Appeal No. UKEAT/0506/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 April 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MR D M MITCHELL — APPELLANT

ST JOSEPH'S SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR GRAHAM WATSON (of Counsel) Instructed by: Macmillans Solicitors Manor House Bridgend Wadebridge PL27 6BS
For the Respondent	MR LLOYD MAYNARD (of counsel) Instructed by: Lyons Davison Solicitors Westbury House 701-705 Warwick Road Solihull B91 3DA

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

PRACTICE AND PROCEDURE – Chairman alone

The Employment Judge did not err when he decided the Claimant, a school bursar, was fairly dismissed when he did not disclose the parlous state of its finances to the board of governors. Applying the company law on attribution set out in **Meridian** and **Orr**, disclosure to two members of the board did not mean the board had knowledge of the finances.

Observed:
There was a danger in this case heard by a judge alone of a subjective approach to misconduct. The law remains as it was before judge-alone became the norm for unfair dismissal cases.

HIS HONOUR JUDGE McMULLEN QC

Introduction

1. This case is about unfair dismissal. I will refer to the parties as the Claimant and the Respondent. It is an appeal by the Claimant in those proceedings against a judgment of Employment Judge Mr JW Major, sitting alone at Truro over two days, recorded with Reasons sent to the parties on 9 July 2012. The Claimant and the Respondent are represented respectively by Mr Graham Watson and Mr Lloyd Maynard, of counsel. The Claimant claimed unfair and wrongful dismissal. The judge dismissed both, holding that the Respondent dismissed him, for reasons, in a portmanteau decision for gross misconduct, but which had several elements, following a fair procedure.

2. The essential issue before the judge was to decide whether, on the material available to the Respondent, dismissal of the Claimant fell within a range of reasonable responses. The Claimant appeals against the rejection of his case. The case came before Mr Recorder Luba QC on the papers, who made some observations, to which I shall return at the end of this judgment, but sent the matters, as *just arguable*, to a full hearing.

The facts

3. The Claimant was highly experienced in banking, having been a successful bank manager in the southwest of England. The Respondent is a school, and it appointed him as bursar on 1 September 2009, when his employment commenced at the beginning of the school year. The organisation of the school is that there is a board of governors and it has a finance and general purposes committee. The leading lights on those are the chairman of the board, Mr Marshall, and the chairman of the committee, Mr Meeson. The head at the relevant time was Mr Garrett, and one of the governors, who was given a role in these matters, was Mr Heard. The accountants to the school were Messrs Francis Clark, who became involved.

4. The ambition of the school was to involve itself in a huge expansion programme for the development of a sixth form. This was the subject of an announcement by Mr Marshall, graphically put, that mechanical diggers would soon be on the sports field.

5. When the Claimant took over the outgoing bursar said that the account at the bank was overdrawn. The state of the finances of the school became parlous. "Horrendous" is the word used by the judge, which has not been disputed. In due course an investigation was conducted by Mr Heard on behalf of the board. The Claimant was interviewed and records of the interviews were all before the board and the judge. As a result, he was dismissed for what the judge summarised as a trio of reasons, which were the following:

> **"1 There has been irrevocable breach of mutual trust and confidence in the employment relationship between you and the School.**
>
> **2 There has been gross neglect in your duty as Bursar to the School.**
>
> **3 There has been gross negligence by you which has, on the balance of probabilities, caused financial losses to the School."**

6. The basis of that can be understood by the further expansion in the letter of dismissal. It comprised this:

> **"1. Failed to ensure proper books of accounts (including income and expenditure accounts and balance sheets) were kept in accordance with clause 3.25.3 of Appendix 2 to the Contract […] We accept that you were not responsible for authorising the planning permission costs for the proposed development. We further accept that you were verbally reporting the levels of expenditure to the Chairman of Governors, Mr John Marshall. However, you failed to report, or detail at all, the planning permission costs of the development in the accounting records and therefore report these to the Governing Board. This resulted in the Governing Board not being aware of the financial cost of obtaining planning permission for the proposed development. Although we do not hold you responsible for Mr John Marshall failing to report matters to the Governors, we do hold you responsible for not correctly recording in the accounts, and cash flow projections, the development costs […].**
>
> **2. Failed to produce reports of the material and financial affairs of the School to the Governors in accordance with their requirements and with the requirements of the law in accordance with clause 3.2.3 of Appendix 2 to the Contract.**
>
> **We reasonably believe that you have failed to produce reports of the material and financial affairs of the School as a result of serious errors and omissions by you. These errors occurred in the bank reconciliations and general accounting which resulted in the cash flow projections being grossly inaccurate. As stated above, because the financial reports to the Governors, i.e. the cash flow projections, were not accurate the Governors were prevented from taking steps to minimise those losses and prevent further losses from being incurred.**

