Neutral Citation Number: [2022] EAT 56

Case No: EA-2021-000183-JOJ

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07 April 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MS N WHITE	**Appellant**
- and –	
HC-ONE OVAL LTD	**Respondent**

- -
- -

Ms Margaret Pennycook of counsel (instructed by the Free Representation Unit) for the **Appellant**
Mr Mark Clayton, solicitor (Watershed) for the **Respondent**

Hearing date: 31 March 2022
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JUDGMENT

SUMMARY

Practice and procedure – striking out – no reasonable prospect of success

The Employment Tribunal had struck out the claimant's claim of unfair dismissal, as having no reasonable prospect of success, in circumstances in which she had requested redundancy. The claimant appealed.

Held: *allowing the appeal*

The claimant's case was that the respondent had manufactured a situation in which another employee was brought in to replace the existing part-time workers (the claimant and another) and she contended that the process followed by the respondent was unfair and had led her to request redundancy. The Employment Tribunal had failed to engage with the claimant's case, focusing only on the decision to accept her request for redundancy and thus finding that the background matters of which the claimant complained were irrelevant. That amounted to an error of law as the Employment Tribunal had not had proper regard to the documentation before it and had failed to take the claimant's case at its highest. There was a dispute of fact between the parties that was relevant to the issues to be determined and it could not be said that the claimant's case had no reasonable prospect of success.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal raises the question whether a claimant's claim of unfair dismissal was properly to be said to have no reasonable prospect of success where the claimant had requested redundancy: accepting that a voluntary redundancy might still give rise to a dismissal (**Burton, Allton & Johnson Ltd v Peck** [1975] ICR 193), might an Employment Tribunal ("ET") be entitled to strike out a complaint of unfair dismissal in these circumstances?

2. In giving this Judgment, I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeal against the Judgment of the London South Employment Tribunal (Employment Judge Truscott QC, sitting alone, on 11 November 2020), sent out on 19 November 2020, by which the claimant's claim of unfair dismissal was struck out as having no reasonable prospect of success.

3. The claimant's appeal was permitted to proceed, after an appellant-only preliminary hearing, before His Honour Judge Auerbach, on 1 September 2021. Prior to that hearing, the claimant had acted in person, but was able to benefit from the assistance of Ms Pennycook of counsel, acting under ELAAS, at the preliminary hearing and she has continued to represent the claimant at this hearing. The respondent's interests have at all stages been represented by its solicitor, Mr Clayton.

The Relevant Background

4. There have been no findings of fact by an ET in this matter and this background summary is taken from the documents that were available to the ET and to which I have been taken on the hearing of this appeal.

5. The respondent provides professional residential nursing and specialist dementia care for older people. It has over 300 care homes across the United Kingdom. The claimant was employed by the respondent, on a part-time basis, as a receptionist at a care home in East Sussex. She records that her employment commenced on 5 June 2013 and it seems that she transferred to employment with the respondent in or around December 2017.

6. In the latter part of 2018, the respondent announced its proposal to reduce the number of employees carrying out receptionist and administrative work in a number of its care homes, including the home in which the claimant worked, and the claimant was provisionally selected for redundancy. In the process that followed, it was the respondent's case that the claimant requested voluntary redundancy, which was agreed, leading to the termination of her employment on 8 October 2018.

7. In giving her details of claim in her ET1, the claimant explained as follows:

> "From December 2017 when the deputy manager (DM) was off sick for 3/6 months I was doing the admin work she did in (additional to my receptionist role. …
>
> I was only paid at the rate of the receptionist but not for the administration role.
>
> I initiated a grievance about this on 24 July 2018. The grievance was closed on 19 October without accepting any of the points I'd made and after I had taken the redundancy.
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> In June 2018 a new receptionist was taken on despite there being the same number there had been for the previous two years. The redundancy consultation started on 13 September 2018.
>
> The initial pool was myself (on 18 hours a week) another receptionist on 16 hours, the DM on 30 hours and the new receptionist on 24 hours. At the second stage in the consultation the DM accepted voluntary redundancy (she was off sick and unlikely to return) and this made the admin role available.
>
> The new receptionist told me she wasn't asked to attend the second consultation. The eventual outcome was that only this new receptionist was kept on for 40 hours a week to do the reception and the admin work with a higher rate of pay.
>
> …

> … I consider I should be paid something for the loss of my job, failure to acknowledge my grievance and my request in a pay increase equivalent to Deputy Managers, the failure to offer me the admin job during the redundancy process and variation of contract and not following the proper process during the redundancy."

