Appeal No. UKEAT/0170/16/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 November 2016

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

MR P M HUNTER

MR T STANWORTH

ARNOLD CLARK AUTOMOBILES LTD — APPELLANT

MR D SPOOR — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MORGAN (Solicitor) Burness LLP Solicitors 120 Bothwell Street Glasgow G2 7JL
For the Respondent	Written Submissions

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

The Employment Tribunal found the Respondent's complaints of unfair dismissal and breach of contract to be well founded. The Appellant's primary ground of appeal that the Employment Tribunal substituted its own view for that of the Appellant failed, as did the contention that the Employment Tribunal reached a perverse decision. The Employment Tribunal misapplied the decision in **Ramphal v Department for Transport** [2015] IRLR 985 and it is not clear from the Decision whether the Employment Tribunal accepted that physical violence amounted to gross misconduct for the purposes of the Appellant's disciplinary procedure. The Employment Appeal Tribunal dismissed the unfair dismissal appeal: physical violence amounted to gross misconduct under the Appellant's disciplinary procedures, but the Appellant failed to have regard to all the surrounding circumstances and the Claimant's exemplary disciplinary record over 42 years. The appeal against the breach of contract claim was also dismissed.

THE HONOURABLE MR JUSTICE SUPPERSTONE

1. The Appellant, Arnold Clark Automobiles Ltd, appeals against the Judgment of an Employment Tribunal (Employment Judge Johnson), sent to the parties on 28 January 2016 following a hearing held at North Shields on 21 December 2015, that the Claimant's complaints of unfair dismissal, breach of contract and failure to pay notice pay are well founded and succeed. Mr Morgan appears for the Appellant; the Claimant is not represented or present, but he has submitted written representations which we have read and taken into account.

2. The Appellant is primarily an automotive retailer, with over 200 branches throughout the UK. The company also provides hire, drive and insurance services. Its services generally include sales, service and bodyshop departments. It has approximately 10,000 employees and has a specific HR facility comprising 15 staff across offices in Glasgow and Manchester. The Claimant worked at the Appellant's Penn Street, Newcastle-upon-Tyne branch. He is a Motor Vehicle Technician with over 42 years' continuous service with the Appellant.

3. The claims arise out of the Appellant's dismissal of the Claimant on 6 May 2015 for reasons related to his conduct. The alleged conduct was physical violence towards another employee. The Claimant had admitted grabbing the other employee but denied any physical violence. The Appellant's disciplinary procedures that are relevant to the Claimant's complaint include the following (as quoted at paragraph 3.5 of the Decision):

> **"1.0** ***Informal procedure***
>
> > **1.1 Minor shortcomings in meeting the requirements of your job will be brought to your attention informally by the person to whom you are primarily responsible. If however formal steps are necessary the following will apply.**
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> **2.0** ***Guidelines for the conduct of formal disciplinary meetings***
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> > **2.1 Disciplinary action will normally be taken by the person to whom you report but circumstances may warrant someone else being involved, for example where your line manager is not available or he or she is involved in the complaint.**

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3.0 ***Implementation of the disciplinary policy***

3.3 The persons conducting the interview will decide what (if any) disciplinary measures to apply whilst taking into account the circumstances and your previous record."

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4. Section 4, headed "Disciplinary actions", sets out disciplinary sanctions that may be imposed. Section 5, headed "Summary dismissal", states:

"5.1 You will normally be dismissed with immediate effect and without notice or payment in lieu of notice in cases of gross misconduct. …"

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Examples of gross misconduct given include physical violence.

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5. The Claimant reported directly to the Workshop Controller, John French, and the Service Manager, Tom Middleton. The incident that formed the subject matter of the disciplinary proceedings taken against the Claimant occurred on 27 April 2015 (paragraph 3.8):

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"3.8. … One of the apprentices, Kieran Chapman, was having some difficulty in operating a printer in the computer room. The claimant thought he could identify the problem and suggested that the paper drawer should be opened to see if the paper had jammed. The claimant suggested that more paper should be put into the drawer. Kieran insisted that extra paper was not required. The claimant momentarily lost his temper, accused Kieran of not listening to him and, using both hands, grabbed Kieran in the vicinity of his neck. The words used by Kieran in the investigation were, "The next think [sic] I know he's got his hands round my neck". When asked in the investigation how long the claimant had his hands round his neck, Kieran replied, "Just a couple of seconds". Kieran then said, "I pushed him off and then he told us to get my hands off him and I didn't have my hand on him like"."

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6. When the Claimant was interviewed, he said that he may have caught his throat but he did not have him by the throat. The following morning the Claimant approached Mr Chapman and apologised to him for his actions. Mr Chapman had already reported the incident to Mr Middleton. Later in the day both of them were called into Mr Middleton's office. They went over the details of the incident. Mr Middleton informed them that he had decided not to proceed with any formal disciplinary action but that he intended to issue the Claimant with a "letter of concern", in accordance with the Appellant's informal procedure. The Claimant again

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apologised to Mr Chapman, confirming that he knew that he was in the wrong and should not have done what he had done. They shook hands and both returned to work.

