Appeal No.UKEAT/0905/03/RN

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 22 January 2004

Before

HIS HONOUR JUDGE WILKIE QC

MR B R GIBBS

MR D SMITH

UV MODULAR LTD — APPELLANT

1. MR A BLAKELEY
2. MR R HOLDERNESS
3. MR D PRYKE
4. MR B P SMITH — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR T LINDEN (of Counsel) Instructed by: EEF Legal services Broadway House Tothill Street London SW1H 9NQ
For the Respondent	MR D O'DEMPSEY (of Counsel) Instructed By: Messrs Whittles Solicitors Pears Assurance House 23 Princess Street Albert Square Manchester M2 4ER

HIS HONOUR JUDGE WILKIE QC

1 This is an appeal by UV Modular Ltd against the decision of the Employment Tribunal held at Leeds on Tuesday 19 August of this year, which upheld the complaints of the four Applicants namely Messrs Blakeley, Holderness, Pryke and Smith who claimed under section 137 of the Trade Union and Labour Relations Consolidation Act 1992 that they were refused employment on grounds related to union membership.

2 The Tribunal had the advantage of hearing evidence from the four Applicants and from a number of witnesses called by the Respondents Mr Osmond the Operations Director, Mr Ewart the Sub-Assembly Manager, Mr Orange the Electrical Manager; and Mr Copping the Sub-Assembly Manager.

3 The dispute arose because the Respondent had developed financial problems during 2002 and in July went into administration. The administrators dispensed with the services, by way of redundancy of 102 shop floor employees but retained 22 shop floor employees and 3 managers in order to complete jobs that remained to be done. Fortunately, arrangements for refinance were made and the company resumed trading substantively in August of that year. Recruitment of employees then took place between 4 and 19 August 2002.

4 The policy of recruitment was on the footing that the future prospects of the company required that the workforce should be smaller by between 20 and 25 percent. The four Applicants, together with a Mr Denton, had been employed by the company prior to its going into administration and were each of them active members of the GMB trade union. Indeed, Mr Pryke was the union convenor with the original organisation and the three other Applicants were shop stewards.

5 None of the Applicants were successful in being offered employment pursuant to this recruitment exercise. The evidence was that each of Mr Blakeley, Mr Holderness and Mr Smith had in various ways and on a number of occasions approached the Appellant to try to obtain employment. As far as Mr Pryke was concerned he not made any personal approach to the Respondent but, insofar as he was putting forward the case for re-employment on behalf of his colleagues and his case was put forward by full-time regional organiser, the Tribunal acted on the basis that each of them had been seeking employment.

6 Before the Tribunal a concession was made on the part of the Appellant that Section 137 which refers to membership of a trade union also refers to activity on behalf a trade union by a trade union member. Although at one stage the appeal of the Appellants was put forward on the footing that this was an erroneous approach as a matter of law, Mr Linden has recognised that this is not a point open to him to take for the first time at this stage and therefore, he has not pursued that point on appeal

7 Essentially the appeal of the Appellants is that the decision of the Tribunal is inadequate both as to the quality of the reasons and the paucity of reasoning as evidenced by the reasons. In this respect there has been some dispute between Mr Linden and Mr O'Dempsey for the Respondents as to what is the appropriate standard by which we should judge the quality of the extended reasons.

8 It seems to be common ground that, as far as claims for matters such as unfair dismissal is concerned, the requirement of the Tribunal to give proper reasons it is to be found in the guidance given by the Court of Appeal in **<u>Tran v Greenwich Vietnam Community Project</u>** [2002] England and Wales Court of Appeal (civil) 553 and in particular by Lord Justice Sedley.

In paragraph 17 he says that the conclusions of the Tribunal and the explanation as to how they got from their findings of fact to their conclusion: "may be done economically, but simply to recite the background and the parties' contentions and then to announce a conclusion is not to do it at all; and an opaque reference to the evidence which has been given does not save it. The giving of adequate reasons fulfils many functions, among them the important one of concentrating decision-makers' own minds on what they are doing and demonstrating to the parties and (if necessary) to appellate tribunals that they have given acceptable answers to the right questions".

