Appeal No. UKEAT/0103/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR A HARRIS

MR T STANWORTH

LONDON CENTRAL BUS COMPANY LTD — APPELLANT

MR P MANNING — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RUSSELL BAILEY (of Counsel) Instructed by: Morehead James Kildare House 3 Dorset Rise London EC4Y 8EN
For the Respondent	MR PATRICK MANNING (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Dismissal found to be fair at disciplinary stage converted to an unfair dismissal following appeal. However, no material unfairness found at the appeal. The highest it was put was that the Claimant was not shown a list of unsuitable vacancies in circumstances where he was not medically fit to continue his employment as a bus driver.

With reluctance (the Claimant had 23 years unblemished service) employer appeal allowed a finding of unfair dismissal set aside.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This case has been proceeding in the London (South) Employment Tribunal. The parties are Mr Manning, Claimant, and London Central Bus Company, Respondent. This is an appeal by the Respondent against the judgment of a Tribunal chaired by Employment Judge Tsamados, promulgated with reasons on 5 November 2012 following a hearing on 25 September, upholding the Claimant's complaint of unfair dismissal (the liability judgment).

2. At a subsequent remedies hearing held on 14 November the same Tribunal awarded the Claimant a basic award of £10,000 but made no compensatory award. There is no appeal by either party against that remedies judgment and reasons have not been sought. The appeal now comes before us for a full hearing following a preliminary hearing held before HHJ Serota QC and members on 11 June 2013.

Background facts

3. The Claimant was a long-serving employee of the Respondent. He commenced employment as a bus driver on 5 September 1988. He was dismissed on ill-health capability grounds with effect from 28 October 2011.

4. From 23 May 2011 the Claimant was unable to work due to numbness in both feet. Proper medical enquiries were made but by 28 October 2011 there was no indication as to when he may be able to return to driving duties and Mr Blair, the General Manager of the Camberwell Garage at which the Claimant was based, decided to dismiss him with pay in lieu of notice following a meeting held that day. A subsequent appeal to Mr Farthing, Personnel Manager, was dismissed following an appeal hearing held on 15 December 2011.

5. The sole issue below which concerns us in this appeal concerns the efforts made by the Respondent to find the Claimant alternative employment.

The Employment Tribunal decision

6. We are told by Mr Bailey, who appeared below on behalf of the Respondent, without dissent from Mr Manning, representing himself today, that at the end of the liability hearing on 25 September 2012 the Judge delivered an oral judgment on behalf of the Tribunal in which the Claimant's dismissal was found to be unfair on two grounds; first, that the Respondent had made no effort to find alternative work for the Claimant after he was certified fit for light duties on 6 July 2011 until the dismissal hearing on 28 October. Secondly, contrary to Mr Farthing's evidence (see reasons, paragraphs 22 to 28) the Tribunal found (paragraphs 45 to 46) that a list of alternative vacancies was not produced at the appeal hearing (although none were suitable for the Claimant; see paragraph 49) and that must make the decision to uphold the dismissal on appeal unfair.

7. The first reason was dropped by the Tribunal in circumstances which they describe under the heading 'Post Judgment' in their written reasons at paragraphs 51 to 55. The written reasons, we emphasise, find that the only unfairness was the failure to show the Claimant a list of unsuitable vacancies at the appeal hearing (see paragraphs 45 to 46, referred to above).

8. At the remedy hearing it is plain from the remedies judgment that the Tribunal accepted Mr Bailey's submission that this was inevitably a case for a 100% **Polkey** deduction, thereby reducing the compensatory award to nil. That still left the Claimant with a basic award based on his long service.

9. Mr Bailey submits that for the Tribunal to revisit their oral judgment without notice to the parties at a time when the Respondent had indicated its intention to apply for a review following receipt of the Tribunal's written reasons was a serious procedural irregularity.

10. Substantively, he submits that the Employment Tribunal fell into error (a) in relation to the employer's obligation to find alternative work for an employee facing dismissal on ill-health capability grounds and (b) in finding that a procedural imperfection at the internal appeal stage rendered an otherwise fair dismissal unfair.

11. It is convenient to take the last of those three grounds of appeal first. Mr Bailey begins with the proposition, which we accept, that a procedural defect, whether at the dismissal or internal appeal stage, does not of itself give rise to a finding of unfair dismissal, applying s.98(4) of the **Employment Rights Act 1996** to this potentially fair dismissal on ill-health capability grounds (see, by way of example, **Taylor v OCS Group Limited** [2006] IRLR 613 at paragraph 48, per Smith LJ).

12. We return to the Tribunal's reasoning and findings of fact. First, they found that the dismissal by Mr Blair on 28 October 2011 was fair (reasons, paragraphs 43 to 44). The sole reason for finding the dismissal unfair is stated at paragraph 46 in this way:

> **"46. Given that the Respondents asserted that alternative employment was fully reconsidered at the appeal stage and our findings that it was not, this must make the decision to uphold the dismissal at the appeal stage unfair.**
>
> **47. We therefore find that the Claimant was unfairly dismissed."**

13. Mr Manning submits that that is a permissible conclusion and one with which we, as we are only too well aware as an appellate tribunal whose jurisdiction is limited to correcting errors of law by the Employment Tribunal, ought not to interfere.

14. We are unable to accept his submission on the particular facts of this case. Although Mr Manning contended before us that he would have performed the job of Night Controller, which appears on the list of vacancies available at the time of the appeal hearing, he was not, on the Tribunal's findings, shown that list but on their findings of fact it was not a job which he could have performed (see paragraph 24).

15. We are, therefore, left in this position, on the findings of the Tribunal expressed in their written reasons. The initial dismissal was fair; at that point there was no failure to consider alternative employment for the Claimant. At the appeal hearing there existed a list of vacancies, none of which were, on the findings, suitable for the Claimant. The mere failure to show him that list of unsuitable vacancies must render the decision to refuse his appeal unfair and consequently his dismissal unfair under s.98(4) of the **Employment Rights Act 1996**.

16. We are unable to accept that final link in the Tribunal's reasoning. Whilst the conduct of the internal appeal process is relevant to the overall question of fairness under s.98(4), the question, as Morritt LJ formulated it in **Westminster City Council v Cabaj** [1996] IRLR 399, paragraph 29 by reference to the House of Lords decision in **Tipton v West Midlands Co-operative Society Ltd** [1986] IRLR 112 and **Polkey v A E Dayton Services Limited** [1987] IRLR 503 itself, is whether the procedural defect denied to the Claimant employee an opportunity of showing that the employer's reason for dismissal, here capability, was an insufficient reason for the purpose of s.98(4).

17. Plainly, the answer to that question can only be that he was not denied any such opportunity. To show him a list of unsuitable vacancies at the appeal hearing would have been an utterly futile exercise, to borrow that expression from **Polkey**. The mere fact of that

procedural failing, if that is a correct characterisation, cannot displace the fairness of the original dismissal. Thus, regardless of the procedural irregularity and perversity arguments raised by Mr Bailey in grounds one and two of this appeal, ultimately the appeal succeeds on ground three without more. The appeal is allowed. We substitute a finding of fair dismissal. The remedy judgment necessarily falls. The basic award of £10,000 must be set aside.

18. Finally, I should say that each of us reach this conclusion wholly without enthusiasm. Here is a man who served his employer well for 23 years and lost his job through absolutely no fault of his own. That he should now still be unemployed, as he tells us he is, without any financial cushion stemming from this case is the unpalatable consequence of the decision in law to which we have been driven today.