Appeal No. UKEAT/0164/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 August 2013
(With additional submissions thereafter)
Judgment handed down on 30 January 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

ROBERT BATES WREKIN LANDSCAPES LTD APPELLANT

MR L C KNIGHT RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Consultant) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR L C KNIGHT (The Respondent in Person)

SUMMARY

CONTRACT OF EMPLOYMENT

Wrongful dismissal

Implied term/variation/construction of term

UNFAIR DISMISSAL – Contributory fault

The Claimant was summarily dismissed. He brought a claim of wrongful dismissal. The Employment Judge found that he had been wrongfully dismissed, the conduct upon which the Respondent relied not being inadvertent and not in repudiatory breach. It was argued that the Respondent was entitled to rely upon an express term of the contract (clause 14.10) so that, even if the Claimant's conduct was not repudiatory, the Respondent was entitled to dismiss him without notice. **Held**: on its true interpretation, clause 14.10 did not apply to a minor or inadvertent breach.

The Claimant was also successful (subject to deductions for contributory conduct and **Polkey**) in a claim for unfair dismissal. The Respondent argued that by reason of clause 14.10 the deduction for contributory conduct should have been 100%. This argument failed both by reason of the Appeal Tribunal's interpretation of clause 14.10 and in any event because section 122(2) and 123(6) of the **Employment Rights Act 1996** require any assessment of contributory conduct to be made on a just and equitable basis.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Robert Bates Wrekin Landscapes Limited ("RBW") against a judgment of Employment Judge Alliott in the Birmingham Employment Tribunal dated 5 July 2012. By his judgment the Employment Judge held that Mr Lee Knight was unfairly and wrongfully dismissed.

2. At the conclusion of the hearing I reserved judgment. I subsequently sent to the parties a further authority, to which I shall refer below. I gave the parties an opportunity to make further submissions to me in writing: they both did so. This is my reserved judgment.

The background facts

3. Mr Knight was a gardener. Unusually for a gardener he had a detailed written and signed contract of employment dated 11 November 2004. Clauses 13 and 14 dealt with termination of employment. Clause 13 made provision for the employment to be terminated by the employer on notice: the provision reflected the employee's right of minimum notice provided by section 86(1) of the **Employment Rights Act 1996**. Clause 14 set out a long list of circumstances in which the employment might be terminated without notice or payment in lieu of notice. I shall quote this clause later in this judgment.

4. Mr Knight's employment transferred to RBW in February 2011. This is a small family run business, described by the Employment Judge as a young company seeking to establish itself. Mr Bates is the director. It undertakes contract gardening and ground maintenance. No less than 40% of its business came from a single contract for an MOD site at Donnington run by

a company called Babcock. The site was a secure site containing a great deal of MOD equipment from battle tanks downward.

5. Mr Knight had worked at this site for some years. He had attended inductions. The Babcock Rule Book was given to attendees to take away. It stated

> **"Any vehicle entering or leaving DSG Donnington is liable to security spot checks and search. No DSG Donnington property is to be removed from the site without the appropriately completed property pass signed by your Babcock Host."**

6. The Employment Judge found that Mr Knight was aware of the importance Babcock attached to this rule. There were many metal items on the site which might be stolen.

7. On 11 October 2011 Mr Bates received a tip-off from someone at Babcock that something untoward had been seen in Mr Knight's van as he left the site. He looked in Mr Knight's van and saw a bag of bolts on the dashboard of the van. He returned the bolts to Babcock and was asked to investigate how it occurred. There was indeed an investigation. Mr Knight was suspended on full pay.

8. Mr Knight's explanation was as follows. He said that he had found the bag of bolts while litter-picking. He put them to one side and then on the dashboard of his van. He intended to hand them in. It was a difficult day: a window in the van had been shattered by a stone and there had been a puncture on the mower. He forgot to hand in the bolts. He intended to return them to site when he next went to work.

9. After the investigation a letter of suspension was written which set out the allegations made against Mr Knight and included witness statements and rule book. It was a model of its kind. Unfortunately it was sent to the wrong address. Mr Knight did not receive it until some

days after the disciplinary hearing which took place on 20 October. After taking time for consideration Mr Bates summarily dismissed him on 26 October. The reasons for dismissal were characterised as theft and removing goods from the site contrary to MOD protocols. Mr Knight appealed; he made a number of points in answer to the documentation he had by then received; but Mr Bates held the appeal himself and dismissed it.

