Appeal No. UKEAT/0181/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 March 2014

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR C A WAY — APPELLANT

SPECTRUM PROPERTY CARE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ALEX USTYCH (of Counsel) Bar Pro Bono Unit
For the Respondent	MR PAUL KELLY (Solicitor) Tozers LLP Solicitors Broadwalk House Southernhay West Exeter EX1 1UA

SUMMARY

UNFAIR DISMISSAL

The Claimant was dismissed for misconduct in relation to the employer's email policy following an earlier final written warning for other misconduct involving breach of company policies.

At the Employment Tribunal hearing he sought to challenge the bona fides of the warning but, notwithstanding that the parties had agreed that the validity of the warning was in issue and written evidence had been served on both sides relating to the issue and the relevant witnesses were available to be cross-examined, the Employment Judge excluded evidence of the background to the warning. He went on to find that the dismissal was fair in the light of the warning.

The EAT decided that the EJ was wrong to exclude this evidence and that it would have been better if he had heard it and made findings on it. However, the EAT dismissed the Claimant's appeal on the basis that in all the circumstances it would have made no difference to the outcome because: (1) the warning required the Claimant to read and abide by company policies and he had indicated that he understood it and had not appealed it; (2) during the appeal against his dismissal he had for the first time challenged the warning and his points had been investigated and rejected; it was agreed before the ET that no complaint was being made about the conduct of the appeal; (3) the manager who had issued the warning was not involved in the disciplinary hearing leading to the dismissal or the appeal therefrom.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal against a decision of Employment Judge Kolanko in the Employment Tribunal in Southampton, which was sent out on 17 September 2012, whereby he dismissed the Claimant's claim for unfair dismissal.

Background facts

2. The Claimant was employed, latterly as Electrical Contracts Manager, by the Respondent, Spectrum Property Care Ltd, from 12 October 1998 until 14 December 2011, when he was dismissed for misconduct.

3. In late 2010 he was disciplined and given a final written warning by Stuart Brookes, who was the Divisional Director of Operations. The Tribunal's finding about that is at paragraph 8.5 in its judgment, which says:

> **"It appears that in... consequence of a disciplinary hearing the claimant was given a stage 3 final written warning and informed of his right of appeal. This briefly related to the inappropriate appointment of an individual by the claimant contrary to the respondent's laid down procedures regarding fair recruitment, and the disclosure of any relationships. A letter confirming the outcome of the disciplinary was sent to the claimant on 7 December 2010. The letter stated that a copy of this warning would be kept on the claimant's HR file for a period of twelve months from the date of the hearing on 3 December 2010. The letter confirmed that it was a requirement of the final written warning that the claimant familiarise himself with the policies and procedures of the company, which included matters that have been raised earlier."**

I think the Judge is there referring to the e-mail policy, which I will come to in a moment. There was no appeal against that final written warning decision, although it is clear that the Claimant considered such an appeal. I will say a bit more about that in a moment.

4. In July 2011 there was an investigation into inappropriate e-mails sent in breach of company policy, and the Claimant was found to have sent three such e-mails: one, five days

after the warning to which I have just referred, and another after 1 July 2011, when the Respondent had made it clear, in an e-mail to staff, that sending such e-mails would amount to gross misconduct. In the light of the warning and the further breach of company policy, the Claimant was dismissed following a disciplinary hearing on 21 September 2011. The Tribunal's finding about that is at paragraph 8.20 of the judgment. It reads as follows:

> **"The hearing on 21 September...addressed the additional e-mails dated 8 December, 11 February and 15 August, together with the CD of the telephone conversation. It was urged on behalf of the claimant by his union representative that these Internet e-mails should have been picked up earlier and urged that a final warning be given to the claimant. The claimant indicated that this has been a big learning curve and that he would not take part in any more inappropriate e-mails. The claimant indicated that he understood about his final written warning and had tried to move on."**

At paragraph 8.21 the Tribunal go on to say:

> **"At the conclusion of the hearing and after an adjournment it was determined that, whilst the first e-mail the subject of the disciplinary process had been sent prior to a final written warning and should be discounted, the additional e-mails were sufficiently serious, and having regard to the impression conveyed by the claimant to the panel that he had not appreciated the seriousness of these e-mails in the context of the company policies, the claimant should be dismissed."**

That is, as I have said, what happened.

