Appeal No. UKEAT/0623/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 December 2013
Judgment handed down on 31 March 2014

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

DISOTTO FOOD LTD — APPELLANT

CARLOS SANTOS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON HARDING (of Counsel) Instructed by: Messrs Dollman & Prtichard Solicitors 8 The Square Caterham Surrey CR3 6XS
For the Respondent	MR TOM BROWN (of Counsel) Instructed by: Baskin Ross & Co 628 Finchley Road Golders Green London NW11 7RR

SUMMARY

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Reasonableness of dismissal

Compensation

Contributory fault

The Employment Judge substituted his decision for that of the employer in deciding whether dismissal for refusal to obey a specific instruction against a background of warnings for similar conduct fell outside the band of reasonable responses of a reasonable employer. **London Ambulance Service NHS Trust v Small** [2009] IRLR 567 and **Davies v Sandwell MBC** [2013] IRLR 374 applied. Appeal allowed.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the reserved judgment and Reasons of Employment Judge Southam, sitting at Watford on 6-7 September 2012. The reserved judgment and Reasons were sent to the parties on 24 September 2012.

2. The Employment Judge found that Mr Santos had been unfairly dismissed by the Appellant and that it was also in breach of its duty to give him a statement of the changes to his particulars of employment under section 4 of the **Employment Rights Act 1996**. A substantial monetary award was made.

3. The Appellant is represented by Mr Simon Harding of counsel. The Respondent is represented by Mr Tom Brown of counsel. I am grateful to both counsel for their written and oral submissions.

The factual background

4. The Employment Judge made findings of fact at paragraph 10.1-10.26 of his Reasons. This summary is taken from them. The Respondent is a manufacturer and supplier of foodstuffs. At the relevant time it had about 40 employees. Mr Santos had been employed by the Appellant since about 1994. By 2001 he was employed as a factory and warehouse manager. He had two weeks off work suffering from work-related stress.

5. On his return, Mr Santos agreed variations in his contract and he moved from being the factory manager and warehouse manager to being the warehouse manager. He accepted a reduction in pay and his hours were reduced to 40 plus. There was no job description and no detailed description of his role.

6. By 2009 the Appellant came to the view that Mr Santos' performance in his role was declining. It commenced disciplinary action. In April 2009 there was a disciplinary hearing. This process was somewhat drawn out, but on 16 July 2009 Mr Santos was given a warning lasting twelve months for failing to follow instructions relating to allowing the factory team to be late because contractors were engaged on site within the factory and being in the picking freezer, which Mr Santos knew he could not comply with but did not tell anyone. Finally, there was a failure to take disciplinary action against a member of the production team, a Mr Freitas.

7. There was a further disciplinary hearing on 4 May 2010. It was concerned with Mr Santos' failure to check that the company was carrying sufficient stocks of certain items, failing to return the Managing Director's call and a general drop in his level of performance. Examples were given. As a result, Mr Santos was given a further warning dated 9 July 2010, which related to the failure to arrange for stocking of a volume-selling product in sufficient time for the company to remain in stock of that item. The warning was for six months and was dated 9 July 2010, therefore within the 12-month period of the previous warning.

8. On 3 November 2010 there was a further disciplinary hearing. This related to an incident involving an agency worker, who appeared to have been under the influence of drugs. The charge was that Mr Santos did not comply with an instruction from the Managing Director of the company that the agency worker should not be permitted to return to work. No decision was made on that allegation at that time, but the Appellant gave Mr Santos a 12-month warning, which was to remain on his file from 8 December 2010.

9. On 22 November 2010 there was a further incident. The allegation was that Mr Santos had failed to follow instructions given to him with regard to loading goods on the delivery

trucks and had not communicated his failure to do so back to the person giving the instructions. Mr Santos was warned that the consequence might be a final written warning or dismissal if the charge was found proved.

