Appeal No. UKEAT/0068/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 June 2013
Judgment handed down on 8 August 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR C EDWARDS

MISS S M WILSON CBE

MR P J W ROSS — APPELLANT

EDDIE STOBART LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS J MULCAHY (of Counsel) (Appearing under the Employment Law Appeal Advice Scheme)
For the Respondent	MR MARTYN WEST (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB

SUMMARY

UNFAIR DISMISSAL – Automatically unfair reasons

Burden of proving the 'whistleblowing' reason for dismissal under s.103A **Employment Rights Act 1996** lies on the employee who has insufficient continuous service to bring a claim of ordinary unfair dismissal. **Smith v Hayle** applied.

However, the case was not decided by this Employment Tribunal on the burden of proof. See observation of Mummery LJ in **Kuzel v Roche**, para. 55.

Claimant's appeal dismissed (ET finding as to reason (conduct)) not a perverse conclusion.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. The principal issue now raised in this appeal is where does the burden of proof lie to show whether the reason or principal reason for dismissal was an inadmissible reason under s.103A **Employment Rights Act 1996**, the whistleblowing reason. Is it on the employer or employee in circumstances where the employee has not completed the qualifying period of service under s.108(1) for 'ordinary unfair dismissal', in this case, one year?

History

2. This is now an old case. The Claimant, Mr Peter Ross, was employed by the Respondent, the national carrier Eddie Stobart Ltd, as an HGV driver from 30 June 2008 until his dismissal effective on 16 April 2009.

3. Unable to claim ordinary unfair dismissal in these circumstances he commenced proceedings in the Liverpool Employment Tribunal complaining of automatic unfair dismissal under, variously, s.103A, s.100 (health and safety dismissal) and s.101A (dismissal relating to working time rights). The claim was resisted and came on for hearing before an ET chaired by Employment Judge Robinson. By a Judgment dated 30 November 2009 that ET dismissed the claim. Against that Judgment the Claimant appealed. His appeal was heard by a division of the EAT presided over by HHJ David Richardson on 16 May 2011. By a Judgment reported at [2011] RTR 30 the appeal was allowed and the case remitted for rehearing by a fresh ET on the complaints under ss.100 and 103A. We have read that Judgment. The first ET failed to engage with the relevant statutory provisions, which were fully laid out in that Judgment.

4. The remitted hearing took place at Manchester before an ET chaired by EJ Howard on 27-29 February 2012. By a reserved judgment with reasons promulgated on 21 March 2012, the second ET also dismissed the claim of unfair dismissal. Again the Claimant appealed. His first Notice of Appeal was rejected on the paper sift by HHJ Richardson, who was of course familiar with the case, under EAT rule 3(7). The same Judge rejected a fresh Notice of Appeal under rule 3(8). Reasons for these decisions were given in letters dated 12 June and 3 August 2012. Dissatisfied with that opinion the Claimant exercised his right to an oral hearing under rule 3(10). That application for permission came before Mitting J on 13 February 2013. Before the ET the Claimant had appeared in person. At the rule 3(10) Appellant only hearing the Claimant had the advantage of representation by Ms Diya Sen Gupta of counsel under the ELAAS pro bono scheme. Mitting J was persuaded to allow the appeal to proceed on, broadly, two grounds; the burden of proof question and a perversity argument. Those points were set out in draft amended grounds of appeal which, with one exception, were permitted by order of the Judge dated 6 March 2013. All other grounds originally pleaded, including a challenge to the finding on s.100 ERA, were dismissed.

The Manchester ET decision

5. We take the relevant facts from the findings of the Howard ET. The principal issue, for present purposes was whether the reason or principal reason for dismissal related to the Claimant's conduct, as the Respondent contended or his having made protected disclosures, the case advanced by the Claimant.

