Appeal No. UKEAT/0126/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 September 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

KENYON ROAD HAULAGE LTD — APPELLANT

MR N KINGSTON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GEOFFREY ISHERWOOD (Representative) Employment Law Advisory Services Charles House – Albert Street Eccles Manchester M30 0PW
For the Respondent	MR PARA GORASIA (of Counsel) Instructed by: Farleys Unit C1 Hurstwood Court Duttons Way Shadworth Business Park Blackburn BB1 2QR

SUMMARY

UNFAIR DISMISSAL

Reasonableness of dismissal

Procedural fairness/automatically unfair dismissal

The Respondent had dismissed the Claimant following an investigation and a disciplinary hearing. The conduct which the Respondent stated was the reason for dismissal consisted of selling scrap metal generated by work at the Respondent's garage and dividing the money obtained among workers, including the Claimant. The Claimant stated that he had done so for years and thought that the management knew and approved. The Employment Tribunal held that the Respondent did not have a genuinely held belief that the Claimant had committed gross misconduct and had not carried out reasonable investigation. It also held that there was procedural failure, by not making clear what the allegations were. Held: The Employment Tribunal did not err in law. It was entitled to come to its view and explained sufficiently why it had done so. Appeal dismissed

THE HONOURABLE LADY STACEY

Introduction

1. This is a Full Hearing in which the Appellant is Kenyon Road Haulage Ltd: that is, the employer. The employee is Mr Norman Kingston. I shall refer to them as the Claimant and the Respondent as they were in the Employment Tribunal.

2. The Respondent appeals against a decision of Employment Judge Feeney, sitting alone in Manchester, sent to parties on 27 June 2013. The decision was the Claimant had been unfairly dismissed.

The Facts

3. The facts of the case, as found by the Employment Tribunal, are that the Claimant started to work at the Respondent in April 1995 and was dismissed on 2 March 2012. He was a Fleet Engineer in the garage business run by the Respondent. The Respondent is a general haulage company working throughout the United Kingdom and employing about 100 employees. It is a family-run business, the current directors being Wayne Kenyon and Michael Kenyon, who are brothers, and who took over from their father. Mr Wayne Kenyon is the Managing Director.

4. The Employment Tribunal found that the Claimant had a skip about eight cubic yards in size permanently in place in the yard. Scrap metal which was no longer serviceable and which could not be overhauled was put into the skip and when it was full the Claimant would phone a company named EMR to have it collected and the scrap weighed.

5. The practice had continued for some years, the amount of scrap being small when the Claimant first started his employment and increasing. The company (that is, EMR) paid for the amount of scrap after it was weighed. There was no invoice to the Respondent in respect of that. The Claimant estimated the amount of money paid in respect of this scrap at about £700-800 a year. He got the money from EMR and distributed it amongst the other members of staff and himself at the garage. His evidence, which the ET accepted, was that he thought that that practice was allowed in the Respondent's premises and that it was custom and practice in the garage trade to do what he did.

6. In the latter part of 2011 Mr George Campbell, who was the Transport Manager of the Respondent, asked the Claimant what happened to money from the scrap. The Claimant told him, saying that the Kenyon family knew about this. On 1 February 2012 Mr Campbell sent an e-mail to the Claimant, telling him that the money from the scrap must be forwarded to him "as it has now been decided to put this money back in the Kenyon pot". On 21 February 2012 Mr Campbell asked the Claimant to attend a meeting by letter. That letter stated that some anomalies in his way of conducting his duties had come to light. At the meeting the Claimant was suspended.

7. On 27 February 2012 Mr Dickinson, who was then the Operations Manager, held an investigatory meeting at which the Claimant was asked about a number of matters including scrap metal. When he was asked if he was authorised to keep the scrap metal money, he replied that it had been the industry norm for years as well as being the practice he had followed within the Respondent's business. He claimed that it had been discussed in 2007 and that the Kenyons knew about it. He said there had been a casual reference to it by Michael Kenyon in or around 2011. Mr Dickinson, in the course of his investigations, spoke to the other workers, who had

been receiving money and they said that they had got the money and they had always been led to believe that the company knew about it and it was approved by management.