> **3. Failed to monitor the income and expenditure in relation to the budget and failed to present regular management reports in accordance with clause 3.3.4 of Appendix 2 to the Contract.**
>
> **We have reasonable belief that you have failed to monitor the income and expenditure correctly. We appreciate that you were told by Mr Graham Garrett "not to worry" about additional staffing costs due to the increase in pupil numbers. However, it was your responsibility to ensure that as the additional fees being generated were discounted, enough income was being generated to justify the additional staffing costs. You failed to do this and that has resulted in the School incurring financial losses.**
>
> **4. Failed to scrutinise payment of all invoices and statements of account in accordance with clause 3.3.8 of Appendix 2 to the Contract."**

7. This was somewhat attenuated by the finding by the board that the Claimant did not use the information generated from such scrutiny improperly.

8. The issue before the judge, being one of gross misconduct, was to apply the test in **British Home Stores Limited v Burchell** [1978] IRLR 379. There is no issue that the judge did not. The reason for dismissal, he found, were the reasons given in the letter. The decision to dismiss the Claimant was within the band of reasonable responses.

9. The central issue which he had to resolve was the complaint that the Claimant made that on more than one occasion he had informed the two chairmen of some of the issues that were the subject of the gross misconduct charge. As to this, the judge ruled that what is called the attribution question in the hearing before me was that the governors did not know what the Claimant said he had told the chairmen and that as a matter of contract it was the Claimant's responsibility to inform the governors as a whole. The judge said this:

> **"2.15 I have been provided with a cash flow objection for 2000/2011 with monthly budget forecasts the effect of which has been substantially disputed in evidence. The Governors and in particular Mr Heard who carried out the discipline believed that on 10 January 2011 cash flow showed a £26,000 overspend at the end of the school year (August 2011) 28 days later on the 7th February the cash flow projection showed a £334,000 overspend with the figure increasing over the following weeks. The School was in a disastrous situation with the Bank threatening to close the School. It would appear that such conversations as the claimant had with Mr Marshall and Mr Meeson which in any way dealt with the claimant's concerns about the escalating expenditure were never reported to the full Board or to the Finance Committee as a whole. It is self-evident that if they had been that different decisions might have been made. An obvious example is that parents could have been called in to help and instead of paying decorators that they could have done some of the work themselves. What happened was that the Governors were deprived of the opportunity to make choices.**

> **8. I am satisfied that the respondent genuinely believed the claimant to be guilty of gross misconduct following a reasonable investigation in respect of which any lack of information or mitigation is largely the fault of the claimant himself and that the grounds set out in the reasons for dismissal were made out. There has been a dispute about whether report to Mr Marshall and Mr Meeson amounted to reporting to the Board. I cannot accept that with the claimant's knowledge of what had been going on that there was not a failure to communicate with the Board as a whole in breach of his contract. The claimant knew that Mr Marshall had gone off on a frolic of his own in relation to the expansion without any funding in place -- that Mr Marshall had a curious view of the accounting and appeared to be saying to the claimant that the expenditure could be concealed because it would not have to be reported to the Board as part of profit and loss calculations -- and the claimant said that the Board appeared to be ignorant of the precarious financial position. In those circumstances I cannot see how the claimant can suggest it was not his duty to report to the whole Board or at the very least the Finance Committee. The partial explanation that he was excluded from some meetings has not merit. The claimant could perfectly well have said that he needed to address the meeting -- suggest his report was taken first -- and then he could leave the meeting. I regard the information given the Headmaster in a different light. The Headmaster was responsible for recruitment and if the Headmaster tells the claimant that additional staffing costs are being funded by the additional pupils the claimant is entitled to believe that. The additional staff costs whilst not insignificant would at least have been covered in part and the claimant had no knowledge of the discounts the Headmaster was offering without the knowledge of the Finance Committee. This is very different from the ongoing horrendous expenditure which was very substantially increasing the overdraft.**
>
> **9. I now have to consider whether dismissal fell within the band of reasonable responses. I am quite satisfied that all trust and confidence had been lost. I would have lost all trust and confidence at the time of the Francis Clark letter. Nothing the claimant would have been able to say would have given me confidence that I could reply on any figures or forecasts he produced and maybe the decision should have been taken then. Given the claimant's responses during the investigation and the information the disciplinary panel and the appeal panel had including admissions which the claimant now says were not justified or misunderstood I find the claimant's position was totally untenable and that dismissal was within the band of reasonable responses. Not only is it within the band but I would consider it unlikely that any private company or public authority would have acted differently this."**

10. The judge was plainly concerned about the way in which this successful former banker greeted the finding, and offered what the judge described as some crumb of comfort, to which I will turn in due course, but it is not relevant to the principal finding.

