Appeal No. UKEAT/0023/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 July 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR A HARRIS

MRS D M PALMER

MR J B STEEN — APPELLANT

ASP PACKAGING LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NABILA MALLICK (of Counsel) Bar Pro Bono Unit
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

UNFAIR DISMISSAL – Contributory fault

An Employment Tribunal decided that the contributory conduct of a Claimant who succeeded in his claim for unfair dismissal was such that compensatory and basic awards should be extinguished altogether. It did not identify the conduct, nor whether it was blameworthy, nor why it was just and equitable to reduce the awards, nor give any sign it appreciated the difference between s.122(2) and s.123(6), nor showed that it was considering what the actual facts were as to what the Claimant had done which was blameworthy rather than relying on the employer's view of what he had done. This was erroneous. In particular, in the rare case where a 100% deduction is made, reasons clear enough to enable the Claimant and any appeal court to understand why no compensation is being awarded should be given.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. An Employment Tribunal at Liverpool (Employment Judge Holbrook and Messrs Bott and Lomas) decided that the dismissal of the Appellant was unfair. In reasons which it sent on 22 May 2012 it found that he was dismissed from his job as a print supervisor for trying to undermine the Managing Director and get him dismissed, especially in the course of a phone call which he made to the Chairman and controlling shareholder of the employing company, Maurice Hartley, whose view was that he thought that the Claimant had acted with malicious intent. That phone call occurred on 4 April 2011.

2. The dismissal which followed was said to be either for conduct or some other substantial reason. It was held to be unfair for procedural reasons. The disciplinary process was chaired by the wife of the Chairman and his view of the conversation of 4 April was in dispute. At paragraph 26 the Tribunal turned to the question of compensation, it said this:

> **"26. Nevertheless, it is clear from the finding set out above that the Tribunal considers that were it not for this procedural defect the Respondent would have been acting reasonably in dismissing the claimant. We find that the claimant's conduct in the events which culminated in his dismissal demonstrates significant contributory fault on his part. Indeed, we find that as a consequence of his actions the claimant was entirely responsible for his own dismissal.**
>
> **27. Even if the question of contributory fault is put to one side, the claimant would only be entitled to compensation for unfair dismissal if the outcome of the disciplinary process would have been different but for the procedural defect we have identified."**

3. It went on to conclude at paragraph 30 that:

> **"There was little if any likelihood that there would have been a different outcome in the disciplinary process had the appeal hearing not been presided over by [the Chairman's wife] but had been dealt with instead by someone who did not have a conflict of interest."**

4. There was no sign in the judgment that the Tribunal understood that the issue of deduction for contributory fault depended upon what actually had happened as opposed to depending upon the view of the employer as to what it thought the facts to be. In particular, the

Tribunal set out at paragraph 12 a conflict of view between the Claimant and the Managing Director about a conversation which they had on 5 April consequent upon the Managing Director having been told of the phone-call the day before to Maurice Hartley.

5. Again, on 20 April there was a meeting in which the Claimant made it clear that he thought that the Chairman, Maurice Hartley, had not been telling the truth about the initial telephone conversation of 4 April. It was thus critical for the question of knowing whether there was here blameworthy conduct by the Claimant to know what it was he had actually done which was, in the view of the Tribunal, blameworthy. If, for instance, his view of the conversations was correct then the Tribunal might have concluded he had done nothing which was blameworthy, even if his employer genuinely thought through the disciplinary process that he had.

6. The appeal against the findings has been presented by Ms Mallick who persuaded the judicial member of this Tribunal (then sitting alone at a rule 3 (10)) hearing that there was a point upon which it would be reasonable for there to be a full appeal. She has set out her argument in a detailed and careful skeleton to which we would wish to pay tribute. No one appears for the Respondent; the Respondent is in liquidation.

7. However understandable therefore the absence of representation may be there is no argument to counter those which Ms Mallick puts before us. Nonetheless we unhesitatingly think that she is right in the points which she makes.

8. In a case in which contributory fault is asserted the Tribunal's award is subject to sections 122(2) and 123(6) of the **Employment Rights Act 1996**. Section 122(2) dealing with the basic award provides:

> **"Where the Tribunal considers that any conduct of the complainant before the dismissal or where the dismissal was with notice before the notice was given was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."**

9. Section 123(6) provides:

> **"Where the Tribunal finds that the dismissal was to any caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

10. The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve a consideration of what it is just and equitable to do.

11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault, (2) having identified that it must ask whether that conduct is blameworthy.

