Appeal No. UKEAT/0219/14/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 November 2014

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

EXOL LUBRICANTS LIMITED — APPELLANT

(1) MR D BIRCH
(2) MR D PERRIN — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GEOFFREY ISHERWOOD (Representative) ELAS Business Support Charles House Albert Street Eccles Manchester M30 0PW
For the Respondents	MR TOM GILBART (of Counsel) Instructed by: Freeths LLP Solicitors 3rd Floor, St James Building 61-95 Oxford Street Manchester M1 6FQ

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

The Claimants were employed as delivery drivers using HGVs. They lived in Manchester but the Respondent depot they had to attend to load up was situated in Wednesbury. Their contracts stipulated that their place of employment was in Wednesbury.

The cost of commuting each day in their transport was too great for the Claimants and in order to accommodate the Respondent agree to make available secure parking for their HGVs in Stockport near their homes. They would drive from their homes to Wednesbury each day and the journey to and from Stockport was treated as part of their working day for which they were paid. It was accepted that this arrangement had become a term of their contracts of employment. All the other HGVs were parked overnight at the depot in Wednesbury. A time came when the Respondent felt it could no longer afford to pay for the secure parking in Stockport and gave notice to the claimants that it was terminating the arrangement. The parties were not able to agree on a compromise that would enable the claimants to commute to Wednesbury each day without having to use the secure parking in Stockport.

The Respondent therefore determined in the absence of agreement to dismiss the Claimants. Initially the proposed ground was SOSR but in the event the reason for dismissal was redundancy.

The Respondent sought to argue that there was a redundancy situation because the basis that Stockport was the Claimants' place of work rather than Wednesbury. The Respondent had sought to argue that as the Respondent no longer wished the Claimants to keep their lorries at Stockport, its requirement for lorry driving in Stockport had diminished and the case was

therefore within the meaning of section 139 (1)(a)(ii) of the **Employment Rights Act 1996**. Employer ceasing "to carry on … business in the place where the employee was … employed". Therefore there was a redundancy situation. The Employment Tribunal rejected the Respondent's case on the basis that the Claimants' place of work was not in Stockport but in Wednesbury because that was where their working day began and ended.

The Employment Appeal Tribunal upheld the decision. It derived the following propositions from the authorities as to the meaning of the phrase "the place where the employee was … employed".

> 1. In cases of someone like a delivery driver, who has no fixed place where he carries out his duties, in determining the place where he was employed within the meaning of section 139, it is proper but by no means conclusive to have regard to the contractual provision.
> 2. It is appropriate to consider, depending on the facts of the case, any connection he may have with a depot or head office or something like that.

Both of those matters were highly relevant in the instant case. The Claimants both had a close connection with the Wednesbury depot. That is where they had to take their lorries every day to be loaded and that is where their instructions came from and to where they reported.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Claimants from a decision of the Employment Tribunal at Birmingham, presided over by Employment Judge Lloyd, who sat with lay members. The Employment Tribunal upheld claims by both Claimants for unfair dismissal. It found that there was no contributory conduct, and there should not be a **Polkey** deduction. It also found there had been breaches of contract on the part of the Respondent but it rejected a number of claims related to disability discrimination and found there had been no harassment. It also found that the Respondent's case that there had been a dismissal by reason of redundancy had not been made out and an attempt to justify dismissal on the grounds of some other substantial reason was also dismissed. Indeed when the Respondent sought to argue the question of some other substantial reason the Employment Judge was somewhat nettled. He described it as wholly improper, belated, without grounds; and it was roundly rejected. That may have been somewhat harsh on Mr Isherwood, although to argue at that point in time that the dismissal was by reason of SOSR would have been extremely difficult.

2. So far as the Second Claimant is concerned, there is no appeal against the findings that were made on discrimination. The appeal was referred to HHJ Clark on what we know as "the sift", and he referred it to a Full Hearing on 3 July of this year. The matter came on before HHJ Richardson on 17 September, who directed that the Employment Judge should produce his notes. I have a typed transcript of some of those notes in the bundle, but it is apparent from what I have been told, particularly by Mr Isherwood, who appears on behalf of the Respondent, that the notes are certainly incomplete and they do not record all the cross-examination of the Claimants. I think it is right to say, and Mr Gilbart will correct me if I am wrong, that his cross-

examination of the Respondent's witnesses has also not been fully made available. In the event, I take the view that I am unlikely to have learned anything from any further notes, and I have more than sufficient material to enable me to determine this appeal.

