Appeal No. UKEAT/0116/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 October 2016

Before

HIS HONOUR JUDGE SHANKS

MR P M HUNTER

MR B M WARMAN

MR J P STRATFORD — APPELLANT

AUTO TRAIL VR LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MR HENRY TRORY (of Counsel) Instructed by: Bridge McFarland Solicitors Suite 1 Marina Court Castle Street Hull HU1 1TJ
For the Respondent	MR NICHOLAS SIDDALL (of Counsel) Instructed by: Gosschalks Solicitors Queens Gardens Dock Street Hull HU1 3DZ

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

An expired warning can be taken into account as part of the overall circumstances under section 98(4) **Employment Rights Act 1996** when the ET is considering whether a dismissal was fair or unfair. The facts of the previous misconduct, the fact that a warning was given and the fact that it had expired, were all relevant matters. See: **Airbus UK Ltd v Webb** [2008] IRLR 309.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by Mr Stratford, the Claimant, against a Decision of Employment Judge Blackwell, sitting in Lincoln, whereby he dismissed the unfair dismissal claim in a Decision sent out on 28 October 2015.

2. The Claimant started work in November 2001, and he was dismissed by his employer, Auto Trail VR Ltd, the Respondent, on 27 October 2014 with 12 weeks' pay in lieu of notice. He had a poor disciplinary record, which is set out in detail of paragraph 4 of the Employment Judge's Reasons, which I will not read into this Judgment but to which reference can be made. The last 2 items in that list of 17 items were a nine-month disciplinary warning for failing to make contact while off sick in December 2012 and a three-month warning for using company machinery and time for what the Tribunal describes as preparing materials for personal purposes in January 2014. We do not have any idea what exactly that involved. Both of those warnings had expired by the time of the events that led to the dismissal, and it is that point that effectively gives rise to this appeal.

3. On 15 October 2014 the Claimant was seen with his mobile phone in his hand on the shop floor. That was something that the employee handbook described as "strictly prohibited". There was a disciplinary hearing at which the Claimant put forward explanations and excuses for having his mobile phone on the shop floor, and at the end of that hearing the Production Manager, Mr Bristow, decided to dismiss the Claimant. What he said was this:

> **"1. Gross Misconduct**
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> **I have considered the circumstances you explained regarding the problems you were having at home. You were fully aware of the correct procedure regarding emergency contact through the switchboard and whilst I don't believe there is any reason you should have had your phone with you on the factory floor, I accept these were unfortunate circumstances and understand your decision to do so. Taking all of this into account, I can confirm that my decision is that you are not guilty of Gross Misconduct.**

2. Formal Warning

You are fully aware that the use of mobile phones on the factory floor is strictly prohibited and I believe you deliberately chose to ignore these rules, albeit not maliciously. I therefore confirm that my decision is to issue a Final Written Warning.

3. Trust & Confidence

I have had to consider whether you can learn from this process or whether we will be discussing yet another matter within a few months. This is the eighteenth time we have had to discuss your actions, for different reasons, on a formal basis. This is in addition to the informal conversations we have had and on many occasions, you have confirmed that this is the last time. In your defence you asked that you be given one more chance, that you love your job, you are highly skilled and pass on your skills to new employees.

Unfortunately Jon, I genuinely believe that you have been given every chance. You are a Grade 1 employee who should set an example and lead by example as well as train others. You have given me no reason to believe that we will not be having a similar conversation in the near future. Whilst your actions may not always be intentional, you do not understand the consequences of your actions and I do not believe this will change. In fact when the investigation was passed to me by your supervisor, you asked if it was that serious. You were also late for your disciplinary hearing on Friday because you went for a cigarette in case the hearing overlapped your morning break.

I can therefore confirm that my decision now is to terminate your employment.

You will receive 12 weeks' pay in lieu of notice."

4. The Employment Judge found that the reason for the dismissal was, as he recorded in paragraph 13 of his Reasons:

> **"13. … because of [the Claimant's] disciplinary history and because Mr Bristow and subsequently Mr Turpin [who heard the appeal] believed as expressed in the dismissal letter by Mr Bristow as follows:-**
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> > **"You have given me no reason to believe that we will not be having a similar conversation in the near future. Whilst your actions may not always be intentional you do not understand the consequences of your actions and I do not believe this will change." "**

The Tribunal Judge went on to say at paragraph 14 that in his view this reason best fell into the category of conduct so that under section 98(1) of the **Employment Rights Act 1996** ("ERA") he found that the reason or principal reason was one that related to the conduct of the employee. We should say he also rejected the reason that was put forward by the Claimant, which was that the employer simply wanted to get rid of him so that they could recruit someone at a lower salary.

