

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

At the Tribunal
On 9 May 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS APPELLANT

MR PAUL HART

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Reasonableness of dismissal

DISABILITY DISCRIMINATION – Direct disability discrimination

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

ET majority finding as to reason for dismissal inadequately reasoned. Unanimous finding of unfairness based on Appellant's reason, conduct, inconsistent with their own finding of fact at para 6 of their reasons.

Appeal allowed and case remitted to fresh ET for rehearing on (a) reason for dismissal (conduct or disability, or both) and (b) fairness of dismissal.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Liverpool Employment Tribunal. The parties are Mr Paul Hart, Claimant, and the Commissioners for Her Majesty's Revenue and Customs, Respondent. I shall so describe them.

2. I have before me for full hearing, on the direction of HHJ McMullen QC, an appeal by the Respondent against the judgment of a Tribunal chaired by Employment Judge Reed, sitting with Mr J Roberts and Mrs J Fletcher, promulgated with Reasons on 11 June 2013. The Tribunal found unanimously that the Claimant was unfairly dismissed by the Respondent and by a majority, the Employment Judge dissenting, that the Respondent had unlawfully discriminated against him on grounds of his disability.

Background

3. The Claimant was a longstanding employee of the Respondent, the employment having commenced on 18 September 1989, rather than in 2009 as the Tribunal record at paragraph 4 of their Reasons. At all material times he held the position of an Administrative Officer and was, it was common ground, disabled within the meaning of the **Equality Act 2010**. He suffered from chronic anxiety disorder with agoraphobia together with bipolar affective disorder.

4. On 22 November 2011 the Claimant's line manager, Mr Blundell, compiled a note following a meeting with the Claimant after the latter returned late from lunch. The note records that the Claimant told Mr Blundell that he had been cautioned by police in a store and fined £80. He described the relevant incident as starting when he was hit with a trolley by one of the staff in the shop and it escalated from there. He said that he was threatened by a security

guard. When the police arrived he was told he was getting a fine for the disturbance. Mr Blundell noted that the Claimant smelt of alcohol.

5. In fact the Claimant did not receive a police caution, which involves an admission of guilt of a criminal offence, but a Penalty Notice for Disorder (PND). As the Respondent accepts, a PND does not involve either a finding or acceptance of guilt. It does remove the possibility of future criminal proceedings being taken.

6. The Respondent's internal policy on private conduct, which was before the Tribunal, provides among other things that employees must keep their manager informed of proceedings, including PNDs issued for retail theft to a value of £200.

7. On 1 December 2011 the Claimant was seen by Ms Hurst, a senior manager. He told her that he had not received a caution, as Mr Blundell had wrongly thought, but a PND. Again he said that it was issued as a result of an altercation. Ms Hurst asked for a copy of the PND but he said he had probably thrown it away.

8. As a result the Claimant contacted the police, who did not send a copy of the PND (compare Reasons, paragraph 8) but an e-mail stating that the PND had been issued for alleged shop theft, I understand cans of fizzy drink for which payment was not made.

9. Disciplinary proceedings followed. The principal charge out of three was that, having accepted a PND for an alleged theft, the Claimant failed to disclose the facts of the matter adequately to his manager, i.e. Mr Blundell.

10. A disciplinary hearing took place before Mr Reeves on 16 May 2012. By a decision dated 30 May the Claimant was summarily dismissed. An appeal against that decision was dismissed.

The Tribunal decision

11. The members of the Tribunal were divided on the reason for dismissal. At paragraphs 29-31 the majority view was expressed in this way:

“29. The majority view was that Mr Reeves had given a wholly unsatisfactory and unconvincing explanation of the rationale for the dismissal of Mr Hart. In those circumstances they felt driven to infer that the real reason for Mr Hart’s dismissal was not related to his conduct at all.

30. Mr Reeves denied being aware of Mr Hart’s relatively poor recent attendance record when he took the decision to dismiss but he was well aware of his medical condition at the time, since that had been an element of the representations made to him in the course of the disciplinary process.

31. The majority view was that it was that information, Mr Hart’s mental state and the likely consequences for the respondents, in terms of his absence and potential actions, that had determined Mr Reeves to dismiss Mr Hart. In other words, his dismissal was by reason of something arising in consequence of Mr Hart’s disability.”

