Appeal No. UKEAT/0185/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 July 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MS K BILGAN

MR G LEWIS

MR D BLACKBURN	APPELLANT
ALDI STORES LTD	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR RICHARD OWEN-THOMAS (of Counsel) Direct Public Access Scheme
For the Respondent	MR RICHARD HIGNETT (of Counsel) Instructed by: Freeth Cartwright LLP Solicitors One Colton Square Leicester LE1 1QH

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

PRACTICE AND PROCEDURE - Amendment

It was part of the Claimant's case of constructive dismissal based upon the implied term of trust and confidence that the Respondent effectively denied any proper appeal against its decision upon a grievance which he had presented. The Tribunal did not determine this issue, apparently regarding it as irrelevant to the Claimant's case concerning the implied term of trust and confidence. This was an error of law.

The Claimant also sought to amend the claim to plead that the grievance procedure in question had contractual effect. The amendment was refused. The Tribunal's reasons for refusing the amendment were flawed.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Mr David Blackburn, the Claimant, against a decision and a Judgment of the Employment Tribunal, Employment Judge Pettigrew presiding, sitting in East London. The decision, taken on the first day of a three-day hearing, was to refuse an application for permission to amend the claim for unfair constructive dismissal. The Judgment, dated 10 August 2011, following the hearing was to dismiss that claim.

2. Underlying both aspects of the appeal is the grievance procedure of the Claimant's former employer, Aldi Stores Ltd, the Respondent. This grievance procedure allowed for an appeal. It was always part of the Claimant's case that the Respondent dealt with his appeal improperly - in effect, that the very person who heard his grievance then peremptorily rejected his letter of appeal. One question is whether the Tribunal dealt properly with this aspect of the case. At the hearing the Claimant applied to amend the claim to allege that the grievance procedure was contractual and that it had not been followed as a matter of contract. This was the amendment that the Tribunal refused to permit. So the other question is whether the Tribunal erred in law in refusing the application for permission to amend.

The background facts

3. The Respondent owned and operated a depot in Chelmsford from which it ran a transport operation to support its network of stores. The Claimant began to work there as an LGV driver on 30 October 2006. He is a retired police officer who has been a vehicle examiner and health and safety trainer in the course of his 30 years of service. Throughout his employment the Claimant had concerns about aspects of health, safety and training at the depot. It was his case that he raised them particularly with Mr Gallivan, the deputy transport manager. The Tribunal

accepted the Claimant's evidence that on one particular occasion Mr Gallivan waved him away, swore at him, said the training was "shit" and told him to "fuck off home". The Tribunal accepted his evidence that on various occasions he raised concerns about health and safety, vehicle safety and other regulatory matters. It found, however, that by the time matters came to a head on 9 June 2009 these matters were largely in the past. It found that overall the Respondent's depot came out well audits of vehicle inspection and health and safety.

4. On 9 June 2009 there was a sharp disagreement between the Claimant and Mr Gallivan after the Claimant, having worked long hours the previous day and started early that day, was asked to do an additional run. It was his case that he was sworn at in the presence of another driver, words to the effect, "If you can do the fucking board better, you'd better do it yourself. You can't fucking win in this place". On 13 June 2009 the Claimant presented a grievance letter. He raised issues about health and safety matters, mostly from 2008, lack of training, his treatment by Mr Gallivan including the instances that we have described, and also a complaint that the transport manager, Mr Pye, disliked him because he had raised issues of training.

5. The Respondent had a written grievance procedure. It provided for a grievance to be dealt with by the section manager; but if the complaint was by a section manager, it should be dealt with by the logistics director. It provided that if an aggrieved employee wished to appeal, he must inform the next level of management in writing within five days, whereupon there would be a meeting and a final decision would be made. Since Mr Pye was a section manager, it ought to have been the logistics director who heard the complaint. However, there was no logistics director, so the grievance was instead dealt with by the managing director for the region, Mr Heatherington.

6. Mr Heatherington spent a significant amount of time considering the grievance. He met twice with the Claimant. The meetings were recorded. He made notes. He spoke to some potential witnesses of the abuse that the Claimant said he had received but not to others.

7. On 3 July 2009 Mr Heatherington wrote a detailed letter dealing with the grievance. To some extent he accepted it. He said, for example, that training could and would be improved and that some shifts had been changed without adequate explanation. He accepted there could be improvements in health and safety maintenance. However, he accepted Mr Gallivan's denial that he had sworn at and abused the Claimant.

