Appeal No. UKEAT/0329/12/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 December 2012

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MR B BEYNON

MISS S M WILSON CBE

MR S BANCROFT APPELLANT

INTERSERVE (FACILITIES MANAGEMENT) LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS S BELGRAVE (of Counsel) Instructed by: Quality Solicitors Burton & Co Stonebow Lincoln LN2 1DA
For the Respondent	MS E CUNNINGHAM (of Counsel) Instructed by: BPE Solicitors LLP St James's House St James's Square Cheltenham GL50 3PR

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Employment Tribunal erred in holding that the Respondent had taken all steps to seek to mitigate the injustice caused to the Claimant by his removal from the workplace at the behest of a third party without considering whether the Respondent had taken reasonable steps to inform themselves of the basis of and justification for the request. **Henderson v Connect South Tyneside** [2010] IRLR 468 applied.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Mr Bancroft appeals from the judgment of an Employment Tribunal sent to the parties on 7 December 2011 which dismissed his claim for dismissal. The parties will be referred to by their titles before the Employment Tribunal as Claimant and Respondent.

2. The Claimant is a chef. From 20 July 2004 until his dismissal on 16 of March 2011 he worked at Wordsworth House, a bail hostel. He became an employee of the Respondent on 30 June 2008 on a transfer of undertaking to them. The Respondent provided a catering service to the bail hostel under a contract with the Home Office. It appears that the bail hostel was operated by the Lincolnshire Probation Trust. Clause 21.8 of the Respondent's contract with the Home Office provided as follows:

> **"The Authority reserves the right to refuse to admit or require the removal from the Properties any Contractor Staff or Contractor Related parties whose admission would be in the opinion of the Authority undesirable. The opinion of the Authority on whether admission is desirable should be final and binding and the Authority shall be under no obligation to give reasons for its decision. If the Authority gives the Contractor notice that a particular member of Contractor Staff is not to be admitted to the Properties, the Contractor shall ensure that the person shall not seek admission or be further deployed in the provision of the Services at the Properties."**

3. The Employment Tribunal found in paragraph 11 of their reasons that the Claimant and the manager of the bail hostel, Mr Laughton, had a difficult relationship. They held:

> **"Indeed it is in the difficult, perhaps poor, relationship between the Claimant and Mr Laughton that the origins of this claim lay."**

4. The Employment Tribunal found that the difficult relationship originated in the Claimant raising a variety of issues in relation to the use of the kitchen at the hostel. These included hostel staff leaving knives in the sink in a way which was dangerous and smoking when passing through the kitchen. The Employment Tribunal found at paragraph 12 that the Claimant had

genuine and reasonable concerns about these matters and that he raised them forthrightly with Mr Laughton. Mr Laughton did not like this. The Employment Tribunal found that:

> **"As a result of the Claimant raising matters such as these with Mr Laughton, Mr Laughton tried to find problems with the Claimant's work and raised a variety of minor matters with the Respondent in relation to the Claimant's conduct. The intention of Mr Laughton was to have the Claimant disciplined."**

5. The Employment Tribunal held that none of the matters raised by Mr Laughton led to any disciplinary action against the Claimant. The Employment Tribunal found that Mr Laughton was overly keen to find fault with the Claimant. They observed at paragraph 16:

> **"The Tribunal found it appropriate to note that it was regrettable that the Respondent took no steps to resolve the difficulties which had clearly arisen in the relationship between the Claimant and Mr Laughton. It would have been better management practice on the part of the Respondent to have engaged with these problems in some way rather than simply treating every issue raised by Mr Laughton as a potential cause for disciplinary action against the Claimant."**

The Tribunal found that by September 2010 the relationship between the Claimant and Mr Laughton had broken down.

6. In May 2010 another member of the hostel staff, Ms Bhatti, complained about the way the Claimant spoke to her after a misunderstanding over margarine. Ms Bhatti complained to the Respondent regarding the incident and the Claimant was suspended. The Respondent then undertook disciplinary proceedings.

7. The Claimant in turn raised a grievance in relation to the action taken by the Respondent on Ms Bhatti's complaint. The disciplinary hearing finally took place on 21 December 2010. The outcome of that hearing was that the Claimant was given a first and final warning. In the meantime, on 16 September 2010, Mr Laughton had written to Lisa Kitson at the Home Office, under which the Probation Trust ran the bail hostel, about the Claimant saying that he did not

wish him to return to the hostel regardless of the outcome of the disciplinary investigation into Ms Bhatti's complaint. He wrote as follows:

> **"I am writing with reference to Mr Steve Bancroft who is employed by Interserve to provide chef duties at Wordsworth House. As you are fully aware there have been numerous issues raised about his conduct and behaviour whilst he has worked at the Approved Premises and he is currently suspended from work pending further investigations. This recent investigation has now been ongoing for several weeks and to my knowledge there has been no decision made at present. This absence has created difficulties in ensuring we have a consistent catering presence in the building.**
>
> **I have, however, after serious consideration decided I do not wish Mr Steve Bancroft to return to Wordsworth House regardless of the outcome of this investigation. His conduct in the past has given cause for concern and I do not feel it appropriate for him to return to work in a setting where inappropriate behaviour may lead to a serious incident, potentially involving residents and staff working at Wordsworth House. All previous incidents reported have led to an eventual breakdown in relationships between Wordsworth House and Mr Bancroft and such a breakdown cannot be allowed to continue in a property that houses high risk offenders.**
>
> **I trust that Interserve will now move swiftly to provide a permanent replacement to provide catering duties at Wordsworth House under the existing contract."**

8. The Employment Tribunal found that having received that letter, Lisa Kitson on 17 September 2010 emailed the Respondent in the following terms:

> **"Morning John/Marie**
>
> **Please see attached in regards to the chef at Wordsworth House, Lincoln. Please arrange for a permanent solution to be put in place and keep myself and Keith aware of the updates."**

The letter which Mr Laughton had written the previous day was attached.

9. After the conclusion of the disciplinary process on Ms Bhatti's complaint, the Claimant was again suspended. The letter of suspension was in the following terms:

> **"I write to confirm you have been suspended from work effective from 21st December 2010 due to the client asking for your removal from site."**

10. No efforts were made to seek to persuade the Probation Trust to change its mind as, "Marie Powell already knew that the Probation Trust would be most unlikely to change its mind." Ms Powell did not ask them to give the Claimant another chance. She was advised by HR to take no action other than to accept the request for the Claimant's removal.

11. The Employment Tribunal went on to find that the Respondent did what it could to redeploy the Claimant. They offered a job to the Claimant which would have meant a 30 mile journey and shorter hours; 25 per week, and therefore lower wages. The Claimant turned the job down and he was dismissed with effect from 16 March 2011. The Claimant appealed from his dismissal but the appeal was not successful. The Employment Tribunal concluded that the dismissal of the Claimant was for some other substantial reason, namely the third party pressure placed on the Respondent to remove the Claimant from its workplace.

12. The Employment Tribunal directed themselves to consider whether the Claimant had suffered an injustice as a result of such action. In paragraph 34 the Employment Tribunal directed themselves to consider the judgment of Underhill P in **Henderson v Connect South Tyneside Ltd** [2010] IRLR 468 in which the President set out principles to be applied in considering the question of injustice in dismissals at the behest of third parties. The Employment Tribunal set out in full the relevant passage in **Henderson** in which it was said at paragraph 13:

> **"It must follow from the language of section 98(4) that if the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client, most obviously by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee- but has failed, any eventual dismissal will be fair: the outcome may remain unjust, but that is not the result of any unreasonableness on the part of the employer."**

13. The Employment Tribunal in its reasoning considered the fairness of the dismissal and concluded that the Claimant's behaviour was not such that he could have been dismissed for it by the Respondents. He was, after all, given a first and final warning as a result of the disciplinary action taken against him. The Employment Tribunal concluded that the Claimant had suffered injustice but they directed themselves to the question of whether the Respondent had done everything that it reasonably could and they answered that question in the affirmative.

14. The Employment Tribunal concluded that in the light of attempts to find the Claimant another post and in the light of their conclusion that it was reasonable for the Respondent not to try to persuade the managers of the hostel to change their minds, the dismissal which followed was not unfair.

15. In the course of their reasoning, the Employment Tribunal said at paragraph 37:

> **"Although the Tribunal was troubled to some extent by the Respondent's failure to ask the Lincolnshire Probation Trust whether the Claimant could in fact return to Wordsworth House, the Tribunal concluded that ultimately it was reasonable for the employer not to do this given (a) Mr Laughton's view of the possible return of the Claimant being perfectly clear to Miss Powell as a result of her conversations with him; (b) the breakdown of the relationship between Mr Laughton and the Claimant of which Miss Powell was aware and; (c) the terms of the contract which permitted the Home Office (and so in reality Lincolnshire Probation Trust) to require the removal of the Claimant."**

The submissions of the parties

16. Ms Belgrave, for the Claimant, submitted that whilst the Employment Tribunal referred to the correct approach set out by Underhill P in **Henderson** to the consideration of injustice suffered when unsubstantiated or unjustified claims lead to a third party requesting removal of an employee, in this case, no effort was made to resolve the complaints against the Claimant before an impasse was reached.

17. The Employment Tribunal had identified rightly a duty on the employer to do everything it could reasonably to mitigate or avoid injustice but applying that test to the facts it was contended that the conclusion reached by the Employment Tribunal was one which was not open to them.

