Appeal No. UKEAT/0180/14/LA
UKEAT/0318/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 October 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

UKEAT/0180/14/LA

SPUR WAY FOODS LTD — APPELLANT

MR S ZAFAR & OTHERS — RESPONDENTS

UKEAT/0318/14/LA

SPUR WAY FOODS LTD — APPELLANT

(1) MR S ZAFAR
(2) MR K A MALEK
(3) MR W HAIDER — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS LINDEN QC (One of Her Majesty's Counsel) Instructed by; EEF Legal Services Broadway House Tothill Street London SW1H 9NQ
For the Respondents	MR RICHARD ALFORD (of Counsel) Instructed by: Legend Solicitors Imperial Offices 2 Heigham Road London E6 2JG

SUMMARY

UNFAIR DISMISSAL

The three Claimants were dismissed without notice for being involved in a fight at the workplace with a fourth employee.

An Employment Judge considering their claims of unfair dismissal and failure to pay notice did not say what the employer's conduct was in dismissing them, but instead set out the facts he found as to what had happened during the fight, and concluded in the light of that what he thought a reasonable investigation would have uncovered. He mis-stated the burden of proof twice; made a finding that there had been provocation, which was surprising since he did not find that there had been any violence by the Claimants which had been "provoked" as a result, and nowhere indicated that his findings as to the actual events (as opposed to the employer's perception of them) were related to the issues of whether the Claimants were entitled to be paid notice pay, or had been guilty of contributory conduct, because he made no express distinction between the law's requirement that the actual facts be established in respect of the former, and the fact of what the employer thought when dismissing in respect of the latter. He also found that there was an inconsistency of penalty in that two other employees, who were also present during the fight, had not been dismissed, but did so without enquiring whether the employer reasonably thought they were or were not truly comparable, and, if the latter, did so on reasonable grounds. An appeal based on substitution was allowed, and the case remitted for complete rehearing before a different Tribunal.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. An Employment Tribunal at Watford (Employment Judge Herbert sitting alone) found the Claimants had been unfairly dismissed for Reasons which he gave on 11 December 2014. The three Claimants had been dismissed after a fracas involving another member of staff at work. Six people in total, employees, became involved one way or another in what had happened. On any view, the evidence appears clear that whatever physically occurred was provoked by the behaviour of Adeep Kumar. The employer formed the view that the three Claimants had been themselves to different extents provocative, aggressive and had engaged in the fight. Mr Shahnawaz Zafar was an Engineer, Kalim Malek was a Despatch Supervisor and Production Planner, and Waqar Haider was a Despatch Manager, the latter two therefore occupying supervisory and senior positions. Two others apart from Adeep Kumar who were involved were Assim Khan and Amir Aftab. The employer took the view that they had acted to restrain Adeep Kumar, on the one hand, or one or other of the Claimants, on the other.

The Law

2. The role of an Employment Tribunal is to apply section 98 of the **Employment Rights Act 1996** where a complaint is made of unfair dismissal. The only other complaint which was made in the originating applications was a failure to pay notice pay because dismissal was summary. Section 98(1) requires the employer to show the reason or, if more than one, the principal reason for the dismissal. The burden of proof therefore on that rests on the employer. Subsection (4) reads as follows:

> **"(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 reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee..."

3. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal. Secondly, and more importantly still, the focus of a Tribunal's consideration in applying section 98 has to be upon the actions of the employer. It is not concerned to establish for itself what actually occurred in any case in which misconduct is alleged. The statute looks at the employer's perspective. It does not look generally at the fairness of a dismissal. It does not matter that, knowing what is known or may be established at the time of a Tribunal hearing, a dismissal might be thought wrong or unfair. What matters is whether the employer's decision at the time met the standard of reasonableness imposed by section 98(4).