5. The Claimant appealed to Mr Morris, who was the Group Chief Executive of the Spectrum group. One of the points that the Claimant relied on in his appeal to Mr Morris was that the warning he had been given in late 2010 was unfair. Mr Morris's witness statement, prepared for the hearing in the Tribunal, dealt with this part of the Claimant's appeal in this way. Paragraph 5 says:

> **"A lot of Mr Way's submissions related to the previous disciplinary meeting which had led to his final written warning. I did invite Mr Way to go through this if he felt it was pertinent, which he clearly did. I was therefore happy to spend time discussing it with him.**

6. Mr Way made various assertions which had not been previously advanced by him, with a view to arguing his final written warning was unfair. Had he not been given the final written warning, he argued he would not now have been dismissed.

7. Mr Way argued that his line manager, Stuart Brookes, had specifically sanctioned his actions in relation to Joe Girardelli knowing about his relationship with him. There was no evidence of this whatsoever. We checked this with Mr Brookes, who was very clear in telling us that while he had approved the appointment in general terms, he had not agreed to proper processes being waived. Mr Brookes had no idea that Mr Way had completed Joe's application form itself, withholding important information from it.

8. I asked Mr Way on a couple of occasions about his relationship with Joe's mother. It was relatively clear that there had been a close relationship and Mr Way remained friends with her and wished to act to assist her and Joe. In my view, it was clear there was a sufficiently close relationship with Joe that this should have been declared.

9. Mr Way also said that, with the benefit of hindsight, he would have appealed against his final written warning. He said he had been told that if he did not appeal, he would keep his job. Again, there was no evidence of that."

Mr Morris goes on further in his statement:

"13. At the end of the hearing, I told Mr Way that we would need a bit of time to reflect on the detail he had given to us. Later that day I asked questions of some of the individuals referred to in order to follow up points he had made. I concluded there was no real evidence to substantiate Mr Way's assertion and I noted that many of these had not been raised previously and that he had not appealed against the decision to give him a final written warning."

Then at paragraph 19 Mr Morris said this:

"It was clear that, even after the final written warning he had been given, where a key condition was to familiarise himself with our policies and procedures, that had not been done.

20. To my mind, sending the emails was a flagrant disregard of a policy we consider to be very important. Having reviewed the evidence, I was strongly of the view that his conduct in sending the emails constituted gross misconduct and justified summary dismissal, although Mr Way was in fact dismissed on notice for repeated misconduct."

He dismissed the appeal.

The Employment Tribunal proceedings

6. Mr Way started proceedings in the Employment Tribunal and he put in his ET1. The first part of his complaint related entirely to the earlier warning. He said this:

> **"In May 2010, with the knowledge of the Applicant's Divisional Director, Stuart Brookes, the Applicant employed an electrician's mate in line with company procedure, policy, and ethos. The recruitment was sanctioned by Stuart Brookes. This can be evidenced.**
>
> **The Applicant was given a final warning as a result of the recruitment. The Applicant's disciplinary was chaired by Stuart Brookes. The Applicant was made aware, by Stuart Brookes, in advance of the hearing, that the outcome would be a final written warning. The Applicant was told that if he did not appeal the Decision he would 'keep [his] job'.**
>
> **The disciplinary hearing was unfair as...no man may be a judge in his own cause. The principles of natural justice had not been adhered to."**

In the ET3 the Respondent said this:

> **"In late 2010, the Respondent became aware that the Claimant had not disclosed a conflict of interest. The circumstances were that the Claimant had assisted J, the son of a friend and ex-partner, to obtain employment with the Respondent. The Claimant had himself completed an application form for J which J had then signed. The Claimant incorrectly indicated on J's application form that J had no connection with any current employee of the Respondent, not mentioning his own involvement in J's application. He also failed to mention a medical condition from which J suffers. The Claimant also failed to declare his connection with J on his own account on a Declaration of Interest he made in November 2010. He advised J to apply for the job initially through an agency, which had the effect of hiding the Claimant's involvement. The Claimant then acted as recruitment manager, ensuring J's appointment. When challenged, the Claimant denied having completed J's application form until confronted with his own handwriting.**
>
> **7. Following a full investigation and disciplinary process, the Claimant was not dismissed but was given a final written warning subject to the condition that he familiarise himself and comply with the Respondent's policies. The Claimant was warned that any further misconduct or breach of procedure would result in his dismissal. He chose not to appeal."**

7. Before the hearing, the parties agreed on what the issues were. The first issue was agreed to be this:

> **"The Claimant was given a final written warning in 2010. Were the circumstances of this such that the Respondent was entitled to rely on this final written warning when determining whether to dismiss the Claimant? The Tribunal may wish to consider the following in this respect:**
>
> **a. the nature of the allegations and the documentary evidence available; and**
>
> **b. the Claimant's failure to appeal and his reasons for this."**

Statements were put in from the Claimant, from Mr Brookes, from the manager who dealt with the main disciplinary hearing, and from Mr Morris, who dealt with the appeal. There were also statements from Paul Bryan, the company Managing Director, and from Mr Batchelor, who investigated both matters.

