Appeal No. UKEAT/0139/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 May 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MRS M V McARTHUR FCIPD

MRS L S TINSLEY

MR P MIHAJ — APPELLANT

SODEXHO LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS MELANIE TETHER (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
For the Respondent	MR ANDREW ALLEN (of Counsel) Instructed by: DLA Piper UK LLP 3 Noble Street London EC2V 7EE

SUMMARY

TRADE UNION RIGHTS – Interim relief

An Employment Judge dismissed the Claimant's application for interim relief under **Trade Union and Labour Relations (Consolidation) Act 1992** section 161. The Employment Judge erred in determining that an Employment Tribunal at a liability hearing would not be likely to find that the Claimant was dismissed for taking part in trade union activities. He erred in so deciding on the basis that it was not likely that the Tribunal would find that the true reason for the dismissal was the activity as opposed to the way in which it was carried out. Absent certain features not present in this case, the way in which trade union activities are carried out is not material to the question of whether they fall within the scope of sections 161 and 152. **Bass Taverns Ltd v Burgess** [1995] IRLR 596 applied.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Mr Mihaj, the Claimant, appeals from the Judgment of an Employment Judge, sent to the parties on 24 February 2013, who refused his application for interim relief under section 161 of the **Trade Union and Labour Relations (Consolidation) Act 1992**. The Claimant was employed by Sodexho Ltd, the Respondent, from 31 January 2003 until his summary dismissal on 7 January 2014. He brought complaints of "automatically" unfair dismissal, alleging in addition to health and safety grounds that the reason for his dismissal was his trade union activities.

The Relevant Statutory Provisions

2. The **Trade Union and Labour Relations (Consolidation) Act 1992**, section 152(1):

> **"For the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—**
>
> **...**
>
> **(b) had taken part...in the activities of an independent trade union at an appropriate time..."**

3. Section 161(1):

> **"(l) An employee who presents a complaint of unfair dismissal, alleging that the dismissal is unfair by virtue of section 152 may apply to the tribunal for interim relief."**

4. Section 163(1):

> **"If on hearing an application for interim relief it appears to the tribunal that it is likely that on determining the complaint to which the application relates that it will find that, by virtue of section 152, the complainant has been unfairly dismissed, the following provisions apply."**

The section then set outs the consequential relief.

Outline Relevant Facts

5. The Claimant was an active trade unionist. At the time of his dismissal he was the industrial relations and health and safety representative for members of the Rail, Maritime and Transport Union (RMT) employed by the Respondent. The Respondent provided catering services.

6. The Respondent relied on two reasons for dismissing the Claimant: that on 9 September 2013 the Claimant sent a WhatsApp message to about 20 co-workers, alleged by the Claimant, to generate support for another employee, Mr Aslam. The Employment Judge stated that the context in which this WhatsApp communication was sent was that the Claimant was representing Mr Aslam in disciplinary proceedings. There had been a confrontation between Mr Aslam and Miss Virag Pok, a supervisor at Acton underground station, which had resulted in each accusing the other of assault. Both were suspended pending an investigation. When she saw the WhatsApp communication, Miss Pok was upset and raised a complaint about the sending of that message. The message was the subject of a complaint against the Claimant and, it is said, ultimately formed one of the grounds for his dismissal.

7. The second substantive reason for the dismissal relied on by the Respondent concerned the Claimant's alleged behaviour towards an RMT member, Mr Kenny Gyamfi, whom he was representing in disciplinary proceedings. It appears that Mr Gyamfi told his manager that he felt harassed and bullied by the Claimant. The Employment Judge recorded that Mr Gyamfi alleged that the Claimant was putting pressure on him to a raise a grievance about his managers at Earl's Court underground station.

The Judgment of the Employment Judge

8. The basis of the decision of the Employment Judge is set out in paragraph 21 of the Judgment:

> **"Turning to the trade union activity claim, I reject Miss Chudleigh's first submission. In the first place, it seems to me that there is a real question whether the language of the 1992 Act, s152(1)(b) is engaged at all, certainly in the case of the first allegation. Why should a trade union representative who takes sides in a personal spat, not said to relate to union business, between two members of his union, be seen as engaging in the activities of the union? But in any event, even if this profound doubt were overcome, it seems to me improbable that the Respondents, in the person of Mr Dye, will ultimately be held to have relied on the Claimant's** *activity* **(in relation to either charge), rather than on the way in which he conducted himself. There was nothing remarkable about an enthusiastic union representative getting involved in the dispute between Mr Aslam and Ms Pok or urging Mr Gyamfi to take action in pursuit of a particular concern; what was remarkable was that serious complaints resulted of improper or oppressive conduct which appeared to have caused offence in one case and severe distress in the other. In my judgment it is not 'likely' that the Tribunal will find that the true reason for dismissal was the activity, as opposed to the way in which it was carried out."**

The Submissions of the Parties

9. There was a broad measure of agreement before the Employment Judge and before this Employment Appeal Tribunal as to the principles of law to be applied in determining an application for interim relief. In outline, those are that the task of an Employment Tribunal on an application of interim relief is not to reach a final determination of issues but to take a summary view of the likelihood that at the final hearing the Claimant will establish that the reason for his dismissal was taking part in trade union activities.