3. I take the background from the decision of the Employment Tribunal. The Claimants are both heavy goods vehicle drivers. At all relevant times they have lived in the Manchester area. The First Claimant, Mr Birch, is the father-in-law of Mr Perrin, the Second Claimant. Mr Perrin has the misfortune to suffer a disability by reason of a back injury. Mr Birch's employment with the Respondent goes back to January 2004 and Mr Perrin's to 30 August 2005. The Respondent is a manufacturer and distributer of lubricants. Its principal depot is in Wednesbury in the Midlands. That is its depot. That is where deliveries commence, and indeed it has, I think, about nine heavy goods vehicles for deliveries. With the exception of those of Mr Perrin and Mr Birch, they are kept garaged at the Wednesbury depot.

4. Although both Claimants' contracts of employment stipulate that their place of employment is at the Wednesbury depot, and although there is no reference to this in the contract of employment, it is common ground that from the outset of their employment they were entitled to park their lorries in secure parking accommodation in Stockport, nearer their homes in Manchester. At one time, I believe that the Respondent did maintain a small depot and lorry park in Stockport, but for many years it has provided secure parking in Stockport to the Claimants to enable them to save travelling time. It was accepted by the Employment Judge, and not disputed before me, that the entitlement of the Claimants to park their lorries at a secure car park space provided by the Respondents had become a term of their contract. It was also accepted by the Employment Judge that the Claimants would not have been able to afford to take the job with the Respondent but for the facility because of the expense of having to

commute, as well of course as the time taken, at the beginning and possibly the end of the day, to their homes in Manchester from the Midlands. I understand that all the other drivers employed by the Respondent live locally to Wednesbury. I have already mentioned that both employment contracts provide that the normal place of work for these Claimants was in Wednesbury. There is no reference, as I have already said, in the contracts of employment to parking at Stockport. This appears to have been a side agreement.

5. The Claimants' hours of work included the journeys they undertook from Stockport to Wednesbury. They would drive from the secure accommodation in Stockport to Wednesbury, where their lorries were loaded up, and they set off on their deliveries, which were mainly, I think, in the north of the country if I have understood the evidence correctly. On getting into their lorries, they would activate the tachograph, and I assume that when they parked up in the evenings, it would be deactivated. The journeys to Wednesbury were treated as part of the Claimants' working day, and they were effectively therefore being paid for the time of travel to Wednesbury. The provision of the car park spaces apparently caused considerable expense to the Respondent, and by September 2010 it had taken the decision on commercial grounds that it was unaffordable. So it decided to withdraw the parking arrangements effective from 31 December 2012. It hoped to do so by agreed changes to the contracts of employment.

6. There is in my papers at page 9 a letter of 19 September 2012 to Mr Perrin. There is an equivalent letter as well to Mr Birch. The Respondent wrote to inform the Claimants that it would like to make a change in its conditions of employment. The details of the change were that at present he was using a car park at Stockport and driving to a place of work in Wednesbury, using the Exol truck. This represented a high cost for the company and was not consistent with the conditions of employment with respect to the other Exol drivers. He was

informed that Exol would be withdrawing this parking arrangement at midnight on 31 December 2012:

> **"We understand that this could cause you inconvenience but you will be expected to park your vehicle at the Wednesbury site in line with the other Exol drivers."**

He is reminded that the contract of employment states his current place of work was in Wednesbury.

7. On 16 October there are letters again, both to Mr Perrin and to Mr Birch, inviting them to attend a meeting on 22 October to discuss options available in relation to the terms of changes to their employment contract:

> **"As previously discussed the Company is proposing to make a change to your contract of employment, as a result of reviewing your employment conditions."**

The details of the proposed change were the withdrawal of the parking arrangement at Stockport on 31 December 2012.

