

Appeal No. 294/00&1116/99

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 9 March 2001

**Before**

**MISS RECORDER ELIZABETH SLADE QC**

**MR I EZEKIEL**

**MS G MILLS**

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Ms J S Coxon

APPELLANTS

Rank Xerox (UK) Ltd & Others

RESPONDENT

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Transcript of Proceedings

JUDGMENT

**PREMININARY HEARING**

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**APPEARANCES**

For the Appellants

Mrs J Asselman  
(nee Coxon) the  
Appellant in person

For the Respondent

## **MISS RECORDER ELIZABETH SLADE QC**

1 This is the Preliminary Hearing of appeals against two Employment Tribunal decisions. The first decision was that of a Tribunal entered in the register on 20 July 1999. That Tribunal dismissed complaints by Ms Coxon of unfair dismissal, sex discrimination, victimisation and equal pay. We will call that “the First Tribunal Decision”. The second Tribunal decision was entered in the register on 4 February 2000. We will call that “the Second Tribunal Decision”. The second Tribunal had before it complaints against the former employer of Ms Coxon and also two named individuals. The second Tribunal dismissed complaints of sex discrimination, victimisation, unfair dismissal and disability discrimination.

2 The relevant facts may be briefly summarised as follows:

The applicant commenced work on the Helpline Team of the respondents in January 1995 as an Analyst. During the course of her work in the department she raised a grievance about a number of matters and one of those complaints was found to be justified, namely a complaint in relation to training. The grievance procedure was never fully completed it seems, but the applicant moved from that department into another department. At various points in her employment the applicant had raised equal opportunities issues. The events which culminated in her dismissal appear to have been triggered by what occurred on a Basics of Management and Supervision Course when the applicant made her views on certain matters plain, although it is not entirely clear from the papers before us, that is the documentation that we have, and the Tribunal decision, what precisely gave rise to the complaints, and what precisely it was that the respondents later relied upon in disciplinary proceedings against the applicant.

3 Some days after the end of the course and after the applicant had raised sex discrimination issues in a memo of 10 October with a senior manager, and also following an email on 13 October, 294/00&1116/99

during the course of which raising an issue of sex discrimination was referred to, the applicant was suspended by letter of 14 October. That letter stated as follows:

**“Following our meeting earlier today I am writing to confirm that as a result of your actions on the BOMAS Course which may constitute gross misconduct, the company is in accordance with the terms of your contract of employment suspending you on full pay pending a thorough investigation into the matter. This suspension will last for a period of three days commencing from today’s date.”**

The applicant was warned that if gross misconduct was found to have occurred, the company may summarily dismiss her.

4 Two days later on 16 October, the applicant was sent a further letter by Neal McTier, the Operations Manager, stating:

**“Further to our recent discussions I am writing to confirm that I will be holding a disciplinary meeting on Monday 20 October at 10:00am, to be held in Bridge House on the 5<sup>th</sup> floor. As you are aware I am concerned about your conduct on the BOMAS Course, the continuing trend of behavioural problems, as discussed at your recent appraisal and breach of trust and your attitude towards the organisation. I wish to hold a formal meeting at which you will be given the opportunity to discuss this matter further and to present any relevant information. I enclose copies of the information gathered so far on this matter.”**

5 It appears that no specific allegations were formulated before the disciplinary hearing was convened. Following the disciplinary hearing a decision was taken to dismiss the applicant for gross misconduct. In minutes of the disciplinary meeting of Wednesday 22 October the following note was made:-

**“Following the meeting on Monday, reached a decision based on no one event in isolation, looked at the broader picture and do not feel possible to continue the working relationship. Dismissal on grounds of breach of trust, do not consider working relationship is viable with both existing previous managers, overall behaviour and attitude towards company not at a level we expect. More time spent on average on courses, Manager counselling and HR involvement. Situation worsened over time, not improved, always something wrong, not happy with Xerox and summary dismissal for gross misconduct on grounds of breach of trust. Right to Appeal within five working days of receipt of dismissal letter.”**

A dismissal letter followed on 22 October and reasons for dismissal on grounds of gross misconduct were given in summary. I summarise them here as:

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- 1 Breach of trust
- 2 Behaviour and attitude
- 3 Disruption

The letter concluded by pointing out that there was a right of appeal against the decision. The letter of dismissal, whilst indicating the general areas of concern, again appears not to refer to specific instances. An appeal was then held and the appeal was dismissed. The employment of the applicant came to an end by summary dismissal on grounds of gross misconduct.