5. The Employment Judge then at paragraph 16 of his Reasons turned to the question of fairness, which is dictated by section 98(4); and we will not read into this Judgment the very familiar words of that section. He dealt with two authorities that have been drawn to our attention and relied on: **Diosynth Ltd v Thomson** [2006] IRLR 284, a decision of the Inner Court of Session; and **Airbus UK Ltd v Webb** [2008] IRLR 309, a decision of the Court of Appeal. At paragraph 18 he said this:

> **"18. It is absolutely plain that [the Claimant's] disciplinary record and the belief that as a consequence of that record [the Claimant] would not improve were the reasons why Mr Bristow decided to dismiss. In my view Section 98(4) permits the consideration of that record. Those facts are to be put into the balance in applying Section 98(4) and this is what I understand the ratio in *Webb* to be. Also to be put into the balance is of course normal employment practice that once a warning has expired then the slate should be wiped clean."**

At paragraph 19 he said this:

> **"19. … Again we come back to Mr Bristow's assertion that having regard to [the Claimant's] disciplinary record and his attitude to discipline in general Mr Bristow had reached the end of his tether and had determined that enough was enough."**

Then, at paragraph 21, his conclusion:

> **"21. I have considered carefully the documentary evidence as to [the Claimant's] disciplinary record and have taken into account his evidence in chief explaining the background and circumstances to that record. I note in particular that his disciplinary hearings have involved no less [sic] than 6 different managers, one of whom Mr Croudson, [the Claimant] accepted in evidence as being a good manager and a man he got on well with. Those documents and the evidence I have heard show that [the Respondent was] loathe [sic] to lose an experienced and generally competent worker but that their patience had finally run out. Was the dismissal fair in all these circumstances. I unhesitatingly say that it was. I am satisfied that applying the test set out by Brown Wilkinson J [sic] in the *Iceland* [*Frozen Foods Ltd v Jones* [1983] ICR 17] case that the decision to dismiss fell within the band of reasonable responses and I therefore dismiss the claim for unfair dismissal."**

6. The Claimant, who is represented again by Mr Trory of counsel, says that that decision was wrong in law. In ground 1 of the grounds of appeal a proposition of law was set out that, Mr Trory says, means that the decision is simply legally wrong. The proposition is this:

> **"1. Where an employee is guilty of misconduct falling short of gross misconduct which, in itself, does not justify the sanction of dismissal, it is not reasonable for the employer to rely upon earlier misconduct as the principle [sic] reason for dismissal where any warnings given in respect of the said misconduct have ceased to have effect: *Diosynth* … and … *Webb* … Accordingly, the Tribunal erred in law by concluding that it was reasonable for the Respondent to rely upon [the Claimant's] disciplinary record as the principle [sic] reason for the dismissal."**

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7. We have been taken to the two authorities that I have mentioned. **Diosynth** was a case where the Claimant had failed to carry out a safety process. He was disciplined and given a 12-month warning for that. The 12 months had expired a few months before, when there was a fatal explosion in the plant that led to an inquiry, which disclosed that the Claimant and 18 others had failed to carry out that same process. The Claimant in that case was dismissed. The employer made clear that but for the previous warning he would not have been dismissed. The Court of Session decided that the dismissal was unfair. The essence of that decision was at paragraph 24 of the Inner House's Reasons, which says that it was a contravention of the principle of fairness for an employer to put a time limit on a warning and then take it into account as a determining factor in a dismissal of an employee for a misdemeanour after the expiry date. We were not actually referred to that paragraph - we were referred to paragraphs 27 and 28 - but it seems to me that the essence of it is there at paragraph 24.

