Appeal No. UKEAT/0124/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 September 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

P&O FERRYMASTERS LTD APPELLANT

MR M THOROGOOD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS ANDREA CHUTE (of Counsel) Instructed by: Kervin & Barnes Solicitors 23 Berkeley Square London W1J 6HE
For the Respondent	Written submissions

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

The Employment Judge's reasons for finding the Claimant's dismissal on grounds of conduct to be unfair evinced a substitutionary mindset: rather than review the Respondent's findings and reasons, applying the test of the hypothetical reasonable employer, he started from his own strong and repeatedly expressed view on a key issue of fact. This incorrect approach affected his conclusions both as to the Respondent's findings of fact and investigation. Appeal allowed; case remitted for re-hearing.

HIS HONOUR JUDGE RICHARDSON

1. This is an appeal by P&O Ferrymasters Ltd ("the Respondent") against a Judgment of Employment Judge Beard sitting alone in the Cardiff Employment Tribunal dated 28 November 2013. By his Judgment the Employment Judge upheld a claim of unfair dismissal brought by Mr Mark Thorogood ("the Claimant").

The Background Facts

2. The Respondent carries on business in the field of transport and logistics. One of its customers is Tata Steel. It provided the services of the Claimant as a crane and forklift truck driver at Tata Steel's Newport factory. He was employed by the Respondent from 1 January 2007 until his summary dismissal on 25 March 2013.

3. On 7 February 2013, when the Claimant was operating a crane, there was a collision between the crane and the end buffer. The collision was serious enough to cause significant damage to the crane, the buffer blocks from which bolts were stripped and fell out, and connected stairs.

4. The Claimant's account of this collision was as follows. He was moving the crane slowly with a heavy load. His line manager, Mr Edwards, was there. When he was not far from the buffers, there was an electrical cut-out. This required him to use a hydraulic brake. He could not reach it in time. The crane therefore hit the buffers. He was not travelling fast. He did not appreciate that any damage was caused at the time. He carried on after the incident. Later, however, he saw that there was a dent to the plate on the ladders. He went to Mr Edwards to report it. He said that was the only time he left the cab. He thought that, even though he was

driving slowly, the weight of the crane with its load must have been sufficient to cause the damage.

5. Mr Edwards broadly corroborated this account. He said he did indeed witness a collision. The Claimant was driving the crane in a careful and controlled manner. There was a noise, but it was not loud. The Claimant had hit the steps. He thought no damage had occurred. There were contractors nearby working on repairs to roller shutter doors, but they did not stop working.

6. The difficulty with these accounts, from the Respondent's perspective, was that they did not tally with the damage to the crane, the buffer blocks and the stairs. Mr Jones, a crane engineer, said that he found extensive damage to the end stop block and the access staircase. In his opinion, the crane hit the blocks at speed. Mr Selwyn, also an engineer, noted that the crane stop bolts had sheared and that there was damage to the access side steelwork. He said it would appear the crane had been driven at speed into the end stops.

7. The two contractors were interviewed. One, Mr Collins, said that between 10.00 and 11.00 he heard a loud bang sufficient to shake the building. The driver descended from the crane a moment later. No-one else was present when this occurred, though two people arrived afterwards. He did not see the crane carrying anything. Mr Farr's account was to similar effect. There was a loud bang. The driver of the crane descended shortly after the bang. No-one else was present, though two people appeared a short time later. He could not remember seeing the crane carrying anything.

8. Following investigation the Respondent's Mr Walker concluded that there had been a second collision, much more serious than the one which Mr Edwards had witnessed. The Claimant was attempting to attribute the damage to the earlier incident. The Claimant had failed to report a second, much more serious incident and was withholding the truth about it.

9. The Claimant was invited to a disciplinary hearing on 28 February 2013. He maintained his account that there was only one incident. Mr Fitzpatrick, who conducted the hearing, made further enquiries, both as to the evidence of the contractors and as to the damage and its potential significance. He dismissed the Claimant for gross misconduct.