<u>The Claimant's case</u>

11. The arguments on behalf of the Claimant put by Mr Watson relate to the attribution point: that the chairmen were told, and that the controlling mind of the governors is in the minds of the two chairmen. It is contended on authority that the controlling mind therefore knew of what the Claimant was telling the two chairmen and so the board as a whole did. The two chairmen were not put up as witnesses, so they could not be asked. Therefore, any criticism of the Claimant for being in breach of contract or acting in the way he did was mitigated by the fact, as he put it, that the chairman had known and in particular knew of the overdraft.

12. Secondly it is contended that there are two errors in that the judge records the Claimant as accepting that there was a £100,000 loss, and secondly that the figure given by the judge of inaccurate recording is wrong, in that where the judge says that the school was £87,000 better off than it through it was, the figure was only £15,000. The reason for dismissal has not been accurately recorded by the judge, and the judge failed to take account of those relevant factors which have been cited above.

The Respondent's case

13. On behalf of the Respondent it is contended that there are only two matters in the Judgment with which issue was taken, and that is to do with the £87,000 versus £15,000. The documents relied upon, relating to what is said to be a written account of the February 2011 situation, was not before the judge. In any event, the figures, whether they are £15,000 or £87,000 or whether they record a loss of £100,000 or something else, is, as Mr Maynard says, a red herring, since there was no finite figure which the school had lost, but did not say how much.

14. As to attribution, it is contended this is a matter of contract. The Claimant was required by his contract to report to the board and he did not do so. That is a simple solution, but if more were required, then the conduct in relation to this particular company indicated that reporting to the two chairmen was not sufficient discharge of the obligation. In any event, the contention that the board had actual knowledge is displaced by the finding cited at paragraph 2.15 in that the Claimant was aware that there was a gap between what was said and what was reported.

Legal principles and conclusions

15. I prefer the argument of Mr Maynard, whose elegant written skeleton was ably complemented by his succinct oral submissions, and I have had little difficulty in accepting the legal argument which he put on the basis of attribution. This school is, in form, a company limited by guarantee and it is a charity. The law on companies is summarised in the advice of Lord Hoffmann in the Privy Council in **Meridian Global Funds Management Asia Limited v Securities Commission** [1995] 2 AC 500, 507:

> **“"The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself;" as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company?**
>
> **One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, ie if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.”**

16. In his majority judgment in **Orr v Milton Keynes Council** [2011] ICR 704 Moore-Bick LJ cited this and set out the correct approach for unfair dismissal law.

> **57. A similar question arises in relation to s.98. Parliament clearly intended that Part X of the 1996 Act should apply to corporate employers as well as public bodies such as the council. The authorities to which I have referred establish that s.98 requires the tribunal when determining whether the dismissal is fair to consider whether the employer believed that the employee was guilty of conduct justifying dismissal and whether he had reasonable ground for holding that belief. Since belief involves a state of mind, it is necessary, as Lord Hoffmann said, to determine whose state of mind was *for this purpose* intended to count as the state of mind of the employing company or organisation.**
>
> **58. For reasons given earlier Parliament cannot have assumed that in a large organisation every allegation of misconduct or other grounds of dismissal against any employee would be investigated by the person or body that represents it at the highest level, who would himself then decide whether to exercise the power of dismissal. The very fact that in order to be reasonable a belief in the guilt of the employee must proceed on the basis of a reasonable**

> **investigation supports the conclusion that the employer may delegate that investigation and the subsequent decision on dismissal to a person within the organisation who has sufficient skill and experience to carry it out effectively, having regard to the nature of the allegations and the position of the employee against whom they are made. The answer to the question 'Whose knowledge .. or state of mind was *for this purpose* intended to count as the knowledge or state of mind of the employer?' will be 'The person who was deputed to carry out the employer's functions under s.98.'"**

17. A good deal of learning has gone into the submissions before me, based on the authorities on attribution: **Leonard's Carrying Co Limited v Asiatic Petroleum** [1915] AC 705 in the speech of Viscount Haldane LC in **HL Bolton (Engineering) Co Limited v TJ Graham & Sons Limited** [1957] 1QB 159, and **El Ajou v Dollar Holdings plc (no 1)** [1994] 2 All ER 683. However, all in one place and in an employment case, **Orr**, is the law relating to attribution of knowledge to a corporate body, starting with Lord Hoffmann's guidance in **Meridian**.