8. On 13 July the Claimant wrote a further letter to Mr Heatherington with a copy to the group managing director. He appealed against the grievance decision. He noted in particular the outcome of the grievance as regards Mr Gallivan and Mr Pye against whom apparently no action was to be taken. He said that as regards Mr Gallivan the outcome of the grievance appeared to call him a liar. He pointed out that some witnesses had not been interviewed. He said he was not prepared to be called a liar. He said he would, if necessary, go to the Tribunal.

9. According to the Tribunal's findings an appeal meeting was called for 21 July. It was taken by Mr Heatherington himself. It lasted just 20 minutes. There were competing versions as to what happened at this meeting.

10. The Claimant's version was set out in his claim form and confirmed in his evidence. The essence of it was set out in his resignation letter a few days later. He said:

> **"Graham Heatherington also denied my right to a grievance appeal hearing. First he tried to establish that he was answerable to nobody and that he is in overall charge of the region. During the meeting I was barely given the opportunity to speak. Instead I was subjected to a**

dressing down and told that he had no intention of disciplining the people involved in the grievance. He further gave me the choice of being professional and carrying on with my work, seeking other employment or, as suggested in my application for an appeal meeting, I could take the issue to an employment tribunal, but first I would have to leave and claim constructive dismissal. I found the whole tone of the meeting threatening bullying unprofessional and unnecessary."

11. The issue was not dealt with in the Respondent's response form, but it was addressed by Mr Heatherington in his evidence. He said that he did ask the Claimant to explain his dissatisfaction with the outcome of the grievance. There was discussion of an issue relating to driver's records. The Claimant went over the same ground as before and brought forward no new evidence. He told the Claimant he had reached his final decision and the Claimant had to accept it.

12. The meeting was on 21 July; the Claimant resigned on 27 July.

<u>The Tribunal hearing and reasons</u>

13. The Claimant's claims included constructive unfair dismissal in reliance both on section 103A (dismissal for making a qualifying public-interest disclosure) and section 98 (ordinary unfair dismissal) of the **Employment Rights Act 1996**. Since he resigned he was required, on established principles, to bring home his case that the Respondent had committed a repudiatory breach of contract. In his claim form he relied on a breach of the implied term of trust and confidence including, as we have seen, an assertion that he was effectively denied an appeal.

14. By the time of the hearing the Claimant's advisors had appreciated that the grievance procedure was or at least might be an express term of his contract of employment. This provided:

> **"12. Grievance and disciplinary procedures applicable to your employment are set out in the Aldi employee handbook […].**
>
> **14. You are bound by the regulations of the company. The employee handbook, job description, procedures manual and application form part of this contract of employment."**

15. Accordingly, the Claimant's counsel, Mr Owen-Thomas, who appeared for him below as he does today, applied for permission to amend to take this point; permission was refused.

16. In its written reasons for the Judgment the Tribunal recorded the refusal of permission to appeal but did not give any reasons. The Tribunal was asked for its notes concerning the permission to amend. They record the following:

> **"10.1 The claimant's claim form on 26 October 2009 makes no reference to the term or condition that the claimant now seeks to invoke. It asserts in paragraph 26 a breach of the implied term by failure to follow and investigate objectively the claimant's concerns. Thus there is no reference to failure to notify the right of appeal or to hear an appeal and no reference to the term.**
>
> **10.2 At a case management discussion on 10 September 2010 the claimant identified that he relied on the breach of the implied term but not on the express term.**
>
> **10.3 The claimant now says that he wants to plead breach of the express term regarding his rights of appeal.**
>
> **10.4 There is no explanation as to why the application is made now rather than at an earlier stage.**
>
> **10.5 The claimant's resignation letter of 27 July 2009 refers to fundamental loss of trust and confidence following issues and a grievance and breach of the legal obligation.**
>
> **10.6 The prejudice to the respondent is that the claim has been made at the last stage. The prejudice to the claimant is limited.**
>
> **10.7 The claimant has had plenty of time to make the application before now.**
>
> **10.8 Inevitably we shall be looking at the grievance process which is brought into play by the claim of constructive dismissal by breach of implied term of trust and confidence."**

17. In its reasons for finding there was no constructive dismissal, the Tribunal found that the underlying concerns relating to health and safety were largely historical and that Mr Heatherington had at the first stage given reasonable consideration to the Claimant's grievance. It is noteworthy that in its conclusions the Tribunal scarcely mentioned what

occurred on 21 July. Although it had earlier set out the different accounts of the Claimant and Mr Heatherington, it reached no findings about what occurred at the meeting. The only reference in the Tribunal's conclusions to the meeting on 21 July is the following:

> **"Mr Blackburn complained that he did not get the opportunity to appeal to someone else other than Mr Heatherington. This might have been a ground on which to bring a claim for breach of an express term, but that was not the case before the Tribunal."**

18. The Tribunal had earlier said the following:

> **"It is appropriate to emphasise that the tribunal was not dealing here with a claim that there had been a breach of an express term. In relation to the implied term of trust and confidence, when a grievance is brought it is the employer's duty to allow his employee the opportunity to bring his complaint, to have that complaint heard and to give reasonable consideration to it. An employer does not have to go through any set procedure. What he has to do is simply explained in general terms – he must allow the employee to bring his complaint; he must hear it and he must give a reasonable outcome."**

<u>The implied term of trust and confidence</u>

19. For reasons that will appear in a moment, we think it is helpful first to address the issue concerning the implied term of trust and confidence. Mr Owen-Thomas' submission is that the Employment Tribunal unduly restricted the scope of the implied term of trust and confidence. Denial of a grievance appeal is capable of amounting to or contributing to a breach of the implied term. He seeks to derive support from **<u>Lakshmi v Mid Cheshire Hospital NHS Trust</u>** [2008] IRLR 956 and from the ACAS Code relating to discipline and grievances at work. The Employment Tribunal should have made findings, he submits, as to what occurred on 21 July and assessed whether it amounted to or contributed to a breach of the implied term of trust and confidence.

20. In response to this submission Mr Hignett submits that the Tribunal did not err in law. He explains the Tribunal's reasoning in the following way. He says that while the grievance procedure provided for an appeal it was silent on the question of who should hear the appeal.

The meeting on 21 July therefore could be an appeal hearing; the Tribunal found that it was. He further submits that there was a finding later in the Tribunal's reasons that should be taken as meaning that there was no failure to hear an impartial appeal. Taken in the round, therefore, he submits that the Tribunal found there was no breach of procedure, still less a repudiatory breach. He says that **Lakshmi** was decided against a particular background of collective bargaining and did not lay down any proposition of general importance.

21. On this part of the case our conclusions are as follows. We begin with the grievance procedure. The grievance procedure is not to be read as though it were an Act of Parliament; it should be given its normal meaning in the employment context. The ACAS Code of Practice current in July 2009 provided for an appeal (see paragraphs 39-43) and specifically said that the appeal:

> **"[…] should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case."**

The previous Code was to similar effect.

22. These Codes are a reliable indication of the employment context. Against this background we have no doubt that the grievance procedure provided for the appeal to be notified to the next level of management because it envisaged that the appointment of a manager to hear the appeal would be made by the next level of management so that the appeal would be dealt with impartially and by a manager who had not previously been involved in the case.

23. We should say that we are not sure that the Employment Tribunal reasoned in the way in which Mr Hignett suggests. As we have seen, the Tribunal seems to have thought that the result might have been different if there had been a claim for express breach of contract. If the Tribunal had thought that the terms of the grievance procedure were met, we do not see why it would have made the remark set out in paragraph 21 of its reasons.

24. The implied term of trust and confidence is an implied term of the contract whereby an employer must not (**Malik v BCCI** [1998] AC 20, per Steyn LJ):

> **"[…] without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."**

25. In our judgment failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so is a matter for the Tribunal to assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to, a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to or contribute to a breach of the implied term of trust and confidence. Where such an allegation is made, the Tribunal's task is to assess what occurred against the **Malik** test.

26. The right to an appeal in respect of a grievance is important both as a feature of the Respondent's own grievance procedure and of the ACAS Code of Practice. It is a significant right in the employment context. It is not easy to see why an organisation the size of the

Respondent should have been unable to make provision for an impartial hearing by a manager not previously involved.

27. What occurred on 21 July was a matter that the Tribunal should have assessed, and having made findings of fact it should have considered whether there was a breach of the implied term of trust and confidence. In this case, the Tribunal made no findings as to what occurred on 21 July; it made no finding as to whether what occurred amounted to a breach of the grievance procedure or contributed to or amounted to a breach of the implied term of trust and confidence. This was, as we have seen, an important part of the Claimant's case. He was saying not merely that Mr Heatherington took the meeting but that he was in substance denied any real appeal at all. He resigned shortly afterwards. The Tribunal was required to deal with the Claimant's case. The Tribunal seems to have thought that in the absence of an allegation of breach of an express term what took place on 21 July, including any breach of the grievance procedure, was irrelevant; that was an error of law.

28. We should finally say that we reject Mr Hignett's submission that the Tribunal later in its reasons made a finding that the hearing on 21 July was impartial. That paragraph of the Tribunal's reasons relates to the hearing of the grievance, not to what occurred on 21 July. If the paragraph had been intended to concern what occurred on 21 July, it would be unsupported by findings or reasoning.

