Appeal No. UKEAT/0174/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 October 2013

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MR T VINCENT T/A SHIELD SECURITY SERVICE — APPELLANT

MR G HINDER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES TILEY (Representative) Northgate Arinso Employer Services Warwick House Hollins Brook Way Pilsworth Bury BL9 8RR
For the Respondent	MR VIC REDMOND (Representative)

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Where an Employment Tribunal concludes, as a matter of fact, that an employer has not taken into account any mitigating circumstances before applying the sanction of dismissal in a case of gross or serious misconduct and, therefore, that dismissal is not a reasonable action on the part of an employer in the circumstances of the case, there will not necessarily be a misdirection under section 98(4) of the **Employment Rights Act 1996**.

HIS HONOUR JUDGE HAND QC

1. This is an appeal from the Judgment of an Employment Tribunal (Employment Judge Povey, sitting alone) at Cardiff on 8 October 2012. The reserved Judgment and written Reasons having been sent to the parties on 14 December 2012. By that Judgment, Employment Judge Povey held that the Respondent to this appeal, the Claimant below, who I will refer to from now on as the Claimant, had been unfairly dismissed. Later, there was a separate remedies judgment, which is not the subject of this appeal, but which I will need to mention again when I discuss my conclusions. The Appellant, who was the Respondent below and who I will refer to as the employer, has been represented by Mr Tiley as was the case at the Employment Tribunal. The Claimant has been represented by Mr Redmond again, as was the situation in Cardiff.

The facts

2. The Claimant had worked as a security guard for some time and he had been working for the employer since 1 July 2006 (see paragraph 1 of the Judgment). He had an unblemished record and his September 2011 appraisal had been a very good one (see paragraph 23.7 of the Judgment). On 28 and 29 January 2012 he was on duty working a night shift at factory premises in Port Talbot. During that shift there was a break in. In the morning two fellow employees - a Mr Blake, a mobile supervisor, and Mr Marshall, another guard - arrived at the premises and informed the Claimant that there had been a break in and proceeded to inspect physical damage to a roller shutter in part of the factory premises.

3. It seems that the premises were largely unoccupied. Mention is made in the Employment Tribunal's Judgment of an employee of the owner or previous occupier of the premises coming to the premises from time to time. That apart, the Claimant appears to have been looking after

essentially an unoccupied and empty factory. Employment Judge Povey did not go into any further detail about the damage to the roller shutter, although it appears to have been forced open and a wooden pallet or some pieces of wood used to prop it open and some electrical cable seems to have been cut. Although Employment Judge Povey did not mention it, the matter is gone into in some detail in the statements made by Mr Blake and Mr Marshall at pages 100 to 102 of the hearing bundle, and it is from those documents that I derive that description of what had happened.

4. In those statements at pages 100 and 101 Mr Blake and Mr Marshall respectively describe the Claimant as having smoked a cigarette whilst walking through the factory premises to the roller shutter door, and Mr Blake describes him smoking another cigarette on his way back to the office. Employment Judge Povey does not mention the smoking of two cigarettes; something which Mr Tiley has emphasised in the course of his submissions.

5. Employment Judge Povey found as a fact that the Claimant was, and I quote, "confused by what was happening at the factory site" (see paragraph 23.4 of the Judgment). Later that day the Claimant was interviewed by Mr Ebbs, who is an operational manager. During the course of that interview Mr Ebbs noted at paragraph 19 that:

> **"Mr Ebbs' evidence was that when he put to the Claimant that two people had witnessed him smoking in the factory he apologised and admitted he had in fact been smoking."**

6. The Claimant was suspended on that day and the suspension was confirmed by a letter of 31 January 2012 (see page 103 of the appeal bundle). The following day he was written to again and required to attend a disciplinary hearing to answer allegations that he had neglected his duties on Saturday 28 January 2012, as a result of which there had been an undetected break in, and that he had been smoking inside the premises on Saturday 28 January 2012 (see

page 104 of the appeal bundle). The latter allegation has, obviously, been misdated in the letter. The smoking incident must have taken place on the morning of Sunday 29 January and not on the Saturday night. Nothing turns on that.

