Appeal No. UKEAT/0123/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 July 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR S EDWARDS & OTHERS — APPELLANT

THE SECRETARY OF STATE FOR JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR DAVID CUNNINGTON (of Counsel) Instructed by: Thompsons Solicitors 18 Lawford Street Old Market Bristol BS2 0DZ
For the Respondent	MISS SARAH HORNBLOWER (of Counsel) Instructed by: The Treasury Solicitors One Kemble Street London WC2B 4TS

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

The Claimants declined to be taken to work at HMP Dartmoor on a road which had been closed following snowfall. On the question whether the Claimants reasonably believed that there were circumstances of danger which were serious and imminent, (section 44(1)(d) and (e) of the Employment Rights Act 1996), the Employment Judge (1) did not resolve an important issue of fact as to whether the Claimants were told that the police had sanctioned use of Prison 4x4 vehicles, (2) did not address the beliefs of the Claimants individually, notwithstanding that some Claimants gave specific evidence as to their beliefs and the reasons for them which required to be addressed and (3) reasoned erroneously that since some colleagues had travelled without difficulty or danger it did not "lie in the mouths" of others to hold a reasonable belief in serious and imminent danger. In these respects the Employment Judge did not deal sufficiently with the issues in the case, and gave reasons which were not Meek compliant.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by eight prison officers at HMP Dartmoor against a Judgment of Employment Judge Hollow, sitting in Exeter, dated 13 November 2013. By his Judgment the Employment Judge dismissed claims which they had brought against the Secretary of State for Justice. The Respondent had refused to pay them a day's wages in respect of 18 January 2013. The Claimants claimed that they had suffered a detriment in breach of their rights under section 44 of the **Employment Rights Act 1996**, which is concerned with matters of health and safety, and that they had suffered an unlawful deduction from their wages.

The background facts

2. HMP Dartmoor is situated near Princetown high on Dartmoor. Most staff drive in from some distance away. For staff coming from the Plymouth direction the road to the prison starts at the Yelverton roundabout. It is high, bleak and exposed. Like other roads leading to the prison, it is liable to be affected by snow or fog.

3. For this reason the prison had an adverse weather assessment checklist to help it make a proper assessment of risk and safety. The first thing was to check with the Plymouth Police Control Centre which roads were open. The next thing, if a road was closed, was to check with the police whether they had given permission for prison vehicles as an essential service user to collect staff from or return them to designated pick-up points. The next thing was to check whether the police recommended a 4x4 vehicle or all vehicles. If so, the final steps were to decide which vehicles would be used and identify the nominated driver.

4. Prison officers were not aware of the terms of the risk assessment. They were, however, aware of they should do if there was adverse weather. The procedure was set out in the Governor's order No.67/2012. Staff would be advised whether the roads to the prison were passable or impassable and if the transport service was operating. If the transport service was operating staff would be instructed to report to a pick-up point. In the case of officers coming from the Plymouth side, it would be Morrisons' car park in Tavistock. It was plainly intended that they should be collected by the transport service. The order said:

> **"Provided that staff remain there for 3 hours after the starting time of their scheduled duty (unless collected earlier, or given further instructions), they will be credited with the hours they were scheduled to work on that day."**

5. The Claimants were members of staff coming from the Plymouth direction. Their shift was due to start at 8am. Weather conditions were adverse. There had been snow and warnings of snow. When they received the Yelverton roundabout, they were confronted with a "road closed" sign on the road to the prison. They went to the Morrisons car park. By 8am there were 50 officers there. On that morning one officer, Mr Collins, already had a prison 4x4 vehicle at home. He collected some staff from the car park quite early in the morning and went to the prison. Other 4x4 vehicles were sent down from the prison including a minibus.

6. Most prison officers went to the prison in those vehicles, but a total of 13 refused to do so. They went to and stayed in the coffee shop at Morrisons. There were discussions between them and governors and others. They waited until 11am and went home. The "road closed" sign was still there throughout this time. The 4x4 vehicles had passed it and used the road when the sign said it was closed.

7. The Respondent refused to pay those prison officers who had declined to be transported to the prison in the 4x4 vehicles. It is, I think, plain that the Respondent's refusal was because they would not go to work in the prison. It was not simply because they complained.

Some Evidential Points

8. Before I turn to the Employment Judge's Reasons, it is convenient to mention some evidential points which are relevant to the Grounds of Appeal.