Amendment

29. On the question of amendment Mr Owen-Thomas submits that the Tribunal should have applied the well-known principles in **Selkent Bus Co. Ltd v Moore** [1996] ICR 586; that the amendment was in essence a simple relabelling of facts already pleaded; and that the Tribunal

did not correctly balance prejudice. The Tribunal reasoned that there was no prejudice, since the grievance procedure was brought into play by the implied term of trust and confidence, but this was inconsistent with its own subsequent approach to exclude the refusal of an appeal from consideration.

30. Mr Hignett in response does not concede that the grievance procedure was incorporated into the contract of employment. He says this was a new issue, not merely a matter of relabelling. He says that the claim form did not properly raise the denial of appeal as an issue. He says that the reasons given by the Employment Tribunal for refusing permission to amend were proper and sufficient reasons disclosing no error of law or perversity.

31. On this part of the case our conclusions are as follows. In **Selkent** the President, Mummery J, as he then was, gave general guidance as to how applications for leave to amend, including applications for amendments raising a new cause of action, should be approached. The **Selkent** principles are well known. They include the following:

> **"Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."**

32. The Judgment in **Selkent** went on to consider relevant circumstances, which include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

33. The Tribunal's note of reasons makes no reference to **Selkent**, but we have no doubt that the Tribunal had **Selkent** principles in mind. The reference to the balance of prejudice in the concluding paragraphs is indicative of the correct test.

34. We do not accept Mr Owen-Thomas' submission that the amendment was only a relabelling of facts already pleaded. To a large extent the facts were already pleaded, but it was not already pleaded that the grievance procedure was incorporated into the contract of employment. The amendment was therefore not a mere relabelling exercise, although it was close to it.

35. To our mind, the real problem in the Tribunal's reasoning is its balancing of prejudice. It has stated that the Respondent was prejudiced "in that the claim has been made at the last stage". Lateness in making a claim is not necessarily prejudicial; it depends on whether there is any difficulty in meeting the claim and what it is. The Tribunal has not said anything on this subject. Even more important, however, is the Tribunal's conclusion as to whether the Claimant was prejudiced. This conclusion depended on whether and to what extent the Tribunal would consider his allegation that he had been denied an effective appeal as part of the constructive dismissal claim. At the time of hearing the application to amend the Tribunal had not decided that it would do so, and eventually, as we have seen, it did not do so. In these circumstances, the Tribunal's assessment of the relative prejudice to the parties was flawed.

<u>The result</u>

36. For the reasons that we have given, the appeal must be allowed. The Employment Appeal Tribunal itself deals only in questions of law. It should substitute a decision of its own only if, given the facts that the Employment Tribunal found or were undisputed, the result is plain and obvious. While we consider that the Claimant's case concerning the meeting on 21 July has real strength precisely what happened at that meeting remains to be resolved and we do not think we can say that the Tribunal was bound to find that there was a breach of the

implied term of trust and confidence or that it was bound to allow an amendment. In these circumstances, we do not feel able to substitute our own conclusions.

37. It follows that the matter must be remitted. On the question whether the matter is remitted to the same Tribunal or to a different Tribunal, we take account of factors set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. In this case the Employment Tribunal made an error of law in the scope of the implied term of trust and confidence, but overall it dealt with the case conscientiously. It made findings that were to some extent in favour of each party; for example, it preferred the evidence of the Claimant to Mr Gallivan. We are confident that the Employment Tribunal can and should deal with the matter on remission if it is available to be reconstituted. We think that the same Employment Tribunal will be able to deal with the matter within the compass of a day; a complete rehearing by a different Employment Tribunal would involve much greater expense and difficulty.

38. We think the best procedure, subject to anything counsel may say to us in a moment, is as follows. The parties should prepare written statements and skeleton arguments on the question of amendment and on the question of whether there was a contractual grievance procedure in advance of the hearing. They should come along with any evidence necessary to deal with that matter. At the hearing the Employment Tribunal should decide whether to grant permission to amend. If it grants permission to amend it should hear evidence on the question of incorporation, if evidence is required by either party. It should be prepared to consider re-calling witnesses to deal with what occurred on 21 July. We say this because it is now a substantial length of time since the Tribunal hearing. The Tribunal should not, however, reconsider all the underlying matters prior to the meeting on 21 July. Having heard evidence,

the Tribunal should then hear submissions and reconsider its decision entirely afresh on the impact of what occurred on 21 July, having regard to the Judgment we have given.