Appeal No. UKEAT/0401/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 February 2015

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

THE POLICE AND CRIME COMMISSIONER FOR DEVON & CORNWALL APPELLANT

MR G NALDRETT RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GRAHAM WATSON (of Counsel) Instructed by: Devon and Cornwall Constabulary Legal Services Middlemoor Exeter Devon EX2 7HQ
For the Respondent	MR ANDREW WORTHLEY (of Counsel) Instructed by: AVP Law 65 Merafield Drive Plympton Plymouth PL7 1TR

SUMMARY

CONTRACT OF EMPLOYMENT - Notice and pay in lieu

The Claimant was dismissed. He claimed in respect of unfair dismissal and lack of notice pay. The Employment Tribunal found his dismissal was fair. The Employment Tribunal recognised that the test for notice pay differed from unfair dismissal. It was required to decide if the Claimant had breached his contract. The Employment Tribunal decided that the Claimant had not, stating that the Claimant gave direct oral evidence to that effect, whereas the Respondent did not lead direct oral evidence but relied on hearsay evidence. The Respondent argued that the Employment Tribunal had not applied the correct test or if it had it had not explained its reasoning. *Held*: the Employment Tribunal gave insufficient reasoning to show why it had placed no weight on indirect evidence and had accepted the Claimant's oral evidence. Case remitted to the same Employment Tribunal to receive written submissions on the question of notice pay only and to give a fresh decision.

THE HONOURABLE LADY STACEY

Introduction

1. This is a Full Hearing. I will refer to the parties as the Claimant and the Respondent, as they were in the Employment Tribunal. Thus the Claimant is Mr G Naldrett, and the Respondent is the Police and Crime Commissioner for Devon and Cornwall. The Decision against which appeal is taken was taken by Employment Judge Carstairs, sitting alone at Exeter on 20 March 2014, notified to parties on 26 March 2014. He found that the Claimant was fairly dismissed. He also found that the Claimant was dismissed in breach of contract and ordered that he be paid damages by the Respondent in the sum of six weeks' pay and the pension contributions which the Respondent would have paid over that period. It is against that breach of contract decision only that the appeal proceeds.

2. At the Employment Tribunal the Claimant was represented by Mr Angus Gloag of Counsel and the Respondent by Mr Graham Watson of Counsel. I note that the names in the Decision are the wrong way round. Before me Mr Andrew Worthley, Counsel, appeared for the Claimant and Mr Graham Watson, Counsel, appeared once more for the Respondent.

The Facts

3. The background facts in this case are that the Claimant was employed for about six years by the Respondent as a Police Community Support Officer. In the summer of 2013 he was on holiday with his family, which included a two-year-old boy. An incident took place when he was seen in the car park of a Tesco store by a woman who parked her car next to his. She believed that he was masturbating. She shouted at him and reported the matter to the security desk at the shop. That led to a report being made to the police. The matter was not referred for

prosecution, but it led to disciplinary proceedings which resulted in the Claimant being dismissed from his employment. He denied that he had been masturbating and gave an explanation to the effect that he had driving his child around to try to get him to go to sleep. He had parked the car as the child was sleeping and he (that is, the Claimant) wanted some rest himself. He accepted that a woman had parked beside him and had shouted at him. He said that he had loosened his button and his zip and, because he was hot and uncomfortable and was trying to make himself more comfortable, he had said that he had put his hand into his underpants to rearrange his genitals. He denied that he had been masturbating.

4. The woman gave a statement about the incident but she did not attend the internal police discipline hearing, agreeing to answer questions that were put to her by telephone. She was not led as a witness at the Employment Tribunal, which heard the claim of unfair dismissal. At that hearing the witnesses called for the Respondent were witnesses who had investigated the claim but had not actually met the woman; there was evidence led of the investigation; and the Employment Tribunal as I have said, were satisfied on the dismissal that it was not unfair.

The Grounds of Appeal

5. The Grounds of Appeal lodged in writing are as follows: that there is an error of law in the approach to wrongful dismissal. It is accepted that the Employment Judge understood that, in the breach of contract claim, the Employment Tribunal was the primary fact finder, unlike a case of unfair dismissal. He also understood it is the employee's burden to show a breach of contract, namely dismissal without notice, which the employer can defeat by showing that the employee was in repudiatory breach himself and was summarily dismissed. It is argued, however, that the Employment Judge erred in the resolving of that question. It is pointed out that, in the Judgment at paragraph 5.11.1, he stated that the only person who gave direct

evidence about the indecent act was the Claimant, who denied that it happened. No-one attended to give evidence to the contrary. Therefore the Employment Judge stated that the Tribunal was not satisfied that the Claimant committed the alleged act. The ground of appeal argues that this puts too heavy a burden on the employer, who ought to be able to discharge the burden by using the investigation he used in the unfair dismissal matter.

