Appeal No. UKEAT/0323/12/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 December 2012

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MS V BRANNEY

MR B M WARMAN

MR C SIMMONDS — APPELLANT

MILFORD CLUB — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ROBERT CUMMING (of Counsel) Instructed by Harvey Camford LLP 3000 Cathedral Hill Guildford Surrey GU2 7YB
For the Respondent	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Employment Tribunal regarded the fact that the Claimant had been given a final warning as determinative of the question whether his dismissal for subsequent conduct was fair. Without the previous warning the dismissal would have been held unfair. Held: if the Employment Tribunal has cause on the facts to consider that a material previous disciplinary sanction may have been manifestly inappropriate they should hear evidence to determine whether it was. The Employment Tribunal did not do so in this case. Appeal allowed. Case remitted to determine this issue. **Co-operative Retail Services Ltd v Lucas** [1993] UKEAT/145/93, **Davies v Sandwell MBC** UKEAT/0416/10/DA and **Wincanton Group Plc v Mr Stone and Mr Gregory** UKEAT/0011/12 considered.

THE HONOURABLE MRS JUSTICE SLADE DBE

Introduction

1. Mr Simmonds appeals from the decision of an Employment Tribunal sent to the parties on 13 January 2012, which by majority dismissed his claim for unfair dismissal. The appeal turns on a single issue: whether the Employment Tribunal erred in failing to consider whether a final written warning, which was determinative of the majority's decision that the decision to dismiss was not unfair, was a sanction that was appropriately applied. We say "appropriately applied" because there is authority on the appropriate test to be used to approach scrutiny of the sanction in these circumstances.

2. We will refer to the parties by their titles before the Employment Tribunal as Claimant and Respondent.

The facts

3. The Claimant was employed from 2 September 2002 until his dismissal on 24 April 2011 as club steward of the Respondent, a private social club. His wife had previously been employed by the club but retired in May 2009.

4. The disciplinary rules applicable to the Claimant's employment gave non-exhaustive examples of the kind of offences that would normally lead to disciplinary action. The material paragraphs in the he disciplinary rules and procedures provide:

> **"3.2. In the case of serious offences or a repetition of earlier minor offences, the steward will be given a written warning setting out the precise nature of the offence, likely consequences of further offences and specifying if appropriate improvement required and over what period.**
>
> **3.3. In the case of a further repetition of earlier offences, if the steward still fails to improve or if the offence whilst falling short of gross misconduct is serious enough to warrant only one written warning, the steward will be given a final written warning setting out the precise nature of the offence containing a statement that any recurrence will lead to dismissal or whatever other penalty is considered appropriate and specifying, if appropriate, the improvement required and over what period."**

5. So far as the non-exhaustive examples of the sorts of offences that, if committed, will normally lead to disciplinary action, those that have the most bearing on the facts of this case are:

> **"7.2 Serious offences (written warning): negligence resulting in minor loss, failure to comply with a specific instruction.**
>
> **7.3 Gross misconduct (dismissal): negligence resulting in serious loss, damage or injury, assault or attempted assault, disregard of duties or of instructions relating to the employment, falsification of records or other acts of dishonesty."**

6. Included in the duties of the Claimant were those of banking the club's takings. In September 2010, the Claimant was given a final written warning following an incident in which he was going to the bank to deposit the club's takings. Not able to park in a nearby carpark, he put his car outside the bank, and the Claimant's wife went into the bank to deal with the money. The fact that the Claimant's wife had deposited the money came to light when a query was raised about the money given to the cashier. The Respondent was concerned about this incident as its insurance did not cover money that was in the custody of someone who was not one of its employees, and at this point the Claimant's wife was not its employee. The Tribunal found as a fact that there had been no written procedures in place and no relevant or adequate briefing or induction of the Claimant by his predecessor to warn him that money should only be handled by him.

7. The Claimant was invited to attend disciplinary proceedings with regard to his conduct in giving the money to his wife to bank. The result of those proceedings was that he was issued with a final written warning. He appealed from that sanction but his appeal was dismissed.