10. The Employment Judge summarised Mr Fitzpatrick's conclusions as follows:

> **"13.1 That the damage was caused when the claimant was driving the crane.**
>
> **13.2 That the claimant's explanation for the damage arising from the accident reported was unlikely to be correct because the incident was observed by Mr Edwards and seen as minor and was carried out at walking pace.**
>
> **13.3 That if the accident had occurred as the claimant had described a piece of steel was suspended from the crane. Mr Fitzpatrick would have expected it to be seen to swing if the claimant were correct; that was not observed by Mr Edwards.**
>
> **13.4 The two contractors did not stop working at the time of the incident described by the claimant as was observed by Mr Edwards.**
>
> **13.5 He believed there was another incident because of the extent of the damage, that the two fitters referred to a loud bang and feeling the building shake and because they saw no load on the crane which would have been evident if the incident they recall was related to the incident observed by Mr Edwards.**
>
> **13.6 That the claimant had failed to report a second more serious incident and in addition was not prepared to admit that it had happened and was therefore withholding the truth."**

11. This is a summary of a careful and detailed letter of dismissal dated 25 March 2013. This in turn was built upon a careful and detailed investigation report. A subsequent internal appeal was dismissed in April 2013.

The Employment Judge's Reasons

12. The Employment Judge heard the case on 28 November 2013. The Claimant was represented by a solicitor, Mr Harkus. The Respondent was represented by Counsel, Miss Chute. It was not in dispute that the Respondent's reason for dismissal was conduct. The substantive issues were defined as (1) whether the Respondent's belief in this conduct was based on reasonable grounds; and (2) whether the Respondent carried out a reasonable investigation given the facts it relied on to support the belief in misconduct.

13. The Employment Judge, as he made clear in his Reasons, was not at that stage dealing with the issue of contribution. It is often convenient to address an issue of contribution at the same time as liability, but the Employment Judge did not do so in this case.

14. The Employment Judge heard, as one would expect in an unfair dismissal case of this type, from the person responsible for the dismissal, Mr Fitzpatrick, and from the person who dealt with the appeal. He did not himself hear witnesses on such subjects as the extent of the damage, the likelihood of its occurrence if the crane was driven slowly, the degree of noise or whether the Claimant got straight down from the cab. For reasons which are very well-known, an Employment Judge is not expected to hear such evidence when determining an unfair dismissal claim.

15. The Employment Judge, after setting out the background facts and reviewing the way in which the Respondent carried out its investigation and disciplinary proceedings, expressed a view of his own about what took place. He said the following:

> **"15. I am clear from the evidence I have heard from the claimant that there was only one accident that involved him on the 7 February 2013. I do not believe given the timings as they have been described to me that there was the possibility of a second accident. However this finding is not of relevance to the issue of unfair dismissal liability."**

16. The Employment Judge then conducted a lengthy review of the case-law on unfair dismissal. He expressed some views about what section 98(4)(b) might mean. In fact, however, the meaning and function of section 98(4)(b) has been the subject of authority (see **Orr v Milton Keynes Council** [2011] IRLR 317 at paragraphs 63 and 92-98). In the end, however, it is plain that the Employment Judge was well aware the test for him to apply was that of the reasonable employer, bearing in mind that a range of responses will often be open to such an employer.

17. The Employment Judge turned to his conclusions in paragraphs 24-27. These are quite lengthy, but it is necessary to set them out in full:

> **"24. The question of unfair dismissal pursuant to section 98 I have found rather difficult to answer.**
>
> **24.1 As I have indicated I am convinced from the evidence that I have heard that there was only one collision involving the crane driven by the claimant, I make no finding as to the seriousness or speed of that collision given the evidence.**
>
> **24.2 However I also have reminded myself of the limits of my jurisdiction as set out above.**
>
> **24.3 I accept that the decision makers had a genuine belief in the misconduct relied upon.**
>
> **24.4 I accept that as far as the process in the disciplinary hearing and appeal is concerned there is no specific procedural defect.**
>
> **24.5 I also accept that a finding of gross misconduct is appropriate in circumstances where the respondent believes that the claimant has been involved in a serious collision and has not only failed to report that incident but has gone further and attempted to cover it up by reference to an earlier much less serious accident.**
>
> **24.6 If the respondent's decision to dismiss was based on the occurrence of the accident and underplaying the seriousness of that accident alone my task may have been simpler. However the respondent also based the decision to dismiss on the claimant failing to report a second accident and not being truthful about a second accident.**
>
> **24.7 I must therefore ask myself was it objectively reasonable for the respondent to consider that there had been a second incident.**
>
> **24.8 That is made up of two aspects: firstly was that a reasonable conclusion based on the evidence the respondent actually had? Secondly was it reasonable of the respondent to limit its investigation to obtaining that evidence and not to seek more?**
>
> **25. I am of the view that applying the principle Occam's razor that the evidence gathered by the respondent points to only one accident, with Mr Edwards and the claimant underplaying the seriousness of the collision in their descriptions of that accident. However can I objectively say the respondent's conclusion could not be reached on the available evidence?**
>
> **25.1 Clearly there were conflicting accounts provided by the claimant and Mr Edwards on the one hand and the contractors on the other, their accounts as to the significance of the incident do not match.**

25.2 In addition to that the respondent had physical evidence that the accident had involved a very substantial collision.

25.3 On that basis I am clear that the respondent could properly reject the evidence of the claimant and Mr Edwards as to the seriousness of the collision they observed.

25.4 What the respondent did instead was accept that these accounts were accurate but the investigator and decision maker than concluded there was a second accident.

25.5 The contractors do not refer to any other incident. The basis for the conclusion appears to be that the fact that the contractors did not see an item carried on the crane and did not see anyone else present.

25.6 This, the respondent concluded, meant that a second accident occurred when Mr Edwards was not present and when the crane was not carrying the steel.

25.7 The inherent improbability of two accidents occurring within a short period and only one accident being observed by the contractors who, on the timings given would have been present throughout is significant. However I accept that the respondent's conclusion is a rational, if improbable conclusion from the evidence as it then stood.

25.8 In my judgement the improbability of this conclusion moves it outside the band of reasonable conclusions that could be drawn from the evidence.

26. I must move then to the next question, has sufficient evidence been gathered in all the circumstances.

26.1 The respondent was going much further than suggesting that the claimant had an accident. It was suggesting that he had covered up an accident; this in my judgment is a very serious allegation.

26.2 I am of the view in such circumstances it would not be reasonable for an employer of this size to draw such a conclusion without understanding properly the mechanics of the damage.

26.2.1 What the respondent did have was two conclusions suggesting speed. These were necessarily opinions and not factual observations.

26.2.2 The decision maker had little indication as to how those conclusions had been reached.

26.2.3 If those conclusions were simply guesses the respondent could not be said to have carried out a thorough investigation; therefore it was incumbent upon the decision maker to understand the process by which those conclusions had been reached.

26.2.4 Given that I am of the view that the respondent simply did not have enough information to decide whether the damage caused by speed or by some other mechanism.

26.3 In addition to this I am of the view that given the emphasis that was placed on the contractors not seeing Mr Edwards and not seeing the piece of steel, that the respondent ought properly to have understood the relative positions of the individuals involved. This is emphasised it seems to me when Mr Collins is questioned later and one possible interpretation of the evidence as recorded was that he was unsighted insofar as what load the crane might be carrying.

26.4 In my judgment both these aspects make the investigation one which fell outside the limits of the band of reasonable investigations that an employer might carry out in these circumstances.

27. In those circumstances the finding was in my judgment one which fell outside the band of reasonable responses on the evidence gathered and in terms of the investigation pursued. I have come to the conclusion that the claimant's claim of unfair dismissal pursuant to Section 98 of the Employment Rights Act 1996 is well founded. This matter will now be set down for remedy. For the avoidance of doubt I have not addressed any issues of contribution."

Submissions

18. Today I have heard from Counsel for the Respondent, Miss Andrea Chute, in support of the appeal. The Claimant lodged an Answer but only to say that he was unable to attend a hearing and did not have legal representation for the appeal. He has e-mailed the Employment Appeal Tribunal to similar effect. He relies on the papers and on the grounds set out by the Employment Judge.

