Appeal No. UKEAT/0074/15/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 July 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR G CHARLES — APPELLANT

TESCO STORES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS TAMAR BURTON (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR TIMOTHY ADKIN (of Counsel) Instructed by: Squire Patton Boggs (UK) LLP 2 Park Lane Leeds LS3 1ES

SUMMARY

UNFAIR DISMISSAL - Contributory fault

Whether the Employment Tribunal sufficiently explained their reasoning in finding 50 per cent contributory conduct; see **Steen**. They did.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This all-parties hearing is convened to determine one issue remaining in an appeal brought by Mr Charles, the Claimant before the Bedford Employment Tribunal, against the Reserved Judgment of an Employment Tribunal chaired by Employment Judge Sigsworth promulgated with Reasons on 14 July 2014. The headline issue concerns contribution, assessed by the Tribunal at 50 per cent. The Respondent here and below is his former employer, Tesco Stores Ltd.

Background

2. The Claimant, described as being of black African Caribbean ethnic and racial origin, commenced employment with the Respondent as a forklift truck driver on 3 August 1998. He was dismissed on 4 August 2011, the Tribunal found, for some other substantial reason ("SOSR"), namely a breakdown in the employment relationship (see **Perkin v St George's Healthcare NHS Trust** [2005] IRLR 934 CA and **Ezsias v North Glamorgan NHS Trust** [2011] IRLR 550 EAT) considered at paragraph 7 of the Tribunal's Reasons. That dismissal followed a history of grievances brought by the Claimant during his employment, a total of 17 in all. It preceded the closure of the Fenny Lock distribution centre, at which the Claimant was based, on 10 September 2011. Since he had withdrawn his application to relocate to employment in Daventry, his employment would have ended on that date by reason of redundancy (see **Employment Rights Act 1996** ("ERA") section 139(1)(b)(ii), closure of his place of work).

3. Appended to the Tribunal Judgment is a list of issues. Focusing on claim 7 (for he had made seven separate claims to the Tribunal), the list of issues addresses his complaint of unfair dismissal. The first issue identified is: what was the reason for dismissal, was it a potentially fair reason, and was dismissal procedurally fair, given that he was off sick and unable to attend the disciplinary hearing that resulted in his instant dismissal with 12 weeks' pay in lieu of notice.

4. The next heading in the list is "Redundancy payment", and the issues under that head are set out as follows:

> **"The Claimant maintains that there was a redundancy situation and that he should have been made redundant and given a redundancy payment. The issues therefore are:**
>
> **i) Was there a redundancy situation?**
>
> **ii) Did the Respondent refuse to make the Claimant redundant and dismiss him for another ostensible reason?"**

5. For present purposes it is also necessary to mention this issue under paragraph 5, "Victimisation":

> **"The Claimant maintains that contrary to s27 Equality Act 2010 he has been victimised on the basis that he has been dismissed because he has raised previous grievances containing allegations of race discrimination."**

6. I need not dwell on the various claims rejected by the Tribunal - there is no cross-appeal by the Respondent - rather, those upheld by the Tribunal. The Tribunal found, as I have indicated, that the reason for dismissal was SOSR, a breakdown in the employment relationship, and that dismissal for that reason was unfair on procedural grounds (see paragraph 9.2). However, they went on to find, subject to the so-called redundancy point, that had a fair procedure been followed the dismissal would have been fair for SOSR (paragraph 9.4); what I would characterise as the "**Polkey**" point (**Polkey v AE Dayton Services Ltd** [1987] IRLR 503).

7. The list of issues does not mention contributory conduct by the Claimant for the purposes of the unfair dismissal claim. However, the Tribunal asked the parties to address them on contributory fault (see paragraph 9.4). They gave themselves a self-direction in law as to contribution (see paragraph 7) by reference to **ERA** sections 122(2) and 123(6), and the Court of Appeal judgment (see particularly per Brandon LJ) in **Nelson v British Broadcasting Corporation (No 2)** [1979] IRLR 346. Their finding, shortly expressed at paragraph 9.4, was that the Claimant had significantly contributed to his dismissal by his conduct in the breakdown of the relationship, and they refer to their findings of fact. They assessed the contributory factor at 50 per cent.

