Appeal No. UKEAT/0049/15/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 July 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

BRITISH HEART FOUNDATION — APPELLANT

MISS J ROY (DEBARRED) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL MICHELL (of Counsel) Instructed by: Richard Macmillan British Heart Foundation Greater London House 180 Hampstead Road London NW1 7AW
For the Respondent	Respondent debarred from taking part in this appeal

SUMMARY

CONTRACT OF EMPLOYMENT - Wrongful dismissal

An Employment Judge dismissed a claim for unfair dismissal, where the employer thought the Claimant had stolen money from it. He said that if he had had to determine contributory fault he would have found it to be 100%, since he thought on balance she had done what was alleged. He thereby found as a fact that she had stolen from her employer. Nonetheless, he thought the employer was not entitled to dismiss her summarily, and upheld her claim for damages in respect of the pay she would have received during the notice period. He wrongly looked for a term of the contract under which the employer was entitled to dismiss her, rather than applying well established principles of contract law. When the employer sought a reconsideration this was refused on the basis that the employer had in any event affirmed the contract by holding a disciplinary hearing (even though the disciplinary procedure was expressly non-contractual). In reaching his conclusion, the Judge also failed to record the terms of the disciplinary policy faithfully, and wrongly considered that it had not been put to him that by virtue of straightforward contractual principles the employer was entitled to dismiss the Claimant without notice. His decision was totally flawed, and the appeal against it was upheld.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. In a Judgment on 9 October 2014, Employment Judge Nicol at Middlesbrough Employment Tribunal rejected claims for unfair dismissal and non-payment of wages, but upheld the Claimant's case that she had been wrongly dismissed.

The Facts

2. The Claimant was an assistant manager at a furniture and electrical store in Middlesbrough. She was responsible for banking. It appeared to the Respondent that there was a discrepancy between the receipts in the store and the bankings. After what the Judge found to have been a careful and detailed investigation, it concluded on the balance of probabilities that the Claimant had stolen the money. She was dismissed without notice.

3. She always denied it, but the Employment Judge concluded that the employer genuinely believed that she had stolen the money, and that it had reasonable grounds for that belief following a reasonable investigation. It was clear, though the Judge seemed to hesitate a little about it, that dismissal was undoubtedly within the range of reasonable responses.

The Law

4. The law as to wrongful dismissal (in respect of which the appeal arises) needs to be set out.

5. A member of the public might express some surprise if the law were to the effect that an employee whom the employer, on reasonable grounds, suspected of having been guilty of theft

and in respect of whom a Judge concluded that indeed she probably was, had to be kept on at work until the expiry of her full notice period and could not be dismissed immediately.

6. Whereas the focus in unfair dismissal is on the employer's reasons for that dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether, in fact, the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred.

7. In a claim for wrongful dismissal the legal question is whether the employer dismissed the Claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is herself in breach of contract and that breach is repudiatory - that is, in the modern expression of the phrase (see **Tullett Prebon Plc & Ors v BGC Brokers LP & Ors** [2001] EWCA Civ 131) whether she "abandons and altogether refuses to perform" the contract.

8. Just as all contracts of employment contain an implied term on the part of the employer that it will not act without reasonable or proper cause so as to damage or destroy the relationship of trust and confidence which exists, or should exist, between employer and employee, so too the employee may be bound by that term, and is undoubtedly bound by the term that the employee is to provide loyal service to the employer. Stealing from an employer is a clear and undoubted breach of those terms. It could not be otherwise. If an employer, knowing of the repudiatory conduct, dismisses an employee for it, the employer is, by doing so, accepting the employee's breach as terminating the need for it, the employer, to continue to perform its side of the bargain which is the employment contract. In short, if an employee is

guilty of repudiatory conduct, which stealing inevitably is, then except perhaps in the most exceptional circumstances (which for myself I cannot readily bring to mind, but I am prepared to accept may possibly exist), an employer is entitled to dismiss that employee without notice. The employer, by doing so, is not in breach of the contract. It is the employee's breach which causes the termination.

9. In the present case the Employment Judge found (at paragraph 53) that the employee had, on the balance of probabilities, taken the money. What he said was in the context of establishing whether there was contributory conduct for the purposes of compensation in respect of unfair dismissal. As I have said, that involves determining whether or not the employee has, in fact, done something which, so far as the compensatory award is concerned, caused the dismissal. The Judge commented:

> **"53. … If the Tribunal was required to decide whether the claimant had done what she was alleged to have done in order to decide the level of contribution, it is likely that on the balance of probability the Tribunal would have decided that the claimant did do what she was alleged to have done. In that event, the claimant is likely to have been found to have contributed one hundred per cent. …"**

10. Although this is expressed on an hypothesis and qualified by the word "likely", it is clear that the Tribunal's view was that the act of taking the money had actually occurred. Accordingly, it is plain that the employee was, on the Tribunal's on findings of fact, in breach of contract and it would be perverse to think that the breach was anything other than repudiatory. There are no circumstances here which could come within the scope of the exception for wholly exceptional circumstances which I am, at least for present purposes, prepared to accept may exist.