8. On 2 March 2012 a disciplinary hearing was held. The Claimant was asked to attend that by letter, and in that letter the allegations were as follows, as was set out in paragraph 18 of the Employment Tribunal Reasons:-

> **"(a) 'Disposing of company property without the express written permission of a Director or Senior Manager of the business'.**
>
> **(b) 'The monies you received from selling these goods have been distributed by you amongst the other members of staff whilst leading them to believe that your actions had been approved by the business.'**
>
> **(c) 'This Disciplinary Hearing is in respect of Kenyon Road Haulage Limited handbook (Page 10 – paragraph 19) which is read in conjunction with your Contract of Employment and issued to you and verified by your signature dated 21 November 2008.;**
>
> **(d) 'The business has no record of you seeking written permissions for your actions, nor does it have any record of any query/observation logged against you during the consultation period following the issue of the Handbook.'"**

9. At the hearing Mr Campbell produced receipts from EMR, one of which was for a numbered trailer delivering scrap, which the Claimant denied all knowledge of. The Claimant was dismissed at the meeting. He appealed, and a hearing was arranged before Wayne Kenyon. At that appeal the Claimant maintained his position. The outcome of the appeal was set out in paragraphs 33 and 34 of the Employment Tribunal's Reasons, as follows:-

> **"33. In the appeal outcome sent to the claimant on 23 March this event was recorded, and Mr Kenyon stated, 'It is my view that you had received a copy of the company handbook when this was originally issued to you with your new contract of employment', that senior management were not aware of what he was doing and neither was Ian Dickinson or George Campbell, and that he had failed to make Mr Kenyon aware of the procedure. It confirmed that the £856.51 was an invoice in relation to scrap obtained from the company's premises and he said he had taken into account the claimant's length of service.**
>
> **34. He stated, 'I cannot and do not accept that senior management were aware of the process of the disposal of scrap or indeed had ever sanctioned that any proceeds from the sale of scrap could be divided amongst the employees. My findings indicate that you have breached the trust and confidence that the Directors have had in you for a long period of time' and he did not accept that disposal of scrap was part of custom and practice therefore he upheld the decision to dismiss him for gross misconduct."**

Therefore it can be seen that the facts show that the Claimant was dismissed for gross misconduct and that the appeal against that dismissal was unsuccessful.

Illegality

10. There was a discussion at the Employment Tribunal about illegal contracts. The ET decided that the Claimant was not prevented from bringing his claim by any taint of illegality. There was a request for review on that point, which did not yield any different result on the question of illegality (it did prompt the Employment Judge to insert a sentence stating that the Claimant thought the sale of scrap metal was known to the Respondent and condoned by it). No ground of appeal relating to illegality has been allowed at the sift. Counsel has pointed out today that the Employment Judge had to give a decision about illegality because it was argued before her, and that of course is correct. He argues in his Skeleton Argument that the question of illegality has muddied the waters in this case and, while he is right that it did feature in the Employment Tribunal and in the request for review, it is no part of the hearing today.

The Rule 3(10) Hearing

11. At a hearing under Rule 3(10) the EAT did allow appeal on the question of the application of the test set out in the well-known case of **BHS v Burchell** [1978] IRLR 379. That was set out by Lewis J in his decision on the 3(10) application thus:

> **"If it is said to be misconduct, was that belief honest on the part of the employer, did the employer have reasonable grounds for the belief, and did it conduct a reasonable investigation?"**

There is also a ground of appeal allowed by Lewis J in connection with the finding that the basis of the allegations against the Claimant and indeed the allegations themselves were not clearly set out.

