Appeal No. UKEAT/0462/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 September 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MR A HARRIS

MRS M V McARTHUR FCIPD

MR T SINGH — APPELLANT

DHL SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR STEPHEN HEATH (of Counsel) Bar Pro Bono Unit
For the Respondent	MR CRAIG RAJGOPAUL (of Counsel) Instructed by: DWF LLP Solicitors Bridgewater Place Water Lane Leeds LS11 5DY

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Employment Tribunal Judgment was given a generous reading paying attention to the correct self-directions. It did not err in finding the dismissal of the Claimant for misconduct was open to a reasonable employer.

The incorrect self-direction applying **Burchell** without noting the change in the burden of proof in 1980, whilst unforgivable and a distraction, did not affect the result.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about unfair dismissal for misconduct. This is the Judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed. We shall refer to the parties as the Claimant and the Respondent.

Introduction

2. It is an appeal by the Claimant in those proceedings against a Judgment of an Employment Tribunal sitting at Reading under the chairmanship of Employment Judge Gumbiti-Zimuto, sent with Reasons on 7 June 2012. The Claimant was represented by counsel, but different counsel today appears: Mr Stephen Heath. Mr Heath is appearing for free under the aegis of the Bar Pro Bono Unit. The Respondent was represented by its solicitor Mr Menham, who today instructs Mr Craig Rajgopaul.

3. The Claimant made three claims, all dismissed. The Respondent contended that it dismissed the Claimant for his conduct in causing the relationship of trust and confidence to break down as a result of his actions.

The issue

4. The issue as defined by the Employment Tribunal was to decide the three issues and, so far as we are concerned, to decide on unfair dismissal under section 98 of the **Employment Rights Act 1996**. The Employment Tribunal decided against the Claimant on all three; he appealed. The matter came before Langstaff P and members at a preliminary hearing, when substantial numbers of grounds were dismissed but two were allowed to go forward,

relating to one of the three claims the Claimant had made; that is, unfair dismissal in its ordinary sense.

The legislation

5. The relevant provisions of the legislation are not in dispute. They are as follow (section 98(4):

> **"… the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a fair reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

6. This provision applies where the Respondent has shown a reason for dismissal (here, conduct), which is not in dispute.

The Employment Tribunal's directions

7. Sadly, the Employment Tribunal misdirected itself on the fundamental principle of unfair dismissal, for it imposed on the Respondent the burden of proof. We will reproduce this Tribunal's directions on the law:

> **"12.10.1 In order to satisfy the requirements of section 98(1) ERA, the Respondent must show that:**
>
> **(a) it believed the claimant was guilty of misconduct;**
>
> **(b) it had reasonable grounds upon which to sustain the belief;**
>
> **(c) at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case.**
>
> **It is not necessary that the tribunal itself would have shared the same view those circumstances [sic] (*British Home Stores Limited v Burchell* [1978] IRLR 279).**
>
> **12.10.2 After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting its own decision as to what was the right course to adopt for that of the employer) must decide whether the Claimant's dismissal 'fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal**

is fair: if the dismissal falls outside the band it is unfair' (*Iceland Frozen Foods v Jones* [1982] IRLR 439).

12.10.3 In *Sainsbury's Supermarket v Hitt* [2003] IRLR 23 it was explained that the range of reasonable responses test (the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

8. The problem is that counsel for the Claimant in writing says that paragraph 12.10.1 is a correct citation of the law. Mr Rajgopaul acknowledges that there is an error here but it is in favour of the Claimant. This court, the Court of Appeal and the Court of Session has on countless occasions had to direct Employment Tribunals on the correct burden of proof under section 98(4) as it now is. The problem usually arises where there is an application of **Burchell**, for that case was decided by the EAT in 1978 when there was a burden of proof placed upon the Respondent. Parliament changed that by the **Employment Act 1980**, and yet time and time again Tribunals direct themselves without reference to that important legislative change given by the will of Parliament (see, for example, a long explanation on exactly this point that I gave on behalf of the EAT in **West London Mental Health NHS Trust v Sarkar** UKEAT/0479/08 at paragraphs 25 and 26):

