

Appeal No. UKEAT/0211/14/JOJ

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

At the Tribunal
On 5 November 2014

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

BGC TECHNOLOGY SUPPORT SERVICES LTD

APPELLANT

MR J MOORE

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR CRAIG RAJGOPAUL
(of Counsel)
Instructed by:
BGC Technology Support Services Ltd
1 Churchill Place
London
E14 5RD

For the Respondent

MR JOHN MOORE
(The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The Employment Judge found that the Claimant had been unfairly dismissed. However, in breach of rule 62(5) of the **Employment Tribunal Rules of Procedure** he failed to identify the relevant principles of law. Since it was not clear how he had reached the view that the dismissal was unfair and there were indications that he may have fallen into the error of substituting his own views for those of the Respondent, the appeal was allowed and the matter remitted to a different Employment Judge.

HIS HONOUR JUDGE SHANKS

1. This is an appeal against a decision of Employment Judge Prichard in East London, sent out on 21 February 2014, whereby he upheld a claim of unfair dismissal against the Appellant, whom I shall refer to as “BGC”, and he decided that there should be no deduction under **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 or for contributory conduct on the part of the Claimant.

2. The background is that the Claimant was employed by BGC as a communications analyst for the Cantor Fitzgerald Group from 30 April 2007 until he was dismissed on 8 March 2013 with pay in lieu of notice.

3. In August 2012 an anonymous note was sent to internal audit raising a suspicion of fraud and stating that investigators should look at purchasing from two companies: one called Indigo Forward, a company associated with James Stere; and the other a company called Tradesure which was associated with Geoff Marvell. An investigation was duly started. The Claimant was interviewed twice by the investigators, Mr Camery and Mr Lampert. He was asked in the course of the interviews about a particular order for 60 “turrets” which had been placed with Tradesure. The investigators wrote a report, and they said in their summary at the beginning:

“John Moore [the Claimant] lied during the investigation about Geoff Marvell’s (former BGC Employee and founder of Tradesure) relationship with the Indigo founder and Indigo CEO (James Stere);

The Company paid for 60 turrets from Tradesure in a transaction that has several serious irregularities detailed below.

Recommendation

Based on our investigation, we recommend that HR in the UK institute a formal disciplinary process because we believe John Moore has been potentially involved in fraudulent activity and was less than truthful during the investigation. At a minimum, JM receipted turrets without seeing them and they were never received, demonstrating carelessness that caused the company harm.”

4. The matter was duly passed to Rob Stevens to conduct the disciplinary process. The Claimant was suspended on 22 February 2013 and invited to a meeting to take place on 26 February 2013. He was told that if he was found guilty of gross misconduct, he could be dismissed. Mr Stevens clarified with the investigators what it was that the Claimant was said to have been untruthful about in the course of the investigation, and the Employment Judge dealt with this at paragraph 19 of his Judgment by quoting a response that Mr Stevens had from the investigators:

“We asked each of Steere [sic], Marvell and Moore about their relationship. Each said they knew each other. They said that since Marvell’s departure from BGC they saw each other rarely, and chatted on the phone occasionally, most recently about six weeks before the interview. Moore was interviewed on 27 November 2012, the others on 12-13 December. We attached emails concerning Steere’s [sic] stag do in October which we believe are inconsistent with these statements.”

There were a number of emails that were before the Employment Judge and before me that indicated that the Claimant and Mr Marvell had been among the guests at what was described as a stag do, which consisted of a weekend in the Isle of Wight, the “stag” in question being Mr Stere.

5. Before the meeting on 26 February 2013 the Claimant produced a lengthy paper answering point by point the contents of the investigation report I have already referred to. After the meeting further questions were put to him, which he answered in an email dated 2 March 2013. After the meeting Mr Stevens also made enquiries about how the procurement system that had been used to purchase the 60 turrets worked. Following all of those enquiries and the disciplinary hearing Mr Stevens wrote a letter of dismissal to the Claimant on 8 March 2013, and the conclusions in that letter were as follows:

“The principal conclusion I have reached is that you have shown a fundamental lack of due care and attention in carrying out your duties in procuring equipment for the company. You have admitted that your actions in receipting a valuable consignment of goods without checking whether they had indeed been delivered were not appropriate. In addition, this does not appear to be an isolated incident, as you have confirmed that you habitually receipted goods delivered on this basis.

I note that you have represented that your knowledge of the iProcure system is not good. I am concerned however that you have not sought sufficient training you claim you require in the number of years since the system was implemented. Given your length of work experience in this area, I do not accept that you believed that receipting the delivery of the goods was in order for the purchase order to be raised. Your stated misunderstanding of the procurement chain is not credible in my view.

