Neutral Citation Number: [2023] EAT 65

Case No: EA-2021-001177-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 May 2023

Before :

His Honour Judge James Tayler
Mrs Elizabeth Williams
Mrs Gemma Todd

- -

Between :

Lovingangels Care Ltd	**Appellant**
- and -	
Mrs B Mhindurwa	**Respondent**

- -
- -

Peter Collyer Employment Tribunal Consultant for the **Appellant**
Jennifer Linford (instructed by DAS Law) for the **Respondent**

Hearing date: 20 April 2023

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JUDGMENT

SUMMARY

Unfair Dismissal

The claimant was a live-in carer. The person for whom she cared went into hospital. In the normal course of events the claimant would have moved to care for another of the respondent's clients. In the early stages of the Coronavirus pandemic there was limited scope for such movement. The respondent did not have another client for the claimant to move to because of the Coronavirus pandemic. The respondent dismissed the claimant by reason of redundancy. The employment tribunal held that her dismissal was unfair because the respondent did not consider the possibility of putting the claimant on furlough for a period while it ascertained whether the situation would improve and it would be able to place the claimant with another client; and also, because the appeal hearing was no more than a rubber-stamping exercise. The respondent appealed against the finding of unfair dismissal. There was no error of law in the decision of the employment tribunal. Determining a claim of unfair dismissal in respect of a dismissal that occurred in circumstances related to the Coronavirus pandemic does not require any variation to the law of unfair dismissal, which is robust enough to deal with such exceptional circumstances.

HIS HONOUR JUDGE JAMES TAYLER

Overview

1. This appeal raises the question of whether the Coronavirus pandemic required an alteration to the legal analysis to be applied when deciding a claim of unfair dismissal. Put another way, was there a special approach that the employment tribunal should have adopted to dismissals occurring in the context of the Coronavirus pandemic, in respect of which the EAT should provide guidance. Our simple answer to these questions is no.

2. The circumstances of the Coronavirus pandemic were extraordinary, as were some of the measures introduced during its course, such as the Coronavirus Job Retention Scheme ("CJRS"). We consider that the law of unfair dismissal was robust enough to deal with such exceptional circumstances. While the Coronavirus pandemic was highly relevant to some decisions to dismiss during its course, we do not consider that the legal tests to be applied to those circumstances required alteration. While most people were, to a greater or lesser extent, affected by the Coronavirus pandemic, employment tribunals have over the years had to consider claims of unfair dismissal in circumstances that were extraordinary for a particular employer and its employees. A place of work burning down, or the loss of a key customer are exceptional circumstances of the type that the law of unfair dismissal has had to grapple with since its inception, and in respect of which general guidance is not of great assistance. Even in the case of an event such as the Coronavirus pandemic that has very significant and widespread effects, the circumstances of individual employers will be varied, and must be considered when determining claims of unfair dismissal.

3. In outline, the claimant was a live-in carer. The person for whom she cared went into hospital. In the normal course of events the claimant would have moved to care for another of the respondent's clients in due course. In the early stages of the Coronavirus pandemic there was limited scope for such movement. The respondent did not have another client for the claimant to move to because of the Coronavirus pandemic. The respondent dismissed the claimant by reason of redundancy. The employment tribunal held that her dismissal was unfair because the respondent did

not consider the possibility of placing the claimant on furlough for a period while it ascertained whether the situation would improve, and it would be able to place the claimant with another client; and also because the appeal hearing was no more than a rubber stamping exercise. The respondent appealed against the finding of unfair dismissal.

The Law

4. The right not to be unfairly dismissed is provided for by section 94 **Employment Rights Act 1996** ("**ERA**"):

> 94.— The right.
>
> (1) An employee has the right not to be unfairly dismissed by his employer.

