Appeal No. UKEAT/0054/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 July 2014

Before

MR RECORDER LUBA QC

(SITTING ALONE)

MR S OKHIRIA — APPELLANT

ROYAL MAIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NABILA MALICK (of Counsel) Instructed by: Obadiah Rose Solicitors Success House 417 Old Kent Road London SE1 5EQ
For the Respondent	MR STEVE PEACOCK (Solicitor) Weightmans LLP 100 Old Hall Street Liverpool L3 9QJ

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Postal worker dismissed for misconduct (dishonesty). Claim of unfair dismissal unsuccessful. The Tribunal was satisfied that there had been a fair investigation by the employer, founding a genuine belief in the dishonesty alleged, and that the disciplinary and internal appeals processes had been fairly conducted.

The Grounds of Appeal asserted that the Tribunal's conclusions were 'perverse'. Neither ground came anywhere close to establishing any such error.

Claimant's appeal dismissed.

MR RECORDER LUBA QC

Introduction

1. This is an appeal in an unfair dismissal claim. Mr Okhiria, the Claimant, worked for the Royal Mail, the Respondent, in relation to the delivery of mail to addresses in the SE26 postcode area of South London. The Claimant was one of a number of staff made subject of a joint investigation by the Respondent, together with the United Kingdom Border Agency and the police. The investigation concerned suspected criminal activity relating, among other matters, to the ordering of mobile telephones and the interception of them, when sent by post through the Royal Mail. In the course of the investigation, the Claimant was arrested. A large quantity of mobile telephones was found at his home address. He was immediately suspended on full pay and, after a disciplinary hearing, he was dismissed for gross misconduct. An appeal against that dismissal was rejected by the Respondent under its internal appeals procedure. In due course, the Claimant was made the subject of a criminal prosecution, but those criminal proceedings did not come to trial until well after his dismissal. I am informed, through his Counsel, that he was subsequently acquitted in the criminal proceedings.

2. The Claimant presented a claim of unfair dismissal to the Employment Tribunal Service. The claim was considered by Employment Judge Freer, sitting at the London (South) Employment Tribunal on 11 February 2013, which was a date well before the criminal trial took place. Having heard and read the evidence presented by both sides, the Employment Judge reserved Judgment. In due course, for Written Reasons sent to the parties on 13 May 2013, the Employment Judge dismissed the claim.

3. The Claimant now appeals from the rejection of his unfair dismissal claim. Following a hearing conducted under Rule 3(10) of the **Employment Appeal Tribunal Rules**, Cox J permitted this appeal to go forward for a Full Hearing. Paragraph 1 of her order provides that:

> **"The Appellant's application pursuant to Rule 3(10) is allowed upon permission being granted to amend the Notice of Appeal on grounds 1 & 2 only as identified in counsel's skeleton argument dated the 15th day of January 2014. All other grounds are dismissed."**

4. As that extract from the order of Cox J makes clear, the appeal should properly only have proceeded on the basis of the content of the Skeleton Argument dated 15 January 2014. When the case was called on, that Skeleton Argument was not among the papers in the appeal bundle for the hearing. It was not separately provided to me. Counsel for the Claimant, Ms Malick, explained that there had been a misunderstanding and a mistake in recording the terms of paragraph 1 of Cox J's order. Properly understood, submitted Ms Malick, the amended grounds of appeal numbered 1 and 2 were to be understood to be those contained in a document headed "Notice of Dissatisfaction and Amended Grounds of Appeal", received by the Employment Appeal Tribunal on 12 December 2013.

5. In the light of that submission from Ms Malick, it is extraordinary that neither she nor her instructing solicitors caused any application to be made to Cox J to amend or vary paragraph 1 of her order pursuant either to the slip rule or pursuant to the general power given by paragraph 9 of her order (by which the parties were given liberty to apply to vary the orders made).

6. However, Mr Peacock, appearing for the Respondent, accepted that the position was as Ms Malick had recounted it. That is to say that he too understood the two grounds of appeal said to constitute the amended grounds as being those contained in the document to which I

have referred and not any material in the Skeleton Argument of 15 January 2014. In those circumstances, it is my first task to make an order varying paragraph 1 of the order of Cox J so as to provide that the Appellant has permission to appeal on the amended grounds of appeal numbered 1 and 2, shown in the document received by the Employment Appeal Tribunal on 13 December 2013.