10. Secondly, in considering whether the complaint is likely to succeed, the Employment Tribunal should ask themselves whether the complaint of dismissal on grounds of trade union activities has more than a 51% probability of success or, in other words, that it has a pretty good of chance of success. Those principles are taken from the case of **Taplin v C Shippam Co Ltd** [1978] ICR 1068, a judgment of the Employment Appeal Tribunal, Slynn J as he then was. Miss Tether reserves for a higher court an argument as to whether the bar for success to be satisfied by a Claimant is set too high by the judgment in that case.

11. Neither party before the Employment Tribunal referred to the case of **Bass Taverns Ltd v Burgess** [1995] IRLR 596, which both parties agree establishes that, in determining the question of likelihood of showing that the dismissal of a Claimant was for taking part in trade union activities, the way in which those activities were performed is not material. It is only if the activities were carried out dishonestly or in bad faith or for extraneous reasons or in such a way as to take the actions out of the real scope of categorisation as trade union activities that they will not be such. Otherwise the way in which activities are performed is not material to the issue under consideration in this case and that in **Bass Taverns**.

12. After that measure of agreement, the parties then parted company. Miss Tether relied on six grounds of appeal. However, those grounds really amount to one ground of appeal: that the Employment Judge misdirected himself at paragraph 21 of the Judgment in holding that it was not likely that the Tribunal would find that the true reason for dismissal was the trade union activity of the Claimant as opposed to the way in which it was carried out. It was submitted by Miss Tether that, applying **Bass Taverns** and **Lyon v St James Press Ltd** [1976] ICR 413, subject to extremes of behaviour, the way in which the Claimant carries out a trade union activity is not relevant to the issue as to whether a dismissal was for carrying out a trade union activity. If the Claimant was likely to be found to have been dismissed for carrying out trade union activities, he would fall within the scope of section 163(1). Miss Tether contended that in respect of both complaints which formed, it was said, the basis for the dismissal of the Claimant, the Claimant was acting as a trade union representative for a co-worker. The way in which he carried out those duties was not relevant to the likelihood that his dismissal would be held to be for trade union activities.

13. Quite rightly, Miss Tether recognises that if this appeal were to succeed, we are not in a position ourselves to make a substituted decision as to whether or not it is likely that at a Full Hearing the Tribunal would determine that the Claimant was dismissed for taking part in trade union activities. That would be a question of assessment on the facts. Not all the relevant facts are set out in the Judgment of the Employment Judge. The relevant documents are not referred to in the Judgment. The letter of dismissal, the WhatsApp communication by the Claimant to the 20 co-workers which formed the subject of the first complaint against him and the record in the e-mail of the complaint by Mr Gyamfi about the Claimant's conduct are not set out in the Judgment. Nor were these documents originally in the bundle prepared for this appeal. After we asked for them the first two documents were then included.

14. Mr Allen seeks to uphold the decision of the Employment Judge on the basis that his primary conclusion on the first complaint against the Claimant, that concerning Miss Pok, is that he had profound doubt as to whether sending the WhatsApp message was an activity of a trade union at all. Therefore, says Mr Allan, it was not material if the Employment Judge thereafter applied the wrong approach, if indeed it was wrong, in determining whether, if it was a trade union activity, that it fell outside the scope of section 152(1)(b) because of the way in which it was carried out.

15. As for the complaint regarding Mr Gyamfi, Mr Allen pointed out that in the dismissal letter, of which an undated copy has now been included in our bundles, it was stated that the Claimant had volunteered his services in a personal capacity to assist the employee. Mr Allen tells us that he made the submission to the Employment Judge that, as the Claimant was representing Mr Gyamfi in his personal capacity, he was not carrying out trade union activities. Unfortunately this argument was not recorded in the Judgment, nor it seems, was it considered by the Employment Judge.

Discussion and Conclusions

16. The principles of law to be applied in this appeal are clear and they were agreed by the parties. The task of an Employment Tribunal on an application for interim relief is to make a summary assessment of whether it is likely that a final hearing the Claimant will establish that the reason for his dismissal was his taking part in trade union activities. The cases of **Raja v SSJ** UKEAT/0364/09 and **London City Airport Ltd v Chacko** [2013] IRLR 610 were cited. Second, in considering whether the complaint is likely to succeed, the Employment Tribunal should ask themselves whether the final determination of the application for automatic unfair dismissal has more than a 51% probability of success or whether the Claimant has established that he has a "pretty good" chance of success. Those propositions were explained by Slynn J, as he then was, in **Taplin v Shippam** [1978] ICR 1068 at 1074D and 1074F.

