Appeal No. UKEAT/0056/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 April 2014
Judgment handed down on 26 June 2014

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

(SITTING ALONE)

BRITISH AIRWAYS PLC — APPELLANT

MR C VALENCIA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LYDIA BANERJEE (of Counsel) Instructed by: DLA Piper UK LLP 1 St Paul's Place Balm Green Sheffield S1 3JX
For the Respondent	MR MICHAEL SPRACK (Representative) Free Representation Unit 60 Grays Inn Road London WC1X 8LU

SUMMARY

UNFAIR DISMISSAL – Reinstatement/re-engagement

Claimant a cabin crew member held to have been unfairly dismissed but to have contributed to a high degree to his dismissal (80%) and Tribunal held that a fair dismissal might well have occurred in any event so that a **Polkey** reduction of 50% was made.

At a remedy hearing, the Claimant sought reinstatement or re-engagement which was contested on the basis that it was not practicable given the Respondent's belief in the Claimant's misconduct and not just. The Tribunal decided both were practicable, but reinstatement would not be just in light of the high level of contribution. It held that re-engagement would be just because the contributory conduct could be reflected by making no arrears of pay award, thus obviating injustice to the Respondent.

Held: allowing the appeal. To make an order described as a re-engagement order but reinstating the Claimant to his former role on the same terms as previously held was wrong in principle where the Tribunal had decided that reinstatement would not be just. Further, had the Tribunal considered whether re-engagement was just as required by the statute, it would inevitably have reached the same conclusion.

THE HONOURABLE MRS JUSTICE SIMLER DBE

Introduction

1. This is an appeal directed primarily at the remedy judgment and reasoning of the Reading Employment Tribunal dated 14 October 2013, comprised of Employment Judge Gumbiti-Zimuto sitting with members Mr J D Williams and Ms H T Edwards. The judgment followed an earlier liability judgment of the Tribunal dated 9 July 2013 which addressed complaints of unfair dismissal and unlawful disability discrimination alleging a failure to make reasonable adjustments. The Claimant was seeking re-instatement and/or compensation.

2. The Tribunal dismissed the Claimant's claim for unlawful disability discrimination and there has been no appeal against this conclusion. However, the Tribunal upheld the claim of unfair dismissal for procedural reasons and because the conclusion that the Claimant's conduct was prejudicial to safety (an example of gross misconduct in the Respondent's policy) was not a conclusion open to the Respondent on the information available. Nevertheless, the Tribunal concluded that the Claimant was guilty of conduct which contributed to his dismissal and found that the Claimant's conduct on the day in question was, on his own account, in breach of the Respondent's procedures, reflecting a high level of contribution assessed at 80%. A **Polkey** reduction of 50% was also made.

3. In its judgment on remedy:

   a. The Tribunal considered the Claimant's application for re-instatement and concluded both that the Claimant's wish was to be re-instated and contrary to the Respondent's evidence as to their concerns over the safety of the Claimant returning to work, it was practicable for the Respondent to re-instate him.

b. However, it was not just to order re-instatement 'because there was a high level of contribution'

c. The Tribunal considered re-engagement and concluded that it was practicable to order re-engagement for the same reason as was given for re-instatement. Further it would be just to order re-engagement because the Claimant's contributory conduct could be reflected in the award for arrears of earnings between the date of dismissal and the date of re-engagement; the ability to reduce any award for loss of earnings in this way obviated any injustice to the Respondent.

d. The terms of re-engagement ordered by the Tribunal required the Claimant to be re-engaged in the same role and on the same terms as he was on prior to dismissal.

4. The parties to this appeal are referred to below as the Claimant and the Respondent as they were before the Employment Tribunal. The Respondent has been represented by Ms Lydia Banerjee, and the Claimant by Michael Sprack for FRU.

5. The Respondent sought a stay of enforcement proceedings pending determination of this appeal and if necessary for a further period of 28 days after the resolution of the appeal. This was not contested on the Claimant's behalf, and a stay of enforcement proceedings pending determination of this appeal was granted at the hearing. For the reasons set out below, the stay is no longer necessary, and falls away.

The statutory provisions

6. The relevant provisions of the **Employment Rights Act 1996** ("the ERA") are as follows:

Section 113:

An order under this section may be –

1. an order for re-instatement (in accordance with section 114), or

2. an order for re-engagement (in accordance with section 115),

as the Tribunal may decide.