8. The incident for which he was dismissed arose from events on and after 4 January 2011. The Claimant was instructed to give each employee of the Respondent, and there were six of them, a Christmas bonus in the form of a bottle or bottles up to the value of £15. Instead, the Claimant gave each employee £15 in cash. The Respondent considered this to be a breach of the instruction he had been given. On 18 January 2011, the Claimant attended an investigatory meeting at which this incident and other matters regarding alleged breach of confidence were discussed. The Claimant admitted that he had given the bonus to the employees in cash.

9. Mr Clarke, the club secretary, wrote to the Claimant on 28 February 2011 informing him of the conclusion reached by the Respondent that the explanation that he gave of the way that he had dealt with the money was unsatisfactory. Also at that stage it was considered that his explanation in respect of the other matters was unsatisfactory and that, as the Claimant already had a final warning, dismissal was the appropriate sanction. The Claimant appealed from the decision but that appeal was not allowed.

The conclusions of the Employment Tribunal

10. The Employment Tribunal held that the Respondent had carried out a reasonable investigation into the bonus issue but not the breach of confidence issue, and that there were reasonable grounds for the Respondent to believe that the Claimant had not obeyed an instruction in respect of the bonus issue. They held at paragraph 32 of the judgment:

> **"Accordingly, the Burchell test is satisfied in respect of the bonus issue but not for the breach of confidence."**

11. The procedure adopted for the disciplinary proceedings was held by the Tribunal to be flawed but, in the circumstances, they held that it was not sufficiently serious to cause prejudice to the Claimant or affect the fairness of the outcome. The Employment Tribunal set out their

conclusion on the fairness of the dismissal in the following paragraphs which we refer to in full because they are at the heart of this appeal:

> **"34. Turning then to whether dismissal on notice was a reasonable penalty for the Respondent to apply in relation to the bonus issue, the Tribunal first considered the warning issued in September 2010 without which, of course, the Claimant would not have subsequently been dismissed.**
>
> **35. Ordinarily the Tribunal would not consider the circumstances behind the issue of an earlier warning. The argument to do so on these facts is that that earlier warning was given as Mr Clarke believed there had been a breach of procedures that had been explained to the Claimant by the previous steward and that the Claimant had been fully aware of his responsibilities in this regard. However the evidence and in particular cross examination at the Hearing showed that there had been no written procedures in place and no relevant or adequate briefing or induction of the Claimant by his predecessor.**
>
> **36. The majority view of the Tribunal is that it was reasonable for Mr Clarke to conclude in September 2010 that the Claimant must have known – whether he had been specifically told so or not – that it was wrong to ask his wife to bank the money, especially in light of his background as a publican. The minority view is that it was not reasonable because of the lack of express instruction/induction on the point and that therefore the final written warning should be disregarded in assessing the reasonableness of the subsequent dismissal. Logically then the dismissal would be held to be unfair as the bonus issue alone would not justify dismissal.**
>
> **37. The majority view however, having concluded that the final written warning can be taken into account, moves on to whether even with that warning on the record it was reasonable to dismiss for the bonus issue alone. Given that there was a clear and reasonable instruction which was breached by the Claimant it cannot be said that the decision to dismiss was out with the band of reasonable responses to the Claimant's conduct. Accordingly the dismissal was fair."**

It is clear from the first sentence of paragraph 34 that, without the warning in September 2010, the Claimant would not subsequently have been dismissed for the incident with regard to the bonus. As the Tribunal stated in paragraph 34, without the warning issued in September 2010, the Claimant would not subsequently have been dismissed.

12. The Tribunal then proceeded to consider the previous warning, and on this issue the Tribunal was divided. The majority view was reflected in paragraph 36 of the Tribunal's judgment. The basis for their conclusion that it was appropriate to take into account the previous warning was that they considered it was reasonable for the club secretary to conclude in September 2010 that the Claimant must have known, whether he had been specifically told so or not, that it was wrong to ask his wife to bank the money especially in the light of his background as a publican. The minority was of the view that it was not reasonable to take that

incident into account because of the lack of express instruction or induction given to the Claimant on the point. Therefore, the final written warning should be disregarded in assessing the reasonableness of the subsequent dismissal. The view of the majority prevailed and, accordingly the Employment Tribunal found that the Claimant had not established that he had been unfairly dismissed and his claim was dismissed.