6. The next ground of appeal is an error of law by failing to take into account relevant evidence. This is a reference to the evidence that the employer did adduce about the complainant and about another motorist who had parked on the other side of the Claimant's car. Reference is also made to admissions that the Claimant made about touching his private parts when he was investigated by the police. Further, there was evidence that at the disciplinary hearing the Claimant's position was that he had a medical condition of skin tags, which he had not mentioned before. There were, it was argued, other inconsistencies in that he had previously admitted that he had driven his car away when the woman said that she would report him, but at a later stage his position changed and he said that he did not hear what the woman said. He had accepted at an early stage that when she shouted he had put his hands up as though to say sorry, but then he changed his position on that also and said that he put his hand up but as if to say "What's wrong?".

7. The next ground of appeal is that there was a perverse conclusion on wrongful dismissal. It is argued on paper that if there was enough to satisfy unfair dismissal, then the Employment Judge had an obligation to explain why he was not satisfied on the separate question of wrongful dismissal.

8. The last ground of appeal is that there is a perverse error of fact, and that relates to the investigating officer, the dismissing officer, and the appeal officer all accepting the version of events given by the woman. While this was not argued before, I understood from the Grounds of Appeal that the position taken was that the Tribunal required to explain why it took a different view.

The Procedural History

9. The history of this application to appeal is instructive. It was first rejected under Rule 3(7). At a Rule 3(10) Hearing the President took a different view. The case was presented by Mr Watson, who has appeared before me today. The President allowed a Full Hearing on the basis that the Employment Tribunal had found that the dismissal was fair in terms of the statutory test but it had accepted a late addition to the issues by the Claimant, that he should have been paid notice pay to which he was entitled by contract unless the employer could show that he had breached his contract by what he actually did in the car park.

The Law

10. It was agreed between parties at the Employment Tribunal and noted by the Employment Tribunal as trite law that the issue of notice pay had to be considered separately from the issue of unfair dismissal. That is because unfair dismissal is a statutory construct. The test to be applied is that set out in the statute, as interpreted by the cases. Thus, put shortly, the employer may dismiss fairly if he holds a reasonable investigation and comes to a genuinely held belief as a result of that investigation that the employee has acted in such a way as to warrant dismissal. If that reasonably held belief is not in fact accurate, the employer may still act fairly in dismissing the employee. The Employment Tribunal is not required to consider for itself what the employee did but rather to consider what the employer reasonably thought he did.

11. In a contractual claim for notice pay the position is different. The Employment Tribunal is required to consider what the employee actually did. This is helpfully set out in the case of **Rawson v Robert Norman Associates Ltd** [2014] All ER (D) 154 (Apr) in the Employment Appeal Tribunal on 29 January 2014, which is another case decided by Langstaff P. In paragraph 1 he states as follows:

> **"… The same is true if there is any question of wrongful dismissal which involves looking at whether the employee himself was in breach of contract. … In such a case, what is relevant is not what the employer thought happened, however reasonable that might be. It is what actually happened. A Tribunal needs to know, and say why it takes the view that it does, that the conduct happened as alleged or did not."**

12. In his Judgment in the Rule 3(10) Hearing in this case he states at paragraph 3:

> **"The appeal point is that the Tribunal appeared to have approached the question as an evidential one. It appeared to have taken the view that, if there was direct evidence from a witness and no direct evidence on the other side, the only evidence was that of the direct witness. If that is so, it is said, in the circumstances of this case it was an error because the Tribunal did not take into sufficient account the evidence of those other circumstances. They did not express a necessary view as to whether the account given by the Claimant was or was not credible - it might be implicit but it was certainly not explicit – and if implicit, needed to say why, in these circumstances, when according to Mr Watson who appears for the Police and Crime Commissioner, the Claimant had been inconsistent to some extent in his previous accounts as to what had happened. Thirdly, the Tribunal was entitled to take account of the probabilities of his [that is, the Claimant's] account being the case. The Tribunal was thus either in error of legal approach or did not say sufficient as to its reasons."**

The Employment Tribunal Decision

13. Turning, then, to the Judgment in this case, it sets out in 13 pages the facts found and the application of the law. Most of it is understandably taken up with the matter of unfair dismissal. At paragraph 5.10 the Employment Judge gives his conclusion that the dismissal was fair. He then turns to the question of whether the dismissal was in breach of contract. He had noted that as an issue at the beginning of his Judgment, and it is clear to me that the Employment Judge always knew that there were two separate matters and that he required to deal with them.

