Appeal No. UKEAT/0307/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 November 2012
Judgment handed down on 6 February 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR P SMITH

MR T STANWORTH

MONTRACON LTD — APPELLANT

MR E F HARDCASTLE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW SMITH (of Counsel) Instructed by: EEF Ltd Legal Services Broadway House Tothill Street London SW1H 9NQ
For the Respondent	MISS LENA AMERTEY (of Counsel) Instructed by: Minster Law Alexander House Hospital Fields Road York North Yorkshire TO10 4DZ

SUMMARY

UNFAIR DISMISSAL- Contributory fault

ET held; 60 percent contribution to compensatory award; nil contribution to basic award.

Latter finding set aside; 30 percent deduction substituted.

HIS HONOUR JUDGE PETER CLARK

1. The issue in this appeal, brought by the Respondent before the Hull Employment Tribunal, Montracon Ltd, is whether the majority of the ET (EJ Forrest and Mr McNesty), having found that the Claimant, Mr Hardcastle, was unfairly dismissed from his employment with the Respondent as an HGV driver, and that by his conduct he contributed to his dismissal to the extent of 60 percent for the purposes of s123(6) **Employment Rights Act** 1996 and reduced his compensatory award accordingly, was wrong to hold that it was not just and equitable to reduce his basic award at all under s122(2). The minority member, Miss Fisher, would have found the dismissal fair; alternatively, she would have reduced both the compensatory and basic awards by 100 percent. The ET's Judgment is dated 8 February 2012. Written reasons were provided on 12 March 2012.

The facts

2. The Claimant commenced employment with the Respondent as an HGV driver on 16 July 1990. By the time of the relevant incident which took place on 15 July 2010 he was an experienced driver, with a good record and was generally well regarded.

3. On that day he was instructed to take a trailer on a 60 mile journey. The trailer was unusually high, marked at 4.75 metres. The Claimant took note of that measurement before leaving the Respondent's depot. His destination was a sub-contractor's yard in Sheffield. He had made that journey a number of times in the past. Immediately before the yard was a bridge. That bridge was 4.6 metres high, a fact advertised on warning signs on the approach to the bridge. The Claimant approached the bridge slowly, concentrating on a left turn immediately afterwards into the yard. Unfortunately, he forgot the height on the trailer and collided with the

bridge, causing some £2,500 worth of damage to the trailer, which the Respondent later repaired in house.

4. Disciplinary proceedings followed. At a disciplinary hearing he was found guilty of gross misconduct, reckless damage of company property and summarily dismissed. The Claimant appealed internally against his dismissal, pointing to his 20 years' unblemished service. The appeal was dismissed.

The Employment Tribunal decision

5. Whilst unanimously accepting that the reason for dismissal related to the Respondent's conduct the majority found the dismissal to be unfair applying s98(4) **Employment Rights Act** 1996. Although the tribunal found that any procedural defect at the disciplinary stage was cured on appeal and that the 3-fold **Burchell** test was satisfied, the majority held that dismissal fell outside the range of reasonable responses open to the employer because (a) the Respondent applied an impermissible tariff-based approach; dismissal must follow a driver hitting a bridge and (b) proper account was not taken of his 20 year unblemished driving record with no previous accidents.

6. On the question of contribution the majority found, for the purposes of s123(6) **Employment Rights Act** (compensatory award) the Claimant's conduct in forgetting the height of the trailer when approaching the bridge was clearly culpable and seriously culpable. The dismissal was to a large extent caused or contributed to by the Claimant's actions within s123(6). The majority assessed the level of the Claimant's contribution to his dismissal at 60 percent. The compensatory award fell to be reduced accordingly (there was no '**Polkey**' deduction made under s123(1)).

