Appeal No. UKEAT/0120/15/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 September 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MBNA LIMITED APPELLANT

MR M JONES RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES BOYD (of Counsel) Instructed by: Brabners LLP Horton House Exchange Flags Liverpool Merseyside L2 3YL
For the Respondent	MR JAMES CULLEN (of Counsel) Instructed by: Griffiths Kingsley Solicitors Red Hill House Hope Street Chester CH4 8B

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

The Employment Judge found the Claimant's dismissal to be unfair only by reason of disparity with the sanction imposed on another employee who received a final written warning. However the Employment Judge did not apply the guidance in **Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352; if he had done so he would have been bound to recognise key differences between the two cases. His reasoning on the question of disparity did not properly apply section 98(4) of the **Employment Rights Act 1996**. Finding of unfair dismissal substituted.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by MBNA Limited ("the Respondent") against a Judgment of Employment Judge Emery sitting alone in the Employment Tribunal at Wrexham. By his Judgment dated 21 December 2014 he upheld a claim of unfair dismissal brought by Mr Mark Jones ("the Claimant").

2. The Claimant was dismissed for gross misconduct. The Employment Judge found his dismissal to be unfair only because of a disparity between the way in which the Claimant was treated as compared to his colleague, Mr Battersby. On behalf of the Respondent Mr James Boyd argues that the Employment Judge did not apply the test set out in section 98(4) of the **Employment Rights Act 1996** and the guidance set out in **Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352. On behalf of the Claimant Mr James Cullen argues that the Employment Judge did not fall into either of these errors and that his conclusions do not betray any question of law.

The Background Facts

3. The Respondent bank employed the Claimant as a Collections Officer at its Chester offices from 27 February 2006 until his dismissal with effect from 19 December 2013.

4. On 8 November 2013 the Respondent held an event at Chester Racecourse to celebrate its 20th anniversary. Staff were told that it was a work event and that normal standards of behaviour and conduct would apply. Any misbehaviour would be subject to the Respondent's procedures and guidelines. Among the employees who attended were the Claimant, Mr Battersby, and Mr Battersby's sister.

5. Although the event began at 7.00pm, both the Claimant and Mr Battersby had started drinking earlier: Mr Battersby at about midday; the Claimant at about 5.00pm. They knew each other. There was some form of incident between them early during the event: Mr Battersby kneeing the Claimant in the back of his leg; the Claimant licking Mr Battersby's face. Staff who witnessed this incident did not regard it as more than "fun/banter". Later in the evening the Claimant had his arms around Mr Battersby's sister. Mr Battersby came over. He kneed the Claimant in his leg again. The Claimant punched Mr Battersby in the face.

6. After the Claimant left the celebration he and others went on to a club. Mr Battersby knew he was there. He waited outside. He texted the Claimant seven times in all, threatening to "rip your fucking head off". He invited the Claimant to leave. He said he would follow him back to where he was staying and "rip your fucking bastard head off". There was, however, no further incident between the Claimant and Mr Battersby. He never carried out his threats. The Claimant did not in fact receive the texts until the following day.

7. The Respondent held a disciplinary investigation and brought charges against both the Claimant and Mr Battersby. The Claimant was charged with, among other things, punching Mr Battersby and behaviour which had the potential seriously to impair the reputation of the bank. He said that Mr Battersby had kneed him, causing him a dead leg, and he had lashed out in self-defence.

8. The Claimant's disciplinary hearing was undertaken by Mr Peter Horsefield. It began on 10 December. He adjourned until 18 December to make further enquiries. He gave his reasons for dismissal in a letter dated 19 December. He said:

> **"The allegations against you concerned serious matters and we did not find your explanation satisfactory. I considered the fact that you admitted to hitting Andrew Battersby at a work organised social event on 8 November 2013, therefore this fact is not in dispute. You stated**

that you were provoked into this action you felt that you had been assaulted by Andrew, in the form of him kneeing you in the leg on several occasions, with such force that it caused you to experience a dead leg. You classed your actions as self-defence. However, on review, of the witness statements, it is my belief that that it was you who started the altercation by licking Andrew's face shortly after arriving at the party. Again, taking into account the witness evidence, it is my belief that Andrew did then knee you however this was not done with any force or aggression towards you. It then followed that you hit Andrew however I do not believe that there was substantive provocation to you doing so. This act occurred inside a venue which was clearly branded as an MBNA event therefore I also conclude that this could have impacted the reputation of MBNA."

9. Mr Horsefield also undertook the disciplinary hearing concerning Mr Battersby. He found that the text messages which Mr Battersby sent were "of an extremely violent nature and were wholly inappropriate". He found, however, that they were made as an immediate response to the Claimant hitting him. He said:

> **"… I do not believe that it is your intention to follow through on those threats."**

He issued Mr Battersby with a final written warning. At the ET hearing he accepted that the texts amounted to gross misconduct. He said that, in his view, they were after the event and that there was provocation.

