Appeal No. UKEAT/0457/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 May 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

THE CARPHONE WAREHOUSE LIMITED — APPELLANT

MR A PEART — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR EDWARD HUTCHIN (of Counsel) Instructed by: Group Legal Department The Carphone Warehouse Limited 1 Portal Way London W3 6RS
For the Respondent	MR SEAN O'BRIEN (of Counsel) Instructed by: Morris Legal Employment Law Solicitors Central Boulevard Blythe Valley Business Park Solihull B90 8AG

SUMMARY

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

The question for the Employment Judge to decide was whether, for the purpose of a bonus scheme, the Claimant had a live written or final warning at the date the relevant payment was due. The case turned on whether there was a disciplinary meeting (as opposed to just a performance review meeting) on 4 April 2012 leading to the confirmation of a final written warning on 26 April 2012. On this subject there was a conflict of evidence between the Claimant and the Respondent's Mr Bishop. The Employment Judge decided this issue in the Claimant's favour, but he did not make any clear findings of fact, and gave no sufficient or clear reasons for the decision reached. The terms of the letter dated 26 April 2012 were not decisive of the question he had to answer, and he had not explained why it was not necessary to resort to the burden of proof rather than make findings on the evidence.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by the Carphone Warehouse Ltd against a judgment of Employment Judge Skinner, sitting alone in the Employment Tribunal in Huntingdon. By his judgment dated 10 July 2013 he upheld a claim in contract brought by Mr Adam Peart for £8,400 in respect of a payment under a long-term incentive plan. I will refer to the parties by their status below: Mr Adam Peart as "the Claimant"; Carphone Warehouse Ltd as "the Respondent".

The Background Facts

2. The Claimant was employed by the Respondent with effect from 11 November 1999. At the relevant time he was the branch manager of the Peterborough store. It is common ground that, subject to what follows, the Claimant was entitled to be paid the gross sum of £8,400 in May 2012 under the Respondent's long-term incentive plan. The plan, however, contained the following provision:

> **"No payment under the LTIP will be due if an employee has a 'live' written or final written warning at the date the relevant payment is due to be made.."**

3. It is also common ground that the Claimant was made subject to a performance improvement plan in September 2011 and that he was eventually dismissed by reason of alleged misconduct with effect from 20 September 2012.

The Employment Tribunal Proceedings

4. By the time of the Tribunal hearing, which took place on 25 June 2013, there was a single outstanding issue between the parties. Both were represented by Counsel. The Employment Judge described the issue as follows:

"This is now therefore a single issue case, and the single issue is one of fact. We have been fastidious at the outset to clarify and confirm the common ground between the parties. Their representatives assert categorically the joint position now reached, which is that, barring one precisely defined point of dispute, they agree that the Claimant is entitled to the £8,400 claimed. The point in dispute is the reason for the Respondent's refusal to pay, wholly contained in the short paragraph under the heading 'Disciplinary' in the LTIP rule at page 65 of the documentary bundle of evidence to which I am referred, which reads:

> **'No payment under the LTIP will be due if an employee has a 'live' written or final written warning at the date at which the relevant payment is due to be made (i.e May 2012 and/or May 2013)'**

8. Mr Buckle confirms that the Claimant accepts that this is a valid and effective term of the scheme and that his entitlement to the payment is forfeit and his claim defeated if, as at May 2012, he was subject to a final written warning in accordance with the Respondent's case. Mr Hutchin confirms that the Respondent accepts that the Claimant is entitled, *unless* shown to be subject to the final written warning purportedly issued in April 2012 as the Respondent asserts."

5. In its ET3 response form the Respondent had asserted that:

> **"...the Claimant has been issued with a final written warning on 11 April 2012 and consequently he was not entitled to receive any payments under LTIP in May 2012."**

6. In his ET1 claim form the Claimant had denied that any meeting took place on 11 April 2012.

7. The Respondent's case, by the time of the hearing, was set out in a witness statement by Mr Alan Bishop. He said that he held a six-monthly performance improvement plan review with the Claimant in April 2012. He said that the Claimant had not prepared for the meeting properly and admitted that he had failed to comply with a number of the objectives in the plan. Given the Claimant's position, he considered this to be serious. He took the decision to refer the matter to a disciplinary hearing.

