipulated dates referable to school terms.

Following an unsuccessful trial period in an alternative position, which was terminated early, it was not possible to convene a meeting between the parties before the Claimant left the country on agreed leave, during which time she was unable to access her work email account. The Respondent sent a letter by post and email giving notice of termination. The letter was dated 11 October and to be effective to terminate on the next applicable date (31 December) had to have been received by the Claimant by 31 October.

She contended in her ET1 that the letter had not been delivered to her home and that she subsequently learned of its contents from her union representative. By that time (6th November) it was too late for the required notice to be given to terminate on 31st December. Consequently she was entitled to notice pay until 30 April.

The ET did not give sufficient reasons for its finding that the employment terminated on 31 December, and, in particular, as to whether the letter had been (or should be deemed to have been) delivered to the Claimant. The issue was therefore remitted for determination to a fresh Tribunal.

A cross-appeal relating to the ET's failure to apply a Polkey reduction to an award for loss of statutory rights was also allowed.

HIS HONOUR JUDGE BARKLEM

1. This is an appeal against a decision of an Employment Tribunal ("ET") sitting at the East London Hearing Centre on 30 - 31 August 2018, chaired by Employment Judge Speker OBE DL, who was sitting with Ms Houzer and Mr Rowe. Written Reasons ("the Reasons")were provided on 5 February 2019. I shall refer to the parties as they were below.

2. The Claimant represented herself before the ET, the Respondent being represented by Mr Murray. Before me, Mr Murray again represented the Respondent and the Claimant was represented by Mr Amunwa. I am grateful to them both for their helpful written and oral submissions.

3. The ET held that the Claimant had been unfairly dismissed from her position as a teacher at the Respondent school. The basis of that decision was that, although she had sought to appeal a decision to make her redundant, communicated to her in a letter dated 11 October 2017, the Respondent's refusal to allow her to proceed with an appeal, albeit out of time, was unfair rendering the dismissal unfair; see Reasons, paragraph 19.

4. The ET went on to find that, had the right to an appeal been afforded to the Claimant, there was only a 10% chance that she would have been successful and in accordance with the **Polkey** principle, it reduced her award of compensation by 90%. That reduction was not applied to the sum of £500 awarded for loss of statutory rights, the subject of a cross appeal which has been permitted to go forward along with the main appeal.

5. The Claimant had contended that, for reasons which I shall explain shortly, the dismissal letter, which was sent to her dated 11 October but not received by her (on her case) until 7 November, was invalid. In order to have dismissed her on 31 December 2017 (as that letter had purported to do) it had to have been received by her by 31 October.

6. The Claimant's employment was governed by what is known as the "Burgundy Book." As accepted before the ET, paragraph 4.1 was engaged, which provided that all teachers should be under a minimum of two months' notice (three months in the summer term) terminating at the end of a school term. This was defined in paragraph 1 as being 31 August for the summer term, 31 December for the autumn term and 30 April for the spring term.

7. For reasons which are not material for the purposes of the appeal, the Claimant's position as a part-time teacher of IT became redundant. In May 2017, she was notified in writing (the letter is not in the bundle before me) that unless a suitable alternative role was found for her, she would be served notice of redundancy with a termination date of 31 August. Due to an Ofsted inspection, it became necessary to alter the date of the meeting in connection with redundancy. Subsequently, the process could not be completed such as to give the requisite notice to terminate by 31 August.

8. On 29 June 2017, the Claimant was written to in a letter signed by the Head (Dr David Parry) but drafted by HR which was headed "Offer of suitable employment – four-week trial period." The letter explained that a vacancy had been identified which was believed to be suitable for her. It pointed that, as the new job from different from the old one, she was entitled to a statutory trial period of four weeks. The letter made reference to the redundancy date having been extended to 31 December and explained that if either the Claimant

A or the school found the new job unsuitable for her, she would retain the right to a redundancy payment.

B 9. The Claimant responded by email to Tracey Skingle the Director of HR on 3 July saying, "Just to be clear if I (or you) find the role is [unsuitable] for me during the 4 week trial then I will be made redundant as at 31 December."

C 10. In the event, the trial period did not go well. The Claimant was observed in a number of lessons by three members of the senior leadership team, including Dr Parry, and their concerns as to her performance was such that the trial period was ended prematurely.

D 11. There is a file note of a meeting on 19 September, which records that Dr Parry suggested that the Claimant speak to her union representative, Mr Passingham, "to arrange a formal meeting to discuss the best outcome" and "to work out a way to bring things to a conclusion." The E Claimant was recorded as having been visibly upset.