7. Both letters suggested that each allegation fell into the category of potential gross misconduct, which could result in summary dismissal. The disciplinary hearing was conducted by Mr Williamson, the Company Secretary, on 7 February 2012. Mr Williamson, in effect, acquitted the Claimant of neglecting his duties but although the Claimant asserted that he had not been smoking, Mr Williamson came to the conclusion that he had. At paragraph 17 of the Judgment Employment Judge Povey quotes the last sentence of Mr Williamson's conclusions as set out in the dismissal letter, which is at pages 108 and 109 of the bundle. I think it is better to set Employment Judge Povey's quotation in the context of the whole of the conclusion reached by Mr Williamson in those pages, which is as follows:

> **"You admitted to smoking inside the premises at the investigation, you now state that you did not admit you had smoked. Following a review of the investigation, I found you stated you had smoked and you were sorry, you then explained you had smoked because you were confused due to the break in, that Hayden had been off with you and Peter Blake had turned up unexpectedly. I find it hard to accept that you would admit to smoking even though you had not, even if you were confused, also I would not expect someone to apologise for something they had not done and then give 3 excuses of why they were smoking. In addition to this there are two separate statements confirming that you were smoking. From the evidence presented I believe that you were smoking inside the client's premises, which is illegal and a serious breach of Health and Safety Regulations."**

8. There was an appeal conducted by the principal of the employer, Mr Vincent himself. It took place on 24 February 2012. Mr Vincent rejected the appeal saying in a letter dated 5 March 2012, which is at page 115 of the appeal bundle:

> **"Having considered all of the available evidence and the facts of the case, I came to the following conclusions:-**
>
> - **In the investigation hearing you admitted that you had smoked inside the factory but that you were confused as you had just heard about the break in. You later changed your mind and said that you had not smoked.**

- **That the statements of Mr Ronnie Marshall and Mr Peter Blake are accurate and true account of events."**

The Judgment

9. At paragraphs 9 to 14 of the Judgment Employment Judge Povey gave himself a direction as to the law applicable to misconduct dismissals. I do not understand it to be suggested by Mr Tiley that there is any misdirection contained in those paragraphs. At paragraph 13 of the Judgment the following appears:

> **"The Tribunal must consider the reasonableness of the employer's decision to dismiss the employee and, in judging the reasonableness of that decision, the Tribunal must not substitute its own decision as to what was the right course to adopt for the employer. Rather, the Tribunal must consider whether there was a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view whilst another quite reasonably takes a different view. My function is to determine whether, in the particular circumstances of this case, the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted."**

Whilst accepting that is a perfectly correct self-direction, the thrust of Mr Tiley's submissions to me were that Employment Judge Povey had failed to follow them and had gone on to do the very thing against which he had warned himself, namely substituting his own views for those of the employer.

10. Before coming to those submissions I must mention that Employment Judge Povey had reached three other conclusions adverse to the Claimant's case. Firstly, he concluded that the employer "genuinely believed that the Claimant was guilty of the misconduct upon which he relied" (see paragraph 20 of the Judgment); secondly, this was a belief held on "reasonable grounds" (see paragraph 21 of the Judgment); and thirdly, it was arrived at after investigations which were "proper, adequate and sufficient" (see paragraph 22 of the Judgment). Nevertheless he concluded that the dismissal was unfair. It was not, held Employment Judge Povey, "a fair and proportionate sanction" (see paragraph 23 of the Judgment). This was because

Employment Judge Povey concluded that "the Respondent's disciplinary and grievance policy and procedure" was "unclear".

