Appeal No. UKEAT/0513/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 June 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR T ZAKI APPELLANT

MARSTON'S PLC RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RAD KOHANZAD (Appearing under the Bar Pro Bono Scheme)
For the Respondent	MR PILGERSTORFER (of Counsel) Instructed by: Higgs & Sons Solicitors 3 Waterfront Business Park Brierley Hill West Midlands DY5 1LX

SUMMARY

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

The absence of fact-finding in relation to issues of (a) contribution and (b) wrongful dismissal required the appeal to be allowed and the case to be remitted to the same Employment Tribunal for further consideration on submissions only.

Jafri and **Burrell** (CA) considered on proper disposal of appeal.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the London (South) Employment Tribunal. The parties are Mr Zaki, Claimant, and Marston's plc, Respondent. I have before me for Full Hearing an appeal by the Claimant against the reserved Judgment of a full Tribunal chaired by Employment Judge Hyde and dated 11 October 2013 which, so far as is material, upheld his complaint of ordinary unfair dismissal, subject to a deduction of 75% under the **Polkey** principle and 75% contribution, and dismissed his complaint of wrongful dismissal. The whistleblowing elements of his claim were rejected and do not now concern me.

Background

2. The Claimant was employed by the Respondent as Head Chef at their Pitcher and Piano Pub/Bar in Brighton from 17 November 2008 until his summary dismissal effective on 27 March 2012.

3. As to the complaint of ordinary unfair dismissal the Tribunal found that the Respondent's reason for dismissal related to his conduct, specifically events on 26-27 February 2012 in that on the 26th the Claimant took unauthorised leave, that is, without the permission of his manager, Mr McGrath and secondly his gross insubordination in failing to comply with a reasonable request by Mr McGrath to carry out a food stock check and failing to check for out of date food on the 27th February. The basis for that belief is to be found in a written statement provided to the Respondent by Mr McGrath, a copy of which is included in the EAT bundle at page 91. It is material to note that Mr McGrath was not called to give evidence before the ET.

4. Although the Tribunal found that that conduct was sufficiently serious to justify summary dismissal (paragraphs 136-137), they concluded that the dismissal was procedurally unfair on the grounds (a) of a failure by the Respondent to view CCTV footage relating to events on 26 February; (b) the dismissing manager, Mr Gormally's failure to tell the Claimant of the outcome of his investigations and to give him an opportunity to address them; and (c) that neither Mr Gormally nor the appeals manager, Mr Walker, considered any sanction short of dismissal.

5. On their findings the Tribunal concluded (a) that had a fair procedure been followed there was a 75% chance that a fair dismissal would have followed (paragraph 128); the **Polkey** finding; and (b) that the Claimant contributed to his dismissal by his conduct, specifically on the Monday, i.e 27 February, to the extent of 75% (paragraph 140).

6. Finally, as to the complaint of wrongful dismissal, the claim for pay in lieu of notice raised in the Claimant's Form ET1, the ET state their conclusion, the claim failed, at paragraph 3 of their Judgment. However, their Reasons contain no self-direction as to the law of wrongful dismissal and no reference to their reasoning on this head of claim. Their self-direction in relation to contributory conduct under section 123(2) and 123(6) of the **Employment Rights Act 1996** is set out at paragraph 24 by reference to the well-known approach of the Court of Appeal in **Nelson v BBC (No 2)** [1980] ICR 110.

The Appeal

7. The Claimant's Notice of Appeal originally contained ten grounds. On the paper sift Langstaff P rejected all grounds save for those numbered 9 and 10. It is those two ground only which are before me at this all parties Full Hearing. I shall consider each in turn.