8. The parties did indeed enter into some negotiations, but on 19 November there were further letters sent to Mr Perrin and Mr Birch. The letter refers to the meetings that had taken place on 8, 22 October and 5 November:

> **"As we explained, the Company needs to make changes to your contract of employment because at present you are using a car park at Stockport and driving to your place of work in Wednesbury using an Exol truck. This represents a high cost to the company and is not consistent with the conditions of employment with respect to the other Exol drivers. Your contract of employment states your place of work is Wednesbury and under section 34.8, the company's vehicles are to be returned to the company after each shift though we acknowledge in practice you have previously used Stockport as a base.**
>
> **…**
>
> **In the circumstances, as we previously warned you in our last meeting, the Company has been left with no alternative but to terminate your contract of employment on the grounds of "some other substantial reason". In accordance with the terms of your contract of employment, you are entitled to receive 7 weeks' notice of the termination of your employment. …"**

9. I note that there is no reference there to redundancy. The parties tried to reach some form of negotiated compromise, but this failed. Although offers were made by the Respondent, these were not considered sufficient by the Claimant. The Claimants had issued grievances in relation to the withdrawal of the parking facilities, but they failed to secure an agreement. I refer to page 19, which is a letter to Mr Perrin, noting various proposals that had been made in order to enable the Claimants to continue working while living in Manchester including the offer of a van, which could be kept at home, providing a pallet truck for Mr Perrin's use together with an orthopaedic mattress for his vehicle.

10. The grievance concluded. The Claimants at that stage, on 21 January, had not been dismissed, so I assume that the dismissal had been suspended, and the November proceedings had been withdrawn. I am not sure what these were. There was then a reference to what was being proposed. The letter denies, as had been suggested by the Claimants' solicitors, that there had been any fundamental breach of contract sufficient to substantiate its unfair dismissal claim.

11. On 25 January a letter was written to the Claimants' solicitors, stressing that the original contract had clearly stated that the main place of work was Wednesbury and always had been. It was accepted that an established practice arose of leaving wagons in Stockport overnight, but it was necessary for strong business reasons to cease the overnight parking at Stockport and have the wagons load overnight at Wednesbury to meet changing clients' needs:

> **"4. Your clients were offered relocation which was refused.**
>
> **5. They are now saying they cannot accept the alternative job requirements even when every possible adjustment has been made to accommodate them.**
>
> **6. The only course of action left is, unfortunately, redundancy if the alternative terms cannot be accepted.**
>
> **Please confirm whether your clients will reconsider their actions and if not we will issue an at risk letter to commence redundancy consultation process."**

12. Dismissal was effected by a letter of 1 March, and the grounds of the dismissal were on the basis of redundancy, and the Claimants were entitled to seven weeks' notice pay in lieu of notice. The Claimants sought to appeal against their dismissal, but the internal appeal was dismissed.

13. I now refer to the decision of the Employment Tribunal. The facts I have already referred to, and I have already said that the notes of the Employment Judge with which we have been provided are not as complete as was required. It is asserted by the Claimants that there was more cross-examination about their place of work. However, I can only refer to the evidence that I actually have. In the evidence of Mr Everitt, who was the Managing Director, told the Employment Tribunal that the Claimants lived in Manchester but parked in Stockport. They began their day from Stockport. On some days of the week they would be away from home overnight. Mr Perrin spent an average of two nights per week away from home on runs. Mr Birch would be away overnight an average up to four nights a week. When they began the day from the parking place in Stockport, they would have to drive empty to Wednesbury. Wednesbury was the base where a new run was being begun on a day they would have to run empty to load up. This was poor utilisation of time and equipment.

14. Mr Hoole, the Group Operations Director, gave evidence and confirmed that the Claimants' place of work, as he understood it, was Wednesbury, but the use of parking in Stockport had become part of the contract. In order to change the terms he accepted that the consent of the Claimants was required. He confirmed that the Claimants would come into the depot. Most drivers would come in at about 6.00 and drive to customers by 8.00 in order to miss the traffic.

15. There is then evidence from Mr Mudzemgetere, referred to as Izzy. He was the Operations Director, and he said a lot depended:

> **"… where the driver had gone the night before. We would expect drivers to be at the depot at Wednesbury at 6 O'Clock. We would certainly expect the Claimants to [be at] the Wednesbury depot ready for loading at 7:30am in the morning."**

There was also evidence to which I have been referred from the Distribution Manager, Mr Bond. The shifts at Wednesbury were 6am to 2pm, 2pm to 10pm. During the period 6am "to 2pm we would prepare the work for the afternoon shift." When the two Claimants had travelled down from Stockport in the morning and required to be loaded, they would arrive empty. They would have to use a skeleton team at Wednesbury to load up their wagons. They would have to take that team out of preparation for the afternoon shifts. He confirmed that the Claimants had been parking at Stockport the entire duration of their employment. Sometimes the Claimants would be able to pick up and deliver other loads as part of their journeys in the North. This would cover runs to Sheffield and Newcastle for example. He was asked about the Claimants' evidence that they were originally employed largely on northern routes, and the answer given by Mr Bond was:

> **"… That is incorrect - <u>their place of work is Wednesbury</u>**
>
> **I was working for the company when they were appointed.**
>
> **At the time we were operating a depot at Stockport there were 6 drivers at the depot in Stockport. That depot was closed. We subsequently made arrangements for a separate parking facility in Stockport for the two Claimants to use."**

16. Mr Perrin's evidence is also noted. He refers to his main place of work being at Wednesbury, but his parking was in Stockport:

> **"When I originally took the job I was to be an out-based driver. I requested Stockport as my starting point as place of work…except when I have to stop overnight.**
>
> **I would start [in the morning] at Stockport…used tachograph and therefore reduce the number of hours for the rest of the day …**
>
> **When I took the job I was out-based as a driver for the North. There was a Stockport operational depot which was shut …**

> **The drivers at Wednesbury all lived locally. We would all get into Wednesbury at 6:30/6:45 …"**

He said he could not afford to commute to Birmingham without the truck. The only way he could afford to continue working at Wednesbury was to have the parking at Stockport.

17. I now turn to the balance of the Judgment of the Employment Tribunal. The Employment Judge considered that there was no fundamental difference between the parties as to the law as they saw it. In those circumstances I do not propose to refer to the various matters of law that the Employment Tribunal referred to, and I will just remind myself of what it had to say about unfair dismissal and redundancy. The Employment Tribunal, at paragraph 9, concluded that no potentially fair reason for dismissal had been made out by the Respondent. The Respondent had not discharged its burden of proof under section 98 of the **Employment Rights Act 1996** showing the dismissal was fair. It then says this:

> **"9.2. The respondent has consistently and robustly based its case on the claimants' dismissal being for redundancy as defined by Section 139 [Employment Rights Act]. No other reason was advanced on the respondent's evidential case.**
>
> **9.3. We find there was not a redundancy according to the legal definition. There was no diminution in the requirements of the respondent for employees to carry out work of a particular kind done by the two claimants. That is clearly evidenced by the evidence, not disputed by the respondent, that agency drivers were engaged immediately the claimants' employment was terminated …**
>
> **9.4. We find that the place of work of the two claimants was the Wednesbury depot. That is express in their contracts of employment. It was, further a term of their contracts - we think express, but certainly implied (which was not disputed by the respondent) that they would be provided with secure overnight parking facilities at Stockport. It is clear from the evidence that Stockport was not and never had been their place of work."**

18. Mr Isherwood complains that the Employment Tribunal's Judgment in this regard is not **Meek**-compliant, as it is put in shorthand: that is, it does not give sufficient details of the reasons why the conclusion was come to. Bearing in mind that an Employment Tribunal is not expected to construct elaborate Judgments but to provide Judgments that explain to the parties why they have won or lost and to explain to any appeal court the basis on which they have

taken their decision, in my opinion the Employment Tribunal's findings in relation to where the Claimants' place of work are satisfactory.

19. The Employment Tribunal then went on to reject there being a basis for a finding that there should be what is referred to as a **Polkey** reduction, nor for there being any discount for contribution. Although the procedural conduct of the Respondent was defective, the ACAS code did not apply because it was a redundancy case as far as the Respondent was concerned, so there was no uplift of damages for unfair dismissal. So far as breach of contract was concerned, the Employment Tribunal found, at the very lowest, the parking facility at Stockport was an implied term of the two Claimants' contracts of employment. It was acknowledged by the Respondent to change that contract required the Claimants' express consent. The Claimants refused their consent. The Respondent unilaterally changed their contracts. I do not think I need remind myself what was said in relation to disability. It is not relevant.

20. In its conclusion the Employment Tribunal was satisfied both claims were unfairly dismissed. The pleaded potentially fair reason for dismissal, redundancy, was not proven, and it made no findings of contribution nor **Polkey** reduction. Both claims for breach of contract had been made out.

21. I do not think it is necessary for me to go on to consider the remedy part of the Judgment. There is no challenge to that as such. I will come on to consider the provision in relation to redundancy in the **Employment Rights Act**, which is obviously well known, and was clearly applied by the Employment Tribunal, although it did not set out the provision in full.

