That was not put!

P2CG Limited v Davis (Appeal No. EA-2019-000762-AT)

By Daniel Brown

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[ ] paragraph number of the Employment Appeal Tribunal's ('EAT') judgment
Parties are referred to as they were in the Employment Tribunal ('ET')

1. In this case the ET upheld two claims of direct disability discrimination, including a complaint that the Claimant's dismissal was discriminatory. The second successful complaint rested on the ET's finding that two of the Respondent's directors colluded to deny all knowledge of the Claimant's ill-health [31, 71].

2. In the EAT, it was common ground that the specific allegation of collusion was not put to either of the directors while they were giving evidence [72]. The Respondent therefore argued that it was not open to the ET to make a finding of collusion and that, as such, the judgment was tainted by a serious procedural irregularity. The EAT disagreed.

3. Noting that both directors had denied knowing of the Claimant's ill-health and that the ET had found (permissibly) that they did know [72], Judge Barry Clarke reviewed the "rule in *Browne v Dunn*" (1894) R 67 (UKHL), in which Lord Herschell stated that:

   … I have always understood that if you intend to impeach a witness you are bound, while he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case; but is essential to fair play and fair dealing with witnesses… Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there

having been no suggestion whatever in the course of the case that his story is not accepted.

4. Reference was made to *NHS Trust Development Authority v Saiger & Others* [2018] ICR 297, in which HHJ Hand QC concluded that there had been a serious procedural irregularity, observing that if conclusions of dishonesty are to be reached it will usually be unfair to reach them unless the person accused has had an opportunity to address the allegation. And, where a tribunal is minded to reach a purely inferential conclusion that is neither obvious nor previously advertised at any point in the proceedings, it must give the parties an opportunity to address the matter [75]. However, HHJ Hand QC also commented that:

   When it is clear from the variety of written material that nowadays attends a civil trial or a hearing in the employment tribunal what the issues in a particular case are, it may not be necessary for each matter to be expressly put. Whether it would be erroneous for the tribunal to reach a particular conclusion in the absence of any particular matter being put will depend on the circumstances of the case. The extent to which there has been procedural unfairness is not necessarily a matter of simply scrutinising what actually was put. It will involve a consideration of all of the evidence, how the matter stood at the end of all of the evidence and what the parties and the tribunal should have recognised from that material was still in issue in the case. I do not accept that every failure to put every particular aspect of a case amounts to a serious procedural failure. The context may suggest that looked at overall it was perfectly fair, everybody knew where they were heading, what was at issue, what the case being forward was and what the answer to it should be.

5. Judge Barry Clarke also referred to *Ras Al Khaimah Investment Authority (RAKIA) v Azima* [2021] EWCA Civ 349 in which the Court of Appeal considered *Howlett v Davis* [2018] 1 WLR 948, *Williams v Solicitors Regulation Authority* [2017] EWHC 1478 (Admin) and *Chen v Ng* [2017] UKPC 27

6. *Howlett* was a case concerned whether when a person bringing a personal injury claim lost qualified one-way costs-shifting protection on the ground of "fundamental dishonesty"; Newey LJ held that while it will always be best if a challenge to the honesty of a witness is put to him explicitly, what matters is whether the witness had fair notice of a challenge to his or her honesty and an opportunity to deal with it [76].

7. In *Williams*, Carr J referred to the rule in *Browne v Dunn* and held that [77]:

   The rule is not an absolute or inflexible one: it is always a question of fact and degree in the circumstances of the case so as to achieve fairness between the parties. Civil litigation procedures have of course moved on considerably since the 19th Century. Witnesses now have the full opportunity to give their evidence by way of witness statement served in advance, and then verified on oath in the witness box.

8. In Chen, the Privy Council held that:

   In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it.

   At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds.

9. In light of these authorities, Judge Barry Clarke noted seven points relevant to the appeal in this case [79.1-79.7]:

a. it '*was telegraphed from the very beginning of the proceedings that the Claimant was alleging that Mr Peel and Dr Rawling both denied knowledge of his health'*. In this regard, the EAT drew attention to specific paragraphs of the Grounds of Complaint which made reference to discussions between the Claimant and the directors;

b. The list of issues before the ET included the alleged refusal to acknowledge the Claimant's ill-health as an allegation of direct discrimination. Therefore *'it was, or should have been, obvious to the parties that, if the ET found that [the directors] had refused to acknowledge [the Claimant's] ill-health as alleged, it would need to consider the reason why they did so'*;

c. There was an abundance of suggestions that each side did not accept the story advanced by the other, each party maintained that the other was presenting substantial quantities of false evidence. *'Put another way, alleged dishonesty was at the heart of the dispute with which the ET was confronted'*;

d. The possibility of collusion between the Respondent's main witnesses was *'in plain sight'* throughout the hearing;

e. The ET was under pressure of time and solicitors' notes of the hearing show the Employment Judge seeking to expedite matters *"EJ – ET won't hold against you if some point that hasn't been put. Don't struggle to cover every point"*;

f. The witnesses maintained their denial of knowledge of disability and it was *'implausible to suppose that, if further questions had been put to them in cross-examination about whether they had colluded in their denial with a view to disguising the impact of the Claimant's diagnosis on their actions, they would have performed a volte-face and accepted that they had indeed colluded to that end'*; and

g. Having permissibly found that Mr Peel and Dr Rawling had denied to the Claimant's face their knowledge of his disability (rejecting their evidence to the contrary), the ET was *'duty bound to consider the reason why they had done so'.*

10. In light of the above, the EAT concluded that 'this was a case where, in reality, everybody understood what was at stake and what the questions were getting at. Issues of dishonesty and collusion were sufficiently advertised' [80].

Comment

11. '*That was not put to the witness'* are words no representative wants to hear from their opponent during closing submissions. But in such circumstances, while emphasising the importance of ensuring that witnesses have a fair opportunity to address any point to be taken against them, this judgment provides useful guidance as to the matters that should be considered. Given that, in most discrimination and other complex cases, a bundle of documents and a list of issues are agreed and witness statements exchanged in advance, the pragmatic approach demonstrated in this case is likely to provide some reassurance to Judges and advocates when seeking to keep cross-examination to a proportionate length, particularly when under time pressure.

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