Section 114: Re-instatement Order

(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify –

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement.

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2) (a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of –

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer, and such other benefits as the tribunal thinks appropriate in the circumstances.

Section 115: re-engagement order

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including –

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with.

(3)…"

Section 116: guidance re whether to order reinstatement or re-engagement.

(1) In exercising its discretion under section 113 the Tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account –

(i) whether the complainant wishes to be reinstated,

(ii) whether it is practicable for the employer to comply with an order for reinstatement, and

(iii) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the Tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the Tribunal shall take into account –

(a) any wish expressed by the complainant as to the nature of the order to be made

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3) (c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

(5) – (6)…"

7. It is accordingly clear that tribunals have a wide discretion in determining whether or not to order reinstatement or re-engagement. It is a question of fact for them. However, whereas an order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed, an order for re-engagement is more flexible and may be made on such terms as the tribunal may decide.

8. The statute requires consideration of reinstatement first. Only if a decision not to make a reinstatement order is made, does the question of re-engagement arise. In making a reinstatement order the tribunal must take into account three factors under s116(1) ERA: the complainant's wish to be reinstated; whether it is practicable for the employer to comply; and where the complainant caused or contributed to his dismissal whether it would be just to order his reinstatement.

9. Practicable in this context means more than merely possible but "capable of being carried into effect with success": **Coleman v Magnet Joinery Ltd** [1975] ICR 46 at 52 A-H (Stephenson LJ).

10. Loss of the necessary mutual trust and confidence between employer and employee may render re-employment impracticable. For example, where there is a breakdown in trust between the parties and a genuine belief of misconduct by the employee on the part of the employer, re-instatement or re-engagement will rarely be practicable: see **Wood Group Heavy Industrial Turbines Ltd v Crossan** [1998] IRLR 680 at [10] (Lord Johnston) in the context of misconduct involving drugs and clocking offences:

> **"in this case it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations… when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist….can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee."**

11. Similarly in **ILEA v Gravett** [1988] IRLR 497 (albeit on very different facts) the EAT accepted that a genuine belief in the guilt of an employee of misconduct, even if there were no reasonable grounds for it, was a factor that had to be weighed properly in deciding whether to order re-engagement:

> **"21. The Tribunal ordered re-engagement and are criticised by the Appellant employer for what they submit is a wholly perverse decision upon all the facts of this case. It is a possible view of that decision, but we do not seek nor do we need to go that far. An essential finding in the present case was that the authority had a genuine belief in the guilt of the applicant. It is said with accuracy that this is the largest education authority in the country and that it has a vast area to cover and a vast variety of posts into which the applicant could be fitted. It is, however, a common factor in any of those posts that the applicant would have the care and handling of young children of both sexes. Bearing in mind the duty of care imposed upon the authority and the very real risks should they depart from the highest standard of care, we take the view that this Tribunal failed adequately to give weight to those factors in the balancing exercise carried out in order to reach their decision on re-engagement."**

12. So far as contributory conduct is concerned, this is relevant to whether it is just to make either order and in the case of a re-engagement order, on what terms. In cases where the contribution assessment is high, it may be necessary to consider whether the level of contribution is consistent with the employer being able genuinely to trust the employee again: **United Distillers v Vintners Ltd** UKEAT/1471/99 at [14].

The Employment Tribunal's decisions on liability and remedy

13. By its judgment on liability the Employment Tribunal made a number of findings that are relevant to its remedy decision. In particular, it found:

(a) The Claimant was employed as cabin crew on 7 February 2005. In December 2010 he was disciplined and given a final written warning for behavioural conduct issues. The warning was not appealed and was extant at the time of his dismissal (and although not stated, it was therefore capable of being relied on).

(b) On 8 April 2012 there was an incident on a flight to which the Claimant was assigned as a result of which the flight was delayed and the Claimant was required to leave the flight and his duty and suspended.

(c) Misconduct allegations were investigated including conduct prejudicial to BA's good name and to safety, and breaches of the JPM crew responsibility (by leaving his position unattended without informing anyone else) and JPM chain of command rules (by using his mobile phone to contact the DOMS.

(d) The allegations relating to conduct prejudicial to safety and the breaches of the JPM were found proved by Mrs Barrett. She concluded that these matters taken on their own justified a final written warning. However, in light of the final written warning for behavioural issues that were relevant to the current misconduct, she decided dismissal was the appropriate sanction.