19. Miss Chute submits that the Employment Judge's Reasons, despite their avowal to the contrary, demonstrate a substitution mindset. He started from his own strongly held view, rather than an assessment of the question whether the Respondent acted reasonably. He expressed himself in terms which showed he was considering the claim very much from his own perspective rather than that of the reasonable employer. He failed to review the reasoning of the Respondent to show why it was unreasonable. His criticisms of the investigation were really consequent upon his own strongly held view. The position of the contractors was perfectly well known. There was a plan showing their position by the roller shutter doors. The matter had been investigated by two experienced engineers. Miss Chute has taken me to modern authorities on this question, some of which, in fairness to the Employment Judge, he cited himself.

20. Miss Chute also submits that, despite the detail set out in the Reasons, it is difficult to see why the Employment Judge reached the conclusions he did. Paragraph 15 contains no reasoning of any kind, certainly no assessment of credibility. It is not clear why anything in the timings made the conclusions unreasonable. He seems to have reached the conclusion that not only the Claimant but also Mr Edwards must have underplayed the accident. This was not

advanced by either party, and the Employment Judge gives no reason for concluding that Mr Edwards, whom he did not see give evidence, did any such thing.

Statutory Provisions

21. Section 98(1) provides that it is for the employer to establish the principal reason for dismissal and that it is of a kind specified in section 98(2) or some other substantial reason. Section 98(2) specifies conduct. Section 98(4) provides that, where the employer has fulfilled the requirements of section 98(1):

> **"(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, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

Discussion and Conclusions

22. It is important to keep in mind the different roles of the Employment Tribunal and the Employment Appeal Tribunal. It is the task of the Employment Tribunal (the Employment Judge sitting alone in this case) to apply section 98(4). He must apply the objective standard of the reasonable employer to all aspects of the dismissal: investigation, process, fact-finding and sanction. He must recognise that in many, though not necessarily all, cases there may be a band or range of ways in which a reasonable employer may act.

23. There is appeal to the Employment Appeal Tribunal only on a question of law. In the context of appeals concerning section 98(4) of the **Employment Rights Act 1996** the Appeal Tribunal must itself be cautious of substituting its own opinion for that of the Tribunal.

24. In **Fuller v LB of Brent** [2011] IRLR 414, at paragraphs 27-30, Mummery LJ summarised the position as follows:

> **"27. Unfair dismissal appeals to this court on the ground that the ET has not correctly applied s.98(4) can be quite unpredictable. The application of the objective test to the dismissal reduces the scope for divergent views, but does not eliminate the possibility of differing outcomes at different levels of decision. Sometimes there are even divergent views amongst EAT members and the members in the constitutions of this court.**
>
> **28. The appellate body, whether the EAT or this court, must be on its guard against making the very same legal error as the ET stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the ET without committing error of law or reaching a perverse decision on that point.**
>
> **29. Other danger zones are present in most appeals against ET decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.**
>
> **30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the ET, but then overlooked or misapplied at the point of decision. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

25. In **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 Mummery LJ made the following suggestion concerning the reasoning of Employment Tribunals on the question of unfair dismissal.

> **"It is not the function of appeal courts to tell trial tribunals and courts how to write their judgments. As a general rule, however, it might be better practice in an unfair dismissal case for the ET to keep its findings on that particular issue separate from its findings on disputed facts that are only relevant to other issues, such as contributory fault, constructive dismissal and, increasingly, discrimination and victimisation claims. Of course, some facts will be relevant to more than one issue, but the legal elements of the different issues, the role of the ET and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication."**

26. I have reached the conclusion that, despite his careful self-direction about section 98(4), the Employment Judge has not applied the objective test of the reasonable employer. He has started from his own strongly held conclusion that there was only one incident. My reasons are as follows.