The ground of appeal

13. Robert Cumming, counsel on behalf of the Claimant, advances one ground of appeal. He contends that the majority of the Employment Tribunal failed to apply the correct test as to whether the final warning should have been relied upon by the Tribunal to decide that the dismissal was fair. It was submitted that the approach of the majority, as evidenced by their reasoning in paragraph 36, was in error. He submitted that the correct test was that considered by Mummery P (as he then was) in the case of **Co-operative Retail Services Limited v Lucas** EAT/145/93 of 15 November 1993. The case turned on the fact that there had been a prior written warning. The Employment Appeal Tribunal held that the Employment Tribunal had not misdirected themselves when holding:

> **"... that we are satisfied that no reasonable employer would have imposed a final written warning on the applicant in the circumstances in which this particular employer did."**

and that, accordingly, the dismissal for a subsequent incident, which of itself did not warrant dismissal, was unfair.

14. Mr Cumming also relies on **Davies v Sandwell Metropolitan Borough Council** UKEAT/0416/10/DA of 13 January 2011, which referred to **Lucas** and also to **Stein v Associated Dairies Limited** [1982] IRLR 447 in concluding that the appropriate approach was indeed that outlined in **Lucas** but that close scrutiny was required before a disciplinary sanction

would be held manifestly inappropriate. Mr Cumming said that the proposition to be derived from these authorities, which was also followed in the very recent case of **Wincanton Group Plc v Stone and Anor** UKEAT/0011/2012, was that where a warning is material to the decision whether a related dismissal is fair, if the warning is inappropriate, the Employment Tribunal must consider the factual background against which it was given and then decide whether that warning was an appropriate response of a reasonable employer or a reasonable response of a reasonable employer. In this case, the Employment Tribunal considered whether the club secretary could form the view that he did of the conduct of the Claimant that gave rise to the warning but did not consider that warning against the employment procedures which the employer should have applied in considering the sanction to be given for the conduct found proved. It was submitted by Mr Cumming that this should have been undertaken by the Tribunal in order for them to determine whether the sanction applied was manifestly inappropriate. If it was manifestly inappropriate, the warning should have been disregarded and the Tribunal's assessment of the fairness of the dismissal would, therefore, have been different from that which they reached, and they would have reached the conclusion that the dismissal was unfair.

15. Mr Rees for the Respondent contends that the Employment Tribunal did not err in their approach. This was a decision on the facts, that the minority member was wrong to question the validity of the previous written warning. Mr Rees contended that the approach adopted by the Tribunal was consistent with that in **Stein**. There was no finding by the Employment Tribunal that the sanction of a written warning for the earlier incident was manifestly inappropriate. Therefore there was no error in the Tribunal's decision. Mr Rees accepted that there is nothing in the judgment of the Employment Tribunal to demonstrate that they considered whether the facts that they found proved and which gave rise to the final written

warning fell within the Respondent's written disciplinary procedure as conduct that would attract the penalty of a final written warning.

Discussion and conclusion

16. The Employment Tribunal would not have found the dismissal of the Claimant to be fair in the absence of the final written warning. Their approach to that warning was, therefore, very material to their decision. It is also apparent from the judgment that the Employment Tribunal did not consider whether the sanction of the final written warning was consistent with the disciplinary procedure under which the warning was given. In our judgment, that fact of itself should give rise to concern as to the appropriateness of the sanction applied. It can be seen from the disciplinary procedure that examples are given of conduct that attracts the different levels of sanction under the procedure. The procedure also indicates the approach to be taken to the sanction to be applied for certain types of conduct. If, in any case, a particular sanction is applied by an employer which is outside those to be applied for the conduct of which an employee is found to have committed, that may well give rise to a concern that the sanction applied is manifestly inappropriate. That is a fact-sensitive enquiry to be addressed by Tribunals on the evidence before them. However, the Tribunal in this case did not engage in such an enquiry.