5. So far as is relevant to a redundancy dismissal, the test to be applied in determining a claim of unfair dismissal is set out in section 98 **ERA**:

> 98.— General.
>
> (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— …
>
> (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**
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> (b**) shall be determined in accordance with equity and the substantial merits of the case**. [emphasis added]

6. I hope we can be forgiven for emphasising parts of the best known statutory provision in

employment law. But, as HH Peter Clark often reminded us, there is much refreshment to be gained by drinking from the clear water of the statute. And for all that section 98(4) **ERA** is so very familiar, it is a rarity for a decision of the employment tribunal in a claim of unfair dismissal to enlighten us as to the "size and administrative resources of the employer's undertaking" or to refer specifically to "equity and the substantial merits of the case".

7. If one considers the stage on which a claim of unfair dismissal plays out, it might be said that we are merely players. We have specific roles. None of the players should upstage the others by trying to take on their roles. Mummery LJ reminded us of the roles we play in **Brent London Borough Council v Fuller** [2011] EWCA Civ 267, [2011] I.C.R. 806:

> 12. A summary of the allocation of powers and responsibilities in unfair dismissal disputes bears repetition: it is for the employer to take the decision whether or not to dismiss an employee; for the tribunal to find the facts and decide whether, on an objective basis, the dismissal was fair or unfair; and for the Employment Appeal Tribunal (and the ordinary courts hearing employment appeals) to decide whether a question of law arises from the proceedings in the tribunal. As appellate tribunals and courts are confined to questions of law they must not, in the absence of an error of law (including perversity), take over the tribunal's role as an "industrial jury" with a fund of relevant and diverse specialist expertise.

8. Bean LJ reiterated that approach in **Newbound v Thames Water Utilities Ltd** [2015] EWCA Civ 677, [2015] IRLR 734 at paragraph 68:

All the authorities so far cited date from a time when unfair dismissal cases were heard by a tribunal including two lay members. By an amendment made in 2012 unfair dismissal claims can be heard, as this one was, by an employment judge sitting alone. Thus the traditional reference to the tribunal being an industrial jury is less apt than it used to be (although it was always inaccurate, in that juries give verdicts without reasons, whereas employment tribunals give detailed reasons). However, the statutory restriction on appeals to questions of law has not been amended. So, as in magistrates' courts, the tribunal has the same task to perform whether it is a tribunal of three or of one.

9. It has long been established that it is not for the employment tribunal to substitute its decision for that of the employer, that would be to usurp the role of the employer. The role of the employment tribunal includes considering whether the employer acted within the band of reasonable responses. The band is not so wide as to leave no room for the employment tribunal to conclude that the dismissal was "unfair", the statutory term; otherwise, the provision would be

purposeless, and the employment tribunal would have no role. As Bean LJ stated in **Newbound**, at paragraph 61:

> The 'band of reasonable responses' has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook s.98(4)(b) of the 1996 Act, which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss 'in accordance with equity and the substantial merits of the case'. This provision, originally contained in s.24(6) of the Industrial Relations Act 1971, indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the tribunal's consideration of a case of this kind to be a matter of procedural box-ticking. As EJ Bedeau noted, an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer.

10. If the employment tribunal concludes that the employer acted outside the band of reasonable responses, the EAT must remember its role in considering an appeal. The EAT is not the star of the show but can only determine whether the employment tribunal erred in law. In **Fuller** Mummery LJ held:

> 28. The appellate body, whether the Employment Appeal Tribunal or this court, must be on its guard against making the very same legal error as the tribunal stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the tribunal without committing error of law or reaching a perverse decision on that point.
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> 29. Other danger zones are present in most appeals against tribunal decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.
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> 30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid.

11. Another limitation on the role of the EAT is that it cannot generally consider matters that were not raised in the employment tribunal. In **Aitken v Commissioner of Police of the Metropolis** [2011] EWCA Civ 582, [2012] I.C.R. 78 Mummery LJ stated:

> 55. This court only has jurisdiction to set aside the decision of the employment tribunal if it made an error of law in the way in which it decided the issues presented to it by the parties. In the absence of exceptional circumstances, which are not present in this case, this court does not allow a party to raise an issue that was not raised in the employment tribunal, or to adduce fresh evidence on the issues that were raised.

