Appeal No. UKEAT/0438/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 March 2014
Judgment handed down on 17 September 2014

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

MR G ELLIS — APPELLANT

RATCLIFF PALFINGER LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMIE SUSSKIND (Appearing via the Free Representation Unit)
For the Respondent	MR KEITH PITTS (of Counsel) Instructed by: Chiltern Solicitors 110 Butterfield Great Marlings Luton Bedfordshire LU2 8DL

SUMMARY

TIME OFF - Parental leave/dependent

UNFAIR DISMISSAL - Automatically unfair reasons

Appeal against findings of fact by the Employment Judge that sections 57A and 99 of the **Employment Rights Act 1996** did not apply. The Employment Judge considered all relevant matters and was entitled to reach that conclusion. Appeal dismissed.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the Judgment and Reasons of Employment Judge Mahoney, sitting at Watford on 25 September 2013. The Written Reasons were sent to the parties on 28 November 2012.

2. The Appellant is represented by Mr Jamie Susskind of Counsel, who is appearing as a Free Representation Unit advocate. The Respondent is represented by Mr Keith Pitts of Counsel. I am grateful to both Counsel for their written and oral submissions.

3. I heard the appeal on 7 March 2014. At the conclusion of the hearing I reserved Judgment.

The Factual Background

4. The Employment Judge made substantial findings of fact in paragraphs 4.1-4.38 of his Reasons. In summary, the Claimant had previously been employed by the Respondent in 2008 but had left and then was re-engaged in 2009.

5. His terms and conditions of employment included:

(i) a general paragraph which stated that the employment was in accordance with the company's polices and procedures, which could be found on the intranet or by contacting the HR Department;

(ii) The Respondent provided two weeks paternity leave on full pay as part of their family-friendly policy.

(iii) If the paternity leave was required under the statute, then at least 15 weeks prior notice had to given with an employee choosing either one or two consecutive weeks. Leave could start on any day of the week following the child's birth, but had to be completed within 56 days of that date of birth.

(iv) The Claimant had not made a formal 15 weeks notice request for paternity leave in the events that occurred.

6. In relation to notification of absence from work the following terms and conditions applied:

(i) If employees were absent from work due to an illness or injury, which incapacitated them from doing work they are employed to do, they must notify their line manager by telephone no later than 30 minutes after they were due to begin work.

(ii) Thereafter the employee should keep in contact at intervals appropriate to the illness or condition preventing them from working.

(iii) In any event, there should be contact, at the very least, once a week.

(iv) In the first instance, absent employees were to contact their line manager and, if they were not immediately available, a message was to be left on the Respondent's absence line on 01707 382705.

7. There was a history of the Claimant's absence from work, which resulted in the following sanctions:

(i) a letter dated 1 November 2011 requiring the Claimant to work his contractual hours and warning him that future failure to work the required hours would lead to dismissal;

(ii) on 25 November 2011 a final written warning, to remain on the file for 12 months.

8. The Claimant's partner was heavily pregnant and due to give birth about Monday, 6 February 2012. It appears that she, together with the Claimant, had been to and from hospital on several occasions on that day, and it appears that the concerns about the mother's health were apparent from the previous Sunday.

9. The Claimant did not make contact with his employers on Monday morning to explain the position regarding having to go hospital.

10. The first contact was made by the Claimant's father, who telephoned during the afternoon to explain the fact that the Claimant had to attend hospital with his partner, who was about to give birth. No contact was made by the Claimant on Tuesday, 7 February, despite the fact that he did not go into work. However, he did go with his partner to hospital and she was taken into hospital to have the baby.

11. The first contact by the Claimant that was made was on Wednesday, 8 February, when the Claimant had received a text message from the manager's son, with whom he was very friendly, telling him to get in contact urgently with the office.

12. The Claimant had then spoken to this manager, a Mr Sabieri, who had severely criticised him for not making contact and not coming in to work. This apparently had upset the Claimant. In any event, he did leave a message on the Respondent's answerphone late in the evening of Wednesday, 8 February.

13. The Employment Judge was satisfied that the message merely stated that the Claimant would not be in the following day. He did not accept the Claimant's evidence that, in that conversation, he stated he would not be returning to work until Monday, 13 February. He gave reasons for this finding of fact. The Claimant did not attend on Thursday, 9 February or Friday, 10 February.

14. The reason given by the Claimant at his disciplinary hearing was to the effect that his phone had run out of battery power on Tuesday, 7 February or certainly by the Wednesday, and he had to contact his father on the payphone from the hospital to get him to phone up the Respondent because he did not remember the Respondent's telephone number.