10. On 21 December the Appellant held a disciplinary meeting in relation to the incident on 22 November. The Employment Tribunal records that the only investigation made was that of a meeting on that day, which a Mr Pacitti and a Mr Oddy attended, together with Mr Santos and his trade union representative.

11. At paragraph 10.18 of his Reasons, the Employment Judge says this:

> **"The notes of this meeting suggest that the matters that were established were as follows. The claimant had started work at 6am that day and was due to finish at 5pm. He had not realised that a colleague, Angelo, was off on holiday and, when he realised that he was, he offered to come back and work an evening shift. He took a break from 5.30pm to 6.30pm to go home and feed his children. On his return, he realised how busy the warehouse was and decided to stay and help and undertake a task not described to me, but called 'marking the boards'. He said that Alan Gold was aware of the arrangement. After they had finished loading the vans, he found that there were four urgent orders which had not been loaded. It is recorded that, in accordance with normal procedure, the claimant phoned Mr Dionisi, the managing director, for instructions regarding these orders and was instructed to pick and load them that night and not leave them until the morning and that the claimant agreed to do that. The minute continues to the effect that the claimant, with the assistance of others on shift, picked the orders, with the exception of some banoffee pies, which were located in unit A, a separate unit that would take a little time to open and that the claimant made the decision to get the banoffee pies from unit A the following morning as it would have taken too much time to open the building and get the stock that night. The minute also records that the claimant had said that he did not know which van to place the orders on to. The minute records that the matter was dealt with routinely the following morning when the claimant started work, I infer at 6am, and the discussion about the matter continued. It was put to the claimant that the normal procedure is to load the vans the night before. It avoids mistakes and allows the vans to get away promptly in the morning. It was put to him that if he had been sick there might have been a problem."**

The Employment Judge found that was an accurate record of what was discussed at the meeting.

12. By letter dated 1 February 2011 the Appellant dismissed Mr Santos. The dismissal letter is in the supplementary bundle at pages 44-46. It refers to the disciplinary history and then refers to the incident on 22 November 2010. The letter concludes by saying this:

> **"At 10 o'clock that evening that evening you called Marcello Dionisi and told him that later orders had come through. You were told to mark them up and put them on the van for the following morning and you said ok. You were told to pay overtime to the staff and you said you would get it done.**
>
> **That morning, Marcello Dionisi came into work early and found out that you had not followed his direct instruction to mark the orders up and put them out for the vans. When you were challenged about this later that day in a brief informal meeting where Marcello, Carlo and Alan were present, you said that you did not think it needed to be done in that way. You explained you were doing the company a favour in any event.**
>
> **During this meeting you admitted that you wanted to go home and you thought the way you did it was a better way even though you had been given this instruction.**
>
> **We have considered everything that you told us in the disciplinary meeting. In particular, we considered everything you told us in mitigation. We consider the fact that you said that sometimes you did not know who you should be reporting to and what you should be [doing]. You were told at the meeting you should have raised any such issues with your line manager and if these were not resolved with someone more senior.**
>
> **We concluded that you had served with the company for 17 years and were aware of the line management structure, and the procedures that were to be followed. We therefore did not accept that any difficulties you may have in understanding who to report to was an explanation for your inability to follow instructions.**
>
> **We did not see how an understanding of the line management structure would affect the following of a direct instruction given to you by someone who was entitled to give you such an instruction.**
>
> **Having therefore considered your disciplinary record set out above, and everything you explained to us in those meetings, we have concluded you should be dismissed from this company for misconduct and capability issues.**
>
> **With regret, we have concluded you are unable to follow instructions and procedures as stipulated by the company. I believe you have had many opportunities to change the way you respond to instructions and repeatedly you have failed. The failure to follow basic procedures has resulted in the company losing money. The company has no confidence in your abilities to do the job that you are paid to do.**
>
> **We also believe that you are incapable of performing the tasks. This is because you cannot follow basic instructions and seem to be unable to perform the management role that you have been given. Again, you have been given several opportunities to improve your performance and you have failed."**

The letter concluded by dismissing Mr Santos on 12 weeks' notice.

