Appeal No. UKEAT/0067/15/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 June 2015
Judgment handed down on 3 July 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

ARRIVA LONDON SOUTH LTD — APPELLANT

MR L GRAVES — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GAVIN MANSFIELD QC (of Counsel) Instructed by: EEF Broadway House Tothill Street London SW1H 9NQ
For the Respondent	MISS KARA LORAINE (of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW

SUMMARY

UNFAIR DISMISSAL

Automatically unfair reasons

Contributory fault

Whether the Employment Tribunal was entitled to find that dismissal was for an inadmissible reason under section 152 **Trade Union and Labour Relations (Consolidation) Act 1992** / section 104 **Employment Rights Act 1996**. They were.

Whether the Employment Tribunal finding as to the reason for dismissal precluded a finding of contributory conduct, as the Employment Tribunal appeared to conclude. It did not. The issue of contribution remitted to the same Employment Tribunal (sitting on the Liability Hearing) if practicable. Appeal by the Respondent employer allowed to that extent.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the London (South) Employment Tribunal. The parties are Mr Graves, Claimant, and Arriva London South Ltd, Respondent. This is an appeal by the Respondent against the Reserved Judgment of a Tribunal chaired by Employment Judge Elliott, promulgated with Reasons on 17 November 2014. By that Judgment the Employment Tribunal upheld the Claimant's complaint of automatically unfair "trade union" dismissal without deduction for contributory conduct. A claim of trade union detrimental treatment short of dismissal was rejected. The appeal requires consideration of two points: (1) reason for dismissal and (2) contribution.

Background

2. The Claimant was employed by the Respondent as a bus driver from November 1999 until his dismissal by Mr Gary Smith, Operating Manager for the Norwood garage at which the Claimant was then based, on 26 September 2013.

3. At all relevant times the Claimant was a member of the RMT Union. The Respondent recognised Unite the Union and not the RMT.

4. In 2011 the Claimant and an RMT colleague, Mr Farr, brought proceedings in the London (South) Tribunal complaining of trade union detrimental treatment contrary to section 146 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA"). The complaints were upheld by a Tribunal chaired by Employment Judge Zuke by a Reserved Judgment dated 24 July 2012. Material to the present proceedings was that the Claimant had been disciplined by Mr Gary Smith for wearing an unauthorised "hi vis" vest. The evidence

showed that another employee, Mr Diplock, had in the past worn unauthorised vests, i.e. those not showing the Arriva logo, without being disciplined. The difference, the Zuke Tribunal found, was that the Claimant's vest had the legend "RMT" on the back. Further, Mr Hall, the Zuke Tribunal found, subjected the Claimant to detrimental treatment for the prohibited purpose under section 146. Mr Hall was the Operations Manager at the South Croydon garage at which the Claimant then worked.

5. The Elliott Tribunal noted (paragraphs 20 to 21) that following promulgation of the Zuke Tribunal Judgment the Respondent took no steps to bring it to the attention of either Mr Smith or Mr Hall (the latter did not give evidence before the Zuke Tribunal); no action was taken against them and no training provided consequent upon that Tribunal's Judgment.

6. The index event which culminated in the Claimant's dismissal, on the Respondent's case, was his going off route on 25 August 2013 and then seeking to cover up that fact by putting in a false Occurrence Report ("OR"). As a result, and following a complaint by a member of the public, he was interviewed by Mr Hudgell (Deputy Operations Manager) on 12 September 2013. Mr Hudgell suspended the Claimant. The interview on 12 September which formed the basis of the detriment (short of dismissal) claim was found by the Tribunal to have been held for a proper motive. That part of the claim failed (see paragraph 108).

7. Mr Gary Smith held the disciplinary hearing on 26 September 2013. He dismissed the Claimant for breach of trust amounting to gross misconduct. His reasoning is set out at paragraphs 73 to 76.

8. Against his dismissal the Claimant appealed. His appeal was heard by Mr Halligan and Mr Hall (who featured in the earlier claim). The appeal was dismissed.