8. Mr Bishop then referred to a letter inviting the Claimant to a disciplinary hearing, which was sent by e-mail and supported by a "read" receipt. The e-mail was purportedly sent on 5 April 2012 and read at 17.46 on that date. He also produced documentary evidence, a manager's script, apparently recording a meeting on 11 April 2012. Finally, he produced a

letter dated 26 April. This letter referred to a meeting "on Wednesday 11th April 2012 at 11am". It included the following:

> **"In reaching a decision I have made the findings detailed in the enclosed Outcome Statement. These findings were based on our investigations and the information provided by you at the disciplinary meeting Wednesday 11th April 2012.**
>
> **...**
>
> **I have concluded that in the circumstances the appropriate sanction is a final written warning. This warning will remain live on your file for 12 months and will be taken into account in the event of further disciplinary action being considered necessary."**

9. By the time Mr Bishop produced his witness statement he knew that the Claimant's case was that there was no meeting on 11 April. He said the following:

> **"7. A disciplinary meeting was held in April 2012. It was scheduled to take place on 11 April 2012, and this is the date which was included on the meeting notes and correspondence, although after checking my diary and the signing in book from the Newmarket store where the meeting took place (page 344C of the bundle) I believe that it actually took place on 4 April 2012. I believe that the meeting was rescheduled at Adam's request, although I cannot remember the exact reason for this.**
>
> **8. A copy of the disciplinary meeting notes can be found at pages 106 to 199 of the bundle. During the meeting, Adam accepted that he had not prepared for his six monthly review, and he was unable to provide any real excuse for this (page 112 of the bundle). Adam also admitted that he had not complied with a number of his performance improvement plan objectives. Given Adam's level of experience and senior position, I considered that this was unacceptable and so I decided to sanction Adam with a final written warning to remain on his file for a period of 12 months."**

10. There is of course an immediate and obvious difficulty about Mr Bishop's account. If the meeting which took place on 4 April 2012 was a disciplinary meeting, it is difficult to see why the invitation to the meeting is dated 5 April 2012 or, for that matter, why apparently contemporaneous notes should be dated 11 April 2012. Mr Bishop's explanation was that the meeting had originally been listed for 11 April 2012 but it was brought forward at the Claimant's request and the documents in question produced by the Human Resources Department did not take this into account.

11. The Claimant, for his part, accepted that there was a performance review meeting with Mr Bishop. This, he said, was the meeting which took place on 4 April. He gave a full

description of it in his statement. He denied that he was given a final written warning at that meeting or that there was any subsequent disciplinary meeting. He denied receiving the invitation dated 5 April or the letter dated 26 April despite the "read" receipts which accompanied both documents. He said that he first learned about the letter dated 26 April and received a copy of it in July during a later disciplinary investigation. So his case was that there was fabricated evidence - what the Employment Judge described as a "conspiracy" by the Respondent.

12. At the hearing evidence was given from the relevant witnesses, most importantly the Claimant and Mr Bishop. In final submissions on behalf of the Claimant, it was emphasised to the Employment Judge that the ET3 claim form had specifically relied on the issuing of a final written warning on 11 April 2012. This provoked an application to amend on behalf of the Respondent to plead that the final written warning was issued at a meeting on 4 April 2012, confirmed by letter dated 26 April 2012.

The Employment Judge's Reasons

13. It is necessary to quote at some length from the Employment Judge's reasons. Generally speaking at the final hearing of an issue, the Employment Judge will make findings of fact, explaining them as necessary, and then apply the law to the facts as found. In this case the Employment Judge's reasons are not so straightforward.

