Appeal No. UKEAT/0529/13/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 & 28 November 2014

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR S J LYONS — APPELLANT

TOTAL SIGN SOLUTIONS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS J SCOTT (of Counsel) Instructed by: Burstalls Solicitors PO Box 31 Ocean Chambers 54 Lowgate Hull HU1 1JF
For the Respondent	MR C BOURNE (of Counsel) Instructed by: Andrew Jackson Solicitors Marina Court Castle Street Hull HU1 1TJ

SUMMARY

UNFAIR DISMISSAL

Contributory fault

Polkey deduction

The Claimant succeeded on an unfair dismissal claim.

The Employment Judge made a finding of serious misconduct against him in the context of considering a **Polkey**/conduct reduction and a claim of wrongful dismissal.

That finding was based on reasoning which was flawed and inadequate in three ways which amounted to an error of law:

(1) The Employment Judge failed to spell out exactly what the misconduct was and consequently failed to address or even acknowledge the full consequences of his finding;

(2) The Employment Judge relied in part on a particular factual matter which was agreed on all sides to be wrong and arose from an error made by the Respondent's Counsel;

(3) The Employment Judge relied on a matter in the course of his reasoning which, although it could have properly been taken into account in considering the Claimant's credibility, was not directly relevant to the serious misconduct in question.

The matter should be remitted to another Employment Judge.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by the Claimant against a Judgment of Employment Judge Keevash sitting in Hull, which was sent to the parties on 25 July 2013 following a hearing which took place on 12 March 2013 and then on 1 and 2 July 2013. The Judge found that the Claimant had been unfairly dismissed by the Respondent on 14 August 2012. However, he also found that the Claimant had committed an act of misconduct such that he would have been fairly dismissed within four weeks of 14 August and such that his basic award should be reduced by 100%, his compensatory award should be reduced by 50% and his claim for wrongful dismissal was dismissed. The appeal is in substance against those latter findings. It has been ably argued by Miss Scott for the Claimant/Appellant and resisted by Mr Bourne for the Respondent, ably also. Mr Bourne appeared below. Mr Weaver, who appeared for the Claimant below, was present in court sitting behind Miss Scott.

The Facts

2. The background is this. The Claimant started to work for the Respondent in September 2008. He was a sign installation engineer. That post involved some travel and driving by the Claimant and some night work.

3. In March 2012 the Claimant arranged and booked flights for a holiday in Australia, which involved flying out on the evening of Friday, 27 July 2012 and returning in the early morning of Saturday, 11 August 2012. For some reason he never informed the Respondent about this arrangement, although there were relevant provisions in his employment contract, which are at page 192 in my bundle as follows:

> **"… you must not book holidays until your request has been authorised by the management.**

…

No more than 10 day's holiday may be taken without prior permission from the management. One month's notice must be given by you of the proposed date of commencement of any holiday."

It was accepted that the terms of contract in relation to holidays, which I have not quoted in full, were not the clearest or most beautifully drafted. Notwithstanding the provision that I have read out that says "you must not book holidays until your request has been authorised", no-one has suggested, nor can I see it could have been suggested, that booking the holiday in itself could amount to any kind of misconduct.

4. On 26 June 2012 the Claimant went to see his GP, complaining of stress. The GP notes, which were disclosed to the Respondent well before the hearing in December 2012, recorded in abbreviated form:

"[Patient] has been off work with stress works 16-24 hr days drives long distances every day feels unable to continue with incr workload …"

And then a little later on: "[patient] feels needs time from work to clear his thoughts." In due course the Claimant obtained a sick note, which is at my page 229, which was dated 26 June. It says that the GP has assessed his case on 26 June and, because of work-related stress, the doctor advises that "you are not fit for work" and that that will be the case for four weeks. I say "in due course" the Claimant obtained that sick note, because it is not at all clear from the notes how exactly and when exactly the four-week sick note was given to him and in due course given to the Respondent.

5. The four weeks in question expired on 23 or 24 July 2012. On 23 July 2012 the Claimant went to see his GP again. The note in this case said

"History: Still undertr stress ++ from employer re: time off. Noit [sic] started SSRI yet [SSRI is an antidepressant medication] - poor sleep, mood up and down. No suicidal thoughts …

Plan: Chat;. Encouraged to take SSRI and MED3 [that is a certificate] … issued by hand, not fit for work … 3/52 [that is 3 weeks] stress at work. [Review] 3/52 re:progress."