13. There was an appeal, which in the event was undertaken by a barrister, a Mr John Small of 36 Bedford Row. The appeal hearing took place on 30 March 2011. Mr Santos appeared and made representations. Subsequently Mr Small interviewed Mr Oddy and Mr Pacitti of the

Appellant company. The appeal was dismissed by letter dated 13 April 2011: supplementary bundle pages 56-59.

The Employment Tribunal's conclusions

14. The Employment Judge decided that Mr Santos had been dismissed for misconduct. It was a potentially fair reason under the **Employment Rights Act 1996**. He did not agree that Mr Santos had been dismissed for lack of capability: Reasons paragraphs 12-13.

15. He then turned to the question of reasonableness and said this, at paragraphs 14-21:

> **"14. The second question I had to consider was the question of reasonableness, which broke down into a number of separate tests. I consider the question of the reasonableness of the investigation first.**
>
> **15. In the light of the authorities, especially *Stein*, it is not for me, I consider, to investigate (at least at this stage) the circumstances which led to the issue of the earlier warnings. I will return below to the question of the reasonableness of the decision to dismiss based on those matters. There was no re-investigation of the earlier disciplinary issues, rather reference was made to the employer to what was known of them from minutes and letters sent contemporaneously. As regards the incident on 22 November, there were no prior interviews with any staff before the claimant was seen at his disciplinary hearing on 21 December, at least any that were recorded and put into writing for the claimant to consider at that meeting. For instance, a statement by Mr Dionisi might well have been obtained but was not. The respondent did conduct a thorough disciplinary interview, but that revealed a dispute about what the standard procedure was about loading vehicles the night before deliveries. There was no statement from another management witness who might have been able to shed light on what the procedure was. There was certainly no written procedure. Mr Small conducted interviews with Mr Oddy and Mr Pacitti after the appeal meeting but the contents of those interviews were not put to the claimant. The case of *Pudney* suggests that such a failure may take a decision to dismiss outside the range of reasonable responses. Even in small companies it is usual to find some sort of statement from a witness to alleged misconduct. However, this is not a small company. A company with 44 employees may I think properly be regarded as being medium-sized.**
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> **16. I noted that the letter requiring the claimant to attend a disciplinary hearing of 30 November [28] refers to the claimant's failure to follow instructions [with] regard to loading good on to the delivery trucks and not communicating that failure to the person given the instruction. He was warned that possible consequences were a final written warning or dismissal. There was no reference in the letter to the earlier disciplinary matters, except the third, where Mr Pacitti noted that the matter was yet to be concluded. There is a suggestion that the last two matters might have been considered together but the claimant was not warned that the respondent might be considering the first two matters. In respect of the first, the warning had expired. In relation to the second, the six-month warning had not yet expired.**
>
> **17. The second question I had to consider under the broad heading of reasonableness was whether the investigation revealed evidence on which the respondent could reasonably conclude that the claimant was guilty of the misconduct alleged. The answer to this is straightforward. There was evidence that the claimant did not load all of the goods. The evidence which the respondent had received suggested that the claimant had loaded most of the goods and that all that remained was some banoffee pies to be loaded in the morning. Those goods had to be obtained from a separate storage area, and the claimant felt that that could be left until the morning. The investigation by the respondent also revealed that the**

claimant had said that he would do the outstanding loading in the morning and that he did do it. The suggestion was that, if he had been ill the following day, then there was a risk that the vehicles would leave with incomplete consignments. However, the claimant had not been ill, and there had been no problem. The respondent had no basis on which to conclude, that, if the claimant had been ill the next day, he would not have telephoned those working that day to tell them that the outstanding goods needed to be loaded. Despite this, the claimant's evidence supported the disciplinary charge that the claimant had failed to follow an instruction.

18. The third issue is whether the respondent's dismissing officer and appeal counsel genuinely believed the claimant to be guilty of the misconduct alleged. It is clear that they did so believe. Furthermore, Mr Oddy and Mr Small also believed the claimant to be guilty of the misconduct alleged in relation to the earlier matters.