The Respondent's Case

12. Mr Isherwood has appeared for the Respondent and has argued that the Employment Judge concentrated on the state of mind of the Claimant. He argues that she failed to apply the **Burchell** test and that she made no reference to the expansion of that test, which is set out in the case of **Post Office v Foley** [2000] IRLR 827. He argues that the employee handbook and the contract of employment under which the Claimant worked were plain in stating that gratuities could not be accepted by workers and that unauthorised possession of company property was gross misconduct. He has argued that the events which the Claimant spoke of and which he did not attempt in any way to hide were covered by a combination, as I understood him, of the policy relating to gratuities and the unauthorised possession of company property. He has argued that the Employment Tribunal found that no-one had given the Claimant authority to deal with scrap, and so he was in breach of the contract between him and his employers, and that he had breached the term of trust and confidence which must exist in such a contract. That being so, Mr Isherwood argues, it is illogical for the Employment Judge to find that the **Burchell** test was not met.

13. Mr Isherwood argues, further, that there were no procedural failings in the dismissal. He argues that the Claimant must have been well aware of the allegations against him from the letter which the Respondent sent and which I have quoted above. He says that it is plain from that letter that the difficulty for the Claimant is that his employers wanted to know about his disposal of company property without permission and his dispersing of money received for that company property to himself and other workers. As part of his arguments Mr Isherwood has argued in his Skeleton Argument that the reasons given by the Employment Tribunal do not meet the well known case of **Meek v City of Birmingham DC** [1987] IRLR 250. Mr Isherwood therefore invites me to allow the appeal.

The Claimant's Case

14. Mr Gorasia for the Claimant resists the appeal on the basis that the Employment Tribunal correctly found that the Respondent did not know exactly why it had dismissed the Claimant. The matter of theft arose only in evidence when Mr Campbell was being cross-examined. Mr Gorasia argues that that shows that the employer did not proceed properly, either procedurally or substantively. He relies today on the cases of **A v B** [2003] IRLR 405 and **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721 for the proposition that in cases of alleged dishonesty an employer requires to make a careful investigation. Counsel argues that the Employment Tribunal was entitled to find that the Respondent did not do so on the facts of this case. He says that the Employment Tribunal was entitled to find that the Respondent did not tell the Claimant exactly what the allegation was, and to find that the Managing Director, Mr Kenyon, did not engage in any meaningful way in the appeal. He says that these procedural deficiencies constitute substantive unfairness.

15. Counsel also argues that the Employment Tribunal dealt briefly with the case of **Burchell** at paragraph 67 of the Reasons and he argues that, if the Reasons are read as they should be as a whole, that it is clear from that short paragraph that the Employment Tribunal applied the **Burchell** test, as refined by the later cases including **Foley**. Mr Gorasia argues that the ET set out the deficiencies in investigation. It set out the lack of apparent understanding by the Respondent of what it was doing, exemplified by paragraph 25 of the written reasons, where it is recorded that, when the representative for the Claimant at the disciplinary hearing asked why the Claimant was being dismissed, Mr Campbell, who was the dismissing officer, said that he was not prepared to go into technicalities and he gave no explanation. Thus Counsel argues that the Employment Tribunal was entitled to hold that the Respondent had not shown that it had a genuine belief that the Claimant had committed gross misconduct nor that it had carried

out a reasonable investigation and, of course, if it did not show that it held such a belief then it did not shown that it had reasonable grounds for holding such a belief.

Conclusions

16. My decision in this case is that the appeal must fail. The Reasons in this case are not very clearly set out. The Employment Judge does not say in terms what are findings of fact and what is, in contrast, her narration of evidence. However, I have come to the view that they are compliant with the **Meek** case in that it is clear enough from them why the Respondent lost the case. It is clear, when read as a whole, that the ET accepted that the Claimant had told the Respondent about the skip in the garage, had told them that it was sent from time to time to EMR, and that the money paid by that company for the scrap was divided up amongst the workers including the Claimant. He thought he was entitled to do that. It is also clear that the ET accepted that the Respondent asked the Claimant to attend an investigatory meeting when this matter, along with others, was discussed. It is clear that the ET found that the Claimant gave the explanation set out above. The ET found that the Respondent sent the Claimant a letter telling him to attend a disciplinary meeting, and I have quoted above the terms of that letter, so far as relevant. It is clear from her findings that the ET found that the letter did not specify in any detail what allegations were made. For example, there is no specification of when things were said to have happened nor how often, nor which particular scrap was being discussed.