"25. It is common ground that paragraph 1.1 of the Reasons contains a misdirection for the Tribunal places the onus of proving the three matters there set out upon the employer. The Tribunal expressly refers to *Burchell* without any qualification. In 1980 the burden of proof hitherto imposed upon employers to prove a reason and its fairness was restricted to the former. As long ago as *Post Office Counters v Heavey* [1989] IRLR 513 this position was made clear for as Wood P and Members said referring to, for example, *BHS v Burchell*:

> **'14. As the Court of Appeal has indicated on many occasions, the correct direction for a Tribunal to give itself is to use the actual wording of the statute, and to remind itself that there is no burden of proof on either party. A "neutral" issue is indeed strange to those brought up with our adversarial system. It is not for the employer "to show", nor for the Tribunal "to be satisfied" – each of which expressions indicate the existence of a burden of proof.'**

It follows that the express use of the word 'must show' harks back to the law prior to 1980 and has not been current in the succeeding 29 years. The same could be said of 'validate'. However, the majority of this passage relates to the Burchell test which, as we have shown, the Tribunal found the Respondent had passed. So the real criticism is as to the final sentence dealing with the range of reasonable responses. This comes from the approval of [*Jones*] by the Court of Appeal in *Post Office v Foley* [2000] ILR 827 CA which requires the starting point to be the words of s98(4) themselves and then the determination by the Tribunal of whether in the circumstances the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.

> **26. In our judgment a tribunal which does not start with the words of the statute is always at risk of getting the test wrong. Misdirection can be corrected if the EAT finds that the decision was unarguably right notwithstanding the misdirection: *Dobie v Burns International Security Services (UK) Ltd* [1984] IRLR 329. Alternatively, a misdirection can be rescued by a correct direction elsewhere within the body of the judgment: *Jones v Mid-Glamorgan County Council* [1997] IRLR 685 CA. We hold there is a further lifeboat: just as a correct direction can be vitiated by its misapplication to the facts, a misdirection can be rescued by what appears to be correct application of the law to the facts. In this case, paragraph 3.5 of the judgment, addressing reasonableness, does not include any direction as to the burden of proof. The Tribunal asks 'was the sanction of dismissal within the range of reasonable responses? We think not'. It does not reach back to its self-direction on the burden of proof. The finding that matters were 'entirely clear' shows that resort was not necessary to the burden of proof. And when the finding on reasonableness is placed against the finding in relation to blameworthy conduct (para. 3.11) the Tribunal there uses the words 'we are satisfied', quite properly, to show that it had found as a fact that there was blameworthy conduct for the purposes of s123 of the Employment Rights Act 1996. That argument has to be addressed by an employer to the tribunal and the tribunal must find the facts and reach a conclusion on the balance of probabilities. The Tribunal has thus recovered from its misdirection and this ground of appeal is dismissed."**

9. There is within that the reference to **Heavey**, and the language used in that case so condemned is precisely the language used by the Employment Tribunal in this case. Particularly dismaying is that this is the second case in our list today where this formulation has been used. Thankfully it is no more than an expensive distraction in either case, because the employer won even on the enhanced burden of proof. But it is with great dismay that we have yet again to repeat to Employment Tribunals that the law changed 33 years ago and they should get with it.

The facts

10. We can be the shorter in our account of the facts in the light of the issues having fallen away in the course of the preliminary hearing of this case. The Claimant was a convenor for Unite, the union, at premises run by the Respondent providing catering. DHL was the transferee from a **Transfer of Undertakings (Protection of Employment) Regulations** (TUPE) transfer of Gate Gourmet Ltd, who provided services to the airline BA. He had therefore been employed with continuous service from 6 August 1990. One of the Claimant's complaints was that he had been discriminated against on the grounds of his trade union activities. One of the

matters related to the introduction of a new swipe card, which had the effect of recording the comings and goings of employees of the Respondent. This caused concern to the trade union.

11. At a joint negotiating committee meeting agreement was given to the introduction of a short-term-basis trial of this swipe card. The Claimant was there, and so were the other shop stewards; the minutes make that clear. Regrettably, managers, in order to communicate that agreement, put his signature on a document, which was wrong. They were the subject of the Claimant's grievance about this, and he managed to secure through the relevant manager, Mr Nicholls, an apology from the managers in writing to the Claimant for what the Claimant contended was that he was depicted as selling out the membership. However, the Tribunal found that he had indeed, contrary to his assertion at the Tribunal, made an agreement, so what was a misjudgement rather than a fraud was the finding of Mr Nicholls. This matter has assumed importance because of the way in which the unfair dismissal appeal has developed, and we will return to it.