4. It has become well-established that that generally requires an employer in a conduct case to show the burden of proof being on him in this respect: what was the reason for the dismissal? And the burden being on neither party in these respects: that the employer had reasonable grounds for that belief, reached after a reasonable investigation, and the decision to dismiss which followed from it was within the band of reasonable responses. It is, therefore, the facts relevant to the making of the employer's decision which are the relevant facts for an enquiry. The Tribunal has to ask what did the employer know? What did the disciplinary officer think? Was there a reasonable basis on which to think it? What investigations into the conduct of the employee concerned led him to think this? Were they unreasonable (that is, now recognised to be within the range of reasonable investigations which an employer might reasonably make)?

The Employment Tribunal Decision

5. The Tribunal here is accused in the Notice of Appeal of having substituted its own view of what occurred for the necessary enquiry into the matters I have just set out. That is the first and principal ground of appeal. There are subsidiary matters to which I shall come. It is not a ground of appeal that the Tribunal here adopted a test which was wrong in law, though that is what Judge Herbert did. The Tribunal Judgment began by setting out the issues for the Tribunal: the first asking was the dismissal for a potentially fair reason; the second whether the Respondent employer had a genuine belief that the alleged misconduct had been committed by each Claimant; the third whether such genuine belief was based upon as thorough an investigation as was reasonable in the circumstances to sustain that belief. Then in the opening words of paragraph 7.4 it indicated the Tribunal's view that that was all for the employer to show; whereas, as I have just pointed out, that is erroneous. The same error is repeated in paragraph 8. It is difficult to say whether those errors in fact had any effect upon the Decision, to the structure and pattern of which I now turn.

6. The Judge set out the law, then the findings of fact, then the law relating to facts, and then came to his conclusion that the Claimants had each been unfairly dismissed. But what is absent is any analysis which separated the Judge's conclusion as to what had actually happened, which would be potentially relevant in determining whether or not the Claimants were entitled to notice pay. Notice pay is paid if the Claimants are entitled to it, which they would not be if they were in repudiatory breach of contract. The employer would then be entitled summarily to be dismissed. Where there is such gross misconduct, words which encapsulate the idea of repudiatory breach by an employee, it, as any breach of contract, has to be established objectively on the facts. A breach of contract is not a matter of mere opinion for an employer; it is a matter for a court to assess. Similarly, in dealing with any question of remedy, whether

an employer has contributed to any degree by his conduct towards his dismissal is a matter in which the Tribunal needs to know what happened. It is a matter of factual assessment. It does not involve the Tribunal asking what was in the employer's mind.

7. Those matters therefore need to be kept separate in any analysis from the enquiry into what was in the employer's mind as to what had occurred, whether there were reasonable grounds for that belief after a reasonable investigation and leading to a response which, in the light of that, was within the range of reasonable responses. The Judge never separated these two matters clearly. One might be forgiven for thinking, in the course of the Judgment, beginning at the findings of fact through to paragraph 38, that the Judge was not concerned at all with what the employer actually thought. It is those paragraphs, centrally, upon which Mr Linden, in his Skeleton Argument, focussed his appeal.

8. Secondly, the Judge did not separate the cases of the three Claimants. It can sometimes be extraordinarily difficult to identify what action has been taken by which participant in a struggle or melee which lasts for only a brief period of time. But each employee is an individual, with an individual case, entitled to individual consideration and therefore, separately, to the individual consideration of the employer's thought processes leading to his dismissal of that employee. There is some, but very little, separation in the Tribunal Decision as between each of the employees. In paragraphs 24-38 the Judge, repeatedly using the expression "I find" or "I found that" or "I found on the balance of probabilities that", came to a conclusion that Mr Kumar had provoked the incident and expressed the view that Mr Kumar, even though he had not given evidence, was not a credible witness.

