Appeal Nos. UKEAT/0481/12/DM
UKEAT/0482/12/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 May 2013

Before

THE HONOURABLE MR JUSTICE MITTING

MRS L S TINSLEY

MR B M WARMAN

CENTREWEST LONDON BUSES LTD — APPELLANT

MR V A SPENCER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR COLIN McDEVITT (of Counsel) Instructed by: Moorhead James LLP Kildare House 3 Dorset Rise London EC4Y 8EN
For the Respondent	MS OLIVIA-FAITH DOBBIE (of Counsel) Instructed by: Employment Law Practitioners 17 Hanover Square London W1S 1HU

SUMMARY

UNFAIR DISMISSAL

Misapplication by the Tribunal on the law of theft – central to its decision – impossible to determine what answer should have been if law correctly analysed – remit for rehearing by new Tribunal.

THE HONOURABLE MR JUSTICE MITTING

1. The Claimant was employed as a vehicle engineer at the employer's Westbourne Park depot. That was a depot from which buses operated. He had been so employed since 1989. He was a man of an exemplary disciplinary record.

2. The employers had in place a policy of summary dismissal for gross misconduct which included theft. The policy allowed for "other serious punitive action" short of dismissal. An incident occurred on 6 July 2011. The Claimant did not tell the whole truth about it at the time, but ultimately the facts were not in dispute, and they were as follows.

3. He went into an office used by vehicle controllers and from the back of the door to the office took a rucksack hanging on it. The rucksack belonged to a member of staff, a controller. The Claimant carried the rucksack on his shoulder openly and past his supervisor and took it and put it on the top of a locker in his own workshop and restroom. The owner of the rucksack reported its loss. It was found where the Claimant had left it. He never denied taking it but initially lied about where he had found it. He said to his supervisor that he had taken it from a wall outside the office, suggesting that he may have believed that it had been abandoned.

4. Because of the potential seriousness of the allegation, the Claimant was suspended. A suspension review hearing took place on 11 July at which the Claimant admitted that he had lied about where he had found the bag. His suspension was continued.

5. On 14 July he met his direct line manager and told him that he had no intention of stealing and knew that he had let himself down. A disciplinary hearing took place on 20 July conducted by Mr Bull. He told Mr Bull that he had a habit or impulse to pick up what he described as "detritus", including on occasions bags. He said he had been watching this bag for some time and had concluded that it was abandoned. He took it because he was curious and excited about what was inside it but did not intend to steal. He said he knew the difference between right and wrong, but he said he did not take the bag to lost property because he did not think it was lost property; he thought it was abandoned. He explained why he had lied in the first instance about where he had found the bag: he did not want to admit what he had done.

6. Mr Bull's decision was to dismiss the Claimant for theft and for committing a serious breach of trust of which the principal element was the theft but the second element was the lie. The Claimant appealed to Mr Cheema. He made his appeal on 27 July. The hearing took place, however, somewhat later, on 10 October 2011. At that time Mr Cheema had, as Mr Bull did not, a medical report from Dr Sutton, a clinical psychiatrist, dated 26 September 2011.

7. In her report, Dr Sutton described the Claimant as a vulnerable man with longstanding difficulties as a result of low self-esteem, depression and difficulties with his personality. She described that he had difficulty making relationships and said that professionals who had been caring for him had become concerned about the level of his depression. She set out in some detail the habit which he described to her of picking things up that he considered to have been left behind by others. The things which he described were things salvaged from other people's rubbish and unclaimed lost property which he took home and made use of for his own purposes.

8. She says that she understood that when he had found things of value in the past he had either left those things where they were or handed them in to lost property. When she turned to the incident for which he had been dismissed, she records him as saying that he understood that he had taken something that did not belong to him and afterwards had tried to cover up his action by saying that he had found the item in question on the floor outside rather than hanging on the back of an office door. He said he had done that out of panic when under pressure but told the truth as soon as he realised the bag that he had taken had belonged to a colleague.

9. She went on to state that she understood that he had been unaware of what she described as "the function of his behaviour previously", and when he was challenged by his colleague, he was confronted with feelings of humiliation "at his perceived social inadequacy as well as the realisation that he had done something wrong". As soon as he had had a chance to reflect he told the truth about his actions.

10. In a sentence upon which the Tribunal placed reliance, she observed in her concluding paragraph:

> **"Having known Mr Spencer for the past year and having an understanding of his psychological functioning, it is my professional opinion that Mr Spencer took the item in question from a position of curiosity and that he had no intention of stealing anything of value from his colleague."**

11. Mr Cheema concluded that there was no evidence either in the medical records kept at the depot or in Dr Sutton's report that theft was a function of any mental abnormality. He decided that there no mitigating factors and that Mr Bull's decision should be upheld.

12. The Tribunal gave itself a conventional self-direction about the approach to be adopted, which is impeccable, and concluded that the decision to dismiss was unfair. They did not however find that the employers, Mr Bull and Mr Cheema, did not believe that the Claimant had stolen the rucksack and set out in paragraph 27 the cogent reasons which Mr Bull had for believing that he was guilty of theft:

> **"(a) the rucksack that the claimant took was not as obviously a piece of detritus as, for example, a biro pen, an orange or a pair of old glasses […];**
>
> **(b) the rucksack was not on the floor but behind a door on a hook;**
>
> **(c) the Claimant had lied about where he had found the rucksack; and**
>
> **(d) the Claimant had been watching the rucksack and therefore the theft was premeditated, although, the Claimant explained this by saying that he had been watching it in order to decide whether it was abandoned and having watched it for some time then decided that it must be."**