With regard to your responses to questions from both the investigation team and myself regarding your knowledge of the working relationship between Geoff Marvell and James Stere, and your relationship with them both, I am concerned that your answers have been less than truthful and forthcoming and they actively sought to significantly downplay the closeness of the friendship between all three of you. This is evidenced by your and Geoff Marvell's attendance at James Stere's "stag do" and subsequent wedding invitation, whilst claiming that the relationship between all of you is not close and merely a good working vendor/customer relationship.

In conclusion therefore, I have determined that your actions constitute a fundamental breach of duty as an employee of the company in your failure to follow appropriate procedures to protect the company from potential material financial loss. In addition, your responses to certain questions posed to you during the investigation and subsequent disciplinary process have not met the standards expected of an experienced company employee in that they have been at times misleading and at others not credible."

The Claimant's employment was therefore terminated with pay in lieu of notice.

6. The Claimant appealed against that decision, and his appeal was in due course dismissed by Mr Pion. Mr Pion rejected the points made against the findings by Mr Stevens that I have already referred to, but there was in addition another matter set out in Mr Pion's letter following the appeal hearing:

"It has come to my attention that since your dismissal, you have been in contact with at least two junior individuals on the Desktop Support team with the intent to gain access to your PC and network drives. The manner in which you have attempted to gain this access has been surreptitious. You have not contacted HR but instead appear to have deliberately targeted junior members of the team, who may have been more easily persuaded to grant you access, which calls into question your motives, however benign you claim them to be. These actions constitute a serious breach of the trust and confidence on your part and further calls in to question your judgement and ability to perform your role [to] the level required by the Company.

Conclusion

I reject your points of appeal ... [and] I also consider your recent action in surreptitiously attempting to gain IT access constitutes a further breach of trust and confidence. Consequently, I uphold Mr Stevens' decision to dismiss you with notice. I trust this concludes this matter. ..."

7. There was no dispute that the two reasons given by Mr Stevens and the additional reason given by Mr Pion were reasons that the employer, BGC, genuinely believed to be valid reasons.

The job of the Employment Judge in considering the Claimant's claim for unfair dismissal was therefore to consider in accordance with section 98(4) of the **Employment Rights Act** whether in all the circumstances BGC acted reasonably or unreasonably in treating those reasons as sufficient to dismiss the Claimant.

8. In considering that question he should have reminded himself: (1) that there was no onus on BGC; (2) that he needed to consider whether BGC had reasonable grounds for their belief in the misconduct that they had relied on and that they had carried out as much investigation as was reasonable in all the circumstances, and to consider whether dismissal was a sanction within the band of reasonable responses to those findings; and (3) he should have reminded himself that he must not substitute his own views for those of BGC in considering those matters. What I have just said is all well-known, commonplace law that was of direct relevance to this case.

9. Under rule 62(5) of the **Employment Tribunal Rules of Procedure** that law should have been identified by the Judge in his Reasons. Unfortunately, in this case the Employment Judge failed entirely to follow that rule; indeed, he made no reference at all to the law except for an erroneous reference to the meaning of summary dismissal in paragraph 50 of his Reasons. That omission is clearly an error of law.

10. In those circumstances, unless I am satisfied that it is clear that, notwithstanding his omission, he did in fact ask himself the right questions, the appeal must be allowed. Mr Rajgopaul has taken me through the Judgment and some of the background material at some length. Far from being satisfied that the Judge has asked himself the right questions and applied the law correctly, it seems to me there is plenty of reason to think he may not have. The

Judgment is somewhat disorganised and muddled and it is not at all clear what it is that led the Judge to the conclusion that the Claimant was unfairly dismissed; further, there are numerous findings of fact by that indicate that he may well have substituted his own views for those of BGC - I simply refer in this context to paragraphs 28, 29, 36, 41, 43, 46 and 61 of the Reasons. Furthermore, there are two findings of fact for which there does not appear to have been any evidence: first, in relation to the question of whether the Claimant raised at an earlier stage a point he raised on appeal about a Mr Marino giving him instructions; and second, in relation to Mr Pion's knowledge of the iProcure system. Furthermore, the Judge wholly fails to mention the evidence to the effect that Mr Stevens himself sought information about the operation of the iProcure system.

11. For those reasons, in my view, the Judgment simply cannot stand. It is not appropriate, however, for me to decide the issues that in my view remain open and "up for grabs." In particular, the Claimant has said in the course of his submissions, which were made patiently and cogently today, that the essence of this case is that dismissal was not a fair sanction, or, one should say, not within the range of reasonable responses. That is a point that was not really considered at all by the Employment Judge except perhaps very elliptically in paragraph 50 of his Reasons. For those reasons, the case must clearly go back to the Employment Tribunal, and, given the criticisms that have been made of the job done by the Employment Judge, it clearly cannot go back to him; it must go back to another Employment Judge.