It appears, and I think he accepted at the hearing, that he did not mention to the GP that he was booked to go to Australia on holiday the following Friday, 27 July 2012. There was a sick note, also dated 23 July, produced by a different GP, at page 231 in my bundle, which again says that he was assessed on 23 July 2012 and, because of stress at work, he had been advised that he was not fit for work and that that would be the case for three weeks and that the doctor would need to assess his fitness for work again at the end of that period. That three-week period would last until 13 August 2012.

6. Having returned from holiday on 11 August 2012, the Claimant went into work on 14 August 2012. He had not gone back to see his GP before returning to work. When he arrived, he was obviously suntanned, and there had been pictures put on his Facebook page, which had been seen by others at the Respondent, which showed him driving a sports car in Singapore. When he arrived at work, he was called to a meeting with Mr Coggins, the Director of the Respondent.

7. Mr Coggins' evidence to the Employment Tribunal was that during the meeting the Claimant agreed, in effect, to resign and that he had not been dismissed. The Claimant's evidence was that he had in effect been dismissed and he was supported in that evidence by his partner, Amy Walker, who had been called to and was present at the meeting with Mr Coggins. The Employment Tribunal rejected Mr Coggins' evidence about what had happened at that meeting and found that the Claimant had indeed been dismissed. Since the Respondent was denying that the Claimant had been dismissed at all, no reason was put forward for the dismissal, and in those circumstances the Respondents did not satisfy section 98(1) of the

Employment Rights Act and the Employment Tribunal found that the Claimant had been unfairly dismissed. There is no appeal against that finding.

The Employment Tribunal Hearing

8. It had been agreed that the Employment Tribunal would not determine issues relating to any **Polkey** reduction, contributory conduct or wrongful dismissal at the hearing to take place in July 2012. However, at the close of their oral submissions on the third day of the hearing, both advocates, Mr Weaver for the Claimant and Mr Bourne for the Respondent, agreed that the Employment Tribunal should indeed determine such issues and that the Employment Tribunal had heard all the relevant evidence. It seems that both Counsel had produced written submissions overnight between 1 and 2 July and that those written submissions were only exchanged right at the door of the court before they went in to make their respective oral submissions. Mr Bourne for the Respondent went first. Mr Weaver came second. I was told there was a short gap between the two sets of oral submissions.

9. In the course of his written submissions to the Employment Tribunal Mr Weaver for the Claimant maintained that the true reason for his dismissal was that the Respondents knew that had been on holiday while on sick leave and indeed invited the Tribunal so to find, making the point that merely being out of the country whilst on sick leave could not amount in itself to any kind of misconduct. Under the heading of "**Polkey** and contributory conduct" the Claimant's submissions said this at paragraph 3.2:

> **"The Respondent implies that the Claimant's illness was not genuine and that he contrived a situation in order to take a holiday."**

And the following page, at paragraphs 3.5 and 3.6 it says this:

> **"3.5. There is nothing wrong with any of that and the implied suggestion that Mr Lyons concocted his illness to assist him in taking time off for a holiday, which was not due to start for more than one month later [that is referring to the 26 June sicknote], is unsupported by**

> **any actual evidence and unlikely, especially as the Claimant would have had sufficient accrued but untaken leave owing with the Respondent, i.e., there was no reason why the Claimant could not have taken holiday leave [if] he had not been on sick leave.**
>
> **3.6. There is no law, rule or other policy in place which prevented the Claimant from being away from home during a period of sick leave. The fact that the Claimant was away on holiday during a period of sick leave is not a reason or justification for any finding of contributory fault."**

It is clear from the quotation I have read from paragraph 3.2 that it must have been put to the Claimant clearly during cross-examination that his illness was not genuine.