14. In his introductory paragraphs the Employment Judge noted that "the initial burden of proof on his contract claim is upon the Claimant". The key paragraphs in the Employment Judge's section entitled "Facts" are the following:

> **"17. The Respondent's evidence as to what meetings took place when is confused, confusing and contradictory. Its contemporaneous, formal documentary evidence records a disciplinary meeting on 11 April 2012 (see Mr Bishop's 'Manager's Script', which he describes as his notes**

of the meeting, pages 106-119) at which the Claimant was given the final written warning confirmed 2 weeks later by letter dated 26 April (pages 123-125). All this is wrong. Mr Bishop now believes that the meeting actually took place on 4 April 2012 after being re-arranged –brought forward evidently – at the Claimant's request for mutual convenience. Both sides call in aid various diary and signing-in entries, but none are conclusive either way and the Respondent's late shift in position from the ostensible certainty of 11 April to a tentative 4 April lacks conviction.

18. The Claimant's conviction is a little more convincing, but has the marginal merit of greater consistency, if only because he has fewer contradictions to explain. He denies any meeting on either 28 March or 11 April 2013, denies receiving any such letter as that dated 5 April, repudiates the authenticity of the purported 'read receipt' (as he does of the copy receipt to the outcome letter of 26 April, page 126), and denies ever seeing the so-called disciplinary notes, pointing to the absence of the signature from those notes compared to others in the bundle. (Similar 'manager's scripts' appear for example at pages 241-242 and 280-295, completed on each page by the four signatures of the manager, employer, note taker and companion. Pages 106-119 have just the typed signatures of the manager and employee.).

19. Where the Claimant and Mr Bishop agree is in both coming to believe that a meeting – ***the*** **meeting – took place most probably on 4 April 2012. But they remain at loggerheads as to what that meeting was. Mr Bishop would now insist that this is the disciplinary hearing which the Respondent's records – including much under his name – date 11 April. He falls back on the explanation that the meeting was re-arranged between him and the Claimant direct, but the paperwork channelled through ERAdmin never caught up and he failed to notice the mismatch. He must accept in that event that the Claimant at least had no written notice of any disciplinary meeting, since the purported invitation on the Respondent's own evidence was not sent until the day after, 5 April (page 102). This makes more credible the Claimant's insistence that 4 April was only a review or 'investigation' meeting (see his handwritten annotation to his copy of the 26 April letter, page 127), following the originally scheduled PDR on 28 March 2012.**

20. Nothing in the parties' evidence after the purported meeting is decisive as to if and when any final written warning. The best evidence on the Respondent's side of course is that which it belatedly accepts is not only wrong by persistently misdating the event but also incompatible in substance by relying on a formal invitation and supporting package dated 5 April to a disciplinary hearing dated 4 April."

15. Although these paragraphs come under the heading "Facts", they seem to me to amount to a review of the evidence. The review leans in favour of the Claimant in certain respects, but it plainly does not reach a conclusion as to whether and when any final written warning was given. The Employment Judge, after a brief statement of the Tribunal's jurisdiction in contract claims, then continued as follows:

"22. Attention having been drawn by the Tribunal to paragraph 27 of the ET3 grounds of resistance (R1 page 20 – quoted at 9 above), in closing submissions for the Claimant, Mr Buckle highlights the inconsistency of the Respondent explicitly pleading that date (11 April 2012) and sticking to that pleading despite all the Claimant's protestations, without seeking amendment, and now accepting that the date is clearly wrong.

23. In response, Mr Hutchin makes application to amend paragraph 27 to refer to a written warning issued at a meeting on 4 April 2012, of which the Claimant was informed on that date, confirmed by letter 26 April. He explains that the reason for not making an earlier application to amend is that it was not appreciated that the date was in issue. The question in the case was taken to be only whether the Claimant had been issued with 'a' final written warning. Mr Buckle naturally opposes the Claimant and I will refuse it. It is too late and too inconsequential. My conclusions in this case will give weight to the pleaded position so far as probative of findings of fact made on the evidence at large. I perfectly accept that the

Respondent's case is now to accept that paragraph 27 is wrong and that the date should be 4 April. There is no prejudice to the Respondent in not allowing token amendment, since its case on the facts prior to today has evidently remained as paragraph 27 asserts.