6. The ET found that the Claimant made two protected disclosures prior to his dismissal. The first, on 31 March 2009, was the Claimant's observation to Mr Simpson, the Regional Operations Manager, that requiring him to attend at his depot, the Respondent's Stretton Green depot, during a 'period of availability' breached the provisions of the **Road Transport**

(Working Time) Regulations 2005, as the first EAT under HHJ Richardson had found. Mr Simpson had wrongly thought otherwise (reasons para. 31). Secondly, again on 31 March, he had made a protected disclosure to VOSA, the regulatory body, when he sought confirmation that his understanding of the meaning and effect of a period of availability was correct. He did not receive a definitive reply (paras. 12 and 32).

7. As to the Respondent's case on conduct, the reason which Mr Simpson gave for dismissing the Claimant following a disciplinary hearing held on 16 April 2009, the incidents relied on are set out in a letter dated 9 April quoted at para. 14, inviting him to that meeting and in the dismissal letter of 17 April. His internal appeal against dismissal was rejected by Mr Duckworth, who curiously claimed that he had given evidence before the Robinson ET, when he had not (para. 18).

8. At para. 13 the ET accepted Mr Simpson's evidence that he was not concerned about the issue raised by the Claimant on 31 March concerning his attendance at the depot during a period of availability and at para. 33 the ET expressly found that although both disclosures on 31 March qualified for protection under s.43 ERA they played no part in the decision to dismiss the Claimant. He was dismissed for the reasons contained in Mr Simpson's letters of 9 and 17 April.

9. At para. 34 they added this:

> **"The Tribunal readily accepted the claimant's submission that there were procedural shortcomings in the respondent's conduct of the disciplinary and appeal processes. However, the tribunal was satisfied that Mr Simpson genuinely dismissed the claimant for the reasons given by him and for no other reason. The burden of proof was upon the claimant on the balance of probabilities, to establish that the reason or principal reason for his dismissal was because of the disclosures he made. The claimant could not discharge that burden by identifying evidence upon which the Tribunal could rely in finding a causal link between those disclosures and his dismissal."**

The appeal

10. We begin with the burden of proof argument, turning first to the relevant statutory framework.

11. The right not to be unfairly dismissed enjoyed by employees is contained in s.94(1) **Employment Rights Act 1996** (ERA). Unfair dismissal is dealt with in Part X ERA. In 'ordinary' unfair dismissal cases it is for the employer to show a potentially fair reason for dismissal (s.98(1) and (2)). On the question of fairness under s.98(4) the burden of proof is neutral and has been since the 1980 amendment. Prior to that, it was again for the employer to show that the dismissal was reasonable.

12. However, there is a class of dismissal reasons which are automatically unfair. They are listed in s.108(3). Moreover, the qualifying period of service for ordinary unfair dismissal in s.108(1), 1 year in this case, now 2 years, does not apply to dismissals for the inadmissible reasons listed in s.108(3). Included among those inadmissible reasons (s.108(3)(ff)) are dismissals where the reason or principal reason is 'whistleblowing' under s.103A. That protection was introduced into Part X ERA by the **PIDA 1998** from 2 July 1999.

13. In addition to the automatically unfair reasons contained in s.108(3) ERA, s.152 **TULR(C)A 1992** provides for dismissal on grounds related to union membership or activities (a trade union reason).

14. Section 152 begins:

> **"For purposes of Part X ERA…**
>
> **The dismissal of an employee shall be regarded as unfair if" (it is for a trade union reason).**

15. Thus trade union reason dismissals are treated in the same way as s.108(3) dismissals. In particular, no qualifying period of service is required (TULR(C)A, s.154).

16. The question which arose before the CA in **Smith v Hayle Town Council** [1978] ICR 996, on the provisions of **TULRA 1974**, was on whom did the burden of proving the reason for dismissal fall in circumstances where the claimant did not have sufficient qualifying service for an ordinary unfair dismissal claim and asserted that he was dismissed for an inadmissible trade union reason.

17. On this question the court was divided. In the minority, Lord Denning MR opined that the burden lay on the employer; the majority, Eveleigh LJ and Sir David Cairns, held that it lay on the employee to show that the tribunal had jurisdiction in view of the qualifying period hurdle.

