Appeal No. UKEAT/0317/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 November 2013

Before

HIS HONOUR JUDGE PETER CLARK

MISS S M WILSON CBE

PROFESSOR K C MOHANTY JP

METROLINE TRAVEL LTD — APPELLANT

MR J LIM — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CHARLENE HAWKINS (of Counsel) Instructed by: Metroline Travel Ltd C/O HR Department ComfortDelGro House 329 Edgware Road London NW2 6JP
For the Respondent	MS CATHERINE CASSERLEY (of Counsel) Instructed by: Kensington Citizens Advice Bureau 140 Ladbroke Grove London W10 5ND

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Conduct unfair dismissal. No error of law in Employment Judge's approach. Court of Appeal guidance in **Bowater** and **Graham v DWP** considered and applied.

HIS HONOUR JUDGE PETER CLARK

1. This case came on for hearing before Employment Judge Alison Russell, sitting alone at the Watford Employment Tribunal on 5 November 2012: the parties, are Mr Lim, Claimant, and Metroline Travel Ltd, Respondent. By her Judgment with Reasons dated 13 December 2012 the Judge upheld the Claimant's complaint of unfair dismissal, adjourning questions of contributory conduct, mitigation of loss and any **Polkey** deduction to a remedy hearing to be fixed. We have been shown the Judge's Reasons following that remedy hearing. In particular she made a finding of one-third contribution to his dismissal by the Claimant.

2. Against that Judgment the Respondent appealed. The appeal was first considered by Langstaff J (President) on the paper sift. He rejected it under rule 3(7), observing in a letter dated 28 March 2013:-

> **"The decision would have been remarkable if it had held the dismissal fair.."**

3. Dissatisfied with that opinion, the Respondent requested an oral hearing under rule 3(10). That hearing came on before HHJ David Richardson, who not only directed that the appeal proceed to a full hearing, but also exercised his discretion to order that the hearing should be before a full division. Hence I have the advantage of sitting on this appeal with two very experienced lay members.

4. This is a case of conduct unfair dismissal. In addition to the agreed bundle of eight authorities produced by counsel now appearing on both sides, we have been taken to the recent Court of Appeal pronouncements on how such appeals should be dealt with in the EAT, in particular, **Bowater v North West London Hospitals Trust** [2011] IRLR 331 (CA), **Graham**

v DWP [2012] IRLR 759 and **Tayeh v Barchester Healthcare** [2013] IRLR 387. Those cases show that it is not for the EAT simply to substitute its judgment for the ET under the guise of perversity (see Longmore LJ in **Bowater**, paragraph 19). Further, the court held that a division in which I sat out in **Graham** was wrong to allow the employer's appeal on the basis that there the Tribunal had impermissibly substituted its view for that of the employer. Both were cases in which the Tribunal upheld complaints of unfair dismissal where the reason for dismissal related to the claimant's conduct. In each case the EAT allowed the employer's appeal. On further appeal, the original ET decision was restored by the Court of Appeal. **Tayeh**, on the other hand, is an example of where the Court of Appeal held it was proper for the EAT to interfere with the ET decision below.

The facts

5. The Claimant commenced employment with the Respondent in February 2005 as a bus driver. In November 2006 he was medically diagnosed as having irritable bowel syndrome following a history of unexplained diarrhoea. The Respondent was unaware of his condition, which did not affect his ability to do his job.

6. On 11 April 2011 the Claimant attended the King's Cross depot at which he was based at 3.45am, ready to start his shift at 5.10am. He needed the lavatory. The main building was locked. He understood that he could not use the lavatory in the engineers' portakabin nearby and so he selected a spot behind the main building near the bike stands. He defecated on the ground amongst the weeds, cleaned himself up, and re-adjusted his clothing. His actions were caught by a CCTV camera, and he was seen bending over and adjusting his clothing by a passing fellow employee, Ms Erce. The Claimant was embarrassed and apologised. Ms Erce was shocked and upset and reported the matter. A disciplinary process followed. A

disciplinary hearing took place before Mr Pandya, the Claimant's manager, on 24 April. Mr Pandya decided to dismiss the Claimant for gross misconduct. The Claimant then appealed unsuccessfully to Mr McWeeney, who following a hearing on 29 May 2012 upheld Mr Pandya's dismissal decision.