17. Turning to the authorities, in **Lucas**, Mummery P (as he then was) considered whether the self-direction given by the Employment Tribunal whose decision was being appealed was made in error in its approach to the imposition of a final written warning. He referred to the case of **Stein v Associated Dairies**, and observed:

> **"There are two passages of application generally to the case in which a Tribunal is required to consider the circumstances in which a final warning has been given by an employer. Two points were made clear in Lord McDonald's judgment in the Stein case. The first was that, as a general rule, it is not the function of an Industrial Tribunal to sit in judgment upon the matter whether a final warning should have been given or not ... There is, however, an**

important qualification to that general rule. The Tribunal is entitled to satisfy itself that final warning was issued in good faith and that there were prima facie grounds for following the procedure of a final warning. That appears from paragraph 6 of the Stein case [1982] IRLR 447. There is an important passage in paragraph 8 where Lord McDonald said:

> **'Certainly, if there was anything to suggest that the warning had been issued for an oblique motive or if it was manifestly inappropriate, that is a matter which a Tribunal could take into account.'**

If a Tribunal is entitled to take into account the matter whether a final warning has been given in "manifestly inappropriate" circumstances or without prima facie grounds, the Tribunal must consider the factual background to and the circumstances in which the final warning was given including the employer's own procedures for the issuing of oral warnings, written warnings and final warnings."

The Employment Appeal Tribunal also held:

"The Tribunal was entitled to look into the facts in order to see whether there were prima facie grounds for issuing it [that is the warning] **and whether the issuing of it was or was not a manifestly inappropriate way of responding to Ms Lucas' conduct as related by Mr Moore to the Tribunal."**

18. **Lucas** has been referred to and relied upon in subsequent cases in the Employment Appeal Tribunal, most recently in the **Wincanton** case but also in the case of **Davies**. In that case, the Employment Appeal Tribunal considered the effect of previous disciplinary action on the fairness of a dismissal. At paragraph 28, the Employment Appeal Tribunal considered and set out the contention of counsel:

"He says that it would be contrary to policy and inconsistent with the decision in Stein and Tower Hamlets for the validity of a final warning to be subject to the same test and, therefore, the same potential level of scrutiny as the decision to dismiss. In our judgment, he is correct in his concern. He is also correct in the way he reads the decisions in Stein and Tower Hamlets.

29. The test required by Stein to be satisfied before it would be appropriate for an Employment Tribunal to look behind a final warning is deliberately couched in more exacting terms than the test for unfairness in respect of a dismissal provided the final warning has been issued in good faith and there are prima facie grounds for it or, to put it another way, provided the warning has not been issued for an oblique motive or has not been manifestly inappropriately issued, the employer and the Employment Tribunal is entitled to regard the final warning as valid for the purposes of any dismissal arising from subsequent misconduct provided that the subsequent misconduct is such that, when taken together with the final warning, the dismissal or the decision to dismiss is a reasonable one."

19. In the most recent case of **Wincanton** the Employment Appeal Tribunal gave guidance in paragraph 37 to Employment Tribunals on the approach to be adopted where the Employment Tribunal is not satisfied that the warning was issued for an oblique motive or was manifestly

inappropriate. We have referred to that paragraph for completeness but, in this case, the challenge to the decision of the Tribunal is their failure to consider whether the final warning given was manifestly inappropriate.

20. Although Mummery P in the Employment Appeal Tribunal in **Lucas** did not expressly lay down a two-stage test to be adopted when there are circumstances that give rise to concern about the appropriateness of a disciplinary sanction, in our judgment it is only where on the facts there is a real concern that a sanction may have been manifestly inappropriate that it will be necessary for an Employment Tribunal to engage in a factual inquiry and detailed scrutiny of the circumstances in which that sanction was applied. In this regard, we endorse the approach of the Employment Appeal Tribunal in the **Davies** case that a high level of scrutiny is required in these circumstances and that "manifestly inappropriate" is a higher threshold than the test of that which is applied to test the reasonableness of a dismissal.

21. Without wishing to overcomplicate the approach to the scrutiny of a disciplinary sanction that is questioned, in our judgment on the authorities, if an Employment Tribunal has cause on the facts to consider that a material previous disciplinary sanction may have been manifestly inappropriate, it should hear evidence and decide on the relevant facts whether the sanction applied was manifestly inappropriate. In this case, the Employment Tribunal did not do so, and the appeal is allowed.

22. We have canvassed with counsel the steps to be taken in light of that conclusion, and we remit the case to the same Employment Tribunal, if practicable, to determine whether the sanction applied of the final written warning, which was determinative of their decision that the dismissal was a fair dismissal, was one that was manifestly inappropriate and consider the

decision on the fairness or otherwise of the dismissal having regard to and in accordance with their conclusion on that limited question.