12. As to that, the Claimant circulated a document that he himself had written under the guise of a petition of the workforce, and he got people to sign it. It is highly disparaging, damaging to the Respondent, and reflects the Claimant's own view that members of his union had been targeted and accused of various matters and treated unfavourably as a result of their coming over on TUPE transfer. The authorship of this was hotly in dispute. The Claimant denied he had anything to do with it. Indeed, when his full-time officer, Mrs Beer, was called in, she did not know that he was the author, but he was; he was found by the Respondent's management to lie twice about this before eventually coming clean.

13. The point about it is that it is a very damaging condemnation of the business of the Respondent. It was found that the source of it lay in a personal grievance that the Claimant had about being moved from A to B within the workplace and was nothing to do with any concerted dissatisfaction democratically decided upon by his members. He was seeking to gain an advantage for himself by making this look as though there was a groundswell of opinion when it was really only his problem. So, he was taken to a disciplinary meeting, four points were put to him. Two of them were upheld: that the Claimant had provided false information about the letter; and that he had acted contrary to the Respondent's dignity at work policy and its harassment and bullying policy by making complaints that were in bad faith. These matters were put in a letter to the Claimant at great length, and the conclusion of the letter is this, sent by Mr Robin Moore, the general manager:

> **"I have taken into account the contents of the statement provided by you on 1st June 2011 and I am mindful of your long service, clean record and contribution to the BA in flight catering operation over many years which act as strong mitigating factors. However, I feel that your behaviour during the investigation and abusing your position by acting in your own interests and in bad faith has irrevocably damaged the relationship of trust and confidence between you and the Company and therefore I consider I have no option but to summarily dismiss you from your position as Checker at the Colnbrook Flight Assembly Centre as of 24th June 2011."**

14. The Tribunal considered the law and came to its conclusion. It is common ground now, leaving aside the aberration of the burden of proof, that the Respondent carried out a reasonable investigation, formed a genuine belief and did so on reasonable grounds as to the allegations that it found proved against the Claimant. On its way to deciding this matter the Tribunal looked again at the two allegations that had not been proved against the Claimant and said this (paragraph 12.14):

> **"No reasonable employer faced with the information which this Respondent had could have properly concluded that this allegation was proven."**

15. As to allegations 1 and 4 which were proved, the Tribunal found that the dismissal was fair. It said this:

> **"12.16 The view of the Tribunal is that looking at the matter as a whole the findings at 1 and 4 encapsulate the essence of the misconduct which the Respondent was alleging against the Claimant.**
>
> **12.17 In our view on the basis of those findings the employer would be entitled to conclude, as it did, that there had been a breach of trust and that the relationship between the Claimant and the Respondent had broken down to the extent that it was irrevocable.**
>
> **12.18 It is not for us to replace our views for that of the employer. Another employer may have taken the view that dismissal was not necessary but this employer took the view that it was. In the circumstances, we do not consider that we are able to conclude that the decision to dismiss the Claimant was unfair."**

The Claimant's case

16. Mr Heath, on behalf of the Claimant, recognises the narrow scope of today's appeal, falling as it does within the two grounds earmarked for appeal, which are these (as set out in Mr Rajgopaul's skeleton argument, paragraph 2):

> **"a. [The Tribunal] overstated the importance of the views of the employer and thus failed properly to apply the 'range of reasonable responses' test;**
>
> **b. Failed to adopt a neutral burden in approaching the question of whether dismissal was a reasonable response."**

17. It will be seen that this is entirely targeted on paragraph 12.18 of the Tribunal's Reasons. Mr Heath contends that the Tribunal did not apply an objective test but simply focussed upon what this employer had done uncritically and decided that the finding followed from the finding of a breach of trust that the Claimant should be dismissed. Mr Heath draws our attention to the well-known statements in **British Leyland (UK) Ltd v Swift** [1981] IRLR 910, **Dobie** and **Brito-Babapulle v Ealing Hospital Trust** UKEAT/0358/12. He sought to develop an argument within the band of reasonable responses based upon failure of the Tribunal to consider the mitigation of the Claimant – that is, that he had 20 years of unblemished service – and the authority for that is clear; length of service is important.