17. The ET found that the Respondent referred to the gratuities policy in the company handbook as the policy which had been breached, and it is clear that the ET looked at that policy, because it found at paragraph 61 that the paragraph referred to was not one which

obviously covered the situation with which the company was concerned, so one can tell from that that she considered it.

18. The ET set out the law on unfair dismissal from paragraphs 39-59 and it has not been argued before me today that there is anything wrong with the narration of the law except that there is no reference made to the case of **Foley**.

19. Having set out the law, the ET then went on to give its conclusions, dealing firstly with the illegal contract, which is no longer in this case, and then with procedural unfairness. In paragraphs 58-62 the Employment Tribunal sets out at reasonable length the procedural difficulties which it found. It was entitled, in my view, to find that the procedure had not been properly followed. The ET has explained where it found the investigation lacking and where she it the specification given to the Claimant to be insufficient. It was for he ET her to decide on these matters, and it did not make any error of law on any of those decisions.

20. The ET's findings under the heading "Reason for dismissal" are set out in paragraphs 63-66. On a proper reading of them, the Employment Tribunal states that it did not find that the Respondent's belief in gross misconduct was reasonable for the reasons given in her earlier paragraphs. It seems to me, in this part of the Judgment, that the Employment Tribunal may come close to giving its own view of the investigation rather than considering the state of mind of the Respondent. While Mr Isherwood does not comoplain of substitution, he has submitted to me today that that is the real error of law, that it considered only the state of mind of the Claimant and not the state of mind of the Respondent.

21. I do not agree with the submission. The ET does state that it found the Claimant's beliefs to be genuine; it was entitled to find that as it had heard the evidence. It states in paragraph 65

that it accepts that senior management did not know what was happening with the skip, but in a rather difficult paragraph to construe, it does seem to suggest that the management ought to have known what was happening. However, the ET does not stop there. It goes on, apparently in case it is wrong in what it has written above, in paragraph 67, to deal with the test in **Burchell**. It states succinctly that the investigation was not reasonable, that the Respondent did not understand the meaning of theft, and therefore the Respondent had no reasonable grounds for believing that the Claimant was guilty of gross misconduct. While Mr Isherwood has argued that the ET should have gone on to refer specifically to the case of **Foley**, he has not submitted that there was anything in the case of **Foley, had it been considered,** that would have made this paragraph anything different. Rather, he has submitted that **Foley** is authority for the proposition that the ET does not have to decide what it would have done but rather has to look at what was in the mind of the dismissing officer. It seems to me that that is what it did do. I therefore find that there is no error of law in the ET's judgment.

22. I should make it clear that I accept Mr Isherwood's submission that a person may be in fact not guilty of theft but fairly dismissed because his employer finds he has been guilty of gross misconduct. I accept that the criminal definition of theft is appropriate for criminal courts and that employment law does not require the same sort of proof. It is perfectly plain, as Mr Isherwood submits, that in employment law the employer requires to have a reasonable investigation and from that to have reasonable grounds to hold a genuine belief that a person has done something which may be categorised as gross misconduct. He is quite right to submit that that is quite different from a criminal case for theft. However, it seems to me that in this case the ET has appreciated all that Mr Isherwood has said today, though I understand he was not present in the case before the ET, but it has understood his points. What it has looked at is whether this employer did carry out a reasonable investigation, and did have a genuinely held

belief on reasonable grounds that this employee was guilty of gross misconduct. The ET has come to the view that that did not happen: that is, that the employer did not carry out that reasonable investigation and did not have that genuine belief.

23. That, together with the procedural deficiencies, entitles the ET to find that this dismissal was unfair. Therefore the appeal is dismissed.