17. The Judgment of the Court of Appeal in **Bass Taverns v Burgess** [1995] IRLR 596 makes it clear that the way in which trade union activities are carried out is immaterial to the decision as to whether they are in fact trade union activities unless the way in which they are carried out is such as to be dishonest, in bad faith, or carried out for some other organisation or cause so as to remove them from the scope of what can properly be called trade union activities.

18. In **Bass Taverns** Pill LJ, who gave the Judgment with which the other two members of the court agreed, observed at paragraph 14 in relation to the facts of that case:

> **"I am very far from saying that the contents of a speech made at a trade union recruiting meeting, however malicious, untruthful or irrelevant to the task in hand they may be, come within the term 'trade union activities' in [what was then] Section 58 of the Act.**

19. Reference is also made to the earlier judgment of the Employment Appeal Tribunal in **Lyon v St James Press Ltd** [1976] IRLR 215. In that case Phillips J stated, at paragraph 16,

that the statutory protection given to trade union activities by what was then paragraph 6(4) of the 1975 Act:

> **"...must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally the right to take part in the affairs of the trade union must not be obstructed by too easily finding acts done for the purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate."**

Phillips J added at paragraph 20, in relation to acts claimed to come within the protection given to the carrying out of trade union activities:

> **"We do not say that every such act is protected. For example, wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for dismissal which would not be unfair."**

20. However, the approach in **Bass Taverns**, in the Court of Appeal rather than that in **Lyon v St James Press**, is to be followed if and insofar as there is any relevant inconsistency between the two. In our judgement, the Employment Judge failed to apply the approach set out in **Bass Taverns** in that he determined that an Employment Tribunal at a full Liability Hearing was not likely to hold that the dismissal of the Claimant fell within the statutory protection because of the way in which trade union activities were carried out. The issue for the Employment Judge to decide was whether an Employment Tribunal, on a full Liability Hearing, was likely to find that the Claimant was dismissed for carrying out trade union activities. The way in which those activities was carried out was not relevant unless it was such as described in **Bass** or **Lyon**, namely acting in bad faith, dishonestly or for some extraneous cause or in any other way such as to take those actions outside the proper scope of trade union activities.

21. We have considered Mr Allen's argument as to whether the expressed profound doubt set out by the Employment Judge in paragraph 21 is sufficient to support his conclusion. The effect of the passage in paragraph 21, in which he expressed profound doubt as to whether the conduct of the Claimant in relation to the first complaint, but not the second, properly fell

within the description of trade union activities, is subject to an internal contradiction. By a statement later on in paragraph 21, the Employment Judge held that:

> **"There was nothing remarkable about an enthusiastic union representative getting involved in the dispute between Mr Aslam and Miss Pok or urging Mr Gyamfi to take action in pursuit of a particular concern"**

That passage shows that at that stage the Employment Judge was proceeding on the basis that the actions which are alleged to have led to the dismissal were trade union activities. However the Employment Judge continued:

> **"what was remarkable was that serious complaints resulted [in] improper or oppressive conduct which appeared to have caused offence in one case and severe distress in another."**

The operative part of paragraph 21 then follows, namely that, in the Employment Judge's Judgment, it is not likely that the Tribunal will find that the true reason for dismissal was the activity, as opposed to the way in which it was carried out. This conclusion shows that, in the final analysis, the Employment Judge proceeded on the basis that the matters relied on, to dismiss the Claimant were trade union activities. However the way in which they were carried out removed them from the protection of the legislation and therefore rendered it unlikely that a Tribunal, on a full Liability Hearing, would find that the reason for the dismissal was carrying out trade union activities.

22. Accordingly this appeal succeeds, and the Judgment of the Employment Judge is set aside. Nothing we say in this Judgment should be taken as an indication of the likely outcome of the full Liability Hearing, nor indeed of the likely outcome of a remitted interim relief hearing, which must now take place. The determination of both will be for a matter of assessment and judgement for the Employment Tribunal on the evidence before them. We remit the interim relief application to a differently constituted Employment Tribunal. It has rightly been brought to our attention by Mr Allen that the full Liability Hearing is listed for two

weeks starting on 9 June, which makes it very difficult for there to be an interim relief hearing before that Full Hearing. It may well be difficult to do so but in our judgement it is necessary to do so. If it is of any assistance to the parties in getting an early listing of this remitted hearing before the London (Central) Tribunal, we would wish our concern to be communicated to those responsible for listing. We consider it of the greatest importance that this matter be heard before the Full Hearing takes place starting on 9 June. Neither we nor the parties would think it desirable to have the 9 June hearing date put in jeopardy.