Contributory Fault (Ground 9)

8. The starting point is the Tribunal's reasoning in concluding that the Claimant had by his own conduct contributed to his dismissal. It is set out succinctly at paragraph 140 thus:

> **"In the alternative, in relation to the dismissal being unfair due to the defects in the investigation of the food stock sheets and failure to follow a reasonable instruction charges, the Claimant contributed to his own dismissal by 75%, in the circumstances set out above, namely his actions on the Monday."**

9. Before considering the findings of the Tribunal relied upon by Mr Pilgerstorfer, said to support that conclusion, I bear in mind the valuable guidance, to which Mr Kohanzad drew my attention, of Mummery LJ in **London Ambulance Service v Small** [2009] IRLR 563, paragraph 6, where his Lordship said this:

> **"Mr Marsh [Counsel for the Claimant, Mr Small] spoke of his experience that ETs often structure their reasons by setting out all their findings of fact in one place and then drawing on the findings at the later stages of applying the law to the relevant facts. It is not the function of appeal courts to tell trial tribunals and courts how to write their judgments. As a general rule, however, it might be better practice in an unfair dismissal case for the ET to keep its findings on that particular issue separate from its findings on disputed facts that are only relevant to other issues, such as contributory fault... Of course, some facts will be relevant to more than one issue, but the legal elements of the different issues, the role of the ET and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication."**

10. It is common ground before me that different questions arise when considering (a) fairness of a dismissal (b) the **Polkey** question and (c) contributory conduct.

11. In this case the Tribunal made clear and unimpeachable findings as to the reasonableness of the employer's decision to dismiss and the necessarily speculative **Polkey** question: what were the chances of the Claimant retaining his employment had a fair procedure been followed by the Respondent?

12. The difficulty is that nowhere, in my judgment, did the Tribunal spell out their factual findings as to the conduct of the Claimant on 26 and 27 February; findings which were material to the separate factual contribution question.

13. True it is, as Mr Pilgerstorfer submits, that the Tribunal found that the Respondent was entitled reasonably to reject the Claimant's account as unlikely, faced with the conflicting account given to them by Mr McGrath in writing; see paragraphs 129 and 132. However, the Tribunal do not spell out their own findings for the purposes of the contribution issue. That, in my judgment, represents a lacuna in their reasoning process.

Wrongful dismissal – Ground 10

14. Here, no reasons are given for the conclusion that the wrongful dismissal claim failed and no self-direction is given as to the need for a factual finding as to whether the Claimant committed the misconduct alleged and, if so, whether that amounted to gross misconduct entitling the Respondent to summarily terminate the employment at common law. The answer is indirectly given at paragraphs 136 and 137, but in the context of the approach of a reasonable employer, not as a matter of fact-finding by the Tribunal.

Disposal

15. I agree with Mr Kohanzad that the Tribunal fell into error by failing to make specific findings of fact, on the balance of probabilities, as to the misconduct alleged against the Claimant, both in relation to contributory fault and wrongful dismissal. Further, no explanation is given, however shortly, as to how the figure of 75% contribution was reached.

16. Mr Pilgerstorfer suggests that these omissions can be remedied by a Burns-Barke reference. I disagree. Having reached the point of a Full Hearing in this appeal, it would not be proportionate to adjourn this hearing for Employment Judge Hyde to answer questions which would be, in any event, posed on remission, a course to which I shall return. Further, no opportunity would then be given to the Claimant, as well as the Respondent, to make submissions on the answers to be given by the Tribunal: an opportunity which will arise on remission. That is without taking account of the cautionary note struck by Dyson LJ in **Barke v Seetec Business Technology Centre Ltd** [2005] EWCA Civ 578 itself, as further developed by Mummery LJ in **Woodhouse School v Webster** [2009] IRLR 568 (the report immediately following that of **London Ambulance Service v Small**).

17. As to remission, I have been taken to the two recent Court of Appeal authorities on when the EAT should confirm or reverse an ET decision, having found an error of law, and when it should remit to the same or a different ET (see **Jafri v Lincoln College** [2014] IRLR 544 and **Burrell v Micheldever Tyre Services Ltd** [2014] EWCA Civ 716).

18. Having considered that latest guidance I am satisfied that the proper and proportionate course is to allow the Claimant's appeal and remit the issues of contribution and wrongful dismissal only for reconsideration by the same Tribunal chaired by Employment Judge Hyde at the outstanding Remedy Hearing. That is the extent of the remittal; no further evidence may be adduced on those issues; see **Burrell**, paragraph 20, per Maurice Kay LJ. In particular, it will not be open to the Respondent to call Mr McGrath to give evidence on those issues. They had the chance to do so at the original hearing and did not take that opportunity. The matter will proceed on the basis of submissions only. The parties are directed to exchange and lodge with

the ET Skeleton Arguments not less than eight days before the remitted hearing before Judge Hyde's Tribunal.