24. As to the evidence, the Respondent's is full of contradictions, but I prefer the chaos to the conspiracy theory. However, it is not necessary for me to disbelieve that Mr Bishop intended a meeting in part at least to subject the Claimant to a disciplinary outcome for the alleged performance failings which he describes; or to be convinced by the Claimant that the Respondent's documentary record was fabricated. The matter is determined by the shifting burden of proof.

25. The Claimant discharges the initial burden to show a prima facie contractual entitlement to the sum claimed. The Respondent admits as much but in effect relies on the exception or exclusion clause at page 65. The onus is upon the Respondent to prove that those 3 lines defeat the Claimant's entitlement. I apply the term strictly upon the party relying on it. It might be thought that this evidential burden is only reinforced in the unequal Employment Tribunal relationship; at all events, the Respondent does not satisfy me on a balance of probabilities that the Claimant had a live written warning in May 2012. The only purported written warning is that contained in the Respondent's letter dated 26 April 2012 (page 123) which expressly and exclusively relates to a meeting on Wednesday 11 April 2012 at 11am. It is only it seems late in the day that the Respondent has conceded that there was never any such meeting.

26. The Respondent's conduct of whatever meetings did take place in April 2012 was conspicuously and remarkably unsatisfactory not to say crass and clumsy in terms of good employment relations practice – as witness for example the invitation to a disciplinary hearing which happened the day before, and the apparently pre-prepared, unsigned and incorrectly dated notes of and delayed letter purporting to confirm the supposed meeting. These failings by the Respondent do not matter in the sense that they might in an unfair dismissal complained, dealing with 'fairness', but they do not encourage any coherent answer to the narrowest of agreed factual issues: was the Claimant subject to a written warning in May 2012?

27. As already stated, I am discinclined to adopt the Claimant's contention that he was subjected to a conspiracy extending to the fabrication of evidence for the purposes of these proceedings. I might understand the confusion and frustration out of which that contention springs, but I reject it, and it is immaterial to my decision. The matter is simple: the Respondent relies on page 65 but has not satisfied me of facts that fulfill the pre-condition stipulated by that term. I have been referred to one live written warning in the letter dated 26 April which the Respondent has maintained all the way through until conceding at the last minute that it cannot be true because it relies on a meeting that never took place. The Respondent cannot point me to any other written warning. I will not re-write the Respondent's script to find facts that trigger page 65. Therefore, the Claimant is entitled to his LTIP due in May 2012 and I order the Respondent to pay him the sum of £8,400 gross."

The issue to be decided

16. Counsel are agreed before me, and I also agree, that the key issue for the Employment Judge to decide was whether there was a meeting of a disciplinary nature at which Mr Bishop decided to give the Claimant a final written warning in the manner he alleged. If the letter dated 26 April was simply untrue and no such disciplinary meeting had taken place, it is not the Respondent's case that the letter alone would meet the requirements of the LTIP. Conversely, if the letter was in substance true, the mere fact of an error in giving the date of the meeting would not be decisive.

17. Against this background, I turn to the Grounds of Appeal.

Burden of proof

18. On behalf of the Respondent, Mr Hutchin first submits that the Employment Judge wrongly reversed the burden of proof. He submits that the burden of proving a contractual entitlement always remained on the person asserting the entitlement. The provision of the LTIP was a precondition of payment, as the Employment Judge recognised, and it was for the person asserting the entitlement to show they had met the precondition. On behalf of the Claimant Mr O'Brien submits that the burden of proving that the Claimant was subject to a final written warning indeed lay upon the Respondent. He referred me to **Abrath v Northeastern Railway Company** (1883) 11 QBD 440 and **Robins v National Trust Company Ltd** [1927] AC 515.

19. I prefer the submission of Mr O'Brien. The phrase "burden of proof" is used to describe the duty which lies one or other of the parties either to establish a case or to establish the facts on a particular issue. The general rule is that the party who asserts must prove. It is sufficient to go to one of the authorities on which Mr O'Brien relies. In **Abrath v Northeastern Railway Company** (page 457) Bowen LJ said:

> **"Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively."**

See also **Robins v National Trust Company Ltd & Ors** per Viscount Dunedin (page 520).