12. In considering a dismissal by reason of redundancy an employer will generally be expected to consider alternatives to dismissal, in particular, alternative employment. It appeared from the way in which the appeal was advanced that it was asserted there was something about the Coronavirus pandemic and the CJRS that required a special legal analysis. We asked Mr Collyer whether he contended that it was not open as a matter of law to an employment tribunal to hold that a dismissal by reason of redundancy was rendered unfair because a reasonable employer would have considered the possibility of furlough as an alternative to redundancy. He was reluctant to answer the question but eventually stated that was not his contention. He conceded that a dismissal could be rendered unfair because of a failure to consider furlough as an alternative to redundancy. All would depend on the facts of the case. It would not necessarily be unfair not to consider the possibility of furlough and an employer might consider the possibility but reject it without acting outwith the band of reasonable responses. His argument was advanced on the basis that in the particular circumstances of this case the employment tribunal reached a decision that was not open to it.

The employment tribunal hearing

13. The claim was heard on 4 June 2021 by Employment Judge Gumbiti-Zimuto. The judgment was sent to the parties on 6 July 2021. The judgment was clear and concise. We consider that EJ Gumbiti-Zimuto knew full-well the role he had to play in determining the claim of unfair dismissal.

14. The claimant was in person. Mr Collyer, a consultant, represented the respondent, as he has in the EAT.

The findings of the employment tribunal

15. We take the facts from the findings of the employment tribunal unless otherwise stated, and we shall insert three key dates in relation to the CJRS.

16. The respondent described itself in its ET3 response:

> The Respondent provides live-in and domiciliary care in the community in the Bracknell and Northampton areas. It currently employs 50 staff.

17. The claimant was employed as a care assistant by the respondent on 23 March 2018. In its response the respondent stated that she was engaged as a "live-in carer".

18. We were told at the hearing that the claimant initially provided live-in care for a client of the respondent's. There was then a gap until October 2018, when the claimant started to provide live-in care for a client of the respondent's referred to as HR. On 8 February 2020, HR was admitted into hospital. She subsequently left hospital to live in a care home. The claimant was no longer required to provide live-in care for HR. From 8 February 2020 the claimant was not provided with further work and, pursuant to the terms of her contract, received no pay.

19. The CJRS was announced by the Chancellor of the Exchequer on 20 March 2020, and came into force on 23 March 2020.

20. The employment tribunal stated at paragraph 13:

> On the 18 May 2020 the respondent wrote to the claimant stating that the respondent was not able to offer the claimant live-in care work. The claimant was invited to attend a meeting with the respondent. The purpose of the meeting was to discuss the reasons why her employment may come to an end; whether the claimant believed that her employment could be continued and if so how, and what alternative work may be available. The claimant was told that she could be accompanied by an accredited trade union representative. The claimant was told that if her employment was terminated she would be entitled to a redundancy payment.

21. The employment tribunal held at paragraph 38:

> The respondent's position is explained by the evidence of Ms Moreblessings Chakafa: "*In May 2020 the Claimant asked to be furloughed, but we could not agree as there was no work for her. In an emailed letter dated 18 May 2020 I confirmed to the Claimant that we did not have any other suitable work and invited her to attend a*

> *telephone meeting to discuss. She was informed that a possible outcome could be her dismissal for redundancy*"

22. The respondent accepted that the claimant had asked to be furloughed in May 2020.

23. The employment tribunal held at paragraph 45:

> As Ms Chafaka explained: *"We didn't have any immediate work for the claimant then the amount of live-in work reduced significantly due to Covid-19. The only work we had was local domiciliary care which was not workable for the Claimant because of her Birmingham location."* This is the type of situation that the furlough scheme envisaged. Why it was not considered or not considered suitable in this case is not explained by the respondent.

24. Accordingly, the respondent also accepted that the reason for the reduction in the availability of live-in care was the Coronavirus pandemic.

25. 10 June 2020 was the last date on which an employer could furlough an employee under the CJRS who had not previously been furloughed. This matter was not raised in the employment tribunal.