8. The Claimant's statement made serious allegations against Mr Brookes, saying that he was dishonest, that he had started the disciplinary proceedings in late 2010 in order to cover up his own part in the appointment of J, and the statement also said that Mr Brookes had indicated before the hearing which he chaired that the outcome would be a final warning. There is again complaint about the conflict of interest that Mr Brookes had in chairing the hearing because he himself had been involved in the recruitment of J. The statement says that, within 20 minutes of the completion of the disciplinary hearing on 3 December 2010, the decision was announced and then that, after receiving a letter confirming the decision, the Claimant approached Mr Bryan, the company Managing Director, about an appeal and was told not to appeal, as it was the intention of the company that, if an appeal was received, it could be escalated to dismissal. He was told that it would pay him to forget about the whole thing and move on. As a result of this conversation, the Claimant says he did not appeal the decision.

9. There was also, in a bundle which had been prepared for the Employment Tribunal hearing, some e-mails which provide some evidence that the Claimant was indeed told that his penalty could be increased on an appeal, but they also disclose that he was concerned primarily about the financial consequences of appealing.

10. That was the state of affairs as at the date when the hearing was fixed for 20 July 2012. On 29 June 2012 the Respondent's solicitors sought an adjournment because Mr Morris, who as I have said a number of times heard the appeal against dismissal, had had a cancer operation and would not be available for the hearing. The Claimant opposed the adjournment and Mr Wright, his lay representative, wrote to the Tribunal saying:

> **"Although Mr Way does not agree with the assertions made by the witness who is unable to attend, he does not see that his evidence is substantive to the issues that are to be brought before the hearing. In particular the parties have already agreed a statement of issues to narrow the scope of argument at a hearing, thus saving the Tribunal valuable time and the parties costs."**

The Employment Tribunal decision

11. The Tribunal decided to refuse the application for an adjournment, and the hearing duly took place on 20 July. At the outset of the hearing, the Employment Judge, who had read the papers, was clearly concerned at the amount of material in front of him and, particularly in the light of Mr Morris not being available, he took the view that the background to the 2010 ruling was irrelevant satellite litigation. Although the precise course of events in the Tribunal is in dispute, and there have been affidavits from the Claimant and his representative, Mr Wright, and comments on them by the Employment Judge, I propose to proceed on the basis, which the parties in effect agree: (a) that the Claimant accepted that he was making no criticism of the appeal before Mr Morris, but (b) that the Employment Judge refused to hear evidence about the background to the warning notwithstanding the Claimant's objections to that course. That being the position, the Claimant gave no evidence about the background to the warning, as he was not allowed to do so, and Mr Brookes and Mr Bryan, although they were there, were not asked to give evidence and were not cross-examined.

12. The Employment Judge found that the dismissal was fair; given the existence of the final written warning and assuming the Respondents were entitled to rely on it, the Claimant accepted, in effect, that that conclusion was inevitable. What he says on this appeal is that he should have been given an opportunity to challenge the validity of the warning, and the questions for me on the appeal are therefore (1) whether the Employment Judge was wrong to exclude evidence about the background to the warning; and (2) whether, if he was, it would have made any difference.

The law

13. So far as the law is concerned, I was referred to two cases, **Davies v Sandwell MBC** [2013] EWCA Civ 135 and **Wincanton Group plc v Stone & Anr** [2013] IRLR 178. Both those were decided after the decision in this case, but it is not disputed that they encapsulated the existing law. In short, the test of an unfair dismissal is always that laid down in section 98(4) of the **Employment Rights Act**, namely whether the employer acted reasonably, in all the circumstances, in treating the reason for dismissal as sufficient. When an Employment Tribunal is considering whether an employer has acted reasonably in dismissing an employee, the employer is entitled to rely upon an earlier warning unless that warning was issued in bad faith, with no grounds, or in circumstances which were manifestly inappropriate. The cases suggest that where an appeal against the final written warning was available but not pursued by the employee, there would need to be exceptional circumstances before the Employment Tribunal would re-open the warning. Mr Ustych, on behalf of the Claimant/Appellant, challenged the notion that there had to be "exceptional circumstances" and he said that that notion is based on an obiter dictum in **Davies v Sandwell** by Beatson LJ at paragraph 38. It does not seem to me that I need to resolve exactly whether the test is "exceptional circumstances" or something less: it is certainly right that account must be taken of any appeal process.