The Employment Tribunal's Reasoning

9. The core issue between the parties was what was the reason for the Claimant's dismissal. The Respondent relied on conduct, a potentially fair reason; the Claimant raised doubt as to that reason; he advanced the "trade union" reason. It was thus for the Respondent to disprove (on the balance of probabilities) the impermissible reason. The Claimant had qualifying service. See **Kuzel v Roche Products Ltd** [2008] ICR 799, paragraphs 30 and 66 per Mummery LJ.

10. The Employment Tribunal was referred to the approach of Elias P in **Aslef v Brady** [2006] IRLR 576. Mr Brady was the elected General Secretary of **Aslef**, an outcome of the democratic process which was not universally embraced by members of the Union's EC. Mr Brady then became involved in a fight with the Union President at a social event at Union HQ. He was disciplined and ultimately dismissed for gross misconduct. The President escaped censure. Mr Brady brought unfair dismissal proceedings, contending that the reason for his dismissal was "political". An Employment Tribunal agreed. The Employment Appeal Tribunal dismissed the Union's appeal. There is a helpful analysis by Elias P at paragraphs 79 to 80. I note, in passing, that at paragraph 80 Elias P refers to the onus on the employer to show the statutory (permissible) reason and:

> **"… If the tribunal is left in doubt, he will not have done so. …"**

11. I am confident that Elias P was not here applying the criminal standard of proof. The doubt arises if the Respondent fails to discharge the burden of disproving the prohibited reason on the balance of probabilities. In **Kuzel** the employer put forward a potentially fair reason

which was rejected by the Employment Tribunal. However, the Tribunal went on to find, permissibly the Court of Appeal held, that the employer had negatived the prohibited reason (whistleblowing) advanced by Dr Kuzel.

12. I am satisfied that the Tribunal had the learning well in mind in approaching the "reason" question in this case.

13. Thus far I have referred, by way of shorthand, to the "trade union" reason. However, anticipating a submission advanced by Mr Gavin Mansfield QC on behalf of the Respondent in this appeal, the complaint by Mr Graves raises three potential statutory prohibited reasons for dismissal:

(1) membership of the RMT Union and/or;

(2) taking part in the activities of that Union at an appropriate time contrary to section 152 **TULRCA 1992**;

(3) victimisation contrary to section 104(1) and 4(c) **Employment Rights Act 1996** ("ERA"), by reference to his previous proceedings under section 146 **TULRCA** which were determined by the Zuke Tribunal.

That said, an employer's reason (or principal reason) for dismissal is the set of facts or beliefs which cause him to dismiss the employee.

14. In this case the Tribunal took into account the history of dealings between the Claimant and Mr Smith and Mr Hall, his less than perfect disciplinary record, his falsifying a company document (the log card) and treatment of other disciplined employees and concluded that the Respondent had failed to disprove the prohibited reason/s notwithstanding the Claimant's

admitted misconduct (see paragraph 115). The complaint under section 152 **TULRCA** and section 104 **ERA** was made out.

15. At paragraph 129 the Tribunal said:

> **"… We also find that as the real reason for dismissal was a prohibited reason … no reduction for contributory fault is appropriate."**

It is against this background that I turn to the two questions raised by this appeal.

Reason for Dismissal

16. Mr Mansfield first takes a forensic point on the Respondent's principal reason for dismissal. It cannot, he submits, be three separate reasons: trade union membership (section 152(1)(a) **TULRCA**); trade union activities (section 152(1)(b)) and victimisation contrary to section 104 **ERA**.

17. That superficially attractive argument overlooks, it seems to me, the real issue in this case. Has the Respondent established the conduct reason for dismissal; has it negatived the "trade union" reason? Ultimately, whilst recognising the Claimant's misconduct, as in **Brady**, this Employment Tribunal concluded that it was not the misconduct which really caused his dismissal, it was his membership of the RMT, his taking part in the activities of that union and his previous section 146 complaint, determined by the Zuke Tribunal. No point appears to have been taken below as to the activities or whether they were carried out at an appropriate time. However, even if I were persuaded that the section 152(1)(b) complaint was not made out, it is sufficient that the trade union membership and/or victimisation complaints were made out for the purposes of the Employment Tribunal's finding that dismissal was for an inadmissible reason. True it is, as Mr Mansfield submits, that at paragraph 127 the Tribunal strayed into the

language of section 146 (purpose) applicable to action short of dismissal. However, their finding at paragraph 129 as to the principal reason for dismissal plainly answers the statutory question: what was the reason or principal reason for dismissal?