10. In the course of his findings of fact the Employment Judge accepted the evidence of Mr Knight that he had simply forgotten to hand the bolts in. There was, in truth, a great deal of evidence to support that conclusion. The bolts were openly visible on the dashboard as he left Babcock's premises. Mr Knight took the van to the safe yard where the van was secured for the night. He did not remove the bolts from the dashboard: they were still there when Mr Bates went to look at the van. By the time of the appeal he had provided a statement from his fellow worker saying that he, Mr Knight, had said he intended to hand the bolts in when he put them on the dashboard, and evidence that (though the bolts may have been worth more to Babcock) the scrap value would struggle to be greater than £1 or £2. Mr Knight had an unblemished employment record.

11. Mr Knight in fact started work elsewhere at a similar rate of pay on 7 November 2011.

Clause 14

12. I will now set out clause 14 on which this appeal turns.

> **"Summary Termination of Employment**
>
> **The employment of the Employee may be terminated by the Employer without notice or payment in lieu of notice in the following circumstances.**
>
> **14.1** **If the Employee is guilty of any gross default or misconduct in connection with his employment or**
>
> **14.2** **If the Employee is absent from work without reasonable grounds or**
>
> **14.3** **If the Employee is guilty of falsification of records or**
>
> **14.4** **If the Employee commits a theft of the Employer's or Customer's property or**

14.5 **If the Employee assaults another member of staff or a customer's representative or**

14.6 **If the Employee is drunk at work or**

14.7 **If the Employee is asleep during working hours or**

14.8 **If the Employee causes wilful damage to the Employer's equipment or equipment the Employer is responsible for or**

14.9 **If the Employee commits a serious breach of safety regulations or**

14.10 **If the Employee commits any breach of the Employer's or Customer's security rules or**

14.11 **If the Employee smokes at work except in the designated smoking area. The Employer operates a non-smoking policy whilst working or**

14.13 **If the Employee is convicted of any criminal offence (other than an offence under road traffic legislation in the United Kingdom or elsewhere for which a fine or non-custodial penalty is imposed) or**

14.14 **If the Employee shall become of unsound mind or become a patient under the Mental Health Act 1983 or**

14.15 **If the Employee shall become unable by reason of incapacity, illness or incapability to perform his duties under this agreement for an aggregate period of or exceeding 10 weeks in any 52 weeks or**

14.16 **If the Employee is banned from or otherwise prevented by law from holding a full current driving licence on [sic] driving a motor vehicle for any period whether permanent or temporary, or**

14.17 **If the Employee is found at any time during working hours not to be wearing appropriate Personal Protective Equipment or is found to be in breach of Health & Safety Regulations."**

The contractual claim

The Employment Judge's conclusions

13. The Employment Judge described the claims before him as being an unfair dismissal claim and a claim for notice pay. He was careful in his reasons to distinguish between them and it is convenient to take them in turn.

14. As to notice pay, the Employment Judge described the claim as follows (paragraph 7):

> **"As regards the notice pay claim, this is a contractual claim. The considerations for myself in law are different from those relating to the unfair dismissal jurisdiction. It is for me to decide on the balance of probabilities whether there was a fundamental breach of contract by the claimant entitling the respondent summarily to determine the contract."**

15. The Employment Judge expressed his conclusions as follows (paragraph 25):

> **"I now turn to consider the claim for notice pay with its claim for wrongful termination of the contract. The test in law for me on this issue is completely different from that relating to unfair dismissal, namely whether on the balance of probabilities the claimant was in repudiatory breach of contract. I find on the balance of probabilities the claimant was not guilty of theft. He was, however, guilty of failing to comply with the requirements of Babcocks and his employer by removing the bolts without written permission. Again, I find on the balance of probabilities that this was due to him forgetting the bolts, i.e. that it was not deliberate. Accordingly in my judgment the claimant was not in fundamental breach of contract and the respondent was not entitled to terminate the contract summarily."**

Submissions

16. On behalf of RBW Mr Rees argues the appeal in the following way. He accepts, as he must, the Employment Judge's finding of fact that Mr Knight forgot the bolts, i.e. that his conduct was not deliberate. He submits, however, that the Employment Judge has overlooked the express words of clause 14.10. This clause stipulated that the employer was entitled to dismiss the employee summarily for any breach of the customer's security rules. It did not say "deliberate breach"; but the Employment Judge has read it as though these words were included. The consequences of Mr Knight's breach were potentially very serious, jeopardising a contract representing 40% of RBW's business. Mr Knight was a supervisor. RBW was entitled, by virtue of the express words of clause 14.10, to dismiss him summarily.