6 The grounds of appeal before us in both cases run to many pages. We have also looked at pages of skeleton arguments and a substantial amount of documentation. Mrs Asselman (Ms Coxon has married since the Tribunal decisions) has represented herself most ably. It seems to us that the issues raised by these appeals may be summarised as follows:-

First Tribunal Decision Unfair Dismissal

1 The Appellant complains that she was denied natural justice in that she was not made aware before or during the Employment Tribunal Hearing that the fairness of her dismissal was in issue and she alleges that she was thereby prejudiced in the presentation of her case.

2 That the Employment Tribunal failed to make any proper findings as to what the gross misconduct was, for which the Employment Tribunal found that she had been fairly dismissed.

3 That the finding of the Employment Tribunal that the dismissal was fair, was perverse having regard to, first, the absence of prior notification of the charges that the applicant was due to meet in her disciplinary hearing. Second, the absence of any evidence of what the alleged gross misconduct comprised. Third, the admitted procedural unfairness in failing to give sufficient notice of the disciplinary hearing. Fourth, the evidence from the handbook, which was before the Tribunal, that the appeal was not a re-

hearing. The Employment Tribunal placed considerable reliance upon the appeal that was conducted as curing the procedural defects that there had been in the disciplinary hearing. Those, it seems to us, are the grounds of appeal being advanced against the unfair dismissal finding.

### Sex Discrimination

The appeal attacks the findings of the Tribunal that most of the complaints of sex discrimination were held to be out of time. The Appellant's case is that the Tribunal erred in holding complaints of sex discrimination which had occurred a considerable time ago, ought to have held in time by reason of the fact that when it came to her dismissal, her employers had relied on her reaction to the alleged acts of sex discrimination as part of the foundation for the reasons for her dismissal.

### Victimisation

The Appellant contends that it was perverse for the Tribunal not to conclude that the dismissal was an act of victimisation under the **Sex Discrimination Act 1975** in the light of the sequence of events leading to her suspension and subsequent dismissal and the substance of some of the correspondence at that time.

### Equal Pay

The Appellant contends that the Tribunal failed to make proper findings necessary to a decision as to whether she had been engaged on like work with that of her predecessor comparator.

7 Turning now to the second Employment Tribunal decision, the Appellant contends that the decision to dismiss her complaints on the basis that they were out of time, and also on the 294/00&1116/99

basis that they had been the subject of *Res Judicata* and or related to matters which ought to have been placed before the first Tribunal on the *Henderson v Henderson* principle was perverse in the light of her submission to that Tribunal that she was only alerted to certain facts giving her good ground to raise her complaints to the second Tribunal after she had presented her first complaint and within three months before presentation of her complaints to the second Tribunal.

### *The First Tribunal Decision*

8 So far as unfair dismissal is concerned, in the first ground of appeal, the natural justice ground, the Appellant asserts that she was led to believe in the course of the directions hearing, that the question of the fairness of her dismissal would not be in issue. She also relies upon a letter from the respondent employers to the Employment Tribunal dated 17 May of 1999. The respondent wrote to the Tribunal in the following terms:

**“Pursuant to paragraph 2 of the order made by the Tribunal on 10<sup>th</sup> May and confirmed by letter dated 14<sup>th</sup> May, I write to confirm that the respondents seek leave to amend their amended notice of appearance by the deletion of paragraphs of 1 and 2 and by their replacement with the following:-**

**1 The first respondent acknowledges that its dismissal of the applicant was procedurally unfair.**

**2 The first respondent will contend that the applicant contributed materially to her dismissal by reason of the matter set out in her letter of dismissal dated 22 October 1997, a copy of which is attached hereto. I have sent a copy of this letter by fax to Ms Coxon care of Taylor Walton.”**

9 We consider that there is an argument on the basis of that material, that the Appellant was led to believe that the fairness of her dismissal was not to be in issue but that the hearing would deal with the question of contributory fault on the assessment of compensation. In those circumstances we consider that the first basis of the Appellant’s attack on the finding of no unfair dismissal does raise an arguable point of law.

10 The second basis of the attack on the dismissal of the claim for unfair dismissal, is that the Employment Tribunal failed to make any proper finding as to what the gross misconduct constituted, on the basis of which the Tribunal found that the Appellant had been fairly dismissed. The Employment Tribunal does not specify the nature of the gross misconduct which it concluded justified a summary dismissal for gross misconduct. There was reference in general terms to a breakdown of relations but in our view, it is arguable that the Employment Tribunal failed to make proper findings as to what that gross misconduct constituted.