11. Why then did the Judge decide that the Claimant was entitled to be paid for the notice period and that it was a breach by the employer not to keep her on the books for that period? The reasoning begins at paragraph 55, as follows:

> **"55. With regard to the alleged wrongful dismissal, the Tribunal had regard to Sections 86 and 88 of the ERA and Regulation 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order, 1994.**
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> **56. Whilst the Tribunal recognised that summary dismissal is the usual sanction for dismissal applied by most employers, this is normally made clear through contracts of employment, disciplinary procedures and correspondence relating to disciplinary procedures. The Tribunal asked the respondent to explain the basis on which it considered that it was contractually entitled to dismiss the claimant without notice. The respondent acknowledged that this was not set out in the claimant's contract of employment, although there was a reference to dismissal for gross misconduct in respect of holiday pay. The respondent's disciplinary procedure is described as not being contractual. In that procedure, there is a passing reference to summary dismissal but it is not included in the list of sanctions. In the letter inviting the claimant to the disciplinary meeting it is only stated that a finding of misconduct could result in dismissal. The respondent did not seek to set up any alternative justification for summary dismissal.**
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> **57. Having regard to all of the circumstances, the Tribunal was not satisfied that the respondent was entitled to dismiss the claimant without notice. It follows that the claimant's complaint that she was wrongfully dismissed is well founded."**

12. The reference to section 86 is a reference to that section in the **Employment Rights Act 1996** which sets out the right of the employer and employee to receive minimum periods of notice. It is irrelevant to the present discussion, because in subsection 86(6), to which the Judge did not make reference, it says:

> **"86(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."**

13. Section 88 has nothing to say as to whether dismissal is wrongful or not, though it may have a relevance as to compensation. The Jurisdiction Order merely gives the Tribunal jurisdiction to consider the claim.

14. Paragraph 55, therefore, takes matters no further.

15. What is missing from paragraph 56 is any discussion of the contractual principles which I set out above in this Judgment. It also is less than faithful to the material which was before the Judge. It is right to say that the disciplinary procedure operated by the Respondent was expressly said not to be contractual. It is, however, wrong to refer to it as not including summary dismissal in the list of sanctions. Indeed, anyone considering that phrase would think it a non sequitur; dismissal plainly is a sanction. However, in any event, within the disciplinary procedure put before the Judge these paragraphs are contained. First, under the heading "General principles":

> **"… management has the right to dismiss an employee, without notice, where gross misconduct or gross negligence has occurred, or where an employee has committed an act which would have made continued employment unacceptable to the Foundation, its customers or other staff."**

16. There is a list of matters which the employer will usually regard as gross misconduct or gross negligence. It is not a complete list. However, it does include at the first bullet point of several, though is not limited to, "Theft, dishonesty … misuse or misappropriation of BHF funds or property". Nothing, therefore, could be clearer for the purposes of the disciplinary policy than that theft would be regarded as gross misconduct, and that gross misconduct gave the employer a right, at least under the terms of the policy, to dismiss the employee, and that such a dismissal would be without notice.

17. When the policy continues it is true that at paragraph 10, under the heading "Dismissal or demotion for gross misconduct or gross negligence", it says such a sanction would be appropriate for an act of gross misconduct or gross negligence which had been committed. This does not say whether the dismissal which is provided for is summary or on notice. It does not have to. There is no suggestion that there is any qualification to that which anyone might

expect to be the usual position, namely that a thieving employee is likely to be dismissed immediately without notice and without any further pay.

18. It seems that the Judge in paragraph 56 was looking to find a contractual entitlement to dismiss. The error here, in my view, was in assuming that the dismissal was effected under the contract by the exercise of contractual powers contained in that contract, whereas it was at common law quite simply a response by the employer to conduct by the employee, which indicated in the clearest way, by stealing from her employer, that she was not honouring the contract. If a employee shows that she is not going to honour it, an employer is not bound to its side of the employment bargain. Since the right to notice is part of that bargain the employer was not bound to provide it.

19. The Employment Judge did not engage with the case in respect of wrongful dismissal which it was plain from the documents before me had been put to him. The witness statement of Mr McMenemy gave the reason for her dismissal without notice as being gross misconduct, namely theft. At the outset the submissions made by legal counsel to the Tribunal posed the questions for it to determine. He put them as being whether the Claimant committed misconduct, and whether this was gross misconduct entitling the employer to summarily dismiss. The Judge did not honour the Presidential Guidance given to Employment Judges to set out the issues to be determined at the outset of the Judgment. Had he done so it is likely he would have reminded himself to ask whether the Claimant had committed an act of gross misconduct and whether, if so, she had been dismissed in response. That would be all that he would have needed to do.