9. The first relates to enquiries made by the prison before using the road that morning. The Employment Judge thought that an enquiry had been made by the Night Duty Officer, Mr Bolton. He said:

> **"He kept in touch with the Devon and Cornwall Police and a few minutes before 9am on 18th January he telephoned the Police control room at Exeter to ask if it was alright for the prison to use their own 4x4 vehicles as the roads had been closed by the Highways Authority. According to the note made on the Police control room log, he was advised that they had checked with the Highways Authority and that they could proceed with caution since, curiously, the note said that the road had only been closed due to snow."**

10. It is common ground before me that the Employment Judge was wrong to find that Mr Bolton made this telephone call. There was, however, evidence that such a telephone was made by Mr Mountford, a prison governor, and was to the effect stated by the Employment Judge in his Reasons.

11. The second relates to evidence given by individual Claimants. Some gave evidence which was more specific than others about what they were told when they decided whether to use the prison transport on the closed road. Mr Kevin May, for example, told a governor that he was not happy to travel on the road while it was closed. He said:

> **"8. To clarify the condition of the road at approximately 1000 hrs, I contacted the Devon Highways Agency by phone. I got put through to Phil Virgin their control room who confirmed to me that the road was still closed. I asked Phil Virgin what the legal position was**

for driving on a road that was closed. He said he would find out and call me back; he took my telephone number.

9. At approximately 1040 hrs, Phil Virgin called me back stating that he had spoken to the Police and they told him that driving on a closed road is an offence and that I could be charged with 'not driving to the road conditions'. I took the opportunity to ask him again about the road and he said that the road was still officially closed and would probably remain so for another couple of hours at least.

...

12. My decision not to travel on a road that had been closed by the Devon Highways Agency, was based on the following:

a. the road was closed;

b. all indications were that the road was not fit for use;

c. having spoken to the control room and hearing that the Prison 4x4 vehicle 'nearly came off the road';

d. having spoken to the driver of that vehicle who told me that another 4x4 vehicle was in fact 'in the ditch' after coming off the road.

e. having listened to Radio Devon state that many accidents had already occurred, including at least 3 lorries that had jack-knifed, on better roads than the one I had to travel on; and

f. being informed that driving on a closed road is an offence and if I did so I could be charged with 'not driving to the road conditions'."

12. Miss Sarah Bolton said:

"5. At about 1020 hours, OSG Fitch arrived at the meeting point from the prison. I asked him what the road was like and he said 'not good at all'.

6. At 1035 hours, PO Branley arrived at the meeting point in his own vehicle and stated he had been called in from home. PO Branley asked me if I was willing to use the vehicles as the next one to arrive was going to be the last one. I responded by telling him I would be more than willing to use the transport as soon as the roads were officially opened and it was safe to do so.

7. At 1045 hours, OSG Allen arrived from the prison and stated in front of all the staff, including PO Branley, that the road closed sign was still up and that he had found it quite concerning and that the road was really bad. In spite of this information Mr Branley asked me if I was willing to travel in the vehicle. Officer Cummings asked Mr Branley if the road was now open and he replied that it was still closed. I again reiterated my position to Mr Branley. Mr Branley left in the last vehicle."

13. Mrs Christine Smaldon said:

"15. Shortly after this at approximately 1040 hrs OSG Simon Allen arrived at Morrisons to pick up Governor Branley. Simon was asked whether or not the road was closed and he confirmed that the closure signs were still in place, and the driving conditions were very difficult. It became apparent at this time that Governor Branley had been called in from home to help staff the jail and he confirmed that he was on the way to the jail at that time."

14. The third point relates to what the Claimants were told about the road closure. It has been explained to me by both Counsel that there was a significant issue on this question, the subject of both evidence and argument before the Employment Judge. For the Respondent, it was said that Governor Phillips had expressly informed at least some of the Claimants, not only that the Highway Authority or agency regarded the closure as "advisory only", but also that the police had specifically authorised the prison vehicles to travel over the road. The Claimants deny this. Some Claimants accepted in their witness statement that they had heard statements by Governor Phillips to the effect that the road signs were advisory only. None accepted that they had been told that the police had been consulted and sanctioned the use of the prison vehicles to drive over the road.

The Statutory Provisions

15. Section 44 of the **Employment Rights Act 1996**, so far as relevant, provides as follows:

> **"(1) An employee has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that –**
>
> **...**
>
> **(c) being an employee at a place where –**
>
> **(i) there was no such representative or safety committee, or**
>
> **(ii) there was such a representative or safety committee but it was not reasonably practicable to raise the matter by those means,**
>
> **he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety,**
>
> **(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or**
>
> **(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.**
>
> **(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time."**

16. The provisions were, at least in part, intended to implement provisions within the Framework Health and Safety Directive, 89/391/EEC (see, in particular, Articles 8.4, 8.5 and 11.4 of the Directive). In certain respects, the provisions of the Act are more favourable to employees than the provisions of the Directive. Taking section 44(1)(e) as an example, the equivalent provision in the Directive applies only where the immediate superior responsible cannot be contacted and only where there is serious and imminent danger to safety. The reference to "reasonable belief" in serious and imminent danger to safety is not found in the Directive.