17. Mr Rees accepted that generally speaking gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee, and that this generally required deliberate and serious misconduct or gross negligence: he referred me helpfully to the summary of the position by His Honour Judge Hand QC in **Sandwell v West Birmingham Hospitals NHS Trust** [2009] UKEAT 0032/09/LA. But he submitted that even if the conduct of an employee would not otherwise entitle an employer to dismiss summarily the employer may specifically provide for it by contract.

18. He cited the old case of **Diggle v Ogston Motor Company** [1915] 84 LJKB 2165. In that case an employee's employment (as shop superintendent of a motor works) was said to be

"subject, of course, to your carrying out your duties to the satisfaction of the directors". The employment was for a term of one year, but there was an option to renew it for a further seven years. It was argued that the term must be read as requiring the reasonable satisfaction of the directors. The High Court (Ridley J and Lawrence J) disagreed. It was sufficient that the directors honestly came to the conclusion that they were dissatisfied with the way he carried out his duties.

19. He also cited Tolley's *Employment Handbook* (26th edition) at 56.17:

> **"An employee may be summarily dismissed if he is guilty of a repudiatory breach of the contract of employment. As in the converse case of constructive dismissal, this means a breach which is sufficiently fundamental (see e.g. *Laws v London Chronicle (Indicator Newspapers) Limited* [1959] 1 WLR 698....)…..**
>
> **Sometimes the contract of employment will give a list of cases in which the employee may be summarily dismissed. Subject to the possible effect of the *Unfair Contract Terms Act 1977* the court should probably uphold a dismissal carried out pursuant to such a clause, even if the conduct in question would not otherwise be considered sufficiently gross to merit summary dismissal …"**

20. Mr Knight argues that the Employment Judge was correct. Given his previous unblemished record, there was no justification for saying that a single instance of forgetfulness should entitle the employer to dismiss. The contract should not be read in this way.

21. In the course of preparing for the hearing I had seen reference to an Australian case, **North v Television Corporation Limited** [1976] 11 ALR 599. This case was not readily available and I reserved judgment with a view to finding it and sending to the parties. In that case the blanket term "misconduct" in a contract of employment and an award was construed to mean only misconduct so seriously in breach of the contract that by the standards of fairness and justice the employer should not be bound to continue the employment. In his further submissions Mr Rees submitted that the case was of no assistance: clause 14.10 was clear, and it would not matter how minimal or apparently insignificant the breach of security regulations

might be – the removal of a broken mug would suffice. Clause 14.10 was, he argued, drafted in those terms for the protection of the business.

Conclusions

22. Subject to section 86 of the **Employment Rights Act 1996**, the amount of notice to which an employee is entitled is a matter of contract between employer and employee. Section 86(1) confers upon an employee a right to a minimum period of notice, but that right is qualified by section 86(6), which provides that the section does not affect any right of either party to a contract of employment "to treat the contract as terminable without notice by reason of the conduct of the other party". Some provisions of clause 14 purport to terminate the contract without notice for reasons which do not relate to the employee's conduct: these will not affect the employee's right to a minimum period of notice. But clause 14.10, on which Mr Rees relies, is concerned with the employee's conduct.

23. At the heart of the appeal, therefore, is a simple question of contractual interpretation. Does clause 14.10 apply to any breach of security rules, however minor or inadvertent? I have reached the conclusion that it does not. My reasons are as follows.

24. As a general rule, an employee is entitled to notice unless the employer can point to a repudiatory breach of contract. It is well established in the employment context that a repudiatory breach of contract is one which entails either wilful and deliberate contravention of an essential term of the contract or gross negligence: see **Sandwell** above.

25. It is important to keep general principles of contractual interpretation in mind. Clause 14 is a printed clause put forward by the employer. It is to be interpreted in its commercial context: the general understanding of employer and employee is that, absent gross misconduct

or gross negligence, an employee will be entitled to notice. It is not lightly to be interpreted in a way which extends the rights of an employer contrary to that general understanding. Individual provisions should be interpreted against the background of the clause as a whole.