18. Next, Mr Mansfield complains that the Employment Tribunal failed to consider the reasons for which the individual decision makers acted as they did; see **Dahou v Serco Ltd** [2015] IRLR 30, paragraph 61, per Simler J. I disagree.

19. First, Mr Smith. At paragraphs 73 to 76 the Tribunal record Mr Smith's evidence as to his reasons for dismissing the Claimant on conduct grounds. Plainly the Claimant was guilty of misconduct. Further, Mr Smith also dismissed two other employees, Pascal and Gasiamis, whose cases I must return to when considering inconsistencies of treatment.

20. In these circumstances it was plainly open to the Tribunal to accept his evidence at face value and to find that his reason or principal reason for the Claimant's dismissal was conduct.

21. However, it was not bound to do so (see **Brady** paragraph 9). On the other side of the scales was the unlawful treatment of the Claimant by Mr Smith in relation to the hi vis vest incident and his standing by that decision (see paragraph 112) and the inferences drawn at paragraphs 122 and 125 in relation to an earlier appeal to Mr Smith by the Claimant and the lack of a handshake. It was for the Employment Tribunal to weigh those factors going each way and to reach its conclusions. In my judgment there was material on which this Employment Tribunal could properly reach the conclusions which it did.

22. As to inconsistency of treatment, I agree with Mr Mansfield that there must be truly parallel circumstances between the Claimant's case and that of his comparator(s), as the Employment Tribunal recognised (see paragraph 107).

23. The closest analogy, affecting Mr Hall, one of the appeal decision-makers, was that of Mr Gasiamis. He was dismissed by Mr Smith for breach of trust; he had lied in a report and in his account of an accident to Mr Smith. On appeal the issue was severity of sanction. The appeal panel, including Mr Hall, reduced the penalty to a final caution (equivalent to a final written warning). No such leniency was shown by a panel, again including Mr Hall who had been the subject of complaint in the Zuke Employment Tribunal proceedings, in the Claimant's appeal. The Gasiamis appeal was determined on 1 June 2013 prior to the Claimant's disciplinary proceedings.

24. It follows, in my judgment, that the Tribunal did pay close attention to the motivation of the relevant decision makers. They concluded that it was particularly the Claimant's RMT membership and earlier complaint of trade union discrimination which tipped the balance in favour of dismissal rather than a sanction short of dismissal for his admitted misconduct. That was a permissible finding. No error of law is made out in this part of the appeal.

Contribution

25. I return to paragraph 129 of the Employment Tribunal's Liability Reasons. It is plain to me that the Employment Tribunal considered that as they had found inadmissible reasons for dismissal contrary to section 152 **TULRCA** and section 104 **ERA** no reduction for contributory fault was appropriate. For completeness I have also considered paragraphs 23 to 25 of the

(reconstituted) Tribunal's Remedy Judgment Reasons dated 20 March 2015. In my view that adds nothing to their earlier decision on contribution.

26. It is quite clear that a Tribunal's power to reduce a Claimant's compensatory award (**ERA** section 123(6)) and basic award (section 122(2)) by reason of the Claimant's contributory conduct is directed to the effect of that conduct on the dismissal, not the employer's reason for dismissal; see the four-stage approach set out by Langstaff P in **Steen v ASP Packaging Ltd** [2014] ICR 56, paragraphs 11 to 15.

27. In the present case the Tribunal appears to have concluded that no contribution enquiry was necessary because it had found that dismissal was for the prohibited reasons. That is not correct.

28. Given that the Claimant was, on his own admission, guilty of blameworthy conduct, the question is whether that conduct caused or contributed to the dismissal to any extent and, if so, to what extent (applying the slightly different tests under sections 123(6) and 122(2) **ERA**)? That is the question which I shall remit to the Elliott Tribunal (if practicable) for determination.

Disposal

29. The appeal is allowed to the extent only that the issue of contribution is remitted to the same Tribunal (ideally the Tribunal which sat on the Liability Hearing) if practicable for reconsideration.