12. It should be noted in answering this second question that in unfair dismissal cases the focus of a Tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is upon what the employee did. It is not upon the employer's assessment of how wrongful that act was; the answer depends what the employee actually did

or failed to do, which is a matter of fact for the Employment Tribunal to establish and which, once established, it is for the Employment Tribunal to evaluate. The Tribunal is not constrained in the least when doing so by the employer's view of wrongfulness of the conduct. It is the Tribunal's view alone which matters.

13. (3) The Tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the Tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent then the Tribunal moves to the next question, (4).

14. This, (4) is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the Tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a Tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.

15. In any case therefore, a Tribunal needs to make the findings in answer to questions 1, 2, 3 and 4 which we have set out above. Here this Tribunal did not do so, except in the words we have quoted from paragraph 26. It did not set out what precisely the Claimant's conduct was since it had made no finding about what was said in the conversations on 15 April and made no finding as to precisely what was said between the Managing Director and the Claimant on 5 April. It had simply not made the relevant findings in respect of his conduct for it to be

assumed that what it had already set out in the earlier part of its decision led inevitably to a finding that there was contributory conduct.

16. Next, it did not say (though it implied) that the conduct, whatever it was, was blameworthy. It did not set out the particular features which led it to think that it was just and equitable to reduce the compensatory award and the basic award, nor did it give any hint that it recognised that making the two awards involve the slightly different approaches to which we have referred.

17. It needs to be emphasised that a finding that a Claimant is 100% responsible for his dismissal and that it would be just and equitable to reduce compensation by that amount, and a finding that for the same reasons presumably it would be just and equitable to reduce the amount of the basic award to nil, is an unusual finding. It is however a permissible finding; see the decision of the Appeal Tribunal in **Lemonious v Church Commissioners** [2013] UKEAT/0253/12/KN, a judgment handed down on 27 March 2013 by a panel presided over by Langstaff P.

18. The fact that it is an exceptional course to take was recognised in **Sulemanji v Toughened Glass Ltd** [1979] ICR 799 at pages 800 to 802 where it was noted in the Judgment that:

> **"If the course of reducing by 100% is adopted, it must be justified by facts and reasons set out in the decision."**

19. In **Moreland v David Newton T/A Aidan Castings** a decision of 22 July 1994, Mummery P said at page 11 F to H of the transcript:

> **"We agree with (Counsel for the employer) that depending on the facts of a case it is possible to have both a finding of unfair dismissal and a refusal to award any compensation on the**

> **grounds of contributory fault but it is a rare and unusual combination. Because of its rare or exception combination it requires justification by reference to evidence and requires the giving of reasoning."**

20. In **Lemonious** itself this Tribunal quoted what had been said by Wall LJ in the case of **Perkin v St George's Health Care Trust** when he referred to what Mummery LJ had said giving permission to appeal to the Court of Appeal:

> **"It is unusual to hold that there was a 100% chance that employment would have been terminated even if the procedure had been fair. It is also unusual but legally possible to find a conclusion that an Applicant who succeeds in establishing that there was procedural unfair dismissal has contributed to his dismissal to the extent of 100%."**

21. This Tribunal commented:

> **"Further, even if the conduct were wholly responsible for the dismissal it might still not be just and equitable to reduce compensation to nil, although there might be cases where conduct is so egregious that that is the case. It calls for a spelling out by the Tribunal of its reasons for taking what is undoubtedly a rare course. In particular, it must not be the case that a Tribunal should simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case but the percentage might still require to be moderated in the light of what is just and equitable."**

22. That case, like this, was one in which the Tribunal had reasoned a deduction for contributory fault in such brief and terse terms as to be uninformative as to the reasons for coming to that conclusion. The Appeal Tribunal commented at paragraph 36:

> **"… the reasoning is so succinct … that the claimant must be unsure why precisely his conduct is so bad that he should receive nothing despite his employer being at fault. We, for our part, cannot see whether there was as there might have been an error of law in the decision such as an assumption that the basic award and compensatory award were necessarily to be subject to precisely the same reduction or that the question of how far to reduce an award in both cases was to be answered by the question of causation, ignoring that the only statutory consideration in applying section 122(2) is what is just and equitable. On this basis therefore we uphold the ground of appeal."**