11. On the one hand, section 2 of the procedure included "a serious infringement of health and safety rules" as an example of gross misconduct. Under the heading of "Gross Misconduct", however, in what was admittedly described as a "not exclusive" list, there was no mention of such an infringement (see paragraphs 23.1 to 23.3 of the Judgment). Secondly, it was common ground that the Claimant had been confused that morning (see paragraph 23.4 of the Judgment). Thirdly, on the morning itself neither Mr Blake nor Mr Marshall had stopped the Claimant from smoking (see paragraph 23.5 of the Judgment). Fourthly, the relevant premises were more or less empty (see paragraph 23.6 of the Judgment). Fifthly, in the case of an employee with a good record, a reasonable employer would have considered an alternative sanction, but here the employer had not even given it consideration.

12. At paragraph 23.7 of the Judgment Employment Judge Povey considered the approach taken to dismissal by the dismissing officer Mr Williamson and by Mr Vincent on the appeal and he concluded that the possibility of an alternative sanction had not been considered by either man. His conclusion is in these terms:

> **"[…] there was no evidence that Mr Williamson (in deciding to dismiss the Claimant) or Mr Vincent (in refusing his appeal against dismissal) considered alternative sanctions short of dismissal. Mr Williamson under cross-examination was asked whether he took the Claimant's employment record into account in deciding to dismiss him. Mr Williamson's answer was that he referred the matter to the Respondent's human resources advisors, adopted their advice (which was summary dismissal) and did not consider any other options."**

13. As I have already indicated the issue in this appeal is whether despite the self-direction against substitution, the above betrays that Employment Judge Povey has fallen into what Mummery LJ described in **London Ambulance Service NHS Trust v Small** [2009] EWCA

Civ 220, [2009] IRLR 563 as the "substitution mindset". This is at paragraph 43 of his judgment:

"It is all too easy, even for an experienced ET, to slip into the substitution mindset."

14. Mr Tiley submits that the indications that Employment Judge Povey has done this in this case are to be found in the use by Employment Judge Povey of the term 'misdemeanour'. This is an indication that Employment Judge Povey has, by that choice of language, diminished the seriousness of the misconduct. Secondly, that in his emphasis at paragraph 23.6 of the fact that this was an empty site with only one other occasional visitor, Employment Judge Povey has downgraded the health and safety dangers and the risks involved in somebody smoking in the premises. Thirdly, that in his discussion between paragraphs 23.1 and 23.3 Employment Judge Povey, whilst pointing to an inconsistency in various parts of the handbook, two iterations of which, the 2008 and 2010 versions, are before me, was making more of the problem than might reasonably appear. Employment Judge Povey himself had identified the fact that the list was not exhaustive and so his reasoning in paragraph 23.3 was an excessive criticism of what was not really a significant problem.

15. Mr Tiley also complained about the finding at paragraph 23.4, that it was, in effect, common ground that the Claimant had been confused. This was, he submitted, not a sensible conclusion given that there had been not just one cigarette but two cigarettes smoked by the Claimant. This was, he submitted, in truth a case just like the case decided by the Employment Tribunal in **Smith v Michelin Tyre** IDS 1 October 2007, which establishes there can be no doubt of the seriousness of smoking, whether it be in occupied premises or in unoccupied premises. He pointed to a memorandum at page 95, which had been before the Employment Tribunal and complained that it is not referred to by Employment Judge Povey in his Judgment.

16. Finally, he did not accept that, given the factual matrix in this case, the criticism made of the employer at paragraphs 23.7, 24 and 25, namely that the application of the sanction of dismissal was outside the band of reasonable responses because it was the only sanction ever considered by the employer, was sustainable. This was a significant matter and the employer was entirely right to characterise it as gross misconduct and to reach the conclusion it did.