18. I accept Mr Maynard's submission that the first issue is to determine whether or not, in the constitution of the Respondent, there is a way of fixing knowledge of a particular matter on the board, when it is given to one of its number or to an officer. In my judgment, the contract of employment is the controlling document, and this document, to which the judge and I have been taken in detail, plainly sets out the personal responsibility of the Claimant to report to the governors. This is without exception. In other words, it is a direct responsibility, and under the contract the Claimant is himself entitled, indeed under a duty, to attend the board meetings and to give reports on the finances of the school. That is his personal responsibility and it is owed as a whole.

19. The first question is whether, in the constitution of the school, insofar as it is seen by the Claimant through his contract, entitled to hand over to the two chairmen the undertaking of the financial matters. There is nothing to detract from the primary responsibility imposed upon the

Claimant to report to the governors. In my judgment, this can be resolved by the application of the rules of attribution to the documentation in this case.

20. The Claimant himself accepts in his investigation interview that it is his responsibility to report to the board, for he told Mr Heard that financial accountability lies with the governors, and the bursar is accountable for telling the governors what the finances are. Such is conceded by Mr Watson in his written skeleton, where he says that the governors determine the general policy of the school.

21. So there is no need to reach any further. I accept Mr Maynard's analytic approach to Lord Hoffmann's speech, which is to indicate that there are two steps. If exhaustion of the first step, looking at the constitution, the documents, minutes, articles and so on, does not yield an answer, then one can look at the conduct. That is how Lord Hoffmann put it in respect of the particular legal body with which he was dealing. In my judgment, the result is the same by either route.

22. The first thing to note is that application of the attribution rule step 2, that is looking for special rules, was not accepted by the majority in the Court of Appeal, as Moore-Bick LJ's Judgment makes clear. He was dealing with application of the attribution rule to section 98(4) of the **Employment Rights Act 1996**, which deals with fairness for unfair dismissal. True it is that there was a division, but Moore-Bick LJ does make clear where he differs from Sedley LJ giving the minority judgment in that case. If I am wrong about my holding on step 1 and it is necessary to go into step 2, I would hold that the application of a distinct rule, following **Orr** is not necessary in this case, but even if it were the result would be the same. For if one asks what was the purpose for which knowledge is fastened upon the board, it is for the purpose of

determining whether or not, in the course of an investigation, in the **Orr** case, knowledge of one was attributable to another.

23. But we are in a proto-section 98(4) situation here. If Moore-Bick LJ was not prepared to extend the rule to unfair dismissal investigations, it seems to me that he would not have extended it either in respect of knowledge at an earlier stage than an investigation. Thus, by either route, in my view, it is not correct to attribute knowledge of the board of any communication between the Claimant and the two chairmen.

24. That disposes of it. But given the background cited by the judge about Mr Marshall going off on a frolic of his own and the Claimant appearing to know that matters were not being reported to the board, then as a matter of substance it cannot be said that there was attribution. Indeed, as soon as matters were reported to the board through Mr Heard, they took action. That seems to me to be a factual conclusion which could equally have been arrived at in this case.

25. The very sad fact is that this school was over-ambitious and over-extended itself. The governing body, who were entitled to make informed decisions and not to be deprived of that power, were unaware of what the problem was and were not able to control the position as early as they might. The headmaster resigned once he began the process of suggesting that the Claimant should be put through a capability procedure, but two days later the board started on the process that led ultimately to the disciplinary charges and to the dismissal letter. The prospect of a sixth form has diminished.

26. There is no error of law in the judge's judgment. I reject the contentions that such errors as have been identified by Mr Watson represent an overwhelming case of perversity by the standard set in **Yeboah v Crofton** [2002] EWCA Civ 794; [2002] IRLR 634 (CA). I also bear

in mind the difficulty that there is in all these misconduct cases in the professions, usually in the public sector. There are differences of opinion. See **Fuller v Brent** [2011] EWCA Civ 267 itself.

An observation

27. I indicated that Mr Recorder Luba QC had dealt with this case on the sift. What he said, as I canvassed with both counsel this morning, was this:

> **"To my mind the balance in favour of this going to full hearing was tipped by the rather extraordinary degree of subjectivity that emerges in the Judgment. The judge seems to offer a running commentary as to what he would have done and what he thinks could or should have happened."**

28. Neither counsel before me has criticised the judge on this basis, which is, essentially, what Mummery LJ described in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 as the "substitution mindset". That is, rather than reviewing the actions of the respondent, it might be said that the judge had looked at the matter from his own perspective. This legal construct conventionally applies only where the Employment Tribunal holds a dismissal to be unfair, substituting its judgment for that of the employer who dismissed the employee.