23. Those words are as fully applicable to the present case as they were to that of **Lemonious**. A similar approach was taken, Ms Mallick shows us, in a judgment of this Tribunal, HHJ McMullen QC presiding, delivered on 11 July 2012 **Network Rail Infrastructure Ltd v Mockler** UKEAT0531/11. At paragraph 31 this Tribunal recognised that

counsel for the employer had identified three possible findings which would go to blameworthy conduct. The Tribunal commented:

> **"They may indeed but we cannot say what they are. The Tribunal must do that. Until it does we cannot say that its decision is correct or, more likely, we have to side with Miss Thomas so that the decision on 50% [as it was in that case] cannot stand in the light of the jejune reasoning. It may be that when the Tribunal as we direct meets to consider what its reasoning is for the finding of contribution … it will give its reasons and it will then assess what percentage in the light of those reasons should be affixed …"**

24. It is therefore all too often an error of law that a Tribunal simply states its conclusion as to contributory fault and the appropriate deduction for it without dealing with the four matters which we have set earlier in this decision. We add for the comfort of Tribunals that there is no need to address these matters at any greater length than is necessary to convey the essential reasoning. Of its nature a particular percentage by which to reduce compensation, if that is how the Tribunal seeks to address the word "proportion" in section 123(6), or by a particular fraction, if that is how the Tribunal wishes to address it, is not susceptible to precise calculation, but the factors which help to establish a particular percentage should be, even if briefly, identified. As the cases we have cited show this is all the more so where compensation is entirely extinguished by that which the Tribunal concludes a Claimant actually did which was blameworthy and which made it in its view just and equitable to reduce both the basic award under section 122(2) and separately the compensatory award under section 123(6).

25. For those reasons therefore we have no hesitation here in allowing this appeal. The consequence may be of little comfort to the Claimant, save knowing that his point of principle has been vindicated, since a question must still arise over the finding which the Tribunal made here in respect of the **Polkey** deduction. As Ms Mallick points out **Polkey** deductions and deductions for contributory fault are approached on different bases. They do not directly overlap. That is because the focus in a **Polkey** decision is predictive: it is not historical, as is the focus when establishing past contributory fault as a matter of fact. Second, **Polkey** focuses

upon what the employer would do if acting fairly. Contributory fault is not concerned with the action of the employer but with the past actions of the employee. A finding in respect of **Polkey** thus may be of little assistance in augmenting reasons given by a Tribunal in respect of contributory deduction.

26. Here as it seems to us, the matter will have, as Ms Mallick asks, to be remitted to a Tribunal in order to determine whether the compensatory award should be reduced for contributory fault and, because we are unsure whether and to what extent this Tribunal linked **Polkey** and contributory fault, we consider that it should look afresh at the question of **Polkey**. In short, the question of compensation in this case for unfair dismissal should be determined entirely afresh by a Tribunal.

27. For those reasons, and with that consequence this appeal is allowed. We shall hear counsel as to whether the Tribunal should be the same Tribunal or a different one.

28. The case will be remitted to a fresh Tribunal to hear the issue of compensation. The reason why we think a fresh Tribunal is appropriate is because there is no sign here in the decision that the Tribunal was aware that it needed to make findings precisely what was or was not said by the Claimant in the course of the relevant conversations. That will depend critically upon issues of credibility. If the Tribunal did not have those in mind it would have to rehear the evidence anyway. We doubt that with the passage of 18 months it would sufficiently have remembered enough to assess the relevant respective credibilities of the conversants.

A fresh Tribunal hearing the matter avoids the real risk that Tribunal may be influenced by what it thought it might have heard on the earlier occasion. We think those risks are best addressed by having a fresh Tribunal. We were concerned at one stage with the question of

whether that would be proportionate, particularly bearing in mind that the Respondent employer is in administration, but we have concluded that in any event the Tribunal would have had to hear evidence to assess credibility. In any event the matter should take no more than a day to be heard and therefore it is unlikely that additional (and certainly no significant additional) costs would be incurred by ordering a differently constituted Tribunal.

29. For those reasons the issue will be remitted to a different Tribunal.