8. In the claimant's appeal against the termination of her employment, by letter of 4 December 2018, she had explained her concerns about the redundancy process as follows:

> "The person who was given the role of receptionist following the restructure had no childcare responsibilities and so was taken on as a full-time role. She was recruited in July just a couple of months before the 'restructure' was announced and was placed into the full-time receptionist role within the timeframe of the restructure, suggesting you had hired her with the intention of replacing part-time workers, rather than for the business reasons outlined in the redundancy letter. It also suggests this was not a genuine redundancy situation.
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> During this period I had also raised a number of issues relating to the amount of work I had to cover during the sick leave of the Deputy Manager. Despite a meeting in early September, I did not receive the minutes (dated 17th September 2018) until 19th October 2018 at which it was found that I had no case for the grievance to be taken further. I believe this grievance was another reason why I was targeted for redundancy rather than the business reasons outlined in the redundancy letter.
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> … I believe that [the respondent] did not follow a fair process: the pool of people chosen for redundancy was not made up of <u>everyone</u> doing reception work but was made up only of those part-time staff and people who had been off-sick who did both admin and reception work."

9. At a preliminary hearing before the ET on 15 August 2019 (EJ Freer presiding), the claimant had further explained that she considered she ought to have been offered the administrator role at the home. She said that although the respondent's human resources manager had said that the administrator role would be considered on a job share basis, she had only been offered a role as receptionist with additional duties and no increase in pay. The role of administrator/receptionist had been offered as a full-time position to another employee (the new receptionist). It was because she was not offered the administrator role that the claimant said she had left her employment by taking voluntary redundancy.

10. In its statement of response, attached to its ET3, the respondent had disputed the claimant's account, stating that, following the second consultation meeting in the redundancy

exercise, it had in fact offered the claimant the administrator/receptionist role on a job share basis but she had declined this offer, stating that she wanted to be made redundant. The respondent contended the claimant had thus been fairly dismissed by reason of redundancy, which had been at her request. In the circumstances, the respondent maintained that the claim should be struck out on the basis that it had no reasonable prospect of success or that a deposit should be ordered as the claim had little reasonable prospect of success.

The ET's Decision

11. Considering the question of strike out at the hearing on 11 November 2020, and having reminded itself of the relevant case-law, the ET held as follows:

> "32. The claimant volunteered to be dismissed by reason of redundancy. A claim based on that dismissal would not succeed as the employer would satisfactorily establish the reason and reasonableness of the decision. The claimant wished to complain about the actions of her employer which broke the term of mutual trust and confidence prior to her volunteering for redundancy. She could have claimed constructive dismissal if she resigned in consequence of the breach. However, she did not resign but volunteered to be dismissed. She cannot claim unfair constructive dismissal. Any claim based on her actual dismissal will not address any of the issues she wishes to raise. The Tribunal concluded that her claim, based on actings prior to her act of volunteering, had no reasonable prospects of success. The Tribunal concluded that the claim was fundamentally flawed and should be struck out."

The Appeal and the Parties' Submissions

12. The claimant pursues a single ground of appeal, by which she complains that the ET erred in law when it determined that her claim had no reasonable prospect of success because the respondent would satisfactorily establish: a) the reason for the claimant's dismissal; and b) the reasonableness of the decision to dismiss the claimant, and on that basis struck out her claim.

13. The claimant argues that the reason for dismissal was in issue in this case, notwithstanding her request for redundancy. As her claim had indicated, she was aggrieved by the appointment of a new receptionist only a few months before the redundancy exercise commenced and she considered that this recruitment was with a view to this individual replacing the existing part-time receptionists. Although, therefore the claimant had requested redundancy, she did not accept there was a genuine redundancy situation. In any event, the claimant contends that the ET was wrong to conclude that because the dismissal in this case was a voluntary redundancy it was, by its nature, a fair dismissal. The ET's reasoning appeared to assume that every voluntary redundancy would automatically be a fair dismissal and/or that by volunteering for redundancy an employee would lose the right to claim unfair dismissal. Those assumptions were incorrect as a matter of law.

14. For the respondent it is urged that the appeal raises no misdirection, misapplication or misunderstanding of law (**British Telecommunications plc v Sheridan** [1990] IRLR 27, CA). The ET had correctly identified the relevant law, appropriately observing that there was a high test for finding that a claim had no reasonable prospect of success and that the discretion to strike out a claim should be exercised sparingly.