26. At a meeting held by Zoom on 12 June 2020, the claimant was informed that the respondent could only offer her domiciliary care work. This was not an option for the claimant because she lives in Birmingham and the domiciliary care work was available in the Bracknell and Northampton areas.

27. The respondent wrote to the claimant on the 13 July 2020. She was informed that there was no alternative to redundancy and was given notice of dismissal.

28. The claimant appealed the decision to dismiss her. The claimant's appeal was dismissed by Kyle Pacey. At paragraph 19, the employment tribunal held of Mr Pacey's consideration of the appeal:

> He accepted that he made no enquires to ascertain for himself whether the claimant's contentions were correct or incorrect, he simply accepted what the respondent stated as correct. In my view, in reality it was not an appeal that was capable of remedying any prior error at all, it was merely a rubberstamp of what had gone before.

The conclusion of the employment tribunal

29. The employment tribunal accepted that the claimant had been dismissed by reason of

redundancy. The employment tribunal concluded that the dismissal was unfair:

> 45. **The whole purpose of the furlough scheme was to avoid lay off of employees because of the effect of the Coivd-19 pandemic** by providing significant government support to employers. I am of the view that **in July 2020 a reasonable employer would have given consideration to whether the claimant should be furloughed to avoid being dismissed on the grounds of redundancy.** In this case the claimant's position was impacted by Covid-19. As Ms Chafaka explained: "**We didn't have any immediate work for the claimant then the amount of live-in work reduced significantly due to Covid-19. The only work we had was local domiciliary care which was not workable for the Claimant because of her Birmingham location." This is the type of situation that the furlough scheme envisaged. Why it was not considered or not considered suitable in this case is not explained by the respondent.**
>
> 46. The respondent stated that there were no live-in care clients being referred to the respondent because movement between clients requiring live-in care was restricted due to the Covid-19 pandemic. **The respondent had no way of knowing when it was going to change. The respondent's position was simply that at the time it had no live-in care work so could not agree to furlough the claimant. The respondent does not appear to have considered whether the claimant should be furloughed for a period of time to see what if any change there was in the availability of live-in care work** or other work that the claimant could take on.
>
> 47**. The claimant's appeal hearing before Mr Pacey was a rubberstamp exercise and not a proper appeal. He gave no consideration to whether the claimant should be furloughed.**
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> 48. I am of the view that the **failure to give consideration to the possibility of furlough <u>and</u>** the **failure to offer the claimant a proper appeal** render the claimant's dismissal unfair. [emphasis added]

The appeal

30. We start by noting that the employment tribunal found that the dismissal was unfair on two grounds: first, the failure properly to consider a period of furlough and, second, the failure to adequately consider the appeal. There is no challenge to the finding that the lack of a proper appeal rendered the dismissal unfair. An appeal lies against a determination. The determination was that the dismissal was unfair. The failure to challenge the finding in respect of the appeal undermines the other challenges to the decision. We will consider the grounds of appeal subject to that proviso.

Ground 1

31. The first ground of appeal asserts that the employment judge erred in law in considering the purpose of the CJRS. The employment judge stated: "the whole purpose of JRS, known as furlough, is to avoid the layoff of employees because of covid". The respondent challenges this summary.

32. It is important to analyse the basis of the decision of the employment tribunal. The employment tribunal concluded that the dismissal of the claimant was unfair because of a failure properly to consider the possibility of furlough for a period to allow for the possibility that it would become easier for live-in carers to move to care for people in need of their assistance, and that the respondent would obtain such clients. The decision was not that the employer was required to furlough the claimant, but that it should properly consider the possibility. The employment tribunal accepted that there had been some cursory consideration of furlough but held that the possibility had been rejected because the respondent had no work for the claimant. The point the employment judge was making by stating that "the whole purpose of JRS, known as furlough, is to avoid the layoff of employees because of covid" was that the CJRS generally applied because there was no work for employees. The real issue under the scheme was whether work was not available because of the Coronavirus pandemic. We consider that, insofar as it was relevant to the determination, the employment judge's description of the scheme was reasonably accurate. The scheme allowed employees to be retained in employment where no work was available because of the Coronavirus pandemic. This helped employees by providing them with an income and employers by not losing a skilled workforce that might no longer be available when the situation improved, and work could recommence.