22. The thrust of the Notice of Appeal was what the Employment Tribunal had fallen into error in relation to its finding on redundancy on the basis that Stockport was the Claimant's place of work rather than Wednesbury. The Respondent had sought to argue that as the Respondent no longer wished the Claimants to keep their lorries at Stockport, its requirement for lorry driving in Stockport had diminished. Therefore there was a redundancy situation. The flaw in this argument of course is that it presupposes that Stockport was the place where the Claimants were employed to carry out work. The Employment Tribunal found to the contrary that they were required to work in Wednesbury, and the requirement, it is not seriously disputed, for persons carrying out the jobs undertaken by Mr Birch and Mr Perrin continued, and indeed they were replaced by other drivers, who I assume were residents in the Midlands.

23. Mr Gilbart, who appeared on behalf of the Claimants, supported the Employment Tribunal's Decision and suggested that at the hearing the place of work of the Claimants was not really the subject of that much investigation. I asked Mr Isherwood and Mr Gilbart if there was any authority on the meaning of the phrase, to which I have referred, which I will come to again shortly, which appears twice in section 139, "place where the employee was employed by the employer". I decided to see if I could find anything myself, and I found a substantial passage in *Harvey on Industrial Relations* under the heading of "Redundancy in part D", and I also looked at two authorities. Firstly, there is the authority of **High Table Ltd v Horst**, which has the neutral citation number [1997] EWCA Civ 2000 and also a reference to an earlier case, **Bass Leisure v Thomas** [1994] IRLR 104.

24. I derive from *Harvey* and from the authorities I have mentioned the following. In cases of someone like a delivery driver, who has no fixed place where he carries out his duties, in determining the place where he was employed within the meaning of section 139, it is proper

but by no means conclusive to have regard to the contractual provision. Secondly, it is appropriate to consider, depending on the facts of the case, any connection he may have with a depot or head office or something like that. It seems to me that both of those matters are highly relevant in the present case. There is no issue as to what the contractual requirement was, that the Claimants' place of work was at Wednesbury, and secondly, they both had a close connection with the Wednesbury depot. That is where they had to take their lorries every day to be loaded and that is where their instructions came from. That is where they reported to. It seems to me, in those circumstances, that the Employment Tribunal was correct to determine that Wednesbury was the place where they were required to carry out their work. I do not see that there is any difficulty in understanding the basis upon which the Employment Tribunal said that. It referred specifically to the contract of employment and clearly had evidence of the fact that that is where the Claimants would go to load up. The only connection that it seemed to me that the Claimants had with where they parked their lorries in Stockport was that was where they started work and that is where they finished work. But to suggest that their place of work was in a car park somewhere in Stockport does not seem correct, and despite the very attractive way in which this was put by Mr Isherwood, I am not able to accept it.

25. I sought to obtain some form of definition from Mr Isherwood and Mr Gilbart as to the place where the Claimants were required to work. Neither was able to offer me a clear definition, but I agree with Mr Gilbart, particularly having seen the authorities to which I have referred, that it is something which depends on all the circumstances. Also, and I think Mr Gilbart suggested this, in appropriate cases it was the place where the employees were expected to attend and from where they received their instructions. I would suggest also that generally speaking a place of work does require some attendance, and in cases for example of a delivery driver, a place where he would go to load up or receive instructions. I am satisfied that

although the reasoning is brief, the conclusion that the Claimants' place of employment was not the car park in Stockport but was the depot in Wednesbury, is right. "I had to attend the depot in Wednesbury every day at a set time." They had to deliver up and start their delivery routes in Wednesbury. That was also the contractual provision and it never changed notwithstanding that they were offered, as a concession, parking facilities in Stockport, but nothing that I have seen suggests that Stockport ever became the place they were required to work. It is also right to say that that is the way it was seen by the Respondent until it realised, at a relatively late point in time, that if it was going to assert that this was a redundancy situation, redundancy had certain geographical connotations. It was only at that point in time that one sees, relatively late in the day, a suggestion that they had to find a location where the amount of work had diminished, that they fixed upon Stockport. But, as I have already said, Stockport was not the place of work.

26. In my opinion, the Employment Tribunal's decision was correct. There was no redundancy at Wednesbury, where the Claimants were employed to work, because the job that they did and the need for people to do it remained. Their dismissal was not by reason of redundancy, and it was in the circumstances unfair. There was no fair reason for their redundancy. Had the Respondents sought to justify the dismissals by reason of SOSR rather than redundancy, other considerations may have applied, but that was not the reason on which the Respondents sought to rely.

27. In those circumstances, while I am grateful to Mr Isherwood and also to Mr Gilbart for their assistance, the appeal must stand dismissed.