15. There was an inconsistency to the claimant's case in that she was suggesting that her dismissal was unfair whilst accepting that she had volunteered to be made redundant. The ET had, however, been entitled to focus on the reason for the respondent's decision to accept the claimant's request to be made redundant. This was in the context of a wider redundancy exercise and the ET had permissibly concluded that there was no reasonable prospect of it being found other than that the decision to dismiss was by reason of redundancy. As for the question of fairness, again focusing on the respondent's decision to accept the claimant's request for voluntary redundancy, it had been open to the ET to conclude that the background issues raised in the ET1 and other documentation were not relevant to the question it would

have to determine. Where an employee had volunteered for redundancy, it was likely that an ET would find the decision to dismiss (the acceptance of the employee's request) was fair unless (exceptionally) there was evidence of coercion. The claimant was effectively saying that the ET's decision in this case was perverse but the appeal did not meet the high threshold required (**Yeboah v Crofton** [2002] IRLR 635 CA).

The Legal Framework

16. The right not to be unfairly dismissed is provided by section 94 **Employment Rights Act 1996** ("ERA"). As section 98 **ERA** then explains:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (*a*) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (*b*) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (*a*) …
>
> …
>
> (*c*) is that the employee was redundant, or
>
> …
>
> (4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (*a*) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (*b*) shall be determined in accordance with equity and the substantial merits of the case.

17. As section 98(1) makes clear, the employer has the burden of establishing the reason for the dismissal and showing that it is a reason that is capable of being fair for the purposes of section 98. The reason for the dismissal is:

> "… a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee"

See per Cairns LJ said in **Abernethy v Mott Hay and Anderson** [1974] ICR 323 CA (subsequently approved by the House of Lords in **W Devis & Sons Ltd v Atkins** [1977] AC 931 and in **West Midlands Co-operative Society v Tipton** [1986] AC 536).

18. If the employer can discharge that burden, the ET will determine whether the dismissal of the employee, having regard to the reason shown, was fair or unfair, at which stage the burden of proof is neutral as between the parties.

19. In determining whether a dismissal was by reason of redundancy, section 139(1) **ERA** relevantly provides:

> For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) …
>
> (b)the fact that the requirements of that business— (i)for employees to carry out work of a particular kind, or (ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

20. It is not in dispute that where an employee has volunteered for redundancy, that can still give rise to a dismissal; see **Burton, Allton & Johnson Ltd v Peck** [1975] ICR 193, and **North Warwickshire & Hinkley College v Cooke** [1997] UKEAT 1338 96. As the learned editors of Harvey on *Industrial Relations and Employment Law* observe:

> "[338] … volunteers for redundancy do not agree to terminate their contracts: rather they agree to be dismissed for redundancy."

21. In **Scotch Premier Meat Ltd v Burns and ors** [2000] IRLR 639, the EAT rejected the suggestion that an employee's acceptance of a compensation package (in circumstances where redundancy was inevitable) should be taken to amount to a voluntary resignation, observing:

> "23. … We were concerned that if that was the proper approach, the right of the employees in question to claim unfair dismissal, based on an inadequate handling of the redundancy procedure, ie lack of consultation, would be lost. Given we consider that it is the duty of a good employer facing a redundancy situation in the interest of the whole workforce to consider as at least one option, voluntary redundancies, and call for such, given again that those who accepted such a procedure are benefiting the remaining workforce to some extent, unless as happened here, all are eventually dismissed. It would discourage, in our opinion, that voluntary redundancy being effected or taking place if by so doing the employees lost rights they would otherwise have if they were compulsorily dismissed. We consider it is the proper approach of this tribunal and the employment tribunal to assess the matter in the way most favourable to the retention of rights that the employees have and there can be no greater right than a right to claim unfair dismissal if the redundancy procedure is inadequately handled by the employer."

22. By rule 37(1)(a) Schedule 1 **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"), an ET is given the power to strike out a claim (or part of a claim) if it has no reasonable prospect of success. As the EAT explained in **Balls v Downham Market High School and College** [2011] IRLR 217:

> "6. Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, … the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects.
>
> 7. I would add that it seems only proper that the Employment Tribunal should have regard not only to material specifically relied on by parties but to the Employment Tribunal file. There may, as in the present case, be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospects of success. There may be material which assists in determining whether it is fair to strike out the claim. It goes without saying that if there is relevant material on file and it is not referred to by parties, the

> Employment Judge should draw their attention to it so that they have the opportunity to make submissions regarding it but that, of course, is simply part of a Judge's normal duty to act judicially."

23. Given that the burden of establishing the reason for the dismissal rests on the employer, where that issue is a matter of dispute between the parties, it would rarely be appropriate for that matter to be determined other than after consideration of the evidence at a full merits hearing, see **Romanowska v Aspirations Care Ltd** [2014] UKEAT 0015 14. More generally, a claim should generally not be struck out when the central facts are in dispute, **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly** [2012] IRLR 755 CS, and, ordinarily, a claimant's case should be taken at its highest and strike out should only be used in the clearest cases, where it is plain and obvious, **Mechkarov v Citibank NA** [2016] ICR 1121 EAT.