9. He appears to have asked what it was that happened. He did not articulate what, in his view, the evidence showed the employer had concluded, although three witnesses were called from the employer: Mr Dubber, who heard each of the disciplinary hearings leading to dismissals and decided upon dismissal; Mr Malik, who heard two appeals; and Mr May, who heard the third. There is hardly any reference to their evidence at all as to what they thought had occurred. This is strongly indicative of a Tribunal which has become sidetracked from its task under section 98, and 98(4) in particular, into asking what it thought had happened and therefore whether it thought a dismissal was fair or not. The approach is not said to be adopted purely in order to determine the question of contributory fault or the question of entitlement to notice pay. It leads directly into a conclusion that there has here been an unfair dismissal.

10. Thus the structure of the Decision is one in which the Judge, having assessed for himself what he thought had occurred as if he were the primary fact-finder, then assessed the belief of the employer, the quality of the investigation and the reasonableness of the dismissal decision which followed; a process, in effect, of concluding that the employer was at fault because it had not reached the same decision as, given the facts as they appeared to the Judge, it should have.

The Case-Law

11. The authorities all speak with one voice as to the need for a Tribunal to avoid the substitution of its own view of what happened as determining a claim in respect of unfair dismissal (see, for example, **Graham v SSWP** [2012] EWCA Civ 903 per Aikens LJ at paragraphs 35 and 36; see **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220, paragraphs 40-46, passages which are well-known to any employment lawyer). Though care must be taken to ensure that the substitution mindset, as it has been called in **Small**, was not alleged purely because a Tribunal took a different view of what was fair and

reasonable to that which had been taken by the employer (see paragraphs 17 and 18 of the decision of **JJ Food Service Ltd v Kefil** UKEAT/0320/12/SM, 12 February 2013). A view has to be taken, looking as Mr Alford who appears for the Claimant recognises, at the Tribunal Judgment as a whole, whether it appears that that may be what the Tribunal is doing.

Conclusions

12. Here I have come to the clear view that the Tribunal may very well have been substituting its own view of what happened as being determinative of the fairness of the dismissal. I do that because (1) the Judge made findings as to what had happened. He did not clearly make findings as to what the employer thought had happened; (2) he did not appear to separate the discussion as to which the facts would be relevant from the assessment in respect of unfair dismissal; (3) as a matter of structure he determined for himself what had occurred and then concluded, immediately following, that the investigation conducted by the employer had been wrong in that respect for not, in effect, coming to the same conclusion as had he; (4) there are individual matters which show the same approach. Thus the Judge took the view that a very seriously provocative statement had been made by Mr Kumar (see paragraph 29). That was that Mr Kumar had referred to riots in Gujarat in 2002. In Gujurat in 2002, some 25,000 Muslims had been killed, primarily by Hindus. The Judge found that that provocation, as he called it, had been issued at a fairly early stage by Mr Kumar, directed at Mr Malek. He may or may not have known that Mr Malek had lost some members of his extended family, who were killed during that religious violence.

13. The Judge went on to criticise the employer at paragraph 42 for failing to give the weight which the employer should have done to the evidence of serious religious hatred and provocation instigated by Mr Kumar, together with swearing directed at Mr Malek. He referred

to the riots. He thought the comment deeply offensive to anyone from the area, let alone a Muslim who had lost members of his family during the violence, and that the Respondent had simply not appreciated the significance of what had been reported to them by a number of witnesses. This was a reason for thinking, in part, that the dismissal was outside the band of reasonable responses.

14. The documentary material before the Judge, however, showed that during the disciplinary hearings there had been one reference and one reference alone to the possibility of a religious insult having been directed. The handwritten notes of Mr Malek's disciplinary hearing record Mr Malek being asked whether there were any religious issues, to which he was recorded as replying "No". It might have been thought, therefore, that the evidence before the employer from Mr Malek, whom the Judge thought had been particularly insulted by these comments, was that there was no such issue. The individual reasons for suggesting that this comment of the Judge was not borne out by the material are set out at paragraph 24 of the Grounds of Appeal, and those grounds are faithful to the material before the Judge. It appears to me, therefore, that this was a matter on which the Judge was undoubtedly preferring his own view of what had occurred to that which it might have been thought the employer had taken, though it is difficult to know from the Tribunal's Decision quite what the employer had thought because the Judge did not say anything about it in any detail.