18. That majority ruling has held sway ever since. It was endorsed by the CA in **Marley Tile Co Ltd v Shaw** [1980] ICR 72 and again in **Maund v Penwith DC** [1984] ICR 143 and followed by the EAT in a number of cases cited in *Harvey*, volume 3 NI/424.

19. Ms Mulcahy has sought to circumvent that compelling line of authority by suggesting that 'whistleblowing' cases are different. She points out that the protection afforded by s.103A was added later by the **PIDA 1998** and argues, by reference to the leading judgment in the CA in **Kuzel v Roche Products** [2008] ICR 799 delivered by Mummery LJ, that the burden lies on the employer. The difficulty we have with that submission is that, as Ms Mulcahy recognises, Dr Kuzel had completed the necessary period of qualifying service so that the point in **Smith v Hayle** simply did not arise in that case; a point which I noted in giving the judgment of the EAT in **Kuzel** [2007] IRLR 309, para. 27.

20. Further, there is some academic support for the argument based on the CA decision in Kuzel in the passage in *Whistleblowing Law and Practice,* second edition, Bowers QC et al at para. 8.24

21. The question of where the burden of proof lay in the case of an employee with insufficient service alleging automatically unfair dismissal for a health and safety reason (ERA s.100(1)) was considered by a division of the EAT presided over by HHJ Colin Smith QC in **Jackson v ICS Group** (EAT/0499/97, 22 January 1998, unreported). The approach in **Smith v Hayle** was followed and applied, (4D) as had the EAT in **Tedeschi v Hosiden Bessan Ltd** (EAT/0959/95).

22. One tangential point, which emerged during an illuminating discussion before us, was by reference to Part V ERA when compared with Part IV A. Part V deals with detrimental treatment in, among others, health and safety cases (s.44) and working time cases (s.45A). Dismissal for those reasons are dealt with respectively, at ss.100 and 101A. Whistleblowing protection is found in Part IV A (ss.43A – L). However, on analysis each of those complaints is subject to the regime in s.48 which, by s.48(2), places the burden of proof to negative the prohibited reason for the treatment complained of on the employer. Thus, no distinction is drawn in this respect between whistleblowing detriment cases and those involving health and safety or working time complaints. Our view is affirmed by the helpful Note submitted by Ms Mulcahy and dated 1 July 2013.

23. In these circumstances we have concluded that it is simply not open to this appeal tribunal to depart from the majority opinion of the CA in **Smith v Hayle**, since consistently followed and applied at both CA and EAT level. We can see no material distinction between

the trade union protection afforded by TULRCA and that afforded to dismissed claimants in health and safety, working time and whistleblowing cases. It follows that we reject Ms Mulcahy's submission that the burden of proof lay on the Respondent to show a non-whistleblowing reason for dismissal in this case. The ET was correct in its self-direction at para. 34.

24. However, even had we upheld that submission on the burden of proof, which we do not, we would nevertheless have upheld the ET's conclusion on the facts found (subject to a perversity argument to which we shall return).

25. In **Kuzel v Roche** (CA) at para. 55 Mummery LJ said this:

> **"…the burden of proof issue must be kept in proper perspective. As was observed in Maund … when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof."**

26. In our judgment this is not one of that small number of cases. The ET heard from the dismissing manager, Mr Simpson. Having done so they unequivocally accepted his evidence as to the reason for dismissal. It was the Claimant's conduct; his protected disclosures played no part in the decision to dismiss; see paras. 13 and 33. That was the key finding of fact by the ET. The reference to the burden of proof in para. 34 was not necessary for the ET's conclusion. They did not decide the case on the burden of proof.

27. Finally, perversity. Whilst recognising the high hurdle placed in her way by the approach of Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634, Ms Mulcahy points to a number of unsatisfactory features noted by the ET in their assessment of the evidence called by the Respondent; equally, Mr West relies on a number of findings by the ET helpfully listed at para.

14 of his skeleton argument. We hope that we shall be forgiven for not rehearsing the rival contentions *in extenso*. In short, we are not satisfied that the perversity threshold is crossed by the Claimant in this case.

28. Accordingly, this appeal fails and is dismissed.