14. Having got towards the end of its Judgment then, he set out the matter out in this way at paragraph 5.11.1:

> **"It is trite law that the test for breach of contract is different from that in respect of unfair dismissal. It is necessary for the employer to prove, on the balance of probabilities, that the claimant had committed an act of gross misconduct entitling the employer to dismiss him without notice. It is not sufficient merely to have reasonable belief or reasonable grounds for believing that the claimant was guilty of such gross misconduct."**

15. No-one before me takes issue with that as a correct direction. The controversy arises on what the Employment Tribunal did to put that correct direction into practice. The next and last two paragraphs of his Reasons are as follows:

> **"5.11.2. The only person who gave direct evidence before the Tribunal on this matter was the claimant. He denied the allegation of masturbating in a public place. Nobody attended to give evidence on the contrary.**
>
> **5.12. The respondent has not, therefore, satisfied the Tribunal that the claimant committed the alleged act. Accordingly, the claimant was dismissed in breach of contract. He is awarded damages comprising six weeks' notice pay and the amount of the pension contributions which would have been made by the respondent during that period."**

Submissions

16. For the Respondent (that is, the Police and Crime Commissioner) it is submitted before me that there is insufficient - indeed there is no practically no - reasoning given by the Employment Judge. By use of the word "therefore" the Employment Judge links the failure to call direct evidence with the positive finding for the Claimant. As Mr Watson put it in his written argument "One causes the other". Counsel also argued that the Employment Judge had erred in law by failing to take account of evidence other than direct oral evidence from a witness by failing to consider and give an opinion on inconsistencies in the Claimant's position and by failing to consider the inherent probability or otherwise of the Claimant's evidence.

17. For the Claimant it was argued that the Employment Judge did not fall into the trap described in the **Rawson** case to which I referred above. On the contrary he recognised very clearly what the law is and directed himself accordingly. By finding for the police and

therefore against the Claimant in the unfair dismissal question and for the Claimant and therefore against the police in the notice pay question the Employment Judge demonstrated that he applied two different tests. Counsel argued that the Written Reasons were sufficient and, while they had to be described as brief, that was not in itself a fault.

18. He addressed the word "therefore" and argued that it should be read as to take into account the painstaking examination of all of the evidence which was undertaken in the first 12 pages of the Reasons. He argued that all of that was absorbed into the finding on breach of contract. He argued that all of the evidence had been taken into account by the Employment Judge and he referred me to two cases, firstly **Kingston v British Railways Board** [1984] IRLR 146 and **Manning and Langstaff v Middleton Miniature Mouldings** UKEAT/ 0439/09/DM; UKEAT/0441/09/DM, which was an Employment Appeal Tribunal case of 1 March 2010.

19. In looking at these two cases Counsel argued, taking the latter case first, that it was not perverse if an Employment Tribunal took the view that a written statement lodged by way of evidence, on which the maker of the statement could not be cross-examined, should have little if any weight put on it. That was the decision in the **Manning** case, and Counsel argued that that showed that it was perfectly in order for an Employment Judge to decide to put little or no weight on such a statement.

20. Turning to the other case, that is **Kingston**, Counsel sought to argue that the Court of Appeal in that case had read carefully what was said by the Tribunal at first instance, and under reference to paragraphs 43 to 49 Counsel argued that a similar analysis could be applied here. He reminded me that the focus in this Employment Tribunal and indeed in any similar

Employment Tribunal will be on the unfair dismissal part of the case, and he commended the way in which the Employment Judge had refrained from unnecessary repetition. That led, he argued, to a decision which was extremely concise. Counsel was, of course, realistic and accepted that it would suit his arguments better had there been rather more reasoning, but he argued that there was sufficient. He invited me to apply what he called a holistic analysis, which would lead me to decide that the Employment Judge appreciated the different questions he was asked and that he took a decision to which no exception could be taken because he was entitled to place either no weight or very little weight on indirect hearsay evidence when comparing it to direct evidence. That, he argued, was what he did and what he said he did. Counsel pointed out that a close analysis showed that the Employment Judge did not say that there was no evidence for the Respondent but, rather, carefully said that there was no direct evidence.