15. Next, the Judge thought that there had been provocation. Provocation suggests that a response was provoked. It suggests it is the reason why a physical action has been taken in reaction. It is difficult to see what the Judge thought had actually been done by each of the three Claimants that might have been a response to provocation. At one point (paragraph 47) he referred to their mere presence in the vicinity of what occurred. In another he postulated that

what had happened was purely by way of restraint or self-defence and not at all by way of aggression.

16. There may be an inconsistency between finding extremely serious provocation, on the one hand, and thinking that there had been no aggressive action against Mr Kumar provoked as a response on the other, but it is not entirely clear, and had this been the only ground of appeal (it is one), I would not having heard Mr Alford have been disposed to allow the appeal on this ground, but it does seem to me to be indicative of the general approach of the Judge.

17. Next, the Judge floated the idea of self-defence. The actions such as involved physical contact with Mr Kumar on behalf of one or other of the Claimants were, he thought, taken either to restrain or by way of self-defence. I invited Mr Alford to tell me, he having been present at the Tribunal, whether self-defence had been advanced before the employer and he indicated that it had not been put forward in such terms.

18. For those reasons it seems to me that the substitution appeal must succeed. It is unnecessary, therefore, to consider the other supplementary grounds further and it is unnecessary to consider a separate appeal which was subsequently brought in respect of the conclusions of the Judge as to remedy. It is clear that the consequence of the errors of approach and failure of any clear analysis by the Tribunal is that the appeal must be allowed. The Appeal Tribunal is in no position to make any finding of its own, and indeed Mr Linden QC invites the Tribunal, rightly in my view, to remit the entire case for re-hearing. He submits that should be before a fresh Tribunal. In doing so, he asks me to take into account the clear expression of view given by the Judge which would make it very difficult for him to come to any conclusion other than that the dismissals were unfair, and he regards what Burton J had to say at paragraph

46.4 in **Sinclair Roche Temperley v Heard & Anr** [2004] IRLR 763 as encapsulating the essential argument that he was making in his written Skeleton.

19. Mr Alford, to whose arguments on behalf of the Claimants I should pay some tribute, rightly described by Mr Linden QC as "able", submits that the case should be remitted to the same Tribunal for two reasons. The first is proportionality. The second is that it would avoid a second bite of the cherry for the Respondent's witnesses.

20. As to the first, the case when first heard took two days. I do not regard it as disproportionate for a case of this sort to be heard again over something which I anticipate would be of the same general order of time. As to the second bite of the cherry, it seems to me that, since the Judge made very little on paper of the evidence given by the Respondent's witnesses, this is not a case in which their evidence might be trimmed or improved on behalf of the employer because of their having faced cross-examination on one occasion. I am quite satisfied that this decision was well within the description given at paragraph 46.4 in **Sinclair Roche Temperley v Heard**. It indicates a clear viewpoint. It would be unfair to the parties that it should be heard by the same Judge a second time. Remission will be to a fresh Tribunal.

21. I should make it clear that nothing I have said is intended to pre-judge the conclusions of that Tribunal in any way. Much that has been said before me shows that there are considerable points to be made on both sides. The focus of the Tribunal will, I feel sure, following this decision be, so far as unfair dismissal is concerned, upon why it was that the Respondent decided to dismiss the three Claimants, whether there was a difference, a real difference, between their position and that of the two employees who were not dismissed when it came to deciding the consequence of any finding and thirdly, that it would carefully articulate, if

needing to do so, the basis for any conclusion that notice pay was payable or that there was any or no contributory fault.

22. On that basis this appeal is allowed with those consequences.