Appeal No. UKEAT/0089/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 July 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR M M MILLET — APPELLANT

TESCO STORES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NICHOLAS EDWARDS (of Counsel) Free Representation Unit
For the Respondent	MR TIMOTHY ADKIN (of Counsel) Squire Saunders LLP 2 Park Lane Leeds LS3 1ES

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

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

PRACTICE AND PROCEDURE - Perversity

The finding of fair dismissal on performance capability grounds challenged on '**Meek**' and perversity grounds. The reasons were adequate. The Employment Tribunal conclusion was permissible. Appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Leicester Employment Tribunal. The parties are Mr Millet, Claimant, and Tesco Stores Ltd, Respondent. The Claimant was employed by the Respondent as a warehouse operative, principally engaged in stock picking at their Daventry distribution centre on 21 November 2005 until his dismissal on 7 September 2012. He brought a complaint of (materially) unfair dismissal before the Tribunal. There was no complaint of disability discrimination including failure to make reasonable adjustments. That claim was dismissed by Employment Judge Macmillan, sitting alone on 4 March 2013. His Judgment and Reasons were promulgated on 18 March. Against that Decision the Claimant appealed. Having been rejected on the paper sift by Mr Recorder Luba QC, the appeal was then permitted to proceed to this full hearing at a Rule 3(10) Appellant only hearing by His Honour Judge Shanks on Amended Grounds of Appeal.

2. By way of background, the Claimant's performance levels, particularly his pick-rate, was the subject of numerous informal and formal meetings from November 2008. There is a list of meetings in Appendix 1 to the Respondent's form ET3. I am told by Mr Edwards, now appearing on behalf of the Claimant, that a number of those items were in dispute but the finding of fact is that there were 14 informal discussions and 2 formal discussions about performance before the Claimant was placed into a performance plan; see paragraph 11.

3. He suffered from a back condition which caused him to be off sick between 30 January and 18 April 2011 and from 13 February to 12 March 2012. He was on three occasions asked to produce a medical note from his GP in November and December 2011 if his medical condition was causing him to under perform, but he declined to do so at that time. Eventually

he did sign a medical consent form. He was referred to Occupational Health and adjustments were made to his working pattern by way of a performance plan reducing the number of hours spent picking and limiting his target to 85% of the full expected rate. He still continued to under perform. Disciplinary proceedings followed. There was an oral warning, first warning, and final written warning but his performance did not improve despite those warnings. Eventually he was dismissed following a disciplinary hearing before Mr Fuller and he then appealed unsuccessfully to Mr Haymer.

4. At the end of his Judgment, the Judge characterised the Claimant's position as hopeless in this claim and dismissed it.

5. In advancing the two Amended Grounds of Appeal, Mr Edwards first submits that these reasons were not **Meek** compliant. I have in mind the well known dictum of Lord Justice Bingham, as he then was, in the case of **Meek v City of Birmingham District Council** [1987] IRLR 250 (CA) and I remind myself that the purpose of Tribunal Reasons is to tell the parties why they have won or lost. I accept that the Reasons are economical, but in my view they tell the necessary story particularly to parties who are familiar with the evidence and issues in the case.

6. A particular point which it would seem struck Judge Shanks at the Rule 3(10) hearing was in relation to paragraph 12 of the Reasons, where the Judge said:

> **"… On at least three separate occasions whilst his performance was being discussed in a disciplinary context he was told that if he wanted further adjustments made to his performance plan he would have to produce a note from his GP explaining why it was necessary. Not only did he fail to produce such a note, he took a conscious decision not to ask his GP for one. …"**

The relevance of that finding, which as the parties understood, relates to requests for a GP note during November and December 2011, may be traced back to paragraph 7 where the Judge records that the Respondent's principal reason advanced for dismissal was related to performance and his capability but they suggested that there was also a degree of conduct involved in the decision to dismiss because of a lack of cooperation particularly in relation to obtaining a doctor's note.

7. I see the danger of extracting one piece of evidence in a case and elevating that to justifying interference with an Employment Tribunal Decision where my jurisdiction is limited to correcting errors of law. The particular piece of evidence is an email dated 22 March 2012 in which a member of the Respondent's staff say that it is not necessary to obtain a medical report; clearly the Claimant has an ongoing back complaint. I attach no particular significance to that. It was accepted that he had a back complaint, he had had time off work for a back complaint but the question was whether it prevented him from doing the job or doing the job as revised under the performance plan. It does not seem to me that such a medical report would have added anything to the Respondent's state of knowledge and of course the Claimant did not, particularly at the disciplinary hearing, I have been taken to notes of the hearing, relying on his medical condition as an explanation for his continued under performance.

8. For all these reasons, I can see nothing in Ground 1 of the Amended Grounds of Appeal. As to Ground 2, that is a perversity challenge. Mr Edwards realistically acknowledges the high hurdle placed on Appellants relying on the perversity grounds; see **Yeboah v Crofton** [2002] IRLR 634 (CA). I have considered it and wholly reject it. Far from being a perverse conclusion. It seems to me that the Judge was quite right to characterise this as a hopeless claim and to dismiss it.

9. In these circumstances, there being no error of law in the Judge's approach, this appeal fails and is dismissed.