7. On the same day a copy of the letter was sent by Mr French to Liz Kilshaw in the Appellant's HR Department. In substance it read:

> **"Had some handbags between two guys here and we will be issuing David [the Claimant] with this letter. A copy for your records."**

8. The Tribunal found that the use of the word "handbags" is a local colloquialism for something understood to be a petty and insignificant disagreement. When Ms Kilshaw received Mr French's message and a copy of the letter of concern, she spoke to Mr French and established that there had been an allegation of what she considered to be physical violence, specifically that the Claimant was alleged to have grabbed Mr Chapman by the throat. Ms Kilshaw decided that a formal investigation was required. Having interviewed the Claimant, Mr Chapman and other employees, Ms Kilshaw suspended the Claimant pending a formal disciplinary hearing. A letter was sent to the Claimant on 30 April, which ends by stating:

> **"You should be aware that the company considers this to be a matter amounting to gross misconduct and a potential outcome of this meeting is your dismissal without notice."**

9. The Claimant attended a disciplinary hearing on 6 May, which was conducted by Laura Fowler of HR and Mr French. At the end of the disciplinary hearing, after a short retirement, Ms Fowler said:

> **"… So you have confirmed obviously that you grabbed Kieran by the kind of the collar area which may have been perceived as the neck area. You are not too sure as to why you lost your temper and obviously afterwards you've realised kind of what you've done and apologised to Kieran. Based on the facts established throughout the disciplinary meeting we have decided the outcome of today's meeting will be dismissal without notice, ok. … Just to clarify the reason why we've come to this decision is the physical violence, we couldn't accept it of any nature at all within the business. … we deem any form of any physical violence as unacceptable …"**

10. Ms Fowler gave evidence before the Tribunal. The Judge noted at paragraph 3.21 of the Decision:

> **"3.21. … Ms Fowler insisted that the claimant's length of service and previous good character were not matters to which she should have any regard whatsoever. …"**

11. The Claimant had over 42 years' continuous service with the Appellant, and throughout that time he had an exemplary disciplinary record. Ms Fowler also insisted that "as a matter of policy we cannot tolerate physical violence". She insisted that the Appellant operates a "zero tolerance policy" towards physical violence. The Judge noted that Ms Fowler further refused to acknowledge that allegations such as these must be seen and taken in the context of all of the surrounding circumstances at the relevant time. She did not consider it appropriate to undertake any assessment as to the level or degree of physical violence.

12. The Claimant appealed the decision to dismiss him, and on 25 June Ms Louise Pheasey, Senior HR Adviser, conducted an appeal hearing. After the hearing Ms Pheasey undertook further interviews with two employees who had previously given statements and Mr French. She then issued her letter dismissing the Claimant's appeal on 9 July without referring back to the Claimant. She dismissed all of the Claimant's grounds of appeal. In her letter dismissing the appeal she said:

> **"… I uphold that this was classed as physical violence which is listed in the company disciplinary procedure as an issue of gross misconduct and therefore the outcome of summary dismissal on this basis was fair and reasonable in the circumstances."**

13. Ms Pheasey gave evidence before the Tribunal. The Judge noted that when asked whether grabbing someone by the collar should be regarded as very much towards the lower end of physical violence, she said she saw no reason to make any differentiation. She too insisted that the Appellant operated a zero tolerance policy towards any incident of physical violence and that any such incident would inevitably result in summary dismissal. She

A accepted that there may well be circumstances where an employee involved in an act of physical violence will not be dismissed but insisted that this case was not one of those. An example given was where an employee reacted to provocation that amounted to sexual harassment or racial discrimination. That was not this case, and, that being so, the surrounding circumstances and the Claimant's record were not taken into account.

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14. The Tribunal found that the investigation undertaken by the Appellant was not one that could be said to be within the range of reasonable responses open to a reasonable employer in all the circumstances. No attempt was made to discuss the matter with Mr French and Mr Middleton, and in particular to obtain from them their assessment as to the seriousness of the incident itself. Further, the Tribunal found that no reasonable employer would have dismissed the Claimant having proper regard to all of the circumstances including his previous record. Having regard to what is just and equitable in all of those circumstances, the Tribunal found that the Claimant contributed to his own dismissal to the extent of 50 per cent.