10. The Claimant appealed against his dismissal. The appeal was heard by Mr Hough. He accepted that Mr Battersby had kneed the Claimant with a degree of force and had interposed himself between the Claimant and his sister. He said, at the ET hearing, that this amounted to provocation but not sufficient to justify the punch in the face. He upheld summary dismissal.

11. Mr Hough knew at the time of the appeal that Mr Battersby had been given the lesser sanction of a final written warning. At the ET hearing he said he thought the Claimant and Mr Battersby should both have been dismissed. The Employment Judge said:

> **"56. … He accepted that he knew that Mr Battersby had not been dismissed, that he had questioned this decision, but that it did not factor into his decision making or make him consider that the claimant's sanction was excessive in comparison."**

The Employment Tribunal Hearing and Reasons

12. At the Employment Tribunal hearing both parties were represented by counsel as they have been today. On the Claimant's behalf Mr Cullen argued that the Respondent's investigation was insufficient and its conclusions on various questions of fact unreasonable. He specifically argued that the Respondent had not properly considered the issue of provocation and that there was inconsistency between the dismissal of the Claimant and the final written warning given to Mr Battersby. On behalf of the Respondent Mr Boyd answered these submissions, pointing out that the circumstances of the Claimant and Mr Battersby were not truly like for like and that it was not permissible to find the Claimant's dismissal to be unfair because of Mr Battersby's treatment. Both counsel referred the Employment Judge to **Hadjioannou**.

13. The Employment Judge quoted section 98 of the **Employment Rights Act 1996**. He summarised the law of unfair dismissal accurately in paragraphs 4 to 6 of his Reasons. He did not, however, specifically deal with **Hadjioannou** at this point or elsewhere in his Reasons although he summarised quite fully the submissions of the parties relating to it. The Employment Judge, after making findings of fact and summarising the parties' submissions, found that up to the disciplinary hearing the process adopted was reasonable. He then said:

> **"70. I found that had both the claimant and Mr Battersby been dismissed for what were proven (and unarguable) acts of gross misconduct, that both dismissals would have been fair."**

14. In the next paragraph he considered the question of provocation. He said that a reasonable employer would be entitled to find, as the Respondent found, that the Claimant was not provoked "beyond reasonable measure", a phrase which he took from **Stanton & Staveley Ltd v Ellis** EAT 48/84.

15. The Employment Judge found the dismissal to be unfair for reasons set out in paragraphs 72 to 79. I think it is important to set out those paragraphs out in full.

> **"72. But this is not the end of the matter, as the claimant's further argument is that there was wholly inconsistent treatment between himself and Mr Battersby.**
>
> **73. Mr Horsefield conducted both disciplinary matters on the same day. He did not find Mr Battersby guilty of "any wrongdoing" in relation to the punching incident. He found Mr Battersby guilty of acts of what are deemed under the disciplinary policy to amount to gross misconduct, namely the sending of seven threatening messages which were "of an extremely violent nature and were wholly inappropriate …". But he declined to dismiss Mr Horsefield, and the reason why he did so was that the 7 messages were left as "an immediate response to Mark hitting you …". He finds in effect that Mr Battersby was provoked into sending these messages.**
>
> **74. This statement requires analysis on the evidence in front of Mr Horsefield. The messages were quite clearly not "an immediate response" to the punch. Some were some time later and involved Mr Battersby waiting outside another venue for the claimant to leave so he could, in his words, "come and face me you fucking cunt". This in turn calls into question Mr Horsefield's finding that there was no intention of Mr Battersby to follow through with these threats - on the face of it this was simply an unreasonable assessment to make on the basis of the voicemail messages.**
>
> **75. Mr Horsefield therefore did not make reasonable conclusions on the evidence when determining not to dismiss Mr Battersby. The messages were not immediate and it was unreasonable to find that they were.**
>
> **76. It also appears clear that the defence of provocation was applied differently by Mr Horsefield to Mr Battersby. In the claimant's case, the physical nature of Mr Battersby's intervention was not deemed to be a valid defence of provocation beyond reasonable measure but for Mr Battersby the fact he was punched leading him to send phone calls up to several hours later was deemed to amount to provocation beyond reasonable measure. There was no reasoning for this decision and it is difficult to see how any employer could fairly argue that it was reasonable to find that leaving such messages in this manner was defensible because of provocation beyond reasonable measure.**
>
> **77. The question to address is whether the different tests on provocation being applied in relation to the two participants in disciplinary hearings on the same day in front of the same manager amounts to reasonable conduct of the claimant's disciplinary proceedings, bearing in mind the range of reasonable responses test and the need to determine the case in accordance with equity and the substantial merits of the case.**
>
> **78. I considered that a decision to apply different tests of the defence of provocation gave rise to a failure to treat both employees to the same standards of investigation, analysis of the evidence and decision making - by the same manager on the same day. This led directly to different outcomes for the claimant and Mr Battersby.**
>
> **79. Bearing in mind the need to consider the evidence in accordance with equity and the substantial merits of the case, and bearing in mind the requirement not to substitute, I concluded that the respective decision to dismiss the claimant and give Mr Battersby a final written warning was as a result of the different provocation test applied to both, and this amounted to an unreasonable disparity of treatment between the two of them during the respective disciplinary hearings. This rendered the claimant's dismissal unfair. This remedy was not rectified on appeal, despite the information regarding disparity being available to the appeal manager."**