11 Third, so far as the allegation that the finding that the dismissal was fair, was perverse is concerned, in our view there is some force in the contention that the absence of prior notification of the precise charges to be considered at the disciplinary hearing, the absence of any sufficient evidence from the respondents as to what they found to have constituted gross misconduct, and also the admitted procedural error and the fact that the handbook which was before the Tribunal made it clear that the appeal was not intended under the procedure to be by way of a re-hearing are all matters which can properly be relied upon by the Appellant to attack the conclusion of the Employment Tribunal that the dismissal was a fair dismissal as perverse.

I quote from the handbook or document on the appeal hearing:

**Purpose of Appeal Hearing.**

**The appeal hearing is not a re-hearing of the case, its purpose is to provide the Appellant with an opportunity to demonstrate that his or her dismissal was unreasonable. No new evidence or documents will be admitted unless they were unavailable at the time of the dismissal”.**

Having regard to all these matters, in our view, the appeal against the dismissal of the claim for unfair dismissal, raises arguable points of law.

12 Turning now to sex discrimination, the Appellant contends that the Tribunal ought to have admitted as in time or to have extended time to admit allegations of sex discrimination



originating from acts occurring earlier than three months before the presentation of the originating application. The basis of that argument is that because the respondents later relied upon her reaction to acts of alleged sex discrimination in the past, therefore those acts themselves ought to have been held within time. In our view that argument is misconceived and we can see no basis upon which the Tribunal's decision to rule those complaints out of time can be attacked. Accordingly we dismiss the appeal in so far as it relates to complaints of sex discrimination.

13 We turn now to the complaint of victimisation under the **Sex Discrimination Act 1975**. The Appellant contends that the finding of the Tribunal that the dismissal was not an act of victimisation under the Sex Discrimination Act was perverse, in that the Tribunal failed to have proper regard, or any regard to the timetable of events leading up to her suspension and then dismissal. We have referred in the short summary of relevant facts to those events. In our view the documents that the Appellant relies upon, namely her letter of 10<sup>th</sup> October to her managers, the emails of 13<sup>th</sup> October and also possibly the memorandum of 23<sup>rd</sup> May 1997 re-dated 10<sup>th</sup> October 1997 crossed out, are capable of giving rise to an arguable case that the conclusion of the Tribunal on the complaint of victimisation by way of dismissal, is perverse. We therefore consider that that part of the case can go forward to a full hearing, as well as the unfair dismissal appeal.

14 Turning now to equal pay, in our view it is arguable that insufficient findings of fact were made by the Tribunal in dealing with the equal pay complaint. It is arguable that the Tribunal's decision does not inform the parties adequately why they won or why they lost. In an equal pay claim it is perhaps to be expected of a Tribunal in a like work application to set out the job functions performed by the complainant and the job functions performed by the comparator and then to reach their conclusion. These steps were arguably not carried out by this Employment  
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Tribunal. We therefore consider that there is an arguable case to be made on the equal pay appeal.

*The Second Tribunal Decision*

15 The second complaint. The Employment Tribunal on that occasion had before it three complaints made some two years after the end of the Appellant's employment. The basis upon which they were made showed that there was a considerable overlap between the issues considered by the first Tribunal and the second Tribunal. In our view, the appeal raises no reasonably arguable point of law to challenge the conclusions reached by the Second Tribunal. Accordingly we dismiss the appeal against the second Tribunal decision.

16 In summary, our conclusion is that on the basis outlined in this judgment, the appeal against the first Tribunal decision against the dismissal of the unfair dismissal, victimisation and equal pay claims can proceed. The complaints of sex discrimination are dismissed. As for directions for this appeal, when it comes to a full hearing, we are sure that the Employment Appeal Tribunal hearing this matter will be greatly assisted if the Appellant concentrates on the issues that we have identified in this judgment. There will therefore be a need for an amended and considerably reduced and concentrated notice of appeal, and we give leave for that to be done. Amended Notice of Appeal to be lodged within 28 days. Chairman's notes of evidence relating to the ground of appeal that the finding that the dismissal was fair was perverse to be produced. Time estimate, 1 day. Skeleton arguments to be exchanged and lodged not less than 14 days before the date of the hearing of the appeal.