Discussion and Conclusions

24. By virtue of section 98(1) **ERA**, the respondent bore the initial burden of proving the reason for the claimant's dismissal and that it was a reason that was capable of being fair for the purposes of section 98. In this case, however, the claimant accepted that she had been dismissed after she had requested redundancy. Given that context, was the ET wrong to conclude that the respondent would inevitably discharge the burden of proving the reason for the dismissal; that is, that the facts operating on the mind of the decision-taker at the relevant time, or the beliefs held by that individual, were such as to demonstrate that the reason for the claimant's dismissal was redundancy? More generally, was it wrong to focus on the respondent's decision to accept the claimant's request for redundancy and to hold that the claim in these circumstances was "*fundamentally flawed*"?

25. Although the claimant had volunteered for redundancy, as she had clarified at the earlier case management preliminary hearing, she was saying that this was against a background of an outstanding grievance relating to the position of deputy manager/administrator at the care home where she worked. It was the claimant's case that she covered this role from

December 2017 and that, although she had been told that the receptionist role was likely to be made redundant and that the administrator role would be considered on a job share basis, that had not been how things had worked out and she had only been offered a role as receptionist with additional duties but no increase in pay. She pointed out that the post of administrator/receptionist was ultimately offered to another individual on a full-time basis, at a higher hourly rate than that enjoyed by the claimant and the documentation before the ET made clear that the claimant considered it relevant that this individual had been recruited only shortly before the redundancy exercise had commenced. It was the claimant's contention that this situation had been deliberately manufactured by the respondent - that the respondent had recruited a new receptionist with a view to replacing the two existing part-time receptionists – and she considered this suggested the redundancy exercise at her place of work was a sham.

26. It is apparent that there was a dispute between the parties as to this history. The respondent contended that the claimant had in fact been offered the administrator position on a job share basis with another colleague but the claimant had refused to engage with that proposal and instead insisted that she wished to be made redundant. This was, the respondent argued, to be seen in the context of a much wider redundancy exercise, impacting upon other care homes and the only reason the more recently recruited receptionist was offered the new role was because the claimant had refused it.

27. The ET heard no evidence and made no findings as to the history such as would have enabled it to determine this dispute. It saw these matters as part of the background that might have provided a basis for a claim of constructive dismissal (had the claimant resigned) but considered they were not relevant to the question of unfair dismissal arising from the claimant's request for redundancy.

28. The difficulty with the ET's approach, however, is that it thereby failed to engage with the claimant's case taken at its highest. If it were to be assumed, in her favour, that her account of the history had been accepted, the facts thus known to the relevant decision-taker might well be found to include matters other than simply the claimant's request for redundancy. On the claimant's case, that decision-taker would have known that the request was made in circumstances in which the claimant was aggrieved at not being offered the administrator role. More than that, however, the decision-taker would have been aware that an additional employee had only recently been taken on at the care home in question with the specific intention that they would then replace the existing part-time receptionists. If those were the findings made by an ET at a full merits hearing, it would be difficult to see why the claimant's complaint of unfair dismissal would be viewed as having no reasonable prospect of success. Even if the ET was ultimately satisfied that the actual reason for the claimant's dismissal was redundancy, it would still need to engage with the claimant's broader case on the fairness of the process that had led to that dismissal.

29. As the case-law makes clear, a claim should not be struck out where the central facts are in dispute. In the present case, the ET assumed that the factual dispute between the parties could not be relevant to the issues to be determined on the claimant's complaint of unfair dismissal but that demonstrated a failure to engage with the way the claimant was putting her case. The fact that the claimant had requested voluntary redundancy did not mean that her complaints about the process that had led her to make that request were irrelevant; a claim of unfair dismissal in these circumstances cannot be assumed to be "*fundamentally flawed*". All the more so, given the claimant was alleging that the employer deliberately manufactured the position, such as to suggest that the redundancy process at that particular workplace was a sham. The ET was required to engage with the case before it and to have regard to all the documentation, taking the claimant's case at its highest. Although the ET

had reminded itself of these requirements, it then failed to adopt this approach in its consideration of the claimant's claim. That was an error of law that rendered the ET's conclusion unsafe. More than that, however, it is clear to me that had the ET adopted the correct approach, it could not have concluded that the claimant's case had no reasonable prospect of success. This was a case where there was a clear dispute on the facts that was not capable of summary determination.

30. In the circumstances, I allow the appeal and remit this case to the ET where it should now proceed to a full merits hearing; given the view he had already expressed, this should not be before the same Employment Judge (**Sinclair Roche & Temperley v Heard and Fellows** [2004] IRLR 763 EAT).