20. In this case the Claimant had established, subject only to the question whether he was subject to a final written warning, that he was entitled to the payment in question. The Respondent, by its ET3, asserted the existence of the final written warning. In my judgment the burden was on the Respondent on that issue. This conclusion accords with the general

approach to the burden of proof in civil cases. I therefore consider that the Employment Judge was correct in law to decide that the burden of proof lay upon the Respondent.

21. The Employment Judge referred to the provision of the LTIP as an exception or exclusion clause. I do not think that the burden of proof depends on the precise nature of the clause. The point was that, in practical terms, the Respondent asserted the existence of the final written warning to deny payment of the bonus, and it was for the Respondent to prove it.

22. While rejecting this ground of appeal I would add one further comment. There are, no doubt, categories of civil case such as discrimination cases where the burden of proof may be of great importance. But generally speaking, in a civil case, where an issue is to be determined on the balance of probabilities, a Judge will be able to reach a conclusion on a question of fact without resort to the burden of proof. There may be cases where the evidence is so flimsy or so finely balanced that a Judge cannot reach a conclusion and must decide an issue by reference to the burden of proof, but that should be rare. It has often been said, and I agree, that there should not be a ready resort to the burden of proof in the general run of civil and employment cases.

Amendments

23. Within Ground 3 of the Notice of Appeal the Respondent complains that the Employment Judge wrongly refused leave to amend the ET3 claim form to determine the real issue between the parties. On the face of it, the reason why the Employment Judge refused leave to amend was that the amendment was unnecessary and inconsequential - see paragraph 23 of the Reasons. That being so, the Respondent has, in my judgment, no real complaint. I did at one stage wonder whether paragraph 27 of the Employment Judge's reasons, with its reference to

declining to re-write the Respondent's script, was effectively a reference again to amendment. If it had been, it would have shown a very different approach to that in paragraph 23. In the end, Mr Hutchin submitted that this was not the meaning of paragraph 27 of the Employment Judge's reasons. I agree with him, and there is no substance therefore in any point for the Respondent on leave to amend.

Perversity

24. Mr Hutchin then argues that the Employment Judge was perverse in failing to find that the Claimant was subject to a final written warning, in other words that the only conclusion which the Employment Judge could properly have reached, is that the disciplinary meeting took place on 4 April, in consequence of which the warning was given.

25. There are two main pillars to this argument. Firstly, it is argued that the Employment Judge accepted that a disciplinary meeting on 4 April had taken place with the purpose of issuing a disciplinary sanction. This is said to follow from paragraph 24 of the Employment Judge's reasons, which I have quoted. Secondly, it is argued that the Employment Judge rejected a conspiracy theory. He must, therefore, have accepted that a final written warning was issued.

26. I reject this argument. I do not think it can be said that a properly directed Employment Judge was bound to conclude that there was a disciplinary meeting on 4 April, in consequence of which the final written warning was given.

27. In the first place, I do not think there is any clear finding at all in the Employment Judge's reasons to the effect that the meeting on 4 April was a disciplinary

meeting. It is important to keep in mind that the Respondent's own case was that there were two meetings, a performance review meeting first and then a disciplinary meeting. Paragraph 24 might suggest that the Employment Judge was leaning towards there being a single meeting at which a disciplinary outcome was intended by Mr Bishop, but this was not his case, and paragraph 19 of the Employment Judge's reasons leans towards accepting that the meeting on 4 April was only a review meeting. I do not accept Mr O'Brien's submission that paragraph 19 contains a finding to that effect, but it certainly leans in that direction.

28. Secondly, although the Employment Judge says in paragraph 24 that he prefers the "chaos to the conspiracy theory", it is unclear how far the chaos went, and I do not draw the conclusion that the Employment Judge necessarily thought Mr Bishop's evidence reliable. Nor do I draw the conclusion that he necessarily rejected the Claimant's evidence on that key point.