26. I have already noted that some provisions of the clause purport to confer on the employer rights of termination without notice which cannot stand in the face of section 86. Leaving those to one side, the general effect of the provisions is to spell out types of conduct which would usually be regarded as in repudiatory breach of contract.

27. Some provisions, however, could be interpreted as extending to conduct which would not otherwise be repudiatory. For example, clause 14.17 appears to allow summary dismissal for any breach of health and safety regulations, however minor. But it was plainly not intended to have this meaning – for clause 14.9 refers to a "serious" breach of safety regulations. To my mind clause 14.17 could not be relied on to dismiss summarily an employee who committed any minor inadvertent breach of a regulation.

28. In the same way, I do not read clause 14.10 as giving an employer the right to dismiss for any breach of a security rule, however minor or inadvertent. It would fly in the face of the general understanding of employer and employee if it applied in all such cases. To take the example given by Mr Rees it would be absurd if an employee could be dismissed summarily because he forgetfully took a broken cup with him from the site.

29. I do not derive any assistance from **Diggle v Ogston Motor Company**. That case was concerned with a most unusual form of contract for a senior employee working in what was then an area of cutting-edge technology.

30. I derive some assistance – albeit limited – from **North v Television Corporation Limited**. In that case the word "misconduct", shorn from its context, could have meant misconduct short of that which would otherwise be repudiatory. This, indeed, was the argument put forward for the employer (see page 608). The Australian Industrial Court rejected the argument, holding that the word had to be considered "by reference to the subject matter to which it is related and the context in which it appears". The subject matter was "the termination by one party against the will of another of a continuing contract of employment". "Misconduct" did not mean any misconduct, even if it was not wilful or serious. It meant "conduct so seriously in breach of the contract that by standards of fairness and justice the employer should not be bound to continue the employment".

31. I derive only limited assistance from **North** because the contractual provision which I have to interpret is different. But to my mind similar principles of interpretation apply. They lead me to the conclusion that clause 14.10 does not apply to any breach, however minor or inadvertent. It applies to a breach which is serious and wilful or grossly negligent, applying normal principles of employment law.

32. Although the Employment Judge did not make any express reference to clause 14.10 he reached his conclusion by the application of normal principles of employment law as to summary dismissal. His conclusion that the breach was not repudiatory was open to him. The appeal on this ground must therefore fail.

Unfair dismissal

33. I can deal with the unfair dismissal aspect of the case much more briefly, for it depends largely on the same argument.

34. As to unfair dismissal, the Employment Judge's conclusions may be summarised as follows. Mr Bates was entirely reasonable in investigating the matter and taking disciplinary action – he was concerned that Mr Knight's actions could jeopardise the contract which was an important part of a fledgling business. Mr Bates genuinely believed on reasonable grounds that the bolts were taken for personal gain. The investigation undertaken was reasonable. In itself the decision to dismiss, whilst undoubtedly harsh, was not outside the range of reasonable responses of a reasonable employer. So the dismissal was "not substantively unfair". But the procedure was clearly defective because Mr Knight was not given advance information and the opportunity properly to represent himself - to the point where it was procedurally unfair; and the appeal, taken by Mr Bates himself, was also procedurally unfair.

35. The Employment Judge went on to consider a **Polkey** argument. He found that if Mr Knight had been given a proper opportunity to represent himself, and then an independent appeal, there was a 50% chance that he would have avoided dismissal. Further by his conduct he contributed to his dismissal to the extent of one third. The practical result of this was that the basic award was reduced by one third and a very small compensatory award was also reduced by one third.

36. Mr Rees argues that, since clause 14.10 applied to any breach of security rules, the finding of contributory fault should have been 100%. I have already rejected the premise underlying this argument. It would in any event not follow that the finding of contributory fault would have to be 100%. Section 122(2) and section 123(6) of the Employment Rights Act 1996 require the Employment Tribunal, in cases to which they apply, to make a reduction on a just and equitable basis. Even if clause 14.10 had applied to minor and inadvertent breaches of security rules, the Employment Tribunal would not have been precluded from making an overall assessment as to what reduction was just and equitable.

37. For these reasons the appeal will be dismissed.