10. Mr Bourne's written submissions said the following, at paragraphs 21 and 22:

> **"21. The reason for the second sick note [the one dated 23 July], it is submitted, was not only that the Claimant had not submitted a holiday request but because he had only 10 days leave left to take at the time. No documents have been produced showing the date of the booking nor the dates of travel but, on the Claimant's evidence, he left the UK on Wednesday 27 July and was driving a sports car in Singapore on the weekend of 10/11 August … His attendance at work on 14 August therefore followed 12 working days' absence.**
>
> **22. If the Respondent's case is accepted and the Claimant falsely claimed to be ill in order to obtain a sickness certificate for his holiday, the maximum amount the Tribunal should award is the difference between his SSP and his basic pay for the 10 day period he was away …"**

That latter point is not something I am concerned with, but it is clear from the quotation I have given that the Respondent's position was that the second sick note was false and that the Claimant was falsely claiming to be ill. In the Respondent's response to the amended Notice of Appeal, at paragraph 17 on page 70, the Respondent says this:

> **"Contrary to the assertion at paragraph 3.5 of the Appellant's submissions, it was never suggested that the Claimant had concocted his illness at the start of his sick leave and the Respondent accepted that, when he first began his sickness absence, it did not dispute that he was suffering from stress."**

It is clear, therefore, that the case being made by the Respondent is and was that it was the second sick note from 23 July and only that which was the basis for alleging a false claim by the Claimant to be suffering from stress such that he was unfit for work.

11. The Employment Judge found, as I have said, that the Claimant was dismissed unfairly because no reason had been proffered by the Respondent. He went on to consider, at paragraph 20, whether the Claimant could have been fairly dismissed on his return to work on 14 August 2012:

> **"20.1. The Tribunal found that the real reason for the dismissal was that Mr Coggins believed that the Claimant had deliberately avoided the Respondent's holiday procedures in order to ensure that he could take a trip to Australia which would have involved twelve working days. The Claimant was aware that he had to follow the Respondent's procedure and obtain prior approval for holiday plans. In or about March 2012, he knew that the trip had been booked. He did not obtain any prior approval. He knew that he would not have twelve days' accrued leave. His evidence that he had completed but had simply forgotten to submit a holiday request form was wholly unconvincing.**

At 20.2 the Judge quotes the GP notes from 26 June 2012, which I have already quoted, and then says:

> **"That record must have been based on what the Claimant told his GP. There was no evidence to support the statement that the Claimant worked '16-24 hour *days*' or that he 'drives long distances *every day*' [Tribunal emphasis].**
>
> **20.3. The Tribunal found that the Claimant had misrepresented his work situation to his GP. [The] Tribunal was surprised that the Claimant did not inform his GP that he was about to go on a trip to Australia and that, without consulting his GP again, he returned to work on 14th August 2012, despite that fact that his GP had signed a fit note on 23rd July 2012 confirming that the Claimant would not be fit for work for three weeks and stated that he would need to assess the Claimant's fitness for work again at the end of that period. The Claimant's explanation was again wholly unconvincing. In reaching its conclusion, the Tribunal rejected Mr Weaver's submission that there was no reason why the Claimant could not have taken holiday leave if he had not been on sick leave. On the contrary, there was a very good reason. The Claimant had failed to obtain prior approval for his holiday plans and the trip would have involved the Respondent granting him two days' paid annual leave to which he was not entitled (or, alternatively, granting two days' unpaid leave). The Claimant was not prepared to take the risk that the Respondent would not grant approval.**
>
> **20.4. The Tribunal found and decided that, if the Respondent has followed a fair procedure, it would have dismissed the Claimant in any event for a reason relating to conduct. The Respondent would have suspended the Claimant on 14th August 2012 pending an investigation. It would have invited the Claimant to attend a disciplinary meeting to answer the allegation that he had failed to comply with its holiday procedure. It would have reasonably formed the belief that the Claimant had misled his GP in order to ensure that he could go to Australia. It was most unlikely that the Respondent would have believed the Claimant's explanation. In all the circumstances, the Tribunal decided that the Claimant would have remained in employment for a period of four weeks after 14th August 2012. A fair disciplinary process would have been completed by then."**

At paragraph 23.1 he says this:

> **"… [The Tribunal] found and decided that the Claimant's conduct in misleading his GP so that he could take the trip to Australia, thereby avoiding the need to comply with the Respondent's holiday procedure, was gross misconduct which warranted a 100% reduction [in the basic award]."**