(e) The Claimant had two levels of appeal, but both were unsuccessful.

(f) The Tribunal found that Mrs Barrett was entitled to conclude that the Claimant breached the Respondent's procedures but not that his conduct was prejudicial to safety. It found that she took into account a matter not put to the Claimant (that his attitude towards BA was negative and would continue to affect his flying); and that she failed to take account of information in his personnel file that was to his credit. For these reasons the dismissal was substantively unfair. There were also procedural failings, including delay.

(g) Nevertheless, at paragraph 62 the Tribunal found that the Claimant was guilty of conduct which contributed to his dismissal:

> **"The Claimant's conduct on the 8 April was, even by his own account, in breach of the Respondent's procedures. The conduct contributed to the dismissal. We consider that the Claimant's conduct contained a high level of contribution and we assess that at 80%."**

(h) The Tribunal also found that a fair dismissal might have occurred and assessed this as a 50% chance, so that a **Polkey** reduction of 50% was determined.

(i) The Tribunal did not address the claim of wrongful dismissal in its findings or conclusions.

14. The Tribunal's decision on remedy is commendably brief. It identified the relevant statutory provisions at ss.112 to 116 ERA, and at paragraph 4 that the issues it had to resolve in relation to reinstatement were whether such an order was reasonably practicable, and if practicable, whether it would be just in the circumstances of the case.

15. At paragraph 5 to 7 it recorded the evidence of the Respondent's Chief Training Pilot, Mr Stephen Hawkins, that in relation to the Claimant's (admitted) conduct including the use of

a mobile phone shortly before departure which demonstrated a willingness to disregard safety regulations and procedures within the JPM which related to maintaining a safe operation, this "behaviour and breaches of the procedures in the JPM and his failure to take personal responsibility for safety would mean that BA could not place trust in him as a member of cabin crew". The Respondent relied on this evidence to submit that it was not reasonably practicable for the Claimant to be reinstated.

16. However, the Tribunal balanced against that evidence the fact that a final warning was regarded by Mrs Barrett as appropriate for that conduct, and dismissal was only determined on by virtue of the earlier final written warning (also for behavioural conduct issues). The Tribunal decided that it would be reasonably practicable to reinstate in the circumstances.

17. At paragraph 10 the Tribunal referred to its finding that there was a high level of contribution in this case. However, it reasoned that because the 8 April 2012 matter in isolation did not warrant immediate dismissal, the high level of contribution was therefore in respect of matters which did not warrant immediate dismissal. This is a surprising observation. It is inconsistent with the findings and conclusions of the Tribunal in the liability decision, and overlooks the December 2010 final written warning which was still extant and regarded as relevant because it concerned behavioural issues. In light of the Tribunal's earlier findings, the Claimant's blameworthy conduct in relation to that warning would have required consideration in the context of his blameworthy, contributory conduct overall, and if this reasoning had been followed through by the Tribunal, it might have given rise to an arguable ground of appeal (see paragraph 39 below).

18. However, despite the observation at paragraph 10, at paragraph 11 the Tribunal decided that reinstatement would not be just in this case because there was a high level of contribution –

in other words, as the Tribunal had already found, blameworthy conduct in breach of the Respondent's rules that contributed to his dismissal. It explained that an order for reinstatement requires the Claimant to be treated as though he was never dismissed, and given his contribution to his dismissal (and what has happened to the Claimant in the intervening period – a reference to his failure to mitigate his losses), reinstatement would be unjust.

19. So far as re-engagement was concerned, the Tribunal decided that it was practicable for the reasons already given.

20. At paragraph 14 the Tribunal said:

> **"it would be just to order the Claimant's re-engagement. What would make it just would be to reflect the level of contribution in any award for loss of earnings that we are required to specify when making an order of re-engagement. To reduce the award to reflect the level of contribution in our view obviates any injustice to the Respondent. We consider that the Respondent has been able to show that there was a failure …to mitigate his loss during the period between his dismissal and our order. Justice between the parties can be met by making the financial element of any order reflect the failure to mitigate as well as the level of contribution."**

21. The Tribunal accordingly ordered that the Claimant be re-engaged as cabin crew on the same terms and conditions as previously held; but apart from awarding notice pay for wrongful dismissal, no award of arrears of pay was made for the period between dismissal and the order.