33. The respondent relies on certain requirements for eligibility under the first iteration of the CJRS. Paragraph 6 applied the scheme to a "furloughed employee" who "has been instructed by the employer to cease all work" where the instruction has been given "by reason of circumstances arising as a result of coronavirus or coronavirus disease". It is asserted in the appeal that on a proper construction the claimant would not fall within the terms of the CJRS because she was not instructed to cease work because of the Coronavirus pandemic but because HR no longer needed

care. There is no finding that the respondent applied this analysis at the time it decided to dismiss the claimant. There are also strong arguments that the analysis advanced in the appeal involves construing the CJRS as if it were a statute and disregarding its purpose. If the respondent would, but for the Coronavirus pandemic, have had another client for the claimant to move to in due course, and it wished to keep her on its books, but instructed her to undertake no work because there were currently no new clients because of the Coronavirus pandemic, it is strongly arguable that the scheme would apply to the circumstances of the claimant's employment. Mr Collyer stated in his oral submission that it was "open to question" whether the scheme would apply. Fundamentally, these would have been issues for the employer to determine had it properly considered the possibility of furloughing the claimant.

34. It is asserted that there was no jurisdiction for the employment tribunal to determine whether the Claimant was entitled to furlough pay. The employment judge did not decide that the respondent would be eligible to recover payments made to the claimant under the CJRS. If the respondent had properly considered the possibility of a short period of furlough it would have been for it to take reasonable steps to understand the proper construction of the CJRS and decide whether it felt that a period of furlough was appropriate. What the respondent would have decided on a proper consideration of the possibility of furlough is a matter that could potentially be relevant to remedy. All the employment judge determined was that in the particular circumstances of this case the possibility of a period of furlough to see if the situation improved should have been considered as an alternative to dismissing the claimant by reason of redundancy.

35. The employment judge correctly applied the general tenets of unfair dismissal law to determine this issue. The employment judge was entitled to conclude that the possibility of furlough should have been considered properly. He was entitled to apply the same approach to furlough as he would to any possible alternative to dismissal that an employer might, in appropriate circumstances, be expected to consider if acting reasonably.

Ground 2

36. The respondent asserts that the employment judge "overlooked" the fact that from 30 June 2020 the CJRS was closed to new entrants. The point was "overlooked" by the employment judge because it was not raised by the respondent. Mr Collyer has not asserted any reason why he should be able to raise a point he did not argue in the employment tribunal. Furthermore, the claimant had asked to be furloughed well before the CJRS was closed to new entrants.

37. It is also asserted that the employment judge erred in stating that the possibility of furlough had not been considered. The employment judge noted that the respondent had given the possibility of furlough some cursory consideration but held that the option of furlough was immediately dismissed on the basis that the respondent had no work for the claimant. The finding of the employment judge was that there was no proper consideration of the possibility of furloughing the claimant to give some time for the situation in respect of the movement of live-in carers to improve and the respondent to obtain new clients. There was nothing unrealistic in requiring the employer to give proper consideration to this possibility because the need for live in carers did not cease during the Coronavirus pandemic.

Ground 3

38. It is asserted that the employment judge "substituted his own view by saying that the Appellant should have considered furlough for a period of time". The employment judge did nothing of the sort. He concluded that the respondent acted unreasonably in failing properly to consider the possibility of furlough. That was a finding that the respondent had acted in a manner that fell outside of the band of reasonable responses. The fact that the respondent disagrees with this determination does not mean that the employment judge substituted his determination for that of the employer. As Bean LJ stated in **Newbound** "an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer". In reality, the assertion is of perversity, and the respondent has not established the employment judge made a determination that was not open to him on the specific facts of this case.

39. The appeal is dismissed.