Appeal No. UKEAT/0259/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 November 2013
Judgment handed down on 29 January 2014

Before

HIS HONOUR JUDGE PETER CLARK

MR D BLEIMAN

MR D G SMITH

GM PACKAGING (UK) LTD — APPELLANT

MR S HASLEM — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS KIRTI JERAM (of Counsel) Instructed by: Sintons LLP Solicitors The Cube Barrack Road Newcastle upon Tyne NE4 6DB
For the Respondent	MR ANTOINE TINNION (of Counsel) Instructed by: Richmond Anderson Goudie Solicitors 1-2 Flake Cottages Cone Terrace Chester le Street DH3 3QH

SUMMARY

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Reasonableness of dismissal

Disciplinary process delegated to external HR consultants by this small employer. The reason for dismissal was the set of facts/beliefs in the mind of the consultants, even although the recommendation for dismissal required approval from the employer.

The reason or principal reason for dismissal relates to the categories of potentially fair reasons in s98 **Employment Rights Act 1996**. Where the reason is solely 'conduct' all constituent parts of that reason are relevant to the reasonableness question under s98(4) not the principal act of misconduct.

Additionally, the Employment Tribunal substituted its view for that of employer as to sanction. Employer appeal against finding of unfair dismissal allowed. Finding reversed.

HIS HONOUR JUDGE PETER CLARK

1. In this matter the Newcastle Employment Tribunal heard the combined claims of Ms L Ottey and Mr Steven Haslem, Claimants, brought against their former employer, the Respondent, GM Packaging (UK) Ltd, over five days. By a Judgment with Reasons dated 8 August 2012 an Employment Tribunal chaired by Employment Judge Buchanan upheld the various complaints brought by Ms Ottey, remedy then being agreed in principle between the parties (subject to a remedy hearing and appeal on liability) and in the case of Mr Haslem upheld his single complaint of unfair dismissal, subject to a deduction of 50% contribution in respect of his conduct, and awarded him compensation totalling £17,398.25.

2. Against that Judgment the Respondent appealed in respect of both Claimants. On the paper sift HHJ McMullen QC rejected the appeal in its entirety. However, at a rule 3(10) oral hearing HHJ David Richardson, whilst rejecting the appeal in respect of Ms Ottey, permitted the Respondent's appeal against the finding of unfair dismissal in Mr Haslem's case to proceed to this full hearing on the first four grounds of appeal in his case, ruling that the fifth ground of general perversity added nothing and would be dismissed (Transcript paragraph 18).

Preliminary issues

3. Mr Haslem (SH) applied for a Restricted Reporting Order (RRO) and/or Anonymity Order in respect of both Claimants. We heard that application in private.

4. It appears that a RRO was made at the commencement of the substantive ET hearing on 6 February 2012, and at a remedy hearing in the case of Ms Ottey (LO) held on 17 September 2012 an application was made on behalf of the Claimants for that order to be continued. The application was refused by Employment Judge Buchanan by an order dated

20 November 2012. This application was made to the EAT for the first time on 5 November 2013.

5. The basis of the present application by SH is that he is now separated from his wife but that they have two children, the youngest of whom is a boy aged six years, and the facts of the case may result in his suffering comments at school.

6. We see the force of that concern, but we must weigh the right to privacy under Article 8 of the European Convention with the principle of open justice. We have also considered the approach of Underhill P in **F v G** [2012] ICR 246.

7. In our judgment the principle of open justice outweighs the claim to respect for private and family life invoked by SH, particularly in circumstances where the acts in question involved consensual sexual activity in the workplace and where the findings of the ET have been in the public domain since November 2012. Accordingly the application was refused.

The facts

8. The Respondent is a national supplier of catering disposable products and food packaging, operating from premises on the Tyne Trading Estate, North Shields. It is a small employer, having only nine employees at the relevant time.

9. Graham Montague (GM) is the Managing Director and owner of the business. He is the sole shareholder. SH commenced his employment on 10 March 1997 and in April 2011 was the General Manager. LO joined the company as a sales representative on 10 August 2009.