19. The next question I had to decide is whether dismissal lies within the range of reasonable responses, having regard in particular to the specific matters I was asked to consider (see issues above). It seems to me that the failure related to a failure to load, I think, four banoffee pies that were stored in a separate storage area and which the claimant undertook to load, and did load, without any issues the following morning, before the delivery vans left the respondent's premises. There was no harm caused to the respondent's business. The claimant had worked from 6am until 10pm on 22 November with only two breaks. He had worked some 13 to 14 hours in total and was tired. The claimant had a responsible position. He was the warehouse manager. His hours of work had nominally been reduced and his pay was reduced, yet he still had to work 11 hours a day throughout the period in question, if not at other times. The claimant had a responsible attitude towards the deliveries. He did what he was required to do and he did it in the way that he chose to do it.

20. I bear in the mind that the subject matter of the earlier warnings, which the respondent considered, had not in themselves justified the claimant's dismissal, notwithstanding that the respondent was considering the claimant's position in relation to an earlier disciplinary issue at the time the last incident occurred.

21. The question for me is whether dismissal lay within the range of reasonable responses. The incident on 22 November was, in my judgment, so slight a matter that no reasonable employer could reasonably contemplate dismissing an employee because of that matter even when the previous disciplinary issues, which, in themselves, had not justified dismissal, were taken into account. In my judgment dismissal lies outside the range of reasonable responses. I bear in mind also that the warnings previously given had been for a variety of different matters. The respondent is of course entitled to take into account and they may well have considered that there was a problem in the claimant not doing what was asked of him. Against that must be set the fact that the claimant's new role as warehouse manager had never been defined and that, even after the earlier warnings, the respondent never took the opportunity to set out in writing the scope of his role. The first written warning was in respect of failure to follow instructions, no detail having been given in the warning itself. The second written warning was in relation to the failure to order stock. The third was in relation to failure to deal with an agency employee who may have been using drugs. The claimant could not have known on 22 November, when he made his decision not to load the van until the morning, how the incident of September in relation to the agency worker was going to be viewed."

16. Finally, the Employment Judge turned to the issue of procedural fairness. He stated that he had identified some procedural failings but was of the view that, even if those procedural failures had not occurred, the dismissal would still have been unfair because dismissal did not in this case lie within the range of reasonable responses: Reasons paragraph 22. It followed, in his view, that the Respondent could not rely on a **Polkey** defence: Reasons paragraph 23.

17. Having found that the dismissal was therefore unfair, the Employment Judge went on to make a calculation of the compensation owed to Mr Santos: paragraph 26 (fact-finding) and paragraphs 29-41. Although the third ground of appeal was permitted to go through to a full hearing by the President, he thought that the Employment Judge took a wrong approach to grossing up. It is not necessary for me to solve that issue for reasons which I shall give later in this judgment.

18. I should add a reference to three paragraphs in the Employment Judge's conclusions on remedy. He said this:

> **"30. I have not sought to go behind the earlier written warnings. I accept that they were given, but the respondent had dealt with the claimant for those matters at the time by giving warnings and, whilst they were entitled to take them into account when dealing with the final matter, those matters alone had not led the employer to make a decision to dismiss the claimant. I held that the dismissal was unfair because dismissal lay outside the range of reasonable responses, even taking into account the previous warnings. I do not therefore consider that it is appropriate for me to consider that conduct as conduct before the dismissal justifying the reduction in the basic award.**
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> **31. The second option for reduction is in relation to the compensatory award, where I have to consider whether the dismissal was to any extent caused or contributed to by any action of the complainant. If I do, I shall reduce the amount of the compensatory award by such proportion as I consider just and equitable having regard to the finding: see section 123(6) Employment Rights Act 1996. I do not think it appropriate to reduce the compensatory award on account of the earlier matters. These are matters for which the claimant might have been dismissed but the company's decision was not to dismiss him. I was being asked, in effect, to take a more serious view of the conduct than the respondent did itself.**
>
> **32. For the purpose of assessing contribution, I must make my own findings of fact, and I can look behind the warnings. I must determine if the claimant was guilty of the earlier misconduct or not. I note that, in relation to the 2009 matters, three matters were discussed and the warning was given for failure to follow instructions. There was no consequence to the first of those matters. It was therefore a hypothetical problem only, and therefore was similar to the 22 November 2010 incident. There was a criticism of poor communication. In relation to the third matter, there was a criticism of the claimant for failing to take disciplinary action after a change in the claimant's duties. Given that the respondent had not specified what the claimant's duties were, it is unclear why the respondent felt able to issue a warning in respect of that matter, although I accept that they did so."**