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15. Mr Morgan advances four grounds of appeal. The Appellant's primary ground is that the Tribunal fell into error by impermissibly substituting its own view for that of the Appellant or at the very least the Tribunal substituted the views of the other managers, Mr French and Mr Middleton, who had considered the Claimant's misconduct at an earlier stage. In support of the submission the Appellant pointed in particular to four passages in the Judgment: first, at paragraph 12, the Judge stated:

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> **"12. … The Tribunal saw no evidence from the respondents [sic] to contradict their original assessment of the incident as "handbags". …"**

16. Secondly, at paragraph 13 the Judge stated:

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> **"13. … The Tribunal found that the subsequent investigation, disciplinary and appeal process were [sic] tainted by Ms Fowler's and Ms Pheasey's exaggerated interpretation of the facts. …"**

17. Thirdly, at paragraph 14 the Judge stated:

> **"14. … Whilst some may consider it offensive, it could reasonably only be categorised as mildly so. …"**

18. Fourthly, at paragraph 3.26 the Judge said:

> **"3.26. … When asked whether she had taken into account the claimant's length of service and good record, Ms Pheasey somewhat alarmingly said that she had done so …"**

19. We do not accept that the Tribunal substituted its own views for those of the Appellant's decision makers. Paragraph 14 of the Judgment makes it clear, in our view, that it was the decision of Ms Fowler and Ms Pheasey that the Tribunal subjected to scrutiny and analysis, correctly applying the "no reasonable employer" test.

20. The second ground of appeal is that the Tribunal misdirected itself in applying the guidance of this Tribunal set out in the case of **Ramphal v Department for Transport** [2015] IRLR 985 when considering the role of Human Resources in the Appellant's disciplinary process. At paragraph 13 of the Decision it is stated:

> **"13. The Tribunal found that this was one of those cases where the HR officers involved had unreasonably and improperly imposed their own assumptions and opinions, in circumstances where their involvement was, in the view of those best placed to decide, simply not required. …"**

21. We agree with Mr Morgan that this is a misapplication of the **Ramphal** decision, the essence of which the Tribunal correctly records at paragraph 8 of its Judgment. Ms Fowler and Ms Pheasey were the actual decision makers in this case. Accordingly, the principle enunciated in **Ramphal** has no application to the facts of the present case.

22. The third ground of appeal is that the Tribunal failed to make any finding as to whether the Claimant's behaviour amounted to gross misconduct or not. It is said that at paragraphs 14

A and 15 the Tribunal conflated its findings on the scale of the act of misconduct (physical violence) on the one hand with its apparent view of the mitigating circumstances (apology, risk to others, stressful circumstances, previous employment record) on the other. Applying the **Meek v City of Birmingham District Council** [1987] IRLR 250 test, it is said that the B Appellant does not know why it lost the case. There is, we think, some force in this criticism. The Tribunal found at paragraph 16 of the Decision that this was a minor, trivial incident that could not reasonably be categorised as the fundamental breach of contract by the Claimant. C Admittedly, this was said in the context of considering the breach of contract claim; however, it is not clear from what is said at paragraphs 14 to 16 read as a whole whether the Tribunal is accepting the physical violence in this case amounts to gross misconduct for the purposes of the D Appellant's disciplinary procedure.

23. Finally, the Appellant contends that the Tribunal acted perversely in that this was a decision that no reasonable Tribunal properly directing itself on the law could have reached. E We do not accept that the Tribunal reached a perverse decision, for the reasons that we shall explain. At the conclusion of the oral submissions we invited Mr Morgan to address us on disposal of the appeal if we concluded (1) that he had satisfied us that there were errors in the F Tribunal Judgment, (2) that we were of the view that there was gross misconduct under the Appellant's disciplinary procedure, but (3) we were of the view that the dismissal was unfair because the Appellant had proceeded on the basis of a zero tolerance policy and had not taken G into account all of the circumstances including the Claimant's employment record. Mr Morgan acknowledged that if that was our view we would be entitled to deal with the appeal without the need for remission to an Employment Tribunal.

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24. We have reached the conclusion that there are errors in the Tribunal Decision that we have identified. We are further of the view that there was physical violence that amounted to gross misconduct under the Appellant's disciplinary procedure. However, it is clear to us that Ms Fowler and Ms Pheasey proceeded on the basis that in this case because there was gross misconduct the Claimant was to be dismissed. There was no evidence that the Appellant did operate a zero tolerance policy towards physical violence. Indeed, the Appellant's disciplinary procedure is expressly stated in terms to the contrary. The use of the word "normally" in paragraph 5.1 indicates that the Appellant has a discretion to exercise. In our judgment, the Appellant erred in not having regard to all of the circumstances, including the Claimant's exemplary record. We are satisfied, having regard to the findings made by the Tribunal, which are not challenged, that by reason of the Appellant's failure to have regard to all of the surrounding circumstances the dismissal of the Claimant was unfair.

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25. In the alternative, the Appellant contends that the Claimant contributed 100 per cent to his own dismissal and that in deciding that he only contributed to his dismissal to the extent of 50 per cent the Tribunal acted perversely. We reject this submission. There is, in our view, no basis for interfering with the contribution finding of 50 per cent.

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26. For the reasons we have given, this appeal is dismissed; both the appeal in relation to the finding of unfair dismissal and in relation to the breach of contract claim.

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