7. As to the basic award, governed by s122(2) **Employment Rights Act**, the majority said this at para 33 of the reasons;

> **"However, this is one of those exceptional cases where the majority of the Tribunal would make a distinction between a deduction for the compensatory award, and a deduction for the basic award. We have referred above to Mr Hardcastle's long record of unblemished service with the Respondent. We have found that a reasonable employer would give that factor significant weight as a mitigating factor and, in combination with the other mitigating factors, it would mean that no reasonable employer could dismiss Mr Hardcastle for the offence. We find, applying the different test in section 122(2) for a reduction to basic award that it would not be just and equitable to reduce Mr Hardcastle's basic award by any amount in this particular case. The basic award is an award made in recognition of the employees long service; in our view, it would not be just of equitable to deprive Mr Hardcastle of the accrued rights he had built up in his job over the years by the single act, culpable though it was. We therefore make no reduction to the basic award."**

The statutory provisions

(a) Compensatory award

8. S123(6) **Employment Rights Act** provides;

> **"Where the Tribunal finds that the dismissal was to any extent contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

(b) Basic award

9. S122(2) **Employment Rights Act** provides;

> **"Where the Tribunal considers that any conduct of the complainant before the dismissal […] was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."**

Interpretation

10. Those two statutory provisions have been the subject of extensive judicial consideration; we are grateful to both counsel for drawing our attention to the relevant authorities, which we have carefully considered.

11. It is now well-established that different percentage assessments may be appropriate to the effect of the employee's conduct (synonymous with 'action' in s123(6) in reducing the compensatory and basic awards; see, for example, **Optikinetics Ltd v Whooley** (1999) ICR

984; **Compass Group v Baldwin** (UKEAT/0447/05/DM, 5 January 2006)), applying the Court of Appeal approach in **Rao v CAA** (1994) ICR 495.

12. The question under both provisions is whether any and if so what reduction ought to be made in respect of the Claimant's conduct.

13. The Tribunal is not concerned with the Respondent employer's conduct, nor that of other employees; see particularly **Parker Foundry Ltd v Slack** (1992) IRLR 11, paras 18-24, per Woolf LJ.

14. Of particular relevance to the present appeal is the question as to what factors a Tribunal may permissibly take into account when deciding what is just and equitable for the purposes of s122(2). In **Optikinetics** we referred to the Tribunal's wide discretion (990A); in **Baldwin** HHJ McMullen QC stated (para 32);

> **"We cannot see any limit on what may be taken into account in justice and equity in refusing to award a deduction'**[from the basic award].

15. Mr Smith submitted that the Employment Appeal Tribunal in **Baldwin** was wrong to say, at para 31, that **Parker** does not give any illumination of the issues which may be taken into account in the exercise of the (s122(2)) discretion, other than that it is the conduct of the Claimant which must be considered and not that of other employees. We disagree. Having considered the Judgments in **Parker** we can see no error in the EAT's analysis of that case in **Baldwin**.

The appeal

16. Mr Smith argued that, in making a nil reduction to the basic award the ET impermissibly took into account an irrelevant factor, namely the Claimant's unblemished long service with the

Respondent. We do not accept that that was an irrelevant factor, it was a matter which the majority was entitled to take into account when assessing his overall conduct in deciding whether of not to reduce the basic award under s122(2).

17. However, we think that Mr Smith is on stronger ground in submitting that the ET appear to have taken into account the employer's action in unfairly dismissing the Claimant. That is not a relevant factor in the assessment of the Claimant's contribution.

18. More significantly, in our view, is the proposition that, in making a nil reduction to the basic award, the majority has failed to attach any weight to the Claimant's own conduct, 'culpable though it was' (para 33).

19. It is at this point in the analysis that in our judgment the majority fell into error. Given the majority's findings as to the Claimant's level of culpability no reasonable Tribunal, properly directing itself, could conclude that a nil deduction was appropriate. That is the ground on which we feel obliged to interfere with the majority's finding at para 33.

20. All necessary primary findings of fact having been made we are in a position to substitute a finding that it is just and equitable (as between the parties) to reduce the basic award on the grounds of the Claimant's conduct in driving into the bridge. Consistent with the majority findings, balancing that conduct against his long unblemished service, we have concluded that the proper deduction from the basic award is 30 percent, reflecting a difference between the unchallenged deduction from the compensatory award under s123(6) of 60 percent and what is just and equitable under s122(2).

Disposal

21. It follows that this appeal is allowed to the extent that the basic award is reduced by 30 percent.