29. In the end the Employment Judge did not draw clear conclusions on any of these matters, and I find myself unable to say that the evidence on any of them was so plain that only one outcome to this case was possible.

Reasons

30. Today Mr Hutchin also argued that the Employment Judge's reasons were insufficient for the parties to know how he decided the case. Mr O'Brien took the point that the ground is not explicitly set out in the Notice of Appeal. I agree with him - it is not. Mr Hutchin applied to amend the Notice of Appeal to take the point. Mr O'Brien opposed the application, emphasising its lateness and the potential prejudice to his client.

31. The Employment Appeal Tribunal decides applications for leave to amend on the basis of the overriding objective taking into account guidance given in **Khudados v Leggate** [2005] ICR 1013. I decided to grant leave to amend. The grounds of appeal had argued at some length and in some detail that there was no reason for the Employment Judge to conclude that the Respondent had not established the giving of a written warning in April 2012. It was a very short step to arguing that the Employment Judge had not given any sufficient reasons for that conclusion. It seemed to me, on the argument in the case, that that was the real question. I see no real prejudice to the Claimant. I have no doubt that Mr O'Brien, to whom I gave some additional time, was able to address me properly on it and I consider that justice required the giving of leave to amend.

32. The law relating to reasons appeals is well known. There should be sufficient accounts of the facts and the reasoning to enable the Employment Appeal Tribunal or any other appellate court to see whether any question of law arises. The reasons must enable the appellate court to understand why the Judge reached its decision. The principles are set out in cases such as **Meek v City of Birmingham DC** [1987] IRLR 250 and **English v Emery Reimbold and Strick Ltd** [2002] 1 WLR 2409.

33. It is to my mind very unclear from the written reasons what the Employment Judge actually decided on the key question in issue. There are two possibilities. There are indications of both in the concluding paragraphs.

34. One possibility is that the Employment Judge decided that, since the letter dated 26 April 2012 relied on a meeting which took place on 11 April 2012, it could not support a warning given at a meeting on 4 April 2012. There are real indications of this reasoning both in

paragraphs 25 and 27 of the Employment Judge's reasons. But if a warning really was given at a disciplinary meeting on 4 April it would not in any way be decisive of the case that the wrong date was given in the letter dated 26 April. Accordingly, if the Employment Judge decided the case this way, it would be very much open to question.

35. Another possibility is that the Employment Judge was not satisfied by Mr Bishop's evidence that a warning was given on 4 April. This was squarely Mr Bishop's evidence. The evidence of the Claimant was squarely to the contrary. Both had points to meet in the contemporaneous material. Mr Bishop had to meet the point that documentation and the letter dated 26 April referred to a meeting on 11 April. The Claimant had to meet the point that there were "read" receipts with these documents. There are no clear findings as to Mr Bishop's honesty and reliability except a finding that no evidence was fabricated and an apparent rejection of the Claimant's case as regards fabrication. There is no clear reasoning as to why the Employment Judge was unable to resolve what appears to be a clear conflict of evidence with material on both sides without resort to the burden of proof. It is not wrong in principle for an Employment Judge to decide the case on the burden of proof. But where an Employment Judge has seen and heard witnesses as to what occurred at a critical meeting and has had explanations for documentary material surrounding it, if he is not able to decide the matter without resort to the burden of proof, it is important to say why.

36. For these reasons I have concluded that the Employment Judge's reasoning does not meet the requirement of the law; the appeal must be allowed. It follows that the matter must be re-heard. Whether a re-hearing takes place in front of the same or a differently constituted Employment Tribunal is a matter for the Appeal Tribunal's discretion, exercised in accordance with considerations set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763.

Having borne those considerations in mind, I consider that the best course if for the matter to be heard by a different Employment Judge. He or she should approach the matter entirely afresh, hearing evidence afresh without being bound by any findings of the earlier Tribunal. This seems to me to be the sensible approach given that the Employment Judge's reasons are unclear and that any hearing will in any event be a one-day hearing. So the appeal will be allowed, and the matter will be remitted to be heard by a different Employment Judge.