10. On 13 April 2011 GM and LO had a heated exchange about her entitlement to commission on a particular account. Prior to that date rumours had circulated to the effect that LO and SH were engaged in a personal and sexual relationship. GM was aware of those rumours but had not raised the matter with either of them. The ET found (paragraph 15.11), rejecting GM's account, that he saw both Claimants in the car park by checking security camera surveillance on his laptop after the business closed at 5pm. He looked through the glass panel in the office door; the room was in darkness. He thought he saw the Claimants engaged in oral sex. In the event, on the Claimants' admission, LO was masturbating SH. He ejaculated. A paper tissue was used to wipe up his semen. The used tissue was placed in the waste paper bin in the office.

11. The following morning GM challenged SH as to what he believed he had seen the previous evening. SH admitted that he was having an affair with LO but denied having had full sexual intercourse the previous evening or at all. GM referred to LO as a "tart".

12. Later that morning GM, together with Graham Cook (GC), the Business Development Manager, met with LO in a car park. GM said that he was angry and disgusted and effectively sacked her on the spot.

13. SH was treated differently. Later that day GM made contact with external HR consultants, Right Hand HR Ltd (RH) and received their advice. As a result GC was appointed investigating officer in the case of SH.

14. On 18 April GM realised that a dictating machine in the office had captured the conversation between the Claimants after 5pm on 13 April. He invited GC and another

employee, Andrew Binks, to listen to the recording. It has been transcribed. The Claimants there speak of GM in derogatory terms, as set out at paragraph 15.17 of the Reasons.

15. An investigatory meeting took place on 18 May, taken by GC with GM as note-taker. SH again denied having sexual intercourse with LO but accepted that he had kissed her. Following that meeting he was suspended on full pay. GM gave a statement to GC as to what he had seen on 13 April and his conversation with SH the following morning.

16. On 26 April GM sent LO a letter setting out his reasons for dismissing her and telling her that she had a right of appeal. She did appeal by letter dated 3 May. An appeal hearing was conducted by Dawn Powell (DP) of RH on 23 May. DP telephoned GC stating that it was her recommendation that LO's appeal be dismissed. Having obtained authority from GM, GC passed on that authority to DP, who wrote a letter to LO on 3 June dismissing her appeal.

17. As to SH, he attended a disciplinary hearing before DP on 3 May and stated his case. DP then made further enquiries, after which she sought authority to dismiss him and received it via the same route as in the case of LO. She found three out of four charges levelled at SH to be made out, dismissed him summarily on 6 May by telephone and confirmed her decision and reasoning in a letter of that date.

18. SH appealed that decision. His appeal was heard by Judy Pearson (JP) of RH on 26 May 2011. Having considered the matter she also sought and obtained GM's authority to dismiss the appeal. She did so by letter dated 3 June 2011.

The ET decision

19. Focusing on the decision in the case of SH, the ET set out their reasoning at paragraphs 85-96. They first asked themselves who was the dismissing officer and appeal officer in the circumstances of his case and secondly what was the principal reason for dismissal.

20. As to the first question they concluded (paragraph 86) that, since the authority of GM was required before the dismissal and appeal outcomes recommended by DP and JP respectively were sanctioned it was GM whose reason for dismissal must be ascertained. However, at paragraph 90 the Employment Tribunal rejected a submission by Mr Tinnion that the procedure used in the dismissal of SH was flawed because GM was effectively the dismissing and appeal officer. Their reasoning was as follows:

> **"We have considered whether a reasonable procedure had been followed by the respondent. We reject the submission of Mr Tinnion that the procedure was flawed because GM was effectively the dismissing officer and the appeal officer. In this case GM brought in consultants to deal with this matter as he was involved in the matters under investigation as he was a witness to the events and could not impartially deal with the resulting proceedings. The fact that a consultant brought in to deal with such matters advises the owner of the business of the decision and seeks permission to implement it does no more than reflect the reality of the situation. In an organisation of the size and administrative resources of the respondent company and given the senior position of the second claimant in the company, the actions taken to deal with the disciplinary proceedings against the second claimant were reasonable."**

21. Based on their finding at paragraph 86 they held that the principal reason for dismissal in GM's mind was the sexual activity between the Claimants on the company premises (paragraph 87) and went on to find that dismissal for that reason could not be categorized as gross misconduct and that dismissal for that reason fell outside the band of reasonable responses (paragraph 92). They then went on to find 50 per cent contributory conduct in SH's case, made up of 30 per cent relating to the sexual activity and 20 per cent in relation to the recorded comments about GM.