17. The right not to suffer unauthorised deductions is found in section 13 of the **Employment Rights Act 1996**. Nothing turns, for the purposes of this appeal, on the precise terms of the legislation. It is common ground that if the Claimants were entitled to be paid for the day in question, they suffered an unauthorised deduction which they were entitled to recover.

The Employment Judge's Reasons

18. The Employment Judge heard the case over three days in November 2013. He heard numerous witnesses including the eight Claimants and three members of the Prison Governors team. He did not reserve Judgment. He gave his reasons orally on the third day.

19. In paragraph 6 of his Reasons the Employment Judge recited the provisions of section 44, to which I have referred, and continued as follows:

> **"... I must be satisfied that each of these claims had a reasonable belief that there were circumstances of danger which were believed to be serious and imminent under paragraph (d) and paragraph (e) or which he reasonably believed were harmful or potentially so to health and safety under paragraph (c). Whether or not that belief was factually well founded is not directly in point. What I have to be satisfied of is that each of these claimants had that reasonable belief. What I may consider to be the reasonableness or otherwise of the professed belief may assist me in deciding whether the belief was held and was reasonable. I remind myself that it does not necessarily follow that because one employee has that belief the next employee must necessarily share it; the claimants have to be considered individually."**

20. In paragraph 7 of his Reasons the Employment Judge said the following:

> **"The claim under s.13, colloquially called a 'Wages Act claim', is to be approached differently. Under the terms of a contract of employment it is implicit that an employee must make himself available and attend for work in return for which he will be paid his wages. Circumstances may differ if the employee is prevented through no fault of his own, such as an accident or seriously adverse weather conditions, from attending, but is clear from the case of** *Burns v Santander* **that if an employee declines to work without any such supervening condition and that it is an available circumstance he is not entitled to be paid for the time that he is absent from work."**

21. The Employment Judge noted, in paragraph 12 of his Reasons, that the Claimants had been concerned about the lack of insurance and the scope of Crown indemnity if they travelled in a vehicle on a closed road. He said this was not directly relevant. He said his task was to decide:

> **"...whether or not the claimants had a reasonable belief that there were circumstances of danger which were serious or imminent for whichever paragraph of s.44 might be under consideration."**

22. In paragraph 13 of his Reasons he said that his was the crucial issue. He rejected, in that paragraph, a contention that the Claimants' actions were an attempt to put pressure on the prison authorities to provide overnight accommodation near the prison.

23. The Employment Judge stated his reasons on the question of reasonable belief in paragraph 14. He dismissed the claim of one Claimant, Mr Smaldon, who had not been present and had not given oral evidence. He dealt with all the other Claimants together in the following terms:

> **"14. ... What of the remaining claimants? It does seem to me that a significant factor in this case is that, whilst the claimants indicated that they were not prepared to travel on the 4x4 vehicles, they nevertheless sat in the cafeteria and all have told me that they saw their colleagues being taken in the prison transport and there was never any suggestion that any of them had been involved in any untoward incident or accident on the journey. I bear in mind that it is not exactly known but it seems to be a significant number of people that were able to make the journey to the prison in prison 4x4 transport. That sheds considerable light on the issue as to whether the claimants, and each of them, had a reasonable belief that there were circumstances of danger which were seriously imminent for the purposes of s.44. Although as I indicated earlier each claimant is entitled to be considered separately, I see no distinction to be drawn between any of them for this purpose. I do not suggest that the road which has some snow on it is not more dangerous to some degree that a road which is entirely clear but it seems to me that it does not lie in the mouths of the claimants to say that they had a reasonable belief that the circumstances were so dangerous when a very significant number of their colleagues had made the very same journey that they had been asked to undertake and had**

> **done so without difficulty or danger. I do not find that the claimants or any of them had a reasonable belief that the circumstances were serious or dangerous or certainly that that belief did not persist up until 11 o'clock when they all left Morrisons to go home."**

24. As to the unlawful deduction claim, he said:

> **"The claims under s.44 fail. It must follow in my judgment since the claimants did not in my judgment have a reasonable belief that there were circumstances of danger they were voluntarily refraining from going to work and it must therefore follow that the claim under s.13 must also fail."**

25. The Employment Judge did not, in his Reasons, make any findings about what the Claimants were told concerning the road closure. Nor did he make any findings about what the Claimants were told concerning conditions on the road. The statement that the Claimants' colleagues had done the journey "without difficulty or danger" does not rest on any earlier finding in his Reasons.