Conclusion

14. So the first question is, should the Employment Judge have allowed evidence about the background to the warning? The Judge was right to be concerned to keep matters within proper bounds and to exclude irrelevant evidence. A bare assertion that a previous warning was given in bad faith or had no basis would not be enough to open up the previous warning to

investigation. Although this is a borderline case, I think the Claimant had probably raised enough in his ET1 and, more particularly in his statement, to raise a case that the warning had not been given in good faith, though I do not think, on any basis, it could be said that there were no grounds for the warning or that it was manifestly inappropriate. But there was certainly an attack on Mr Brookes' good faith.

15. Given that conclusion, and given that the parties had both identified the question of whether the Respondents could rely on the warning as an issue to be decided in the case, it seems to me that, notwithstanding the Claimant's decision not to appeal against the warning, the Employment Judge ought to have allowed evidence and ought to have investigated the points being made by the Claimant. It would certainly have been much easier if he had done so given that everything was there before him.

16. That means that the question I have to address is whether it would have made any difference to outcome, namely the finding that the Claimant had been fairly dismissed. This is always a dangerous area for the Employment Appeal Tribunal to get into. Only if I am convinced that the Employment Tribunal reached the right conclusion would it be right for me to dismiss the appeal on this basis, and I must proceed on the assumption that the Claimant would have established bad faith on the part of Mr Brookes.

17. The Respondent points out, firstly, that there was a final written warning, valid on its face which has not been challenged on appeal, which encouraged the Claimant to read and abide by company policies. The Respondent points out that, at the disciplinary hearing, there was no challenge raised to that warning, and that the Claimant himself indicated that he understood about it and said that he had tried to move on. Second, there was an appeal to Mr Morris, the

conduct of which the Claimant agreed that he would not criticise; it is clear from Mr Morris's statement, which I have quoted at some length, that the earlier warning was investigated by Mr Morris and that he rejected the points made about it by the Claimant, having investigated them and having given the Claimant an opportunity to say whatever he wanted about the warning. The final point, which I am not sure the Respondent made but seems to me of significance, is that there is no suggestion that Mr Brookes had any role in the disciplinary proceedings or the appeal in relation to the e-mails.

18. In those circumstances, it seems clear to me that the employer was indeed entitled to have regard to the warning even if in fact it had resulted from Mr Brookes' bad faith. Given that conclusion, as the Claimant acknowledged, the dismissal almost inevitably followed, and its fairness cannot be doubted. On that basis, I would reject the appeal.

19. There is another point. In the **Wincanton** case the President pointed out that:

> **"It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters."**

The Appellant says that the warning he was given arose out of something completely different to the matter that led to his dismissal. But the Employment Judge dealing with this matter, at paragraph 18 of his judgment, simply said this:

> **"It is not to the point that the offence for which the final written warning was imposed was of a different nature to the matter that came before the disciplining panel. The fact is that there was a final written warning which warned the claimant that any further misconduct during the operative part of the final written warning could lead to the dismissal of the claimant. I find that they were entitled to determine having regard to the conduct and the final written warning that was live, that the sanction of dismissal fell within the band of reasonable responses."**

The Appellant says that the Judge, particularly in the first sentence of paragraph 18, has closed his mind to the differences between the two matters and has in that way made an error of law, overlooking what the President said about taking account of the factual circumstances of the warning.

20. The Respondent says that this is a new point, not covered by the grounds of appeal which were permitted to go through on a rule 3(10) hearing by Judge David Richardson. Looking at the grounds of appeal, at page 13 in my bundle, it is hard to see that this point is covered by them, notwithstanding Mr Ustych's valiant attempt to say that the point comes within paragraph 3 of the amended grounds of appeal. But in any event I have considered the point.

21. It seems to me that, read in the context of the whole decision and, in particular, paragraphs 8.5 and 8.20, which I have quoted in full earlier on, the Employment Judge in paragraph 18 did not make an error of law in discounting the different nature of the earlier offence and the offence for which the Claimant was dismissed. Although the point was potentially relevant to the overall fairness of the decision to dismiss, the Employment Tribunal was, in my view, entitled to find that any difference between the breaches of company policy made no difference to the outcome in this case on the facts, bearing in mind in particular the terms of the warning, which invited the Claimant to follow company policies and procedures in future. I do not read the judgment at paragraph 18 as saying any more than that, on the facts of this case, the different offences did not make any difference to the final decision.

22. I therefore dismiss the appeal and the Employment Tribunal's decision stands.