EXTRACT OF APPEAL FOR FULL JUDGEMENT SEE BELOW

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Appeal No. UKEATS/0020/09/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 30 October 2009

Before

THE HONOURABLE LADY SMITH

MISS S. AYRE FIPM FBIM

MRS A. E. HIBBERD

SCOTTISH POLICE SERVICES AUTHORITY APPELLANT

MS FIONA McBRIDE RESPONDENT

Transcript of Proceedings

JUDGMENT

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Discussion and decision

33. The Employment Tribunal ordered that the claimant be reinstated to a "non-court going" role in circumstances where that was not actually her goal. Indeed, the Tribunal recognised that, as they put it "the thrust of the claimant's position was about returning to court going duties" (paragraph 373). That was her ultimate aim and objective and thus her wishes did not actually coincide with the limitations of the reinstatement order. That matter was relevant to their consideration of the first issue to which reference is made in s. 116(1) but has not been taken account of by the Tribunal.

34. Then, so far as practicability was concerned, as Ms Jones submitted, there were a number of relevant factors. In particular, it was plain that from the outset of the McKie saga, the claimant had insisted that her identification of Y7 was correct, a position which was not, at any time, supported by her previous employers or by the respondents. We do not accept the Tribunal's assessment of her position as not being that she sought vindication. Achieving what she saw as justified vindication was plainly inherent in her determination to return to full duties. It was, further, plain that much friction and tension had ensued not just between Mr Mulhern and the claimant but between her and others employed by the respondents such as Ms Masson. It was plain that the claimant was critical of them and also of the respondents in general. She had voiced that criticism to the media in no uncertain terms and it was publicised in The Herald newspaper. We cannot accept the Tribunal's conclusion that, on

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their findings in fact, the fact that the claimant spoke to the press in the terms reported in The Herald articles were not demonstrative of a breakdown in trust and confidence between the claimant and Mr Mulhern. Further, they were demonstrative of a breakdown in trust and confidence between the claimant and the respondents in general, as any reasonable tribunal would have concluded.

We note, further, that the Tribunal describes the consultation process that was engaged in with the claimant as a "sham"; that shows that they regarded the claimant as having justification for a significant loss of trust and confidence in her employers. All these factors also had to be viewed in the context of enquiries into the McKie saga not being at an end. They are not, even yet, at an end.

35. Nor can we accept that the Tribunal could reasonably draw the conclusion that once they had affirmed that the respondents' decision that the claimant could not return to court going duties was a reasonable one, matters would be able to move forward. On the contrary, matters had been left, at the time of the claimant's dismissal, with her making further demands for detailed enquiries to be made of a range of persons and bodies as to why she could not return to full duties. There was no indication in the findings in fact at all that her attitude would alter simply because the Tribunal decided that the respondents' limitation of her role was a reasonable one. The Tribunal's hope that that would happen was, we accept, a laudable one but it looked very much like a vain hope in all the circumstances. The clear picture is that returning the claimant to work for the respondents in the limited non court role provided for by the Tribunal would not work. The claimant and the respondents parted

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company on her dismissal against a background of considerable conflict and with the claimant entertaining marked distrust of her employers. That conflict had not been resolved and there was nothing to suggest that the claimant's mistrust of her employers had lessened. Far from being practicable, the impression presented was one of the reinstatement envisaged by the Tribunal being liable to have disastrous consequences. In these circumstances, we are satisfied that the high perversity test is passed in this case and the appeal is well-founded.

36. Turning to contribution, we have given careful consideration to whether, in the circumstances, the Tribunal fell into error in their finding that the claimant did not contribute to her own dismissal. We can fully understand why Ms Jones submitted that they had and have some sympathy for the argument that there is an apparent illogicality in finding that the claimant had all the answers to her questions by 27 April 2007 and yet was not to be criticised for failing to engage in discussions about redeployment thereafter. However, we have reached the view that it would not be appropriate for us to determine the contribution issue that now arises. There will require to be a hearing on remedy with a view to ascertaining what monetary award, if any, ought to be made to the claimant. The issue of contribution has not, thus far, been considered under reference to the question of whether or not compensation should be reduced. It will now have to be considered and determined in that context (s. 122(2) and s. 123(6) of the 1996 Act). That is a task which has not been but will now require to be addressed.

37. So far as the question of remit is concerned, we are persuaded that the remit should be to a freshly constituted tribunal. The nature and extent of this Tribunal's criticism of Mr

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Mulhern and of the respondents is such as to be indicative of a significant measure of sympathy towards the claimant. The respondents' submission that any remit should not be to the same tribunal is, in the circumstances, justified.

Disposal

38. In the foregoing circumstances, we will pronounce an order upholding the appeal and revoking the judgment of the Employment Tribunal except insofar as it found that the claimant was unfairly dismissed by the respondents. We will then remit the case to a freshly constituted tribunal to determine compensation including the issue of whether any award should be reduced under and in terms of s.122(2) and /or s.123(6) of the **Employment Rights Act 1996**.