18. As to inconsistency of approach, this was not a separate ground of appeal, and the sole reliance placed by Mr Heath was upon the treatment of the managers who had put the Claimant's name on the earlier agreement. Separately today, orally, Mr Heath sought to advance an argument based upon the finding that others had distributed the offensive letter, but he acknowledged that their circumstances were different from the Claimant's, since they had not created it and signed it and covered it up to look as though it was somebody else's. But as to the managers, Mr Heath contends that it is part of the band of reasonable responses that must be considered.

19. He further contends that the Tribunal has committed the error identified in **Brito-Babapulle** of moving from a finding that there was gross misconduct or conduct of a kind that caused a breach of trust to the inevitable conclusion that there was a fair dismissal.

The Respondent's case

20. On behalf of the Respondent it is contended that the ground of appeal relating to disparity of treatment is not one that was before the EAT; there ought to be a freestanding ground of appeal, and there is not, but, if necessary, it would require some further attention. However, Mr Rajgopaul submits that in any event there is no proper comparator as between the managers who did not lie and who were found to have misjudged the situation, whereas the Claimant's evidence before the Tribunal about the nature of the agreement was not accepted. As a matter of practicality, it may be said that there was not a difference because the Claimant had attended as a union convenor the meeting at which the agreement was made. In any event, the finding by the Tribunal in the light of its language, if infelicitous, was unarguably right, and a generous approach should be taken to the language of an Employment Tribunal (see

Hewage v Grampian Health Board [2012] IRLR 870 and **Fuller v London Borough of Brent** [2011] IRLR 414).

Discussion and conclusions

21. We prefer the argument of the Respondent and have decided to dismiss the appeal. First, we agree with Mr Rajgopaul that there is no freestanding ground of appeal on comparators. Mr Rajgopaul has brought before us in order to defend this point if necessary the Judgment of the EAT in **Hadjiannou v Coral Casinos** [1981] IRLR 352 at paragraph 24, and he identified the three situations where comparability may strike at the fairness of the decision that was made. Mr Heath did not reply on this point, and we accept Mr Rajgopaul's submission that the first and second category noted by the EAT in that case did not apply, and so we are looking at whether there are truly comparable circumstances. We hold that there are no truly comparable circumstances as between the managers putting the Claimant's name on the agreement and the Claimant lying and distributing the letter, so this point must be dismissed. We in any event agree that this was not one that was earmarked at the preliminary hearing and so should not be raised.

22. We then turn to the criticism of the language used in paragraph 12.18. Mr Heath's point has some force. On its own, this is an imperfect finding, for it does not expressly evoke the objective test of the hypothetical reasonable employer. So, what one has to do is first to use the tool of generous interpretation vouchsafed to us in **Hewage** by the Supreme Court and to look at those words in context, for in law context is all. In our judgment, there is no doubt the Tribunal was applying the objective test. The test is most plainly set out in paragraph 12.10.3 set out above – that is, as the Tribunal put it, the need to apply the objective standards of the reasonable employer – which it self-directs is relevant to the decision to dismiss for a conduct

reason. The Tribunal uses the word "reasonable" on 14 occasions within little less than a page. It plainly had in mind what was reasonable, and, as we have cited the passage in paragraph 12.14, which was a finding in the Claimant's favour, there could be no doubt that within six lines the Tribunal was applying the same test and could not be condemned for having got the test wrong.

23. This, in our judgment, is a complete answer to the case. The Tribunal was entitled to take the view that the employer had shown the reason and that it was for the employer in the first place to decide whether to dismiss. The exercise is in two parts, of course: the **Burchell** exercise, which looks at procedural matters, and the employer got through all of that satisfactorily; and then standing back with the range of reasonable responses test to look at whether it was objectively within that band. Once the finding has been put in the context of the remainder of its directions and conclusions, the Tribunal applied the correct test.

24. Finally, the argument is raised that the Tribunal as part of the range of reasonable responses test should have made a finding about the Claimant's mitigation. That is correct; however, the Tribunal did say in paragraph 12.9 that the reasons given by the employer in that letter were upheld, and that, as we have cited, plainly shows that Mr Moore took account of the Claimant's long service, clean record and contribution to the operation. Yet what he did was so wrong as to defeat the relationship of trust and confidence. The Tribunal assessed that judgment against the standards of the reasonable employer, we hold, and there is no error in the finding.

25. So, we would very much like to thank Mr Heath and Mr Rajgopaul for their arguments today. This appeal is dismissed.