Finally, at paragraph 25, in dealing with the wrongful dismissal claim, the Tribunal said this:

> **"The Tribunal asked whether the Claimant's conduct was sufficiently serious to warrant dismissal without notice. It found and decided that his conduct constituted gross misconduct. He had committed a repudiatory breach of his contract of employment which would have entitled the Respondent to terminate it summarily. Accordingly, the complaint under this head failed."**

12. Although it is not expressly spelt out by the Employment Judge, it seems to me, based on what he does say and on the way the parties were putting their cases, that he must have found that the Claimant was in fact fit to go to work on 23 July 2012 and knew that he was fit and was pretending to be suffering stress when he went to see his GP in order to be able to go on holiday. That is made clear by the Judge's letter to the EAT dated 2 July 2014 at page 105 where the Judge said:

> **"… [The Claimant] falsely claimed to be ill in order to obtain a GP statement of fitness to work. He was not prepared to take the risk that [the Respondent] would not grant approval for a holiday request."**

The Problems with the Judge's Reasoning

13. That finding is obviously a very serious one. It would certainly warrant the **Polkey** reduction and the conduct reductions and the finding on wrongful dismissal. I acknowledge that it is a finding of fact and would have been based in large part on the Judge's undoubtedly poor assessment of the Claimant's credibility. However, there are, it seems to me, three problems with the Judge's reasoning which lead to that finding.

14. First, although the Judge says in his Judgment that the Claimant misled his GP in order to go to Australia, nowhere does he expressly spell out as he does in the letter that the Claimant falsely claimed to be ill in order to get a sick note or the necessary corollary of that, namely that on 23 July 2012 he was not suffering stress, at least not to a sufficient degree to mean that he was incapable of work and that he was capable of work. If the Judge had expressly made those findings, he would have seen that he had to grapple with, or at least acknowledge, two

difficulties with the finding: first, that there must have been a change at some time in the Claimant's condition between 26 June and 23 July 2012 since, as I have said a number of times, no-one was suggesting that the June sick note was in any way false and, second, that the GP's diagnosis on 23 July 2012 was wrong.

15. The second problem with the Judge's reasoning is that an important part of that reasoning in paragraph 20.3 which I have read was based on the notion that the Claimant's proposed holiday involved 12 working days: i.e more than the ten working days which apparently were all that he had left by way of holiday and which are also specifically identified in the contract as requiring prior management permission. The 12 days figure was based on an error in Mr Bourne's submissions at paragraph 21, which I have read out. In the paragraph Mr Bourne says that the Claimant left the UK on Wednesday, 27 July. Unfortunately 27 July was a Friday, not a Wednesday, which takes two working days off the calculation. Mr Bourne acknowledges very frankly that he simply made an error and does not seek to blame anyone else for it. The reasoning, therefore, at paragraph 20.3 that the Claimant had failed to obtain prior approval and that the trip would have involved him being granted two days' paid annual leave to which he was not entitled was, on the face of it, not correct.

16. Mr Bourne, in submissions, had a number of answers to this point: (a) he says that, even a ten-day holiday would have required permission by 23 July 2012 so that in a sense the 12-day issue was a red herring. The problem with that is the contract specifically identifies holidays in excess of ten days as requiring some kind of special permission, and he in submissions and the Judge in his Judgment particularly rely on the fact that it was to be a 12-working day holiday and it also seems to have been relevant that the Claimant only had ten working days' holiday leave outstanding.

17. So the point was particularly relied on by him and by the Judge, and one cannot know how the case would have looked to the Judge if he had not proceeded on the mistaken basis that he did. His letter, at page 106, says this:

> **"… On reading the Claimant's affidavit, I now realise that 27 July 2012 was a Friday and not a Wednesday. That meant that the trip involved ten working days. I do not consider that this error warrants a reconsideration of my Judgment because, as stated in paragraphs 20.4 and 23.1 of the [Reasons], the Polkey ground for dismissal and the blameworthy conduct was the Claimant's failure to comply with the Respondent's holiday procedure and not the taking of leave to which he was not entitled."**

It seems to me that the Judge has rather missed the point there. The blameworthy conduct, as he identified it, was misleading the GP and pretending to be ill when he was not. The question of 12 or ten days went to whether the Claimant needed to do that or not.