27. The Employment Judge's fundamental task in an unfair dismissal claim is to find why and how the employer took the decision to dismiss and to review whether it was reasonable for the employer to take the decision for those reasons and in that way. The Employment Judge started appropriately, making findings as to the Respondent's process and reasons. He summarised in paragraph 13 the reasons given by Mr Fitzpatrick for his decision. I would then expect the Employment Judge, applying section 98(4), to review the elements of that reasoning and the elements of the procedure, applying the standard of the reasonable employer.

28. The Employment Judge's approach was rather different. In paragraph 15 he interposed a finding of his own, expressed in trenchant terms but with very limited reasoning. After a long disquisition on the law, he returned in paragraph 24 to the very same starting point - his own conviction that there was just one collision. He recognised what he described as "the limits of his jurisdiction" but then returned to his own view at the beginning of paragraph 25.

29. The reference in paragraph 25 to Occam's razor, a principle of philosophy that plurality should not posited without necessity, is unhelpful. There is no rule that accidents and events are all capable of the simplest explanation. In any case, it begs the question: was it necessary in order to explain the evidence to find that there was a much more significant incident than the one Mr Edwards saw? The Employment Judge seems to have thought that it was so inherently unlikely that two collisions would occur that it was unreasonable, for that reason alone, to conclude that it happened. That may have been his view, but that there is no real explanation as to why it was unreasonable for the Respondent to reach the contrary conclusion.

30. In this case the Respondent had found that there was significant damage to crane, buffers and staircase. If all four witnesses were describing the same incident, there was a substantial

gulf fixed between the evidence of the Claimant and Mr Edwards and the evidence of the two contractors. The Claimant and Mr Edwards described an incident which was so minor that they did not think any damage had occurred. There was a substantial item suspended from the crane. They carried on working. The Claimant appears to have said that he did not get out of his cab at that point, and he would seem to have had no reason to do so if there was no damage. Contrast that with the evidence of the contractors to the effect that there was a very loud bang; the driver got out of his cab; and there was until a little later no sign of anyone else present. This, together with the evidence of quite extensive damage, might indeed suggest that there was a second collision.

31. The Employment Judge does not, to my mind, really grapple with the question why the Respondent's reasoning was outside the band of reasonable responses. He seems to have held a view about the timing of events, but it is impossible to see what this was or why he thought the Respondent's view about timing was unreasonable.

32. The Employment Judge had reached a strong view of his own. Rather than express it repeatedly, it would have been very good discipline to set it on one side and examine carefully the reasoning of the Respondent. There was no call to express, still less repeat, his own strongly held view, and it has, in my opinion, deflected him from his true task.

33. To my mind, this approach also carries over into the Employment Judge's conclusions about investigation. The position of the two contractors was perfectly well-known. They were by the roller shutter doors. This was the evidence of Mr Edwards. It was confirmed by the contractors. There was a plan which showed how close the roller shutter doors were to the

crane. There was, so far as I can see, no real issue about the position of the contractors and the position of the crane.

34. So far as further investigation is concerned, the Respondent had two opinions from experienced engineers about the damage. One, when asked, had expressly said in an e-mail:

> **"Yes, I have seen damage like this before caused by a train travelling at speed into the buffers (driver failing to stop)."**

It is difficult to see what exactly the Employment Judge thought was required of the Respondent by way of further investigation and he does not explain it.

35. I have reached the conclusion that the Employment Judge's reasons indeed demonstrate a substitutionary mindset. Because of that substitutionary mindset, he has not reviewed the Respondent's reasoning or, if he did, has not set out why it falls outside of the parameter of a reasonable employer. Nor has the Employment Judge reached tenable conclusions on the question of investigation. They are, to my mind, infected by the substitutionary mindset. It follows that the appeal must be allowed.

36. Miss Chute suggested to me, with appropriate faintness, that I might be able to substitute my own decision. I fear that this is impossible in a case of this kind. The limits on the powers of the Employment Appeal Tribunal are set out in the recent cases of **Jafri v Lincoln College** [2014] IRLR 544 and **Burrell v Micheldever Tyre Services** [2014] IRLR 630. Applying those principles conscientiously, I cannot properly substitute a decision of my own. It follows that the matter must be remitted for re-hearing. I have no doubt that the re-hearing ought to be in front of a different Employment Judge.