The grounds of appeal

19. At a preliminary hearing on 10 May 2013 the President permitted the appeal to go forward on three grounds only: appeal bundle page 55. I take each ground of appeal in turn.

Ground 1: the Tribunal wrongly substituted its own judgment and decision for that of the Employer by (a) taking a flawed approach to the earlier warnings (b) making flawed findings and (c) treating the last incident as "so slight a matter that no reasonable employer could reasonably contemplate dismissing an employee..."

20. Mr Harding refers me to paragraph 10.18 of the Reasons, which show the background facts. There is no dispute that there was a direct management instruction to load the lorry that evening and Mr Santos chose not to do so. He then refers me to paragraph 19 of the Reasons. The Employment Judge said that Mr Santos "did what he was required to do and he did it in the way he chose to do it." Mr Santos in fact loaded the missing pies the following morning and not on the evening on which he had been instructed to do it. Mr Harding refers me to paragraph 20, which I have set out above. The submission is that this shows clear substitution.

21. Mr Brown points to the duty on the Tribunal under section 98(4) of the **Employment Rights Act 1996** to assess whether an employer has acted reasonably or unreasonably. He submits that the Employment Judge took account of all relevant factors and made careful findings of fact including the excessive number of hours which Mr Santos was working. He submits that the decision was one which was open to the Employment Judge on the evidence before him. Finally, he refers me to a number of cases where dismissals for failure to follow instructions have been found to be fair or unfair. The most recent case he refers me to is **Piggott Brothers and Company Ltd v Jackson** [1991] IRLR 309.

Discussion

22. In **London Ambulance Services NHS Trust v Small** [2009] IRLR 563 at paragraphs 41-43, Mummery LJ, giving the judgment of the Court, said this:

> **"41. On the liability issue the ET ought to have confined its consideration to facts relating to the Trust's handling of Mr Small's dismissal: the genuineness of the Trust's belief and the**

reasonableness of the grounds of its belief about the conduct of Mr Small at the time of the dismissal. Instead, the ET introduced its own findings of fact about the conduct of Mr Small, including aspects of it that had been disputed at the disciplinary hearing …

42. The ET used its findings of fact to support its conclusion that, at the time of dismissal, the Trust had no reasonable grounds for its belief about Mr Small's conduct and therefore no genuine belief about it. By this process of reasoning the ET found that the dismissal was unfair. In my judgment, this amounted to the ET substituting itself and its findings for the Trust's decision-maker in relation to Mr Small's dismissal.

43. It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

That is the test I shall apply in this case. The Employment Judge correctly followed the approach in **British Home Stores Ltd v Burchell** [1978] IRLR 379. First, he decided that the reason for dismissal was misconduct, which was a reason put forward by the employer: Reasons paragraph 12-13. Second, although he criticised parts of the investigation process in detail and, in particular, that there was no re-investigation of the earlier disciplinary issues, he found that there was a "thorough disciplinary interview" and he does not specifically find that the investigation was unreasonable: paragraphs 15-16. Third, the Employment Judge considered the question of whether the investigation revealed evidence on which the employer could reasonably conclude that Mr Santos was guilty of the misconduct alleged. He found that the "answer to this is straightforward" and that "the Claimant's evidence supported the disciplinary charge that the Claimant had failed to follow an instruction": Reasons paragraph 17. Fourth, the Employment Judge considered whether the Appellant's dismissing officer and appeal counsel genuinely believed the Claimant to be guilty of the misconduct alleged. He found that they did so believe. He also found that they both believed Mr Santos to be guilty of the misconduct alleged in relation to the earlier matters: Reasons paragraph 18.