Submissions

16. On behalf of the Respondent Mr Boyd submits that the Employment Judge did not apply **Hadjioannou**. The conduct of the Claimant and Mr Battersby was not the same. The Claimant

punched Mr Battersby in the face during a corporate event. Mr Battersby texted threats to the Claimant which he did not actually carry out following the corporate event. If the Employment Judge did apply **Hadjioannou**, then his conclusion on this point was perverse. The references to applying a different test on the question of provocation really amount to no more than the Employment Judge substituting his views for those of the Respondent.

17. On behalf of the Claimant Mr Cullen submits that the Employment Judge, though not referring to **Hadjioannou** specifically in his discussion and conclusions, must be taken to have followed it. He had been addressed upon it and had recorded the submissions about it. He must therefore be taken as finding that the circumstances concerning the Claimant and Mr Battersby were "sufficient similar" for disparity to be a proper issue. He submitted that it would not be perverse for the Employment Judge to conclude that the conduct of the Claimant and Mr Battersby was essentially comparable. The Employment Judge had directed himself correctly that he must not substitute his own opinion for that of the employer. There is no reason to suppose that he did not apply the law in this respect.

18. I should mention that Mr Battersby also submitted that certain findings by the Employment Judge were perverse: for example, the Employment Judge's finding that Mr Battersby's emails were "not an immediate response". He also emphasised that the Respondent's witnesses, especially Mr Horsefield, had identified that the punch was a matter of central significance in deciding to dismiss the Claimant and distinguish his case from Mr Battersby's. If the Employment Judge's reasoning stated the contrary, it was perverse.

Statutory Provisions

19. The relevant provisions of section 98 of the **Employment Rights Act 1996** are as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
>
> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> >
> > **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it -**
>
> > **…**
> >
> > **(b) relates to the conduct of the employee,**
> >
> > **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

Discussion and Conclusions

20. Where there is an appeal against a finding of unfair dismissal, the respective roles of the ET and EAT are well-known, but it remains important in a case of this kind to restate them briefly. It is the task of the ET to apply section 98(4) to all aspects of the employer's decision to dismiss: the investigation, the process, the conclusions and the sanction imposed. The ET must apply section 98(4), recognising that there may be a range of reasonable ways in which an employer may react to the circumstances which give rise to the dismissal. The question for the ET will be whether the employer's treatment of the case fell within the band of reasonable responses. It is an error of law for the ET to substitute its own view for that of the employer.

21. The EAT's jurisdiction is limited to deciding questions of law. The EAT must therefore not intervene unless there is an error of law in the ET's Decision. The EAT must itself be careful not to substitute its view of the case for that of the ET. Moreover it should read the ET's Reasons in the round, not being hypercritical or pernickety in its treatment of them, but rather, generously looking for the central reasons given by the ET.

22. It is important when considering issues of disparity for an ET to keep the statutory test in section 98(4) firmly in mind. The question is whether it was reasonable for the employer to dismiss the employee whose case the ET is considering. The ET is to answer this question "having regard to equity and the substantial merits of the case" but it remains the central question. If it was reasonable for the employer to dismiss the employee whose case the ET is considering, the mere fact that the employer was unduly lenient to another employee is neither here nor there. That is why arguments about disparity must be considered with particular care and why the guidance in **Hadjioannou** is important.

23. In **Hadjioannou** the Appeal Tribunal accepted the following analysis of the circumstances in which disparity might be relevant to an ET's consideration of an unfair dismissal claim:

> **"24. … Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will be not dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for a dismissal. … Thirdly … evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances."**

24. In this case we are concerned with the third type of circumstance: whether a decision made in truly parallel circumstances made it unreasonable for the employer to dismiss the employee. The EAT accepted, in **Hadjioannou**, that evidence as to decisions made by an

employer in truly parallel circumstances may support such an argument (see also, in this context, **Post Office v Fennell** [1981] IRLR 221 at paragraph 12). However, the EAT sounded a note of caution. At paragraph 25 Waterhouse J said:

> **"25. … Tribunals would be wise to scrutinize arguments based upon disparity with particular care. … there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues raised by s.57(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of the individual employee's case. …"**

25. The approach set out in **Hadjioannou** was endorsed by the Court of Appeal in **Paul v East Surrey District Health Authority** [1995] IRLR 305 at paragraphs 34 to 35, 38 and 41.