Conclusions

21. I have considered all that was put before me both by way of Skeleton Arguments and written submissions in the Grounds of Appeal and the Response and the oral argument before me this morning. Despite Mr Worthley's valiant attempts to defend the Decision, I have decided that the Employment Judge has not written enough to show that he has put into practice the correct direction which he gave to himself. The losing party, that is the Police and Crime Commissioner, cannot tell from this Decision what the Employment Judge made of all of the evidence (direct, oral, indirect and written) which was put before him. While I agree with Mr Worthley that there is no need for long repetitious Judgments, there is a need for more than is given here. I have to say that I did not regard the cases of **Kingston** and **Manning** as particularly helpful as they are illustrative of process and they depend on their own facts. Because I take the view that this Employment Judge has directed himself correctly but has then

not put his own direction into practice or at least has not given reasons which show that he did that, I will allow the appeal.

Disposal

22. Disposal was also a matter of controversy were I minded to allow the appeal. Mr Watson submitted as his first position that I should remit it to a freshly constituted Tribunal in order that they might hear evidence on the wrongful dismissal question only and make a fresh Decision. His secondary submission, if I were not with him on that, was that it should be remitted to the same Employment Judge for him to have before him written submissions from each party about the wrongful dismissal question and for him to give a written Decision. Mr Worthley submitted that I should simply remit it to the same Employment Judge for him to give fuller reasons. If I were not with him on that, then he adopted the secondary submission put forward by Mr Watson, that is that I should remit it for written submissions on the matter of wrongful dismissal on the evidence already led and for a written Decision. I have considered this matter and I have decided that, in fairness to both parties, I should remit to the same Employment Judge to consider written submissions from both parties on the evidence already led.

23. In order that I make this entirely clear, I should say that no further evidence should be led before the Employment Judge but written submissions should be made by each party, if so advised, on the evidence which was led at the Tribunal which has already taken place. The Employment Judge should consider those submissions, consider all of the evidence that was before him and should make a decision on the question of the notice pay (that is, the wrongful dismissal only), which of course he should give in writing.

24. I am grateful to Counsel for the assistance they have given me this morning.

Fees

25. I am asked to make an order under Rule 34A(2A) in respect of the fees, which are a total of £1,600 which have been paid in order to bring this appeal. The decision which I have made today has shown that the Employment Judge failed to give sufficient reasoning for his decision and I have required to remit it to him in order that he hears once again in writing submissions from parties about the wrongful dismissal case. Therefore, as Counsel clearly recognise, while the appeal has been allowed, the final outcome of the case cannot be known today. The final outcome has to have some relevance to this question of fees and therefore I am of the view that I should not make any order regarding fees today while that final outcome is unknown. The perhaps more difficult question is, should I make an order which would enable the Respondent to seek those fees at a later stage depending on the final outcome of the case?

26. I have decided not to do that. I am told that the Claimant did make an offer to settle this case following his Counsel having had a watching brief at the hearing under Rule 3(10) and Counsel taking a view at that stage that there was at least a colourable possibility that the appeal might be allowed. Therefore advice was tendered and accepted that the Claimant should offer to take less than the amount that was found in the first place to be due to him. Counsel has submitted to me today that it would be an unusual Claimant who offered to take nothing in that situation, but he argues that the Claimant acted properly in offering to take less than he had been awarded. I am told that the Respondent did not make a counter-offer and of course did not accept the offer made to settle because the matter was one of importance. It is put before me that the Respondent is a large employer and, simply because the Respondent is a large employer, these matters are of importance because, in the nature of things, claims are made from time to time to any large employer and it is therefore important for that employer to know

what the Employment Appeal Tribunal makes of cases in order that it may make sure that it is carrying out its duties under the law.

27. On that basis, given that one side of this dispute does consist of a large employer with a proper interest in that, and the other side of the dispute consists of an individual who has been awarded so far a relatively small sum of money, just a little over the amount that we are discussing in fees, I have decided that I will not make any order as to fees.

28. Once again, I am grateful to Counsel for their arguments on this rather awkward matter of fees. I do not pretend that that is straightforward, so I am grateful to you both.