17. Mr Redmond, on behalf of the Claimant, wished to raise a number of arguments about the impact of the **Health Act 2006** and, for that matter, the **Health and Safety at Work Act 1974**, and what was and what was not unlawful or prohibited in terms of smoking. He accepted that these were not arguments that had been raised before the Employment Tribunal and he also accepted that this Tribunal is concerned only with the way the matter was analysed by the Employment Judge and analysed in terms of the material that was before him. Consequently, I did not think it would help me to consider this statutory material to any extent and I have not done so. He also wished to emphasise that nobody had prevented the Claimant from smoking. Mr Redmond's essential submission, however, was that this was a judgment reached by Employment Judge Povey after hearing the evidence, reading the documents, considering the witnesses, correctly directing himself and reaching a conclusion that was not a substitution of his own view but a criticism of the employer's conduct.

18. I accept that some of the emphasis given by Employment Judge Povey to some of the factors might not appeal to everybody, but it seems to me that he was not doing anything other than analysing what the factual circumstances were and raising the possibility that there were, in those factual circumstances, some aspects that might be described as mitigating circumstances. I do not accept Mr Tiley's submission that to use the word 'misdemeanour' is necessarily a downgrading of the seriousness of what had happened. On the other hand, I do

not think it makes the matter less serious that the employees, who observed the misconduct, did not interfere at the time.

19. It does not seem to me that Employment Judge Povey reached his conclusions on any basis other than that this was serious misconduct on the part of the Claimant. Quite correctly he does not decide whether the Claimant was smoking or not; that is the error of confusing reasonableness and factual findings. It is the error that lay at the heart of the Tribunal's misdirection in **London Ambulance Service v Small**. In his Judgment at paragraphs 44 to 46, Mummery LJ explains how important it is to keep these concepts apart. Employment Judge Povey did not fall into that confusion in this case. Ultimately, in the remedies hearing he decided as a fact that Mr Hinder, the Claimant, had been smoking but he did not complicate or confuse what I could call the liability Judgment by reaching any factual conclusions of his own at that point. I should say that Mr Tiley's attempts to introduce issues from the remedies Judgment seem to me to be misplaced and I was not prepared to consider issues arising from it given that there was no appeal against it.

20. Ultimately, this case brings us back to the very difficult area that any Tribunal must face in deciding whether the sanction is within the band of reasonable responses that might be applied by a reasonable employer in the circumstances of the case. There is a wealth of guidance given not just in **London Ambulance Service v Small** but in **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23, **British Home Stores Ltd v Burchell** [1978] IRLR 379 and other cases as to how a misconduct dismissal should be approached. Ultimately, however, they are all attempts to explain the right approach to the application of the text of s.98(4)(a) and (b) of **Employment Rights Act 1996** to cases of misconduct. That guidance notwithstanding, the Employment Tribunal must reach a determination by reference to the statutory language. The issue is whether in the circumstances the employer acted reasonably or

unreasonably in treating it as a sufficient reason for dismissing the employee and that has to be determined, as Mr Redmond reminded me, in accordance with equity and the substantial merits of the case.

21. Whilst I myself would not have regarded the fact that there was an empty building, or that there might be some lack of clarity in the disciplinary procedures as being of great moment, it seems to me that the same difficulty faces this Tribunal as faced the Employment Tribunal when it comes to considering whether the sanction of dismissal was reasonable or unreasonable in the circumstances. Indeed, I am less well placed to judge this matter than was Employment Judge Povey. He took the view that on the facts of the case and in the circumstances of the case to apply the sanction of dismissal without any consideration whatsoever of any alternative in the case of somebody with a good record was not the action of a reasonable employer and was not within the band of reasonable responses on the facts of this particular case. It does not seem to me that is an error of law and therefore something with which this Tribunal can interfere. Ultimately, it was a matter of fact for Employment Judge Povey in the particular circumstances of the case. He found that there were mitigating circumstances, which the employer ignored and that was something outside the band of reasonable responses. I might have decided the matter differently but I cannot see that by deciding as he did Employment Judge Povey misdirected himself in terms of s.98(4) of the **Employment Rights Act 1996**. Accordingly, this appeal will be dismissed.