18. (b) Mr Bourne says that in any event, on the facts, the holiday would have involved at least 11 working days because the Claimant was to get a flight at Heathrow on Friday evening on 27 July 2012 and he would have had to leave Hull much earlier in the day. That, I am afraid, is a point of fact not dealt with by the Judge nor, as I understand it, ventilated at the hearing at all, so I do not think it would be appropriate to take it into account.

19. (c) Mr Bourne says that his error in the written submissions was really there for everybody to spot and correct. I was told that the written submissions were produced by both sides just before court and, as I have said, there was a short break before the Claimant's Counsel had to make his oral submissions. I was also told that the point was never aired in the course of the hearing or the cross-examination of the Claimant. In those circumstances, I do not think it can be right for the Respondent to be able to rely on a mistake which it accepts it was responsible for, although it does not seem to have been picked up by the Claimant.

20. The third problem with the Judge's reasoning is this. The Judge relies, as I have said, in paragraph 20.2 and the first sentence of paragraph 20.3 on what the Claimant told his doctor on 26 June 2012. I accept that it was open to the Judge to draw a conclusion from the notes that the Claimant was misleading the doctor on 26 June about the amount of work he was doing, although I say parenthetically that I am not sure that it was entirely fair to do so on the basis of a GP's very brief note, which contains a statement which is obviously an exaggeration. I accept that it was open to the Judge, having drawn that conclusion, to use the statement to the GP on 26 June as material in considering the Claimant's overall credibility. However, I do not see the relevance of what happened on 26 June 2012 to the Judge's reasoning in paragraph 20 as to the position on 23 July 2012 given, I repeat again, that it was not suggested that the 26 June 2012 sick note was false in any way and given, indeed, that the June sick note could not have impacted on the holiday starting on 27 July 2012 in any event.

21. That deals with the three problems that I have identified with the Judge's reasoning based on the submissions made to me. I appreciate that I am getting close to the line between fact and law here, but it seems to me that when a Tribunal makes a finding of serious misconduct against a party, as this Tribunal has, that finding should, as a matter of law, be based on cogent reasoning and accurate facts. In this case the Judge's reasoning unfortunately is based on a straight factual error, fails to deal with or acknowledge some obvious consequences of this finding and includes considerations of dubious relevance. In those circumstances I have come to the view that the Judge's Reasons in this respect are flawed and inadequate and that the finding cannot stand.

22. I should say, in fairness to the Judge, that it was probably unhelpful that the parties decided to change direction after the evidence had been heard on 1 July 2013 and that it was

also unhelpful that, at least until the final submissions, the exact misconduct that was being alleged against the Claimant had not really been formulated. However, the issues relating to the **Polkey** reduction, the conduct reduction and wrongful dismissal will need to be remitted to another hearing. Mr Bourne suggested that Judge Keevash could deal with the matter. Given the views that he has already formed, in particular those which I have quoted from this letter, I do not think it would be right to remit the case to him and the matter will therefore, regrettably, need to go before a new Employment Judge.

23. I make it clear that on a reconsideration of all the evidence and arguments it may well be that another Employment Judge comes to the same conclusion as Employment Judge Keevash has or that, even if he or she does not reach such a firm conclusion, nevertheless **Polkey** and other reductions may be in order and there may be a basis for finding that the Claimant was in repudiatory breach of his contract of employment. Given those comments, it is to be hoped, perhaps vainly, that the parties can reach some kind of agreement on a suitable compensation figure and avoid a further hearing.

Costs

24. I have decided this appeal in favour of the Claimant/Appellant not on the precise basis, I think, that it was put in the Notice of Appeal. So I cannot say that the Appellant has scored a complete success. It may be that after the matter has gone back, if it is reheard, the Claimant/ Appellant ends up in the same or possibly even a worse position than he is at the moment. On the other hand one of the reasons for allowing the appeal was an error made by the Judge which was induced, in part anyway, by an error that Mr Bourne very frankly admitted in his final submissions. Putting all that together, it seems that this is perhaps a 50/50 case and I will therefore award costs in the sum of £800 to the Appellant in relation to the appeal.