15. The disciplinary meeting took place on 15 February 2012. The Claimant was represented by a fellow employee of longstanding. The decision was that the Claimant should be dismissed and given one month's pay in lieu. The letter to that effect was sent to him on 16 February 2012, giving him the right to appeal. The dismissal letter is in the core bundle at tab 8. The reason given for the dismissal is as follows:

> **"Further to the disciplinary meeting held in accordance with the Company's disciplinary procedure on 15 February 2012, as you are aware, this meeting was held in relation to the allegation that you failed to make reasonable efforts to inform the company that you would not be attending work during the week of 6th-10th February 2012.**
>
> **During the meeting, it was established to the Company's reasonable satisfaction that the allegation was substantiated.**
>
> **It was confirmed to you that the Company has had cause to speak to you on 24th-25th November with regard to your refusal to carry out a reasonable request and your mistreatment of the PPE that had been issued to you. You were informed at the meeting on 25th November that if you committed any further incident of misconduct of any kind within 12 months, the Company would dismiss you.**
>
> **Despite listening to your representations on 15th February, I was not able to find sufficient mitigating circumstances and I am therefore writing to confirm that the Company has decided to terminate your employment."**

16. The Claimant duly appealed, and the appeal was heard on 20 March 2012. The appeal was dismissed.

The Law

17. The Employment Judge set out the law at paragraphs 5.1-5.6 of his Reasons. This case turns on section 57A of the **Employment Rights Act 1996**, which provides as follows:

> **"57A. – Time off for dependants**
>
> **(1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary --**
>
> **(a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted..."**

Sub-paragraphs (b) – (e) are not relevant.

> **"(2) Subsection (1) does not apply unless the employee –**
>
> **(a) Tells his employer the reason for his absence as soon as reasonably practicable, and**
>
> **(b) Except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent."**

Subsection (3) provides that a "dependant", in relation to an employee, includes a spouse. The Employment Judge refers to the "Claimant's partner": Reasons, paragraph 4.21.

The Employment Judge's Conclusions

18. The Employment Judge came to the following conclusions in paragraph 6.2-6.10 of his Reasons. He said this:

> **"6.2 I consider that the respondent did carry out a reasonable investigation into the circumstances of the claimant's failure to notify the respondent of his proposed absences from work which led to his dismissal and indeed the matters raised by the claimant relating to both the final written warning and the written warning.**
>
> **6.3. Although the best procedure would have been for Mr Green not to have been present when Mr Sabieri was dealing with the initial investigation into the failure to notify by the claimant, I do not consider that that had any bearing on Mr Green's decision. In any event, even if it did, it was in my view completely resolved by Mr Williams when he dealt with the appeal. He effectively carried out his own investigation into all the matters that had been raised by the claimant from the appeal.**
>
> **6.4 I do consider that the investigations by Mr Sabieri and Mr Williams did disclose adequate grounds to sustain a belief by the respondent that the claimant was guilty of that alleged misconduct and that the respondent did believe the claimant to be guilty of that alleged misconduct.**
>
> **6.5 Subject to the matters raised in relation to s.99 ERA, dismissal was within the band of reasonable response of a reasonable employer in all the circumstances.**

6.6 So the question then arises which is effectively the first issue, namely, was the principal reason for the claimant's dismissal his conduct or was it because he had taken time off under s.57A ERA.

6.7 The view I have come to is that the claimant is not entitled to rely on s.99 and s.57(A) because the claimant did not tell his employer the reason for his absence as soon as reasonably practicable.

6.8 In this day and age of mobile phones even if the claimant's mobile phone had run out of battery early on the Monday or the Tuesday, there would have been no difficulty in him recharging his mobile phone and making appropriate phone calls early in the morning to his employers. I particularly take the point that once his wife had gone into childbirth there was every opportunity for him to go into the hospital corridor and make a quick telephone call to his employers which he failed to do. Even if for some reason his mobile phone was not working there would have been no difficulty, in my view, from him borrowing a mobile phone from somebody else to make the necessary phone calls. Even if that was not possible from the claimant's own evidence he used the pay phone in the hospital to phone his father to make a telephone call on the Monday, and I can see no reason whatsoever why he could not have gone to the pay phone and made these phone calls from the pay phone on Tuesday and Wednesday.

6.9 So, in those circumstances I do not consider that s.99 applies. In those circumstances I am satisfied that at the end of the day that the principal reason for the claimant's dismissal was his misconduct and that the respondent was satisfied, in their own mind, that the claimant had been guilty of all the matters that they alleged against him and they carried out a fair procedure in coming to that conclusion.

6.10. So in those circumstances the claimant's claim fails and is therefore dismissed."

The Grounds of Appeal

19. Although a number of submissions were made before the Employment Judge at the hearing on 25 September 2012, the Notice of Appeal confines itself (in my judgment correctly) to the issue under section 57A of the **Employment Rights Act 1996** that the Claimant's dismissal was automatically unfair by virtue of s.99 of that Act.

20. I agree with Mr Susskind that the Employment Judge's reference to Regulation 20 of the **Maternity and Parental Leave Regulations 1999** in paragraph 2.1 of his Reasons is wrong as a matter of law, but they do not affect the ultimate decision of the Judge on sections 57A and 99 of the 1996 Act.

21. I take each ground of appeal in turn.

Ground 1: the Employment Judge based his decision on legally irrelevant factors relating to the Claimant's actions in the days after Monday 6 February

22. Mr Susskind submits that the Employment Judge was in error in failing to make a clear or correct determination at paragraphs 4.23 and 4.25 of his Reasons. He referred to "the first contact was made by the Claimant's father...": paragraph 4.23 and "the first contact that was made was in fact on Wednesday...": Reasons, paragraph 4.25.

23. Mr Susskind submits that the Employment Judge made a further material error by either deeming Wednesday and not Monday as the time of the first contact and/or considering that the Claimant was at fault for not contacting the Respondent again **after** the first contact.

24. Despite Mr Susskind's careful analysis in his Skeleton Argument and oral submissions, I am not persuaded that the Employment Judge made these errors. Paragraph 4.23 makes it clear that the first contact was made by the Claimant's father on Monday. There is no dispute about this. It is a correct finding of fact that the telephone call was in relation to the fact that the Claimant had to attend hospital with his partner on the Monday because she had been unwell since the Sunday due to the pregnancy. At that point in time the Claimant's partner had not been taken into hospital in order to give birth. That did not happen until the Tuesday.

25. The Claimant's partner was taken into hospital on the Tuesday in order to give birth. That was separate from what had happened on the Monday, albeit related to the pregnancy. In my judgment the Employment Judge correctly analysed the sequence of events from the Tuesday (and including that day) in paragraph 6.8 of his Judgment. He made it clear (having heard evidence from the Claimant) that he rejected the explanation that the Claimant's mobile telephone had run out of battery early on the Monday or the Tuesday, and he could not

therefore contact the Respondent until the Wednesday evening. On the facts of this case I do not find that the decision of Mrs Recorder Cox QC (as she then was) in **Qua v John Ford Morrison** [2003] ICR 482 of assistance. Neither do I accept Mr Susskind's submission that, based on the Employment Judge's findings of fact, there was only one telephone call on the facts of this case. Neither do I accept Mr Susskind's submission that the Employment Judge disregarded the telephone call made on the Monday by the Claimant's father and did not treat it as notice under section 57A(2)(a) of the **1996 Act**.

Ground 2: the Claimant told the Respondent the reason for his absence "as soon as is reasonably practicable"

26. Mr Susskind makes four submissions. The principle was set out in paragraph 46 of his Skeleton Argument. Taking each in turn:

(a) What is "reasonably practicable" must be determined by reference to the specific circumstances of the individual employee. I do not set out the authorities. The Employment Judge made a specific finding that the Claimant's partner was heavily pregnant and due to give birth **about** Monday, 6 February 2012. However, she was not admitted to hospital until the Tuesday to give birth. Clearly therefore, he had the specific circumstances in mind.

(b) What is "reasonably practicable" should not be confined to what is reasonably capable physically of being done. I do not set out the authorities. The Employment Judge found that there were concerns about the mother's health apparent from the previous Sunday. He was also aware that she had gone to and from hospital on the Monday. He took those matters into account.

(c) What is "reasonably practicable" should take into account the mental state of the employee. I do not set out the authorities. There was no medical evidence

before the Employment Judge of the Claimant's mental state. Clearly the Employment Judge heard the Claimant's evidence and took that into account.

(d) The operational needs of the employer are entirely irrelevant to whether the employee informed them as soon as was reasonably practicable. I do not set out the authorities. There is nothing in the Employment Judge's Reasons which persuade me that he was not aware of this principle.

27. The Employment Judge clearly had section 57A(2) and the test of reasonable practicability in mind. He made specific findings about it in paragraph 6.8 of his Reasons. I agree with Mr Pitts that this ground of appeal is in fact a perversity argument. I reject it.

Conclusion

28. For these reasons the appeal is dismissed.