20. The story does not end there. Surprised by the decision by the Judge that, on the one hand, the Claimant failed in her claim for unfair dismissal, but that, on the other, the employer was found liable to pay her damages for failing to continue to employ her during the notice period to which she would have been entitled if the contract subsisted, it sought Reasons. When those Reasons were provided the employer sought a reconsideration. The Judge held that there was no reasonable prospect of the Judgment being varied or revoked. His reasons for that, given on 28 October 2014, set out at paragraphs 6 and 7, are as follows:

> **"6. If one party to a contract of employment commits a fundamental breach of that contract of employment, the other party has the choice of accepting the breach or waiving it. This is clearly demonstrated in the respondent's disciplinary procedure where it is stated that 'dismissal or demotion for gross misconduct or gross negligence … will be appropriate when an act of gross misconduct or gross negligence has been committed …', showing that the choice of affirmation is available.**
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> **7. Can the respondent show that it was intending to accept a repudiatory breach of contract? The respondent's conduct is consistent with affirming the contract of employment by following its disciplinary procedure and purporting to make decisions in accordance with that procedure. In the letter dated 28 November, 2013, from the respondent to the claimant it is not suggested that summary dismissal, as opposed to dismissal, is under consideration. In its response to the complaint (which appeared to have been drafted by the respondent's representative), the respondent states that 'the claimant was summarily dismissed for gross misconduct in line with her employment contract and therefore not entitled to notice'. In other words, the respondent affirmed the contract of employment and relied on it in dismissing the claimant. The fact that the respondent was wrong in its assertion as to the terms of the claimant's contract of employment does not detract from the respondent's intention. The respondent never sought to vary this part of its case. If it now seeks to do so, it has failed to set out its proposed amendment.**
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> **8. As the respondent had not alleged that there had been a repudiatory breach of contract, the Tribunal was not obliged to find whether one had occurred or not. …"**

21. There are various concerns about this line of reasoning. First, it might be observed that in paragraph 6 there is a rather fuller consideration of the terms of the disciplinary procedure than there was in the original determination, but still the Judge did not refer to the passages in full, which I have quoted above, which make it clear in the terms of the disciplinary procedure that there could be a dismissal without notice.

22. As to paragraph 7, he took as affirmation of a contract of employment the Respondent's conduct in following that which in his earlier determination he had recognised not to be part of

the contract at all. But more fundamentally, if the suggestion is that an employer who is following a disciplinary procedure is thereby affirming the contract so that if following the disciplinary hearing it is clear to the employer that the employee has actually committed a theft, he can no longer dismiss the employee for that theft, this is completely misguided. The purpose of a disciplinary procedure is to ensure fairness in dismissal. By operating the disciplinary procedure the employer is not affirming the contract. Its very existence and continuation is necessarily in the balance where the charge is serious enough. The employer instead is ensuring that it takes a fair and reasonable decision and that it does not jump too hastily to a conclusion, which might be right but which might also be in error, to the effect that the employee has committed a repudiatory breach. The paragraph 7, in my view, is misguided and demonstrates a misunderstanding of the processes involved.

23. The case made by the Respondent in the ET3 was not a case which, as the Judge appeared to think in the earlier paragraphs of the reconsideration, was that put to him at the hearing. I have already quoted the opening words of the closing submission on behalf of the employer. That is entirely consistent with the ET3. The case is a relatively simple one. The employer thought that the employee had been stealing. The employer had a disciplinary hearing. At the end of that the employer was convinced. The employer might not have been correct but the Employment Tribunal agreed with the employer's conclusion. Objectively, on balance of probability, that is what happened. There was no other conclusion the Employment Judge could have come to but that a dismissal for that reason did not have to be on notice. It was clearly the employer accepting the conduct of the employee as putting an end to its own obligations to continue the contract.

24. The Judgment under appeal and its reconsideration are, in my view, totally flawed and I have no hesitation in allowing this appeal. The claim in respect of wrongful dismissal is dismissed. There is no other conclusion which on findings of fact this Judge could have reached.

25. In reaching this determination I have not heard from the Claimant. She was debarred from appearing, having taken no part in the appeal and having issued no Respondent's Notice. The reasons for that may be apparent given the nature of the case. It nonetheless seems to me that it would have been very difficult, if not impossible, for anything to have been said on her behalf which would have affected the conclusion to which I have just come. The appeal is allowed.