The grounds of appeal in relation to re-engagement

22. Although three grounds of appeal are pursued in relation to the re-engagement order made by the Employment Tribunal in this case, the central ground is that in the circumstances of this case, the order for re-engagement made was wrong in principle, involving a misdirection or wrong approach by the Tribunal.

23. Ms Banerjee submits that s. 116(1) (c) in relation to re-instatement and s.116 (3) (c) in relation to re-engagement, ask the same question of a tribunal, namely whether or not it is just to make the order where the complainant caused or contributed to their dismissal. Here, having found a very high level of contribution assessed at 80%, the Tribunal found that it was not just to order reinstatement '*because there was a high level of contribution*'. She submits that the same test in respect of considerations of justice applies to the question whether or not to order re-engagement and should have led to the same conclusion. Against that Mr Sprack submits that the two orders are different or there would be no point in having two different available orders. Therefore, there will be circumstances where one order is just and the other is not; and this is such a case as the Tribunal explained.

24. Whilst reinstatement and re-engagement are obviously different orders, and the outcome of a consideration of whether it is just to make either order in a particular case may be that one is just but the other not, I cannot agree that this is such a case for the following reasons.

25. An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed: s. 114(1). Accordingly, it requires that the employee is put back into his pre-dismissal job and treated as if dismissal had not occurred: in other words, placing him into precisely the same job on the same terms, reporting to the same manager and working alongside the same colleagues as before.

26. A re-engagement order is different. It requires that the employee is engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment: s. 115(1). It is engagement in a different role (albeit comparable or otherwise suitable) and may involve a

change in the identity of the employer, the nature of the employment or the terms as to remuneration.

27. Hence in a case for example, where a particular manager has lost trust and confidence in an employee so that it would not be just to order reinstatement, it may nevertheless be just to order re-engagement in a comparable or otherwise suitable role in a different part of the employing organisation or by a different associated employer, and reporting to a different manager who retains trust and confidence in the employee concerned. This is of course, not the only factual circumstance that admits of such a conclusion, but is illustrative of how this outcome might emerge.

28. In the present case, having concluded that an order for reinstatement was unjust because of the high level of contributory conduct in the Claimant's case, the Tribunal nevertheless made an order for reinstatement but called it a re-engagement order. It ordered that the Claimant be reinstated to the role he held before dismissal on precisely the same terms and conditions he had previously been employed on. To do so was wrong in principle, and was not permitted by the statutory scheme. Moreover, having in effect ordered reinstatement by a different name, it is difficult to see how the high level of contributory conduct that made reinstatement unjust did not also make the so-called 're-engagement order' unjust for the same reason.

29. The only difference between the order made by the Tribunal in this case, and an order properly described as an order for reinstatement related to the arrears of pay it awarded between the date of dismissal and the date of the order. In this regard I cannot accept Ms Banerjee's argument that there is no requirement that an order made under s.114 (1) for arrears of pay between the date of dismissal and the date of reinstatement must be an order for the arrears to be paid in full (subject only to s. 114(4)). She submitted that the wording of sections 114(2)(a)

and 115(2)(d) is identical and accordingly, that a tribunal must determine the amount payable by the employer in respect of arrears between the date of dismissal and re-employment in both cases, and that a finding of contributory fault can have the effect of reducing the sum payable under both s. 114(2)(a) and s. 115(2)(d).

30. This approach ignores the important provision in relation to reinstatement in s. 114(1). Subject only to deductions for payments received from that employer or another employer in respect of that period under s.114 (4), full arrears of pay are required under s. 114 ERA because a reinstatement order is an order that requires the employee to be treated in all respects as if he had not been dismissed; whereas a re-engagement order is different. The employee is not required to be treated as if never dismissed, and where a re-engagement order is made, s. 116(3)(c) permits the tribunal some discretion as to the terms of such an order where contributory conduct has been found.

31. At paragraph 14 of its remedy decision, the Tribunal recognised this difference, and relied on the flexibility available to it in relation to the arrears to be ordered under a re-engagement order (as opposed to a reinstatement order) to justify its conclusion that a re-engagement order would be just in this case. This was not a permissible approach. Section 116 (3)(c) required the Tribunal to consider, in light of its finding that the Claimant had by his conduct contributed to his dismissal to a high degree, whether it would be just to order re-engagement, and if so, the terms of such an order. There are two questions – the latter is to be addressed only if the former is answered affirmatively.