26. In this case, although the Employment Judge was referred to the guidance in **Hadjioannou** by counsel during submissions, he did not return to it in his Reasons and conclusions. He did not expressly address the question whether the circumstances of the Claimant and Mr Battersby were sufficiently similar to render an argument on disparity appropriate. If he had done so, he would have been bound to conclude they were not. The Claimant punched Mr Battersby in the face during an event in respect of which he was expressly told that the Respondent's disciplinary rules would apply. Mr Battersby did not. His conduct later that evening - sending text messages threatening violence - was plainly reprehensible but he did not in fact carry out his threat in the workplace or anywhere.

27. Mr Cullen submitted to me that the Employment Judge must be taken to have applied the guidance in **Hadjioannou**. I do not think he did. I think he reached his conclusion by a different line of reasoning, set out by him in paragraphs 72 to 79.

28. As I read the Employment Judge's Reasons, there are two elements to his finding that the dismissal of the Claimant was unfair. Firstly, he found that Mr Horsefield did not reach

reasonable conclusions on the evidence when determining not to dismiss Mr Battersby. The texts which Mr Battersby sent were, he said, not immediate and it was unreasonable to find that they were (see the discussion in paragraphs 73 to 74, culminating in the conclusion in paragraph 75). Secondly, he found that what he described at the "defence of provocation" was "applied differently" in the case of the Claimant and the case of Mr Battersby (see paragraphs 76 to 79 of his Reasons).

29. The first of these elements does not address the question posed by section 98(4) at all. The question for the Employment Judge was not whether the Respondent was unreasonably lenient or reached unreasonable conclusions in Mr Battersby's case. The question was whether it reached reasonable conclusions and applied a reasonable sanction in the Claimant's case. The Employment Judge had for practical purposes answered this question affirmatively in paragraphs 70 to 71. In particular he had expressly found that it was reasonable for the Respondent to conclude that the Claimant was not provoked "beyond reasonable measure"; that the conduct was gross misconduct; and that, subject to what followed, it was reasonable to dismiss.

30. The second of these elements requires rather more unpacking. The Employment Judge's reference to a "defence of provocation" and to the application by the Respondent of "different tests on provocation" has a forensic ring to it. The Respondent was not required to apply a "defence of provocation" or to articulate any particular test for it. Provocation is not a defence to assault in either civil or criminal law. It is a matter of mitigation, to be weighed by the employer, in respect of which no particular test applies. There is no reason to suppose that the Respondent approached the case by considering a defence of provocation. This is the Employment Judge's construct. It seems to me, reading paragraphs 76 to 78, that the

Employment Judge's reference to "different tests" is no more than a lawyer's way of saying that the Respondent made different decisions in circumstances which he, the Employment Judge, considered to be indistinguishable. In this, however, he was not applying the correct legal test. The question, for the purposes of section 98(4), was whether the Respondent's decision to dismiss was a reasonable one. To my mind, the Employment Judge had correctly addressed this question in paragraph 70 of his Reasons.

31. For these reasons I conclude that the finding of unfair dismissal cannot stand. I accept Mr Cullen's principal submissions. The Employment Judge erred in law by not following the guidance in **Hadjioannou** and departed from the statutory test in section 98(4) of the **Employment Rights Act 1996**. If the Employment Judge did not draw a distinction for the purposes of a disparity argument between a deliberate punch in the face at what was designated to be a workplace and a threat afterwards, his decision would, in my judgment, have been perverse.

32. The EAT can only substitute its own decision on the question of unfair dismissal if, given the ET's findings, only one result was possible once the law is applied correctly: see **Jafri v Lincoln College** [2014] ICR 920. For this reason most unfair dismissal cases where an Employment Tribunal or Employment Judge has erred in law must be remitted for re-hearing. In this case, however, it seems to me that the Employment Judge essentially asked and answered the correct legal question in paragraphs 70 and 71 of his Reasons. His subsequent reasoning was a distraction from the correct legal test; and I am in a position to substitute a finding that the dismissal was fair in the circumstances of this case.

33. I will briefly address Mr Boyd's perversity argument. I accept, as he demonstrated to me by reference to agreed notes of evidence, that the Respondent's witnesses did make the point at the Employment Tribunal hearing that the punch was an important part of their reasoning. But I do not understand the Employment Judge to have found the contrary. I would not have allowed the appeal on this ground.