12. At an earlier stage, the Claimant had been granted permission to book a holiday during F term-term. I have been shown a brief email exchange between her and Mr Passingham over 14 to 19 June 2017, which dealt with queries as to the redundancy process and confirmation by him (which of course does not bind the Respondent) that notice would have to be served if the trial proved unsuccessful. In one email the Claimant said "One sticking point I still have is that G I've booked a two-week holiday in Thailand in October, which they have not come back to me about." The potential relevance of this will become apparent.

H 13. Although the Respondent tried to arrange a meeting with the Claimant prior to her departure on holiday, said to have been on 10 October, this proved not to be possible. A letter

was written on 11 October 2017, which is said to have been posted to the Claimant's address as well as sent by email, albeit to her school email address and not to her non-school address. The email was copied to Mr Passingham who received it.

14. In marked distinction to the letter of 29 June 2017, the 11 October letter was headed "Without prejudice – Confirmation of notice of redundancy." The document was plainly not "without prejudice", in the legal sense, but in other respects it conformed with the requirement in the Respondent's redundancy and restructuring procedure for notification to be given in writing following a meeting in which the decision to dismiss on the grounds of redundancy has been made and notifying of a right of appeal.

15. The letter included the comment, "I write to confirm that I have concluded that the role of Teacher of Maths is not a suitable alternative for you and I have taken the decision to dismiss you by reason of redundancy with effect from 31 December 2017." In a subsequent paragraph, it stated, "You have the right to appeal against this decision. If you wish to do so, please write to me within seven working days of the date of this letter."

16. Without deciding the point, it is in my judgment at least arguable that this letter and not (as the Respondent contended before the ET and here) the letter of 29 June was the notice of termination required by the Burgundy Book and the redundancy process. Indeed, in an email to Mr Passingham on 6 October, Ms Skingle had urged that a meeting be held before the Claimant went on leave commenting "the notice will not be extended beyond 31 December…we won't be caught out by that again!" Again, that is not determinative of the legal position, but it does give a strong hint to her own view of the situation.

17. In her ET1, the Claimant made numerous complaints as to the way in which she had been treated, challenging the process regarding the redundancy and alleging that she had been bullied, harassed and unfairly dismissed. Of relevance to this appeal, she also claimed at paragraph 3 of ET1, that she had been given the correct notice to be made redundant and should therefore have been employed by the school until the end of the spring term, which the Burgundy Book deemed to be 30 April.

18. The Claimant stated in the ET1 that she had no access to the school email account during her holiday and that "When I returned, I told my union representation that I did not know what the school was planning, he sent me an email containing a notice of redundancy. I received this on 7 November. The letter was dated 11 October. I did not receive this in the post."

19. In its Written Reasons, the ET made a number of findings of fact, summarising the letters of 29 June and 11 October and the Claimant's emails from Ms Skingle of 3 July. No finding was made as to whether the letter was duly delivered (or was to be deemed to have been delivered) to the Claimant's home, nor as to when she returned from her holiday. Each of those factual issues could potentially be relevant to the questions of law that arose.

20. At paragraphs 5.14 to 5.16, the ET summarised the Claimant's argument that she had not received the official notice of termination and thus her employment should have not have ended until the end of the spring term, as well as the submission that the letter of 29 June was not a formal letter of redundancy but rather a job offer in relation to the trial period. At paragraph 5.22, the ET referred to her reliance on **The Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood** [2018] 1 WLR 2073. In **Haywood**, the Supreme Court held (on the facts of that case) that the employee was not to be treated as having received notice of redundancy until she read it following her return from leave, with the consequence that notice started from the date of

reading and not delivery. The Claimant contended in the present case that her position was analogous to that of Ms Haywood and that as she had not received the letter until 7 November, the requisite notice under the Burgundy Book had not been given to her.

21. The ET held that there was a genuine redundancy and that a proper process had been undertaken. As I mentioned at the start of this judgment, they held that the only unfairness was a failure to afford the Claimant an appeal. The nearest the Tribunal got to dealing with the issue as to which of the letters of 27 June and 11 October was the appropriate notice of termination was at paragraphs 18 and 19 of the Reasons under the heading "Notice of Appeal" and at paragraph 23 under the heading "Incorrect notice claim." These state as follows:

> "**Notice of Appeal**
>
> **18 The Tribunal considered in detail the issue with regard to the appeal which the Claimant wished to lodge on her return from holiday in Thailand. We find that on sending the letter to the Claimant on 11 October, the school took reasonable efforts to ensure that this reached her by sending it by email and by hard copies and copying in her Union official. However, it has to be acknowledged that the school were well aware that at the time Mrs Gardner had left the country on holiday in Thailand. This was a holiday which the Claimant herself described as a holiday to take into account the fact that she had been made redundant, another indication that she was well aware that her employment was coming to an end.**
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> **19 The Tribunal does find that when Dr Parry received the letter of appeal and taking into account that Mrs Gardner had been out of the country, a fair employer would have extended the time for the consideration of her appeal notwithstanding that he had referred to seven days in his letter and that the redundancy policy referred to a shorter period. It is implicit in good employment relations practice, that employees are given the opportunity to challenge decisions which are made, whether in relation to dismissal by way of misconduct or by reason of redundancy. The Tribunal finds that it was unfair not to afford to Mrs Gardner the right to have her appeal considered. This could have been remedied had the referral to the Chair of Governors and the governors generally dealt with the matter, but in the event, they declined to do so. We find therefore that the dismissal was rendered unfair by reason of the failure to grant an appeal.**
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> **Incorrect Notice Claim**
>
> **23 The Claimant sought a figure of £5,470.20 on the basis that she had not received proper notice and she should be paid £5,417.20 for the period January to April 2018. However, the Tribunal has found that this claim is not made out and that the employment came to an end on 31 December 2017 without any right for any further notice."**

22. At the sift stage this appeal was permitted to go forward by His Honour Judge Auerbach who held that the Claimant's contention as to the dates when notice begun to run was arguable

given the provisions of the Burgundy Book, the issues as to when she saw the dismissal letter and the brevity of the Reasons of paragraph 23, which arguably did not properly determine that issue.

23. Much of the argument before me has centred on the validity of the rival termination letters and I have been taken to a number of authorities. However, Mr Amunwa's case is in essence that the ET erred in failing to provide adequate reasons for the findings that it made so far as notice is concerned.

24. Mr Murray argued that, given all the circumstances of the various communications, the parties could have been no doubt as to 31 December being the relevant date of termination, unless the trial period in respect of the alternative job was successful. That it was unsuccessful was put beyond doubt following the meeting of 17 September and there could be, he says, have only been one possible outcome, namely termination on 31 October. He says that whilst with the benefit of hindsight the ET could have gone into more detail and given fuller Reasons, the Employment Appeal Tribunal should not interfere with its conclusions.

25. The problem with Mr Murray's case, (which was substantially the same as advanced before the ET), is it is simply not possible to understand from the Reasons why the ET reached the conclusion that it did. Other than setting out in the very briefest of terms the rival contentions as to the applicability of **Haywood**, the ET made no attempt to grapple with the legal issues which that case gave rise to, nor indeed to issues of fact which were begged by the case.

26. Rule 62(5) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** requires an ET in any Judgment to identify the issues which the Tribunal had determined, state the findings of fact made in relation to those issues, concisely identify the

relevant law, and state how that law has been applied to those findings in order to decide the issue. The requirement is a codification of the principles set out in **Meek v City of Birmingham District Council** [1987] IRLR 250. In essence that says that the parties are entitled to know on what basis they have won or lost. In my judgment, the ET in this case failed to do that in relation to the issue of the validity of the notice of termination, I therefore allow the appeal.

27. I have no reason to doubt the professionalism of the ET which dealt with the case. However, the given the firmness of their relevant finding without giving reasons, there is the risk of a perception of the ET being given a "second bite of the cherry" were this single issue to be remitted to it. Moreover, and in particular at these difficult Covid times, the likelihood of the same panel being able to be convened within a reasonable period (the Employment Judge is a fee-paid Judge based in the North East) seems to me to militate against remission to the same panel. I accordingly direct that it be reheard by a fresh ET.

28. As to the cross-appeal, Mr Amunwa made essentially neutral submissions pointing to an ET having a broad discretion to set compensation at what it considered to be just and equitable. He noted the relevant case law, in particular **Hope v Jordan Engineering** [2008] 5 WL UK 27 in which the Employment Appeal Tribunal (His Honour Judge Peter Clark), held that the loss of statutory rights fell to be reduced by any applicable **Polkey** reduction. In my judgment, this was an oversight by the ET. Had it intended this to be an exception to the usual rule it would have said so. The cross-appeal also succeeds and I direct that the same reduction should apply to the loss of statutory rights as to other heads of compensation.

29. The last two sentences of paragraph 16.2 read as follows:

> **"The Tribunal finds that there was appropriate consultation at all stages although it was unfortunate that the meeting at which the Claimant was informed that her trial period in**

> **maths was being discontinued, did not lead to an earlier further meeting[sic] to view other options. However, the Tribunal does not find that the school was at fault for this."**

30. Given a lack of explanation for this finding or the relevant evidence underpinning it, I direct that this passage should not bind the ET re-determining the question of the notice period should it consider it necessary to revisit that issue. It goes without question that no comment in this judgment on the merits of the remitted issue should be regarded as binding on an ET in any way.