32. The Tribunal conflated the two questions and thereby failed to answer the first question whether such an order was just in light of its finding of 80% contribution. Moreover, since it was in effect ordering reinstatement (save so far as arrears were concerned) it is impossible to

see how a proper application of the section could lead to any other conclusion than that it was not just to order re-engagement for the same reason that it was not just to order reinstatement. The question of arrears of pay under s. 115(2)(d) did not arise.

33. Mr Sprack contends that this is to impose a laboured, legalistic approach to the wording of s. 116(3)(c) which the statute does not require. He argues that tribunals are required to approach s. 116(3)(c) as a single question that looks at the terms of such an order as part of the assessment of whether such an order is just to be made. I disagree. The approach I have identified is precisely what the statute requires, and is entirely consistent with its wording. Nor can I accept that this is what the EAT (Underhill P presiding) had in mind in **Oasis Community Learning v Wolff** UKEAT/0364/12/MC when referring at paragraph 39 to "sensible creativity, in a case that really calls for it, should not be discouraged". In every case where contributory conduct has been found, the statute requires consideration of whether a re-engagement order is just in those circumstances. That stage was omitted by the Tribunal.

34. For these reasons I have concluded that the Employment Tribunal erred in law in ordering re-engagement in this case. Its approach was wrong in principle, and involved a material misdirection. Given that a reinstatement order was refused, it was not open to the Tribunal to order reinstatement under the guise of a re-engagement order. Moreover, any proper consideration of re-engagement required consideration of whether such an order was just. This conclusion makes it unnecessary to deal with the Respondent's perversity arguments.

35. So far as the question of disposal is concerned, I have considered whether it would be right to remit the question of re-engagement to the Tribunal as Mr Sprack has urged. However, I have concluded that the inevitable conclusion in the circumstances of this case, given the Tribunal's findings on contribution, is that it would not be just to order re-engagement for

precisely the same reasons that it was not just to order reinstatement. Accordingly, the order for re-engagement is set aside, and no order is made. The case will however, have to return to the Tribunal to deal with questions of compensation unless those are capable of resolution by agreement.

Additional issues

36. That leaves two further issues. The question of notice pay raised in the grounds of appeal has been resolved by agreement. Accordingly, the notice pay award of £5,397 is set aside and the correct figure of £4,737.04 is substituted.

37. The final issue concerns the question whether the Tribunal failed to deal with and consider the impact of the final written warning of December 2010 in this case. It arises as follows. Ms Banerjee submits that in addition to arguing by way of its primary case that the Claimant's conduct was 'conduct prejudicial to safety' identified as gross misconduct in the Respondent's disciplinary procedures, the Respondent's secondary case advanced at both hearings was that even if the conduct did not justify summary dismissal the admitted conduct on 8 April 2012, combined with the final written warning justified dismissal. This ground of appeal is expressly not a challenge to the finding of wrongful dismissal, nor is it a challenge to the 50% **Polkey** reduction in this case. Rather, she submits, the Tribunal was obliged to consider whether or not the Claimant would have been fairly dismissed given the admitted misconduct and the existing final written warning, and (having been invited to do so both at the liability and again at the remedy stage) it failed to do so and that failure is an error of law.

38. Mr Sprack submits that although this question was not directly addressed by the Tribunal, the findings and conclusions adequately address the issues raised, and implicitly addressed this issue.

39. With some hesitation, I agree with him. Tribunals are not required to decide every point raised by the parties, provided that the central issues are addressed. Although some aspects of the Tribunal's reasoning in relation to the warning and Mrs Barrett's conclusions (and in particular, that identified at paragraph 17 above) are difficult to follow, a fair reading of the liability decision overall, given that the Tribunal rejected the Respondent's case of gross misconduct but made a finding that he had contributed to his dismissal by his blameworthy conduct to the extent of 80% and a finding that a fair dismissal might have taken place, suggests that the earlier warning was considered. I would have taken a different view if the Tribunal's observation at paragraph 10 of the remedy decision had been relied on by it to undermine those earlier conclusions. This ground of appeal accordingly fails.

40. For the reasons set out above, the appeal is allowed in relation to the order for re-engagement which is set aside. It would not be just to make such an order in this case. The case is remitted to the Employment Tribunal to deal with questions of compensation only.