18. In her initial submissions Ms Belgrave elaborated on a contention that in these circumstances fairness would have required that the employer seek to "nip the problem between

the Claimant and Mr Laughton in the bud". The Respondent should have taken steps to try to resolve the differences between them at a much earlier stage before the start of events which led to his ultimate dismissal.

19. Ms Belgrave also pointed out that when on 16 September 2010, Mr Laughton said that the Claimant should not return, the Respondent took no steps from that point right up to the date of his dismissal to investigate the problem or to try to deal with it. It was submitted that in light of failing to take such steps, the Tribunal erred in holding that the Respondent did everything that they could do to mitigate the injustice to the Claimant.

20. Ms Cunningham, for the Respondent, contended that the Employment Tribunal properly directed themselves on the law and reached a conclusion which was open to them on the facts. The reasons expressed by the Employment Tribunal supported their conclusion that the Respondent had done everything that they reasonably could.

Discussion and conclusion

21. Dismissals resulting from a demand of a third party can give rise to a wide range of different considerations. The reasons why a third party may seek to enforce a right not to have one of the Respondent's employees working on their premises or on their contract are many and varied. The reasons given may be justified or unlawful.

22. In **Dobie v Burns** [1984] ICR 812 which was a case of dismissal at the behest of a third party, although it is usually referred to in a different context, in the Court of Appeal the Master of the Rolls, Sir John Donaldson made the following observation at p.817B:

> **"So I agree with the appeal tribunal that the industrial tribunal misdirected themselves when they averted to section 57(3) in those terms. In deciding whether the employer acted reasonably or unreasonably, a very important factor of which he has to take account, on the**

facts known to him at that time, is whether there will or not be injustice to the employee and the extent of that injustice."

23. That proposition has been considered in more recent authorities. In **Greenwood v Whiteghyll Plastics Ltd** [2007] All ER (D) 111 (Aug) EAT the Employment Appeal Tribunal considered the case of a claimant who had been dismissed because a major customer of his employer stated that he should be banned from their premises. The Employment Tribunal held that the dismissal was fair. The Employment Appeal Tribunal held that the case was to be remitted to the Employment Tribunal as in the original decision there was no consideration of what was described in **Dobie v Burns** as the very important factor of whether there will be injustice to the employee and the extent of the injustice.

24. The issue was considered further in the **Henderson** case. The Employment Tribunal in this case had referred to the material passage in paragraph 13 of **Henderson** which we set out earlier in this Judgment. It is noteworthy that there are no findings of fact made by the Employment Tribunal as to whether any enquiry was made as to why Mr Laughton took the view in his letter of 16 September 2010 requesting that the Claimant be removed from the premises and that he can no longer work at the bail hostel.

25. It appears from the Tribunal's decision that they considered the complaints which had been made by Mr Laughton against the Claimant to have been trivial. The matters which gave rise to the disciplinary proceedings against the Claimant were complaints by Ms Bhatti. The grievance proceedings brought by the Claimant related to Ms Bhatti's complaints. It seems therefore that the difficulties between Mr Laughton and the Claimant and the rights and wrongs of them were not investigated in the course of the grievance proceedings and the disciplinary proceedings. They may have been referred to as background but no more. The Tribunal appear not to have addressed their minds to the issue of why the Respondent did not consider the rights

and wrongs of the difficulties between Mr Laughton and the Claimant in all the period from the date that Mr Laughton made his request for the removal of the Claimant in September 2010 until the Claimant's eventual dismissal in March of the following year.

26. In those circumstances, in our judgment, the Employment Tribunal did not properly apply the principles outlined in the authorities in holding that the Respondents had done everything they could do mitigate the injustice caused by the third party's request that the Claimant no longer work on their premises. The Employment Tribunal failed to make all the necessary findings of fact on this issue and the material on which they took their decision in our judgment was inadequate to support it.

27. In another case the question of whether an employer has taken adequate steps to mitigate injustice to an employee as a result of his removal at the behest of a third party may engage the broader question of whether avoiding injustice would require a consideration of whether the employer should have taken steps earlier in the employment history to seek to remedy a problem before it became an insuperable problem leading to dismissal. That is not this case. It is an issue which may arise for consideration in an appropriate case. However, so far as this appeal is concerned, in our judgment, the Employment Tribunal erred in considering the fairness of the dismissal of the Claimant in the respect we have identified.

28. The Employment Tribunal failed to make all the necessary findings of fact on the issue of whether the Respondent had taken all steps to seek to mitigate the injustice caused to the Claimant by his removal at the behest of the third party. Having failed to consider all relevant matters their conclusion on the issue cannot stand.

29. The appeal is allowed and the claim remitted to the Employment Tribunal for findings of fact on the issue we have identified and for them to reach a conclusion on the fairness of the dismissal in light of those conclusions and directing themselves in particular to **Henderson** and **Dobie v Burns**.