23. Finally, in relation to liability, the Employment Judge turned to the question of whether the dismissal lay within the range of reasonable responses. I have set out his conclusions in the

Reasons paragraphs 19-21 above. In my judgment, it is here that the Employment Judge fell into error. Paragraph 19 is an attempt by the Employment Judge to re-investigate facts (which were not in dispute) and to minimise the conduct. All of those facts were known to the employer and the employer took a different view in reaching its decision to dismiss. It is not for the Employment Judge to take a different view from that of the employer. The last two sentences of paragraph 19 are simply inexplicable. The Employment Judge said this:

> **"The claimant had a responsible attitude towards the deliveries. He did what he was required to do and he did it in the way that he chose to do it."**

That simply ignores the fact that Mr Santos had been instructed to load every item including the pies on to the lorry before he went home that evening and he had agreed to do so. It was flat disobedience to the instructions.

24. Neither do I understand paragraph 20 of the Reasons. Those warnings were matters of fact in the real world: see **Davies v Sandwell MBC** [2013] IRLR 374 at paragraph 35 per Lewison LJ. It is quite clear that the employer had relied upon those earlier warnings in its dismissal letter and it was entitled to do so. The Employment Judge's comment that those earlier warnings "had not in themselves justified the Claimant's dismissal" is irrelevant and illogical. They were earlier warnings in relation to misconduct which the employer was entitled to take into account on this occasion which was the further offence of misconduct by disobeying a specific instruction.

25. However, the best evidence of the substitution mindset is in paragraph 21 of the Reasons. First, the Employment Judge states that:

> **"The incident on 22 November was, in my judgment, so slight a matter that no reasonable employer could reasonably contemplate dismissing an employee because of that matter even**

> **when the previous disciplinary issues, which, in themselves, had not justified dismissal, were taken into account."**

Here, the Employment Judge is quite clearly giving his personal view of the gravity of the incident on 22 November. It is the employer's view of the gravity of that incident which matters and not that of the Employment Judge.

26. The Employment Judge then said this:

> **"In my judgment dismissal lies outside the range of reasonable responses. I bear in mind also that the warnings previously given had been for a variety of different matters. The respondent is of course entitled to take into account and they may well have considered that there was a problem in the claimant not doing what was asked of him."**

27. That, again, is substitution. It is quite clear from the dismissal letter that (a) the employer was well aware of the history of the warnings and what they were for and (b) that it represented more than them considering that there was a problem in the Claimant not doing what was asked of him. It took a very serious view of the matter and it was not for the Employment Judge to go behind the gravity of those warnings: see **Davies** supra at paragraph 20 and 23 per Mummery LJ; paragraph 34 per Lewison LJ and paragraphs 37-38 per Beatson LJ. This is not a case where Mr Santos challenged the circumstances of his previous warning. There was no appeal against any of them.

28. However, in this case the Employment Judge specifically, in the remainder of paragraph 21, went behind the warnings and criticised them as being in some way different. The reality was that they were warnings for disobeying a specific instruction in each case.

29. My conclusion, therefore, is that the Employment Judge did substitute his decision as to whether or not dismissal in this case fell within the range of responses of a reasonable employer and substituted his own decision for that of the employer in this case.

Grounds 2 and 3

30. As I am allowing the appeal under ground 1 it is not necessary for me to consider grounds 2 or 3.

Conclusion

31. For these reasons the appeal is allowed under ground 1. The decision that Mr Santos was unfairly dismissed is set aside, and I will substitute a finding that he was fairly dismissed.