12. On the other hand, the Employment Judge said at paragraph 32:

“For the sake of completeness, the minority view (of the Employment Judge) was otherwise. Mr Reeves did appear to be wholly genuine in his view that Mr Hart’s conduct warranted his dismissal.”

13. Further, the Tribunal considered the unfair dismissal claim on the assumption that the Respondent had made out the conduct reason for dismissal. On that footing, the unanimous view of the Tribunal was that the dismissal was nevertheless unfair for reasons set out at paragraphs 14-20:

“14. As we have said, the sole ground for dismissal was the failure on the part of Mr Hart to disclose to his manager the actual reason for the issuing of the PND.

15. We were shown various extracts from the respondent’s disciplinary code. While some referred to disclosure in relation to criminal offences etc., none addressed the particular position of a PND.

16. A PND, unlike a conviction or a caution, does not connote guilt on the part of its recipient. In effect, it amounts to that recipient agreeing to make a payment in exchange for the police taking the matter no further. Mr Hart made it clear throughout that he denied that he was guilty of theft and that denial is inconsistent with the payment he made.

17. It was Mr Hart who had declared to his manager that the PND had been issued to him – it appears quite likely that if he made no mention of it, the respondents would never have become aware of it.

18. Mr Reeves appeared to be under the impression that at the second meeting with management on 1 December Mr Hart had been expressly asked what the reason for the issuing of the PND was. That did not appear to have been occurred.

19. In short, we were unanimously of the view that Mr Reeves could not reasonably have concluded that Mr Hart had committed misconduct in that regard warranting his dismissal.

20. It followed that whether or not the reason for dismissal was conduct (and for the reasons we set out below, the majority view was that it was not), it had to follow that the dismissal was unfair.”

The appeal

14. The starting point is the Tribunal lay majority finding that the Respondent, through Mr Reeves, had not established his avowed reason for dismissal, conduct; it was in fact the Claimant’s disability (paragraph 29). The difficulty with that finding is, first, the wholly inadequate reasoning (see paragraph 29); we should be told why Mr Reeves’ explanation of the rationale for dismissal was “wholly unsatisfactory and unconvincing”. Whilst an issue was raised as to the real reason for dismissal, conduct or disability, clear reasoning for rejecting Mr Reeves’ evidence as to his reason was required. It has not, in my judgment, been provided. Secondly, that conclusion appears to me to overlook (a) Mr Reeves’ reason, as articulated at paragraph 14, and (b) the Tribunal’s unanimous finding of fact at paragraph 6, namely:

“6. On 22 November Mr Hart returned to his office late from lunch and explained that he had been issued with a Penalty Notice for Disorder (‘PND’) arising from an incident which he broadly described as an altercation that had occurred in a shop. In fact, the PND had been issued in relation to an allegation of theft from the shop.”

15. Regardless of whether Mr Reeves believed Ms Hurst asked the Claimant why he received the PND on 1 December (see paragraph 18), the finding at paragraph 6 was that the Claimant failed to reveal the real reason, alleged theft, either on 22 November or 1 December. He was required to inform the Respondent of receipt of the PND under the Policy Document HR 22009, to which the Tribunal were referred, contrary to their finding at paragraph 15.

16. In these circumstances, it seems to me, the majority finding as to the reason for dismissal cannot stand.

17. Turning then to the unanimous finding that dismissal for the reason advanced by Mr Reeves and summarised at paragraph 14, was unfair, the Tribunal do not set out a full direction in law as to the fairness question raised by s.98(4) of the **Employment Rights Act 1996**. I shall assume, nevertheless, that this very experienced Employment Judge had in mind the three-fold **Burchell** test and the range of reasonable responses test to be applied to both procedural fairness and the sanction of dismissal.

18. On that basis the sole reason for finding the dismissal unfair appears to be (paragraph 19) that Mr Reeves did not have reasonable grounds for concluding that the Claimant was guilty of the conduct set out at paragraph 14. However, that conclusion seems to me to be wholly inconsistent with the finding of fact at paragraph 6 to which I have earlier referred.

Disposal

19. It follows, in my judgment, that this Tribunal judgment is not adequately reasoned either on **Meek** principles or under what was then rule 30(6) of the 2004 ET Rules. It cannot stand. The appeal is allowed. The case will be remitted to a different Tribunal for re-hearing on the issues (a) of the unfair dismissal claim and (b) unlawful disability discrimination by way of dismissal.