29. The first thing to note is that the role of an Employment Tribunal in a dismissal case has been most recently set out in **Davies v Sandwell Metropolitan Borough Council** [2013] EWCA 135 (CA), per Lewison LJ at paragraph 33, which is, as he put it, the view of an outsider into the law of unfair dismissal. See also the holding by Sir Stephen Sedley in **Turner v East Midlands Trains** [2013] 107:

> **71 For a good many years it has been a source of distress to unfair dismissal claimants that, with rare exceptions, they cannot recanvass the merits of their case before an employment tribunal. In spite of the requirement in s.98(4)(b) that the fairness of a dismissal is to be**

determined in accordance with equity and the substantial merits of the case, a tribunal which was once regarded as an industrial jury is today a forum of review, albeit not bound to the *Wednesbury* mast. Other claims – for example discrimination claims – based on the same or related facts, do attract a full merits hearing. But in relation to unfair dismissal the law is unequivocally what Lord Justice Elias has set out in paragraphs 16 to 22 above.

30. The point is that the duty of the Employment Tribunal is to review the decision-making of the employer on the material that was available or ought to have been available following the completion, in a conduct case, of the stages in **Burchell** [1978] IRLR 379 EAT, then to stand back and decide if the dismissal fell within the band of responses of a reasonable employer.

31. What no doubt attracted the attention of the Recorder in this case were the following passages of the judgment.

> **"2.13 In my view the governors would have been justified in dismissing the claimant at this stage for some other substantial reason, on the basis that all trust and confidence had been lost ... I found it quite astonishing that in the evidence the claimant was not prepared to accept the degree of fault ...**
>
> **9. I now have to consider whether dismissal fell within the band of reasonable responses. I am quite satisfied that all trust and confidence had been lost. I would have lost all trust and confidence at the time of the Francis Clark letter. Nothing the claimant would have been able to say would have given me confidence that I could reply on any figures or forecasts he produced and maybe the decision should have been taken then. … I find the claimant's position was totally untenable and that dismissal was within the band of reasonable responses. Not only is it within the band but I would consider it unlikely that any private company or public authority would have acted differently this."**

32. Having made the decision, the judge went on to offer what he described as some crumb of comfort to this highly experienced banker put into an environment which he was not able to cope with. He said this:

> **"If I had to advise the school with the information now available I would have advised the dismissal for some other substantial reason, namely that all trust and confidence had been lost and the claimant's position was untenable."**

33. This is the first appeal which I have heard, as a judge alone in this court, from a judge alone at the Employment Tribunal on a case of misconduct. This is because the **Employment**

Tribunals Act 1996 was changed in 2012 for this to happen. It seems to me that there is a danger, when a judge sits alone, in failing to recognise the importance of the task as set out by Lewison LJ, and Sir Stephen Sedley which is reviewing the material before the employer. The industrial jury has always seemed to me to be an inapt analogue and now Sir Stephen Sedley has consigned it to history. That is put beyond doubt by the introduction of the judge-alone jurisdiction. A specialist judge is not a jury.

34. Using the first person singular may lead the unwary to develop the substitution mindset. The law is the same, whether the hearing is being conducted by a judge alone or by a three-person Tribunal. The chemistry of the decision-making will obviously be different. Where three people from different experiences of industry and law come together, there is bound to be some give and take and some exchange of views about what falls within the band of reasonable responses of an employer in the circumstances. That is missing when there is a judge alone. The Employment Judge is carrying out a function which is common to single judges in other jurisdictions. Take, for example, judges of the Administrative Court, who are reviewing administrative action rather than making a decision on the substance. Missing out relevant factors in making decisions is a ground for appeal, so is perversity. It is not a misuse of language to describe the hearing of a case of unfair dismissal for misconduct as a judicial review of the employer's procedure and decision.

35. It remains to be seen whether the band of reasonable responses will be widened as a result of single judges deciding without the benefit of lay members' experience in industry. In this case, fortunately, both counsel have enabled me to make this decision without having to form a decisive view about the language used by the judge in reaching his decision. I have to say I agree with Mr Recorder Luba that this does indicate quite a high degree of subjectivity,

but nevertheless the judge did direct himself correctly on the **Burchell** test and ultimately applied the law to the facts as he had found them.