13. Having set out Mr Bull's reason for believing that the Claimant was guilty of theft, they then went on to identify a particular factor which he had failed to take into account which was repeated and emphasised at every stage of their analysis of the decision-making process:

> **"However, we are concerned that, although invited to do so, Mr Bull did not engage in a consideration of the difference between, or potential difference between, intentional and unintentional theft. The Claimant did explicitly say to Mr Bull that the taking of the bag was not intentional and Mr Bull seems to have been unable to engage in a consideration of whether that made a difference to his decision that he was faced with was a theft and a serious breach of trust."**

14. When considering the decision of Mr Cheema to reject the appeal they noted his conclusion that there was no evidence to support that intentional theft is an acceptable side effect of mental health but said (paragraph 31):

> **"Again Mr Cheema has failed to engage in a consideration of whether what the claimant did was intentional and he seems to have come to the conclusion that the theft was intentional without taking into account the doctor's professional opinion** [a reference to Dr Sutton's final paragraph]**."**

15. When they came to give their reasons for holding the dismissal to have been unfair, they observed as follows (paragraph 42):

> **"It is trite to say that if you steal 2p, 20p or £2 or £20 or £200 it is still theft, and we agree that normally that would result in a decision to dismiss. But in this case Mr Bull had an additional issue to consider which he was unable to do, and that was whether or not the theft was intentional or unintentional. In other words was it a theft at all or was it a taking of the bag in unusual, possibly unique, circumstances? He might have needed some medical evidence, he might have simply needed to take more time to think about this concept so that he could deal with both the medical situation and the issue of intentional v unintentional in his decision."**

16. They then went on to identify the facts which might have suggested that there could have been a theft and those which suggested that there might not have been. The Tribunal went onto conclude that Mr Cheema's finding in dismissing the appeal was perverse because it had ignored the final paragraph from Dr Sutton's report.

17. It went onto consider the submission that **Polkey v A E Dayton Services** [1987] IRLR 503 required it to find that if a fair procedure had been followed the Claimant could nonetheless have been fairly dismissed or that in any event a substantial contribution would have been made by him to his dismissal. The Tribunal again emphasised the issue of intentionality or otherwise by referring again to Dr Sutton's conclusion:

> **"She was the person most qualified to decide whether there was intentionality or not and her professional opinion would have carried considerable weight."**

18. Thus the common thread in its reasoning was the view of the Tribunal that Mr Bull and Mr Cheema should have had in mind the distinction between intentional and unintentional theft, and that because they did not do so their decisions were flawed. Mr McDevitt, who appeared below from the employers and represents them again today, and Ms Dobbie have struggled

valiantly to attempt to explain what the Tribunal meant by drawing attention to the distinction between "intentional and unintentional theft".

19. Mr McDevitt has suggested that it might have been a mis-stated approach to the issue of dishonesty. We are unable to accept that submission, because in paragraph 27 of the decision to which we have referred, the Tribunal set out clearly the reasons for believing that the Claimant was guilty of dishonest appropriation of the bag. It was not an obvious piece of detritus. It was not on the floor but behind a door. The Claimant had lied about and he had been watching it, so that when the Tribunal went on to say, "Mr Bull did not engage in a consideration of the difference between or potential difference between intentional and unintentional theft", no sense can be made of that sentence if the words "dishonest" or "honest" appropriation are inserted.

20. We are simply at a loss to understand what the Tribunal meant by their analysis. The law of theft is set out in section 1 of the **Theft Act 1968**. It is well known. It applies in the employment context as it does in the criminal law and in the remainder of ordinary life. Theft is the dishonest appropriation of property belonging to another with the intention of permanently depriving that person of the property. If authority is required for the obvious proposition that the statutory definition of theft applies in the employment context, it is to be found in the judgment of this Tribunal in **John Lewis PLC v Coyne** [2001] IRLR 139 at 27 in which Bell J analysed the approach of the criminal law to the element of dishonesty set out in **R v Ghosh** [1982] QB 1053 in precisely the terms spelt out by Lord Lane, Lord Chief Justice.

21. The Tribunal have, in other words, condemned the employers for failing to take into account a distinction which does not exist in law because that is the principal reason which they give for reaching their conclusions about the decisions of Mr Bull and Mr Cheema. Their decision cannot stand unless we were to be persuaded that a Tribunal approaching this matter properly would inevitably have come to the same conclusion as this Tribunal. We are unable to reach that conclusion.

22. What a Tribunal had to do on this somewhat unusual case was to determine first, as this Tribunal correctly did, what the reason for dismissal was, conduct, and the employer's belief that the Claimant had stolen a colleague's rucksack; secondly, whether or not that belief was reasonable; and thirdly, whether or not the decision to dismiss was within the band of sanctions reasonably open to the employers.

23. It is plain that this Tribunal thought that whatever the Claimant had done, given his long record of impeccable service, the sanction of dismissal was not a reasonable one. That is a conclusion that would on a proper analysis of what occurred have been open to the Tribunal although it would have had to have approached it with care given the case law-established test of requiring that a decision to dismiss was with the band of sanctions reasonably open to the employers.

24. We cannot say on the material that we have considered including and principally the factual findings of the Tribunal that that is a conclusion which a Tribunal would or would not be bound to reach. This is a case which requires a careful analysis of the facts, principally of the employer's responses to the facts as they found them to be.

25. Against an accurate understanding of the law of theft, it is, we regret to say, necessary that that exercise should be performed by a freshly constituted Tribunal from the start. Accordingly, and for the reasons that we have given, we allow this appeal. We remit the matter to be determined afresh by a new Tribunal. In those circumstances it is unnecessary for us to reach any conclusion about the employer's second appeal against remedy.