7. That matter having been clarified, Ms Malick began to present the appeal by reliance on her more recent Skeleton Argument, dated 23 June 2014. The first submissions made in that Skeleton Argument, at paragraphs 31-33, are in support of a proposition that does not emerge from either of the two amended grounds of appeal. That is to say, it outlines a contention that the Employment Judge fell into error by failing to stay the Employment Tribunal proceedings, and instead proceeding with the hearing on 11 February 2013, notwithstanding the impending criminal trial.

8. I invited Ms Malick, in those circumstances, to indicate whether she wished to put forward Re-Amended Grounds of Appeal, including that new ground. In the event, she decided not to proceed in that way. Had she formulated such an amended ground, it would have been necessary for her to satisfy me that the Employment Judge had been invited to stay or adjourn the proceedings before him and, at least on the materials presently before me, I cannot see anything to that effect. Be that as it may, the application to re-amend the Grounds of Appeal was not pursued.

The Tribunal's Judgment

9. As will shortly appear, the two grounds of appeal put in issue the Tribunal's conclusions that, in this particular case, the employer's investigation and its disciplinary processes were each within the range open to a reasonable employer: that is to say that the dismissal for gross misconduct had been made fairly, having regard to the provisions of section 98(4) of the **Employment Rights Act 1996**. That being the gravamen of the Grounds of Appeal, it is sensible to put them into context by looking at the Tribunal's Written Reasons in relation to the adequacy of the investigation and the fairness or otherwise of the procedure.

10. The findings of fact made by the Employment Judge at paragraph 20 and following of the Written Reasons set out the following account. First, as I have already indicated, a joint criminal investigation was put under way by the Respondent, the UKBA, and the police. As part of that, the Claimant was interviewed on 22 June 2011 at a police station by those conducting the criminal investigation. The next step, as far as the Respondent employer was concerned, was that the Claimant was suspended on full pay and then invited to a formal conduct interview, otherwise called a disciplinary hearing, which was conducted by a Mr Hunt of the Respondent on 28 September 2011: a little over three months after the meeting at the police station.

11. In the formal conduct interview, the Claimant put forward the names of two staff members who he believed had set him up for dismissal in order to punish him for having crossed a picket line in an industrial dispute.

12. In the dismissal letter issued following the meeting, Mr Hunt outlined the reason for dismissal, that is to say 'dishonesty', and he also wrote this:

> **"In your defence you named two individuals who you believed were out to get you and were behind this. I have established the names put forward had no connection with the Security Team investigations.**
>
> **As a result of your dishonesty, I have lost confidence in your ability to provide a professional and reliable service to our customers."**

13. The Employment Judge found that the appeal against the decision to dismiss was dealt with a Mrs or Ms Walsh of the Respondent. She was the Appeals Casework Manager. She conducted a hearing with the Claimant in November 2011, after which date she made extensive further enquiries. Those enquiries included interviews with a Mr Cubitt, the Respondent's Security Manager, Mr Sanderson, the Delivery Manager and three further members of staff.

14. Ms Malick took me to material indicating that her modus operandi was to outline the general background to these other persons and then put to them specific matters that the Claimant had raised in the appeal hearing. Her practice was then to record their responses in the form of statements. This process necessarily generated further investigation documents including the accounts given by the persons interviewed. All these documents were sent to the Claimant for comment, but they were not received by him, having been misdirected to the wrong postal address and, although sent by recorded delivery, having been signed for at that other address.

15. In due course, Ms Walsh, the Appeals Officer, produced a 15-page investigation report. It dealt with matters at length, but it recorded that one of the grounds of appeal had been that the Claimant was the victim of a conspiracy by others who disliked him because he had been working during industrial action. In short, on that point, Ms Walsh concluded that she found:

> **"...no evidence of conspiracy as this whole matter came to light because the security team noted the high number of losses in the office and found that they occurred on the claimant's duty when he was the delivery officer."**

16. In sum, therefore, the appeal failed and in January 2012 Ms Walsh confirmed the dismissal decision.

17. That, then, was the factual background as found by the Employment Judge. Before him, the Claimant was represented by his solicitor and he gave his own evidence. The Employment Tribunal also heard the evidence of Mr Hunt and of Ms Walsh. I assume that in addition to their oral evidence the Employment Judge had access to their witness statements. Those materials are not before me.

18. On the issue of whether there had been a reasonable or adequate investigation and whether the procedures followed by the employer had been fair, the Employment Judge reached a