9 Where there is disagreement between Mr Linden and Mr O'Dempsey is on the extent of which guidance given by the Court of Appeal in the context of sex or race discrimination cases is equally applicable to cases where the allegation is discrimination on the grounds of trade union membership.

10 Those statements of principle or guidance, are, we are reminded, contained in two Court of Appeal decisions. The earlier one is the case of **Chapman v Simon** reported in 1994 IRLR at page 124, a Race Discrimination case. There the Court of Appeal had to consider the approach of a Tribunal where the drawing of an inference was an essential part of the reasoning process. We are reminded of the passage in the judgment of Lord Justice Balcombe at paragraph 33 sub-paragraph 3 where he says this:

> "In order to justify an inference a Tribunal must first make findings of primary fact from which it is legitimate to draw the inference. If there are no such findings, then there can be no inference: what is done can at best be speculation. There are no primary facts mentioned by the majority of the Industrial Tribunal justifying their inference that 'sub-

consciously or unconsciously [Ms Chapman] was affected in this instance by the fact that [Ms Simon] is black

And later in the decision of Lord Justice Peter Gibson at paragraph 43 says this:

> **"Racial discrimination may be established as a matter of direct primary fact, for example if the allegation made by Ms Simon of racially abusive language by the head teacher had been accepted there would have been such a fact. But that allegation was unanimously rejected by the Tribunal. More often racial discrimination will have to be established, if at all, as a matter of inference. It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the Tribunal in its fact finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the Tribunal can say what those facts are. A mere intuitive hunch, for example, that there has been unlawful discrimination, is insufficient without facts being found to support that conclusion".**

11 The later of these two decisions is the Court of Appeal decision in **Anya v The University of Oxford** a case of alleged racial discrimination - [2001] EWCA civ 405. Starting with the head note of the report in the ICR report the Industrial Tribunal is recorded to have dismissed the complaint, recording in their extended reasons the Applicant's allegations of his treatment in the two years preceding the job interview, but making no findings as to their truth or whether they indicated racial bias. The Applicant's appeal to the EAT was dismissed. The Court of Appeal allowed the appeal and remitted the matter for rehearing. Their decision in respect of the reasons of the Tribunal is recorded as follows:

> **"That the Tribunal should not simply set out the relevant evidential issues but follow them through to a reasoned conclusion and that the Industrial Tribunal had failed to record any conclusions on the factual issues, either as to the prior events put in evidence by the Applicant or the breaches of university policy, which were essential to its decision and, in consequence, there had been no proper determination of the matter of complaint".**

12 In the course of his judgment Lord Justice Sedley at paragraph 15 says as follows:

> **"In the present case the Industrial Tribunal embarked in exemplary fashion on the methodical approach which this court has said is essential. In paragraph 16 it tabulated five prior events put in evidence by Dr Anya as evidence of hostility on the part of Dr Roberts and denied or explained, as in each case the Industrial Tribunal records, by Dr Roberts himself and by other witnesses".**

13 But later on in that paragraph he says this:

> **"On none of these issues, from first to last, did the Industrial Tribunal record any conclusion as to where the truth lay and what, if anything, it indicated in terms of racial bias"**

14 In paragraph 24 of his judgment Lord Justice Sedley deals with an argument which had been advanced by counsel for the University, Mr Underhill, he said this:

> **"The difficulty is not answered by the decisions of this court relied on by Mr Underhill Martin v (Glynwed) Distribution Ltd [1983] ICR 511, and Meek and City of Birmingham City Council [`1987] IRLR 250 to the effect that tribunals are not required to do more than make findings of fact and answer a question of law. In the Race Relations field this principle does no more than beg the questions: what findings what law?"**

He then cited with approval a judgment of the Employment Appeal Tribunal with Mr Justice Morrison in the chair, in the unreported case of **Tchoula v Netto Food Stores** 16 March [1988] and said that the EAT spelt out what that meant in practice as follows:

> **"a bald statement saying that X's evidence was preferred to Y's is, we think, both implausible and unreasoned and therefore unacceptable";**
>
> and then a little later on,

> **"what a Tribunal should do is state their findings of fact in a sensible order (often chronological), indicating in relation to any significant finding the nature of the conflicting evidence and the reason why one version has been preferred to another. It is always unacceptable for a Tribunal to assert its conclusion in a decision without giving reasons".**

15 Lord Justice Sedley goes on after that citation to say this:

> **"To assert this not to demand, as Mr Underhill sought to suggest it did an infinite combing by the Industrial Tribunal through endless asserted facts or an over-nice appraisal of them. It is simply that it is the job of the Tribunal of first instance not simply to set out the relevant evidential issues, as this Industrial Tribunal conscientiously and lucidly did, but to follow them through to a reasoned conclusion except to the extent that they become otiose, and if they do become otiose, the tribunal needs to say why. But the single finding of the Industrial Tribunal in this case on Dr Robert's honesty as a witness, while important, does not make the other issues otiose: on the contrary it begs all the questions they pose".**

16 It seems to us that in a case which is, essentially, one of discrimination where the Tribunal itself recognises that its decision is wholly reliant on the drawing of inferences to see where the truth is more likely to lie, the adoption of the kind of approach which is exemplified by the guidance given both by the Court of Appeal and by the EAT in the two cases to which we have referred is nothing more than an expression of what is common sense and self evidently good practice. In a case where the decision turns, not upon direct evidence but upon an inference as to the true reasons for an employer's decision, it seems to us that the bare minimum requirement of a properly reasoned decision is that it should record what was the explanation which the employer gave for the decision which it took, whether or not the Tribunal accepted that explanation; if they did not, why they did not accept that explanation and what the inference the Tribunal draws from that rejection of it as the true explanation for the decision complained of.

17 In this case Mr Linden has taken us at a little length and in some detail through the decision of the Tribunal and in particular paragraph 3, where it purported to find the facts in relation to each of the Applicants, and paragraph 7 of the decision where the Tribunal purported to carry out the exercise of looking for inferences to see where the truth is more likely to lie.

18 Mr Linden points out, and we do not think that Mr O'Dempsey has really challenged this, or at least if he has not to our satisfaction, that there is no-where in paragraph 3 any account in respect of each of the individual Applicants of what the employer said was the process by which the decision was taken, or the explanation as to why it was taken. There is no identification of who it was who took the decision, what discussions they had, or what the reasons were for that decision.

19 It follows that there is, in paragraph 3 and in paragraph 7, simply no assessment by the Tribunal as to whether it accepted those explanations and if not, why not. The application was made by four separate individuals. They are related to their seeking employment, in different ways and at different times. The decision not to offer them employment, certainly on the Appellant's case, was taken by different people in different departments for different reasons.

20 We do not necessarily accept what we take to be Mr Linden's submission that there should have been an individualised consideration of the explanations, and findings of fact as to their truthfulness or otherwise, without looking at the overall picture. But it is certainly the case that there is nothing in this decision of the Tribunal which demonstrates, of each individual person, what the Appellant's case was, whether they rejected it, and, if they did so, why.

21 There do appear to be a number of matters relied by the Tribunal on as being material from which an inference might be drawn and material upon which a Tribunal might rely in

determining the credibility or otherwise of any explanations, if those had been recorded. But the way in which this Tribunal decision reads it seems as though the Tribunal has gone straight from the Applicant's version of events to a conclusion that their respective failures to obtain employment is more then mere coincidence. This smacks of the Tribunal relying in what has been described as "an intuitive hunch" that there has been unlawful discrimination but without the necessary findings of fact to support the conclusion that there was.

22 It therefore follows that, not withstanding Mr O'Dempsey's brave efforts to persuade us to the contrary, we are persuaded by Mr Linden that the reasons are inadequate and evidence a failure to adopt the appropriate approach. This appeal must succeed and the matter must be remitted to a differently constituted Tribunal for a re-hearing.