8. At paragraph 9.8 the Tribunal upheld the victimisation claim in claim 7. The rationale appears to be that the Claimant was dismissed because of the breakdown in relationships in large part because he had persisted and was likely to persist in putting in grievances and Tribunal claims alleging racial discrimination. Earlier complaints constituted protected acts; there is no cross-appeal against that part of the Tribunal decision. Finally, on redundancy payment, at paragraph 9.9 the Tribunal say:

> **"The Claimant is entitled to a redundancy payment, on the concessions made by the Respondent."**

9. That refers back to paragraph 9.4, where it is recorded that the Respondent has conceded that they should have allowed the Claimant to be made redundant (see also paragraph 3.16, last sentence). Having summarised the Tribunal's relevant findings in their Reasons, I should set out the first four paragraphs of their Judgment:

> **"1. The Claimant was unfairly dismissed.**
>
> **2. The Claimant contributed to his dismissal to the extent of 50%.**
>
> **3. The Claimant is entitled to be paid a redundancy payment by the Respondent.**
>
> **4. The Respondent unlawfully victimised the Claimant by dismissing him (claim 1201633/2011)."**

10. All other claims were dismissed (see paragraphs 5 to 7), and remedy was adjourned; no remedy hearing has yet taken place whilst this appeal remains pending.

The Appeal

11. Mr Charles, who had represented himself below, lodged a Notice of Appeal running to 18 pages of close type. It was considered on the paper sift by HHJ Shanks, who rejected it in its entirety under EAT Rule 3(7) (see EAT letter dated 2 December 2014). Dissatisfied with that opinion, the Claimant exercised his right to an Appellant-only oral-permission hearing under Rule 3(10). The matter came before Mr Recorder Luba QC on 4 March 2015. On that occasion the Claimant was represented by Mr Andrew Perfect of counsel under the ELAAS pro bono scheme. Mr Adkin, counsel representing the Respondent throughout, attended to observe the proceedings.

12. Mr Perfect placed draft amended grounds of appeal, three in all, before the Judge. I refer to the careful analysis of the then case to be found in the Judgment given by the learned Recorder on the day. The upshot was that only the first amendment, relating to contribution, was permitted to proceed to this Full Hearing; see transcript paragraphs 19 to 22. The Judge thought it arguable that the Tribunal had not followed the four stages identified by Langstaff P in **Steen v ASP Packaging Ltd** [2014] ICR 56; see particularly paragraphs 11 to 14.

13. In advancing this appeal on behalf of the Claimant Ms Burton takes three points. First, she submits that the Tribunal has failed to identify the blameworthy conduct on the part of the Claimant which led to the finding of contribution. I disagree; the Reasons should be read as a whole. The Tribunal directed themselves as to the need to find culpable and blameworthy conduct that was causative of the dismissal (Reasons, paragraph 7). They concluded by

reference to their earlier findings of fact that his conduct significantly contributed to the breakdown of the employment relationship and thus his dismissal. It is not difficult to see how they arrived at this conclusion having looked at their findings of fact. I gratefully adopt paragraph 9 of the Respondent's Answer, which sets out the relevant findings of fact; I need not set it out again in this Judgment.

14. That also deals with Ms Burton's second point, that the Tribunal did not sufficiently spell out what was the causative link between the conduct and the dismissal; they did. I bear in mind the President's observation at paragraph 24 of **Steen**: it is not necessary for Tribunals to address the contribution questions at any greater length than is necessary to convey the essential reasoning. In my judgment, it is clear to the parties in this case why a finding of contribution was made on the facts found.

15. Thirdly, it is said that the Tribunal failed to make the just and equitable assessment of the degree of contribution as required both under section 122(2) (basic award) and section 123(6) (compensatory award). Again, in my view, further reasons are not necessary, although another Tribunal might well have given further explanation. The 50 per cent assessment was quintessentially a matter for the industrial jury; see **Hollier v Plysu Ltd** [1983] IRLR 260. I infer that the Tribunal intended it to be applied to both the basic and compensatory awards, but this is not spelt out in their Judgment or Reasons.

16. Strictly, that disposes of this appeal; it fails and is dismissed. The matter will now return to the Sigsworth Tribunal for a remedy hearing. I forebear from making any comment in this Judgment on how that hearing should proceed. That will be a matter for argument, as counsel before me agree, before the Tribunal at that hearing.