7. The Judge heard from both the Claimant and Mr McWeeney. Mr Pandya was unable to attend the hearing because he had been involved in a road traffic accident, although his witness statement was before the Judge.

The Judge's reasoning

8. Having directed herself as to the law, including section 98(4) of the **Employment Rights Act 1996,** the well-known **Burchell** test approved by the Court of Appeal in **Post Office v Foley** [2000] IRLR 827, and the range of reasonable responses test at paragraphs 29-35, the Judge held, on the facts found:

(1) That the reason for dismissal was entirely related to the Claimant's conduct, the incident on 11 April 2012 (see paragraph 36 of her Reasons).

(2) That the Respondent did not have reasonable grounds based on a reasonable investigation for their belief that the Claimant was guilty of indecent exposure (paragraph 36). They did to some extent have reasonable grounds for believing that he had breached health and safety requirements, but in that respect had not carried out a proper investigation (paragraphs 38 to 39). The third allegation with which the Claimant was charged, soiling company property was "upheld" (paragraph 40).

(3) Having considered the distinction between misconduct and gross misconduct under the Respondent's disciplinary procedure (paragraphs 42-43) the Judge finally asked herself the critical question: did dismissal for the misconduct in question fall within or outside the range of reasonable responses open to the employer? She found that it fell outside the range. Hence her conclusion that his dismissal was unfair.

The appeal

9. In advancing the appeal, Ms Hawkins, who did not appear below, has organised her submissions under three broad heads in challenging the Employment Judge's approach: misapplication of the **Burchell** test, impermissible substitution of her own view for that of the employer, and perversity.

10. As to the first head of complaint three points are taken. First, that the Judge misdirected herself in taking account of the reasoning of the Court of Appeal in **Crawford v Suffolk Mental Health Trust** [2012] IRLR 402 (CA), where Elias LJ builds on his earlier Judgments in **A v B** [2003] IRLR 405 (EAT) and **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721 (CA), dealing with the level of investigation required in the case of a claimant at risk of being unable to work in his or her chosen field in future following dismissal for misconduct.

11. However, as Ms Casserley points out, there was no indication in fact that any higher test was applied by this Employment Judge in looking at the level of investigation carried out in the present case. It applies only to the health and safety charge levelled against the Claimant and no investigation was carried out by the Respondent (see paragraph 39).

12. Secondly, in relation to the charge of indecent exposure, we are satisfied that the Judge was entitled to conclude that the Respondent had no reasonable grounds for believing that the Claimant was guilty of indecent exposure either as a matter of fact (see paragraph 37) or law. Plainly his actions did not constitute a breach of section 66 of the **Sexual Offences Act 2003**, as it does not simply require exposure but also the necessary intent, to which Mr Pandya referred the Claimant at his disciplinary hearing.

13. Thirdly, at paragraph 39, the Judge made a qualified finding that the Respondent had reasonable grounds for believing that there was a breach of health and safety. She was therefore entitled to go on to consider the level of investigation into that matter by the Respondent.

14. In summary, we have concluded that the Judge correctly applied the **Burchell** test overall

15. Next, substitution of view. Ms Hawkins submits that, despite her correct self-direction at paragraph 32 not to substitute her view for that of the Respondent, that is precisely what the Judge went on to do. We have been taken to what are said to be examples of that wrong approach, at paragraphs 18, 20, 21 and 27, but we reject this submission. It seems to us that the Judge was here making permissible and relevant and necessary findings of fact and took great care at all times to apply the range of reasonable responses test, to which she referred at paragraph 33 (see **Sainsburys Supermarkets Ltd v Hitt** [2003] IRLR 23 (CA)). As to the Judge's analysis of the level of misconduct (paragraphs 42-46) we see no inconsistency between the finding that the Claimant was dismissed for misconduct and the finding of 33% contribution in the Judge's subsequent remedy decision, nor do we find any error in her considering where this behaviour fitted in the Respondent's own disciplinary procedures.

16. Ultimately the Employment Judge had to make a judgment as to whether the conduct found by the Respondent was sufficient to justify the sanction of dismissal in all the circumstances. For the reasons given at paragraph 46 the Judge found that dismissal fell outside the range. In arriving at that conclusion she took into account all relevant factors and, contrary to Ms Hawkins' submission, did not fail to take into account any irrelevant factors. Her conclusion was a permissible one. It was not legally perverse.

17. Consequently this appeal fails and is dismissed.