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8. **Webb** was a case in the Court of Appeal that came two years later. The facts, briefly, are these. In July 2004 the Claimant was summarily dismissed for gross misconduct. On appeal the lesser sanction of a final written warning, expressed to remain on his file for 12 months, was substituted, and he was warned that further misconduct was likely to lead to dismissal. In September 2005, three weeks after the expiry of that written warning, the Claimant, together with four fellow employees, was disciplined for being away from the workplace when he should have been working. The employer found them all guilty of gross misconduct. The Claimant alone was dismissed, whereas the other employees, who had no prior disciplinary record, were given final warnings. The Court of Appeal found that an employer's dismissal of an employee for misconduct could be fair within section 98 **ERA** even though the employer in its response to the reason for the dismissal took account of previous

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misconduct that had been the subject of an expired final warning. The judgment by Mummery LJ expressed the question that the Court of Appeal was concerned with at paragraph 4. He said:

> **"4. The question is whether the employer, when considering dismissal of an employee for misconduct, must, for all purposes and in all circumstances, ignore an employee's previous misconduct because a final written warning received for it has expired."**

He then turned at paragraph 42 to consider the **Diosynth** case, for what legal proposition it was authority and whether it was a proposition that had to lead to the conclusion that Mr Webb's dismissal in that case was unfair. First, he said that:

> **"43. … Strictly speaking the *Diosynth* case is not binding on this court [the Court of Appeal], but it is highly persuasive …"**

That follows in relation to the EAT. Second, he turned at paragraph 44 to the general merits of the case, and at paragraphs 45 to 47 laid down some general propositions of law, starting at paragraph 45 as follows:

> **"45. The court's decision … ultimately depends on the construction of the legislation, bearing in mind that the tort of unfair dismissal is entirely the creation of statute …"**

That, of course, relates in particular to section 98. He then at paragraph 46 said this:

> **"46. … with the benefit of full legal argument on the correct construction of section 98 of the 1996 Act, I am persuaded that it is open to a tribunal to find that a dismissal for misconduct is fair, even though the employer, in his response to the reason for which the employee is dismissed, has taken account of the employee's previous similar misconduct, which was the subject of an expired final warning."**

Then, at paragraph 47:

> **"47. Having regard to the reason for dismissal shown by the employer the question to be determined under section 98(4) is whether, in the circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee and this shall be determined in accordance with equity and the substantial merits of the case. I see nothing in the very wide wording of these provisions as laying down a rule for tribunals that the circumstance of the employee's previous misconduct must be ignored by the employer, if the time-limited final warning had expired at the date of the subsequent misconduct, which was the reason, or principal reason, shown by the employer for the dismissal. The fact of the previous misconduct, the fact that a final warning was given in respect of it and the fact that the final warning had expired at the date of the later misconduct would all be objective circumstances relevant to whether the employer acted reasonably or unreasonably and to the equity of the case and the substantial merits. The legislation does not single out any particular circumstance as necessarily determinative of the questions of reasonableness, equity, merits or fairness."**

So far as **Diosynth** is concerned, he said at paragraph 66 that in his judgment that case did not lay down a legal proposition that determines the outcome of the **Webb** case as one of unfair dismissal. He then made a number of points. In particular, he distinguished the **Diosynth** case on the basis that in **Webb** the principal reason for dismissal was the index offence, which was itself a matter of gross misconduct warranting dismissal, whereas in **Diosynth** the reason was more the history, and the index offence did not in itself amount to gross misconduct warranting dismissal.

9. It seems to us that the legal position to be applied by the EAT is as described by the Court of Appeal in paragraphs 45 to 47 of **Webb**. Looking at that account of the law as it should be applied, we can see no error of law in this Decision in the Employment Tribunal, by taking account of the previous record, along with the index offence and the manager's prediction as to how the future was going to go if the Claimant was not dismissed. If **Diosynth** has to be distinguished, we note that in this case the Claimant's record was very different to that in **Diosynth**. It was longer, there were many more incidents, they covered the entire period of the Claimant's employment, and some involved no formal action at all; so, there was no warning to be expired. In **Diosynth**, there was just one previous warning, which had expired and which was described as tipping the balance rather than being looked at as part of a whole record leading to dismissal. We therefore dismiss the appeal on ground 1.

10. Ground 2 is effectively based on the proposition that the Employment Tribunal's Decision was perverse, relying factually on similar points to those made in relation to ground 1. We are quite clear that a perversity appeal is hopeless and say no more about it.

11. Having rejected those two grounds of appeal, we uphold the Employment Tribunal's decision that the Claimant was not unfairly dismissed. In light of that decision, none of the other grounds of appeal or cross-appeal are of any relevance any longer, and we say no more about them.