The appeal

22. The first statutory question raised in this appeal is what was the Respondent's reason for dismissal (**ERA 1996**, section 98(1)). That reason:

> **"...is the set of facts known to the employer or, it may be, of beliefs held by him which cause him to dismiss the employer."**

See **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 at 330 per Cairns LJ. It is only when that set of facts or beliefs has been established by the employer that the reasonableness question under section 98(4) ERA can be properly answered.

23. Plainly the reason in this case related to SH's conduct (section 98(2)(b)). However the issue which fell to be resolved in this case was whether the "reason" was that in the minds of DP and JP when, respectively, they recommended dismissal and rejection of SH's appeal to GM or whether, in sanctioning those causes of action, GM was the "mind" of the Respondent for the purposes for ascertaining the reason for dismissal.

24. At paragraph 86 the Employment Tribunal found that it was the reason in the mind of GM and not DP and JP which was the Respondent's reason for dismissal. On that basis the Employment Tribunal limited the "principal reason" in the mind of GM to the sexual activity which took place between SH and LO (paragraph 87).

25. In our judgment the Employment Tribunal fell into error in two respects. First, having accepted that the process undertaken by RH was a genuine and proper procedure for this small business, run by GM, to follow, it was internally inconsistent of the ET to ascribe a different reason for GM for dismissing SH because he had the last word. He accepted the recommendations of DP and JP. The reason for those recommendations were theirs.

26. Secondly, the use of the term "principal reason" by Mr Tinnion in relation to the sexual activity, adopted by the Employment Tribunal (paragraph 87), represents a fundamentally erroneous approach to section 98 ERA. Section 98(1) requires the employer to show the reason or, if more than one, the principal reason for the dismissal. The reason is one of those falling within subsection (2) or some other substantial reason.

27. The list of potentially fair reasons in subsection (2) includes conduct, capability, redundancy, etc.

28. Thus if the set of facts or beliefs, to adopt the **Abernethy** formulation, includes both conduct and capability reasons, the question is what is the principal reason. Provided it is a potentially fair reason under subsection (2) then the reasonableness question under section 98(4) arises for determination.

29. Here, the only reason for dismissal related to SH's conduct. That included all the matters taken into account by DP on dismissal. Moreover, even if GM is treated as the decision-maker the result is the same. The sexual activity and the tape recording were both in the minds of DP and GM at the disciplinary hearing stage. It is simply wrong for the Employment Tribunal to focus solely on the sexual activity as the principal reason for dismissal. It was the whole of the conduct leading to his dismissal, an approach which the ET took when making its findings on contribution.

30. The Employment Tribunal found that a reasonable investigation had been carried out and a reasonable process followed. They found the dismissal of SH unfair because, in their view (paragraph 92), no reasonable employer would categorise sexual activity between two

adults out of hours in a deserted office as gross misconduct justifying summary dismissal. We are prevented by Judge Richardson's order from considering whether such a conclusion is legally perverse. However, we agree with Ms Jeram that, despite their self-direction to the contrary, this is a plain example of the ET impermissibly substituting their views for that of the employer.

31. It follows, in our collective judgment, that the ET fell into error in three respects, either individually or cumulatively. First, they misunderstood what is meant in section 98 by the principal reason for dismissal; secondly, having found the delegation of the disciplinary function to RH to be a genuine and proper procedure, they failed to consider the reason given by DP and JP for their respective decisions; and thirdly, they substituted their own views as to what was an appropriate sanction for that of the range of reasonable responses open to a reasonable employer.

Disposal

32. The appeal is allowed. The question arises as to whether we can determine the liability issue or whether it should be remitted to the same or a different Employment Tribunal for further consideration. We bear in mind the observations of Jacob LJ in **Bournemouth University v Buckland** [2010] ICR 908, paragraphs 57-58. Rather than indulge in "ping pong", all the primary facts having been found, we shall reach our own decision.

33. The conduct in question involved a senior manager engaging in sexual activity with a member of his staff on the company's premises after hours, accompanied by a conversation which revealed, at the least, a complete lack of respect for his boss. Plainly, dismissal for that conduct fell within the range of reasonable responses open to the employer.

34. In these circumstances we shall set aside the finding of the Employment Tribunal. SH's dismissal was fair.