Submissions

26. On behalf of the Claimants, Mr David Cunnington's submissions can, I think, be summarised as follows. (1) The Employment Judge's error concerning Mr Bolton was a significant one, impinging on the question whether the Claimants were ever told that there was an authorisation from the police to use the road. (2) There is in any event no finding that the Claimants were ever told about any authorisation from the police notwithstanding that this was a significant issue at the hearing. (3) The Employment Judge accepted that the belief of the Claimants was genuine. He was obliged to approach the question of the Claimants' reasonable belief on the basis that they reasonably believed that the road had been closed by a statutory agency responsible for road safety without any assurance that the police had authorised the use of the road and without any assurance as to the existence of any safe system of risk assessment. (4) The Employment Judge failed to consider the reasonable belief of the Claimants individually notwithstanding his correct self-direction in paragraph 6 of his Reasons. He

therefore made no findings about, and failed to address the reasons given by the Claimants sufficiently. He omitted to address, for example, the specific reasons given by Mr May, Mrs Bolton and Mrs Smaldon. It was not sufficient simply to say that others had travelled the route without danger or difficulty. (5) The Employment Judge was required to address the reasons given by the Claimants; in the result he reached a decision which was insufficiently reasoned in that it did not deal or deal adequately with the issues between the parties, or it was a perverse decision. (6) The Employment Judge's reasoning in relation to section 13 of the **Employment Rights Act** was in error. Since the Claimants had attended Morrisons in obedience to their contract, they were entitled to be paid from 8am in accordance with the Governor's order.

27. On behalf of the Respondent Miss Sarah Hornblower's submissions in answer may be summarised as follows. (1) The error as to the identity of the person who contacted the police was immaterial. (2) It is true that the Employment Judge did not expressly resolve the issue concerning what the Claimants were told, but it is to be inferred from the Employment Judge's Reasons that he must have accepted Governor Phillips' account. (3) The Employment Judge did not accept that the belief of the Claimants was genuine. He concluded that they did not hold to the belief at all. His reasons were in any event sufficient to address the issues before him; (4) the Employment Judge stated plainly that he considered each Claimant individually. Their evidence was factually similar. He was not required to draw any distinction between them. They could be treated as a group. (5) The Employment Judge's conclusions cannot be described as insufficiently reasoned or perverse; (6) The Claimants were not entitled to be paid when they were not willing to go to the prison to work.

28. I asked Counsel to address me as to the legal context and effect of the "road closed" sign. I was referred to statutory provisions which authorise the erection of road signs and potentially make it a criminal offence to disobey the road sign. Neither below nor on appeal was it established precisely what power had been exercised.

Discussion and Conclusions

29. As I turn to the various grounds of appeal, I emphasise that the Appeal Tribunal hears appeals only on questions of law (see section 21(1) of the **Employment Tribunals Act 1996**. In a case such as this the Appeal Tribunal is concerned to see whether the Employment Tribunal has applied correct legal principles, given sufficient reasons to explain to the parties and an appellate court how it decided the issues, and reached findings and conclusions which are supportable, that is to say not perverse if the correct legal principles are applied. A finding or conclusion is perverse if and only if it is one to which no reasonable Tribunal, on a proper appreciation of the evidence and the law, could have come. The Appeal Tribunal's role is, therefore, limited.

30. An Employment Tribunal's obligation to give reasons for its Judgment was discussed in **Meek v City of Birmingham DC** [1987] IRLR 250 where Bingham LJ stated that, although Tribunals are not required to create "an elaborate formalistic product of refined legal draftmanship", their reasons should contain:

> **"...an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises.."**

31. It is convenient to begin with the legislation. I will first say a word about section 44(1)(c). The test posed by section 44(1)(c) is significantly different from that posed by

section 44(1)(d) and (e). The requirement is a belief in circumstances which were harmful or even potentially harmful to health or safety. There is no requirement of a reasonable belief in circumstances of danger which are serious and imminent. The Employment Judge mentioned section 44(1)(c) at the outset of his Reasons, but it was not the test he applied. He did not explain why there was any further reference to the test, and this was originally a ground of appeal. Mr Cunnington did not pursue that ground of appeal, and he was plainly right not to do so. Section 44(1)(c) was not engaged in the circumstances of this case. Its function within the legislation is quite different to that of section 44(1)(d) and (e). Section 44(1)(c) is to do with drawing safety matters to the attention of an employer. The Respondent declined to pay the Claimants because they would not get on board prison transport and go to the prison to work. The Claimants did not lose their day's pay for drawing any circumstances to the attention of the Respondent. They lost it for refusing to go to the prison to work. The Employment Judge therefore did not need to address the test in section 44(1)(c).

32. Section 44(1)(d) and (e) were at the heart of the case below or on appeal. Both were in issue: depending on precise findings of fact either might have been applicable. Two elements are common to the subparagraphs. Firstly, there must be "circumstances of danger". Secondly, the employee must reasonably believe the circumstances of danger to be serious and imminent. I do not think the Employment Judge quite posed the question correctly when he said the question was whether the Claimants had a reasonable belief that there were circumstances of danger which were believed to be serious and imminent, but I do not think it matters in this case. The Claimants were being asked to go on a road which the police or Highway Authority had closed in snowy conditions. There were circumstances of danger. The question was whether the Claimants reasonably believed them to be serious and imminent.

33. Answering this question required the Employment Judge to make findings as to what each Claimant actually believed, to decide whether that added up to a belief that there were circumstances of danger which were serious and imminent and to decide whether that belief was reasonable. The Employment Judge elided those questions to the point where Counsel were not even agreed, and it is by no means plain from his Reasons whether he found the stated beliefs of each Claimant to be genuinely held. I think he probably did, because he appears to have rejected the argument that the Claimants were motivated by a desire to put pressure on the prison to provide overnight accommodation. But it is not as clear as it could be.

34. I have reached the conclusion that the Employment Judge has not provided sufficient reasons for his Judgment.

35. Firstly, I accept the submission which was made to me by both Counsel, namely that there was a dispute below, on what was regarded on both sides as an important issue, as to what the Claimants were told concerning the closed road. If the Claimants were indeed told that the prison had contacted the police control centre and that the police had confirmed that the 4x4 prison vehicles might use the road, it would be very difficult indeed for the Claimants to maintain that they had a reasonable belief in serious danger. If on the other hand, the Claimants were told only that the Highway Authority said the road closure was advisory, the position is rather different. They would be entitled to ask on what basis the prison transport vehicles were ignoring the advice of the authorities encapsulated in the "road closed" sign. The issue was not resolved by the Employment Judge. I do not accept Miss Hornblower's argument that a conclusion on this issue is in some way implicit in the Employment Judge's reasoning. His reasoning took a very different line.

36. Secondly, I accept the submission that the Employment Judge, although saying that he must consider each case individually, did not do so. This is, to my mind, plain from the passages of evidence which I have already quoted in this Judgment. The Employment Judge said, globally, that colleagues had made the same journey without difficulty or danger. But some Claimants were saying specifically that they had been told that there was difficulty or danger. There are no findings as to whether their evidence was truthful or what the Employment Judge made of it.

37. Thirdly, I accept the submission that it was insufficient to reason, as the Employment Judge did, that because some colleagues had made the same journey "without difficulty or danger" it "did not lie in the mouths" of the Claimants to say that they had the requisite reasonable belief. This depends on what the Claimants were told or knew about the condition, a question on which there is evidence with which the Employment Judge did not deal. It does not follow that, because no accident had happened, on a relatively small number of journeys, there was no risk.

38. I should mention the Employment Judge's error concerning Mr Bolton. This was an unfortunate mistake. It is difficult for me to evaluate whether it had any real consequences. Miss Hornblower said it did not, since a different governor made the call. Mr Cunnington says it did because the other governor, Governor Mountford, was shown to have gone on his rounds without communicating with the Governors at the car park. I do not think I would have allowed the appeal on this ground alone, but it tends to highlight the fact that the Employment Judge did not determine an issue which was regarded as of real importance on both sides.

39. For the reasons I conclude that the appeal must be allowed. It is not a question on which the Employment Appeal Tribunal can substitute its own view. It must be remitted for re-hearing. Given that the Employment Judge has not recorded any assessment or finding as to the evidence of individual Claimants, and given what I am told about the detailed evidence at the hearing, and given the strong overall view expressed by the Employment Judge, I think remission should be to a different Employment Judge.

40. This leaves finally the argument of Mr Cunnington that the Claimants were in any event entitled to be paid from 8am since they attended at the car park in accordance with instructions. I reject that argument. It was implicit in the instruction to attend the car park that attendance was for the purpose of onward transport to work at the prison. If they unreasonably rejected the transport and therefore did not work at the prison, there is no basis for paying them merely because they attended the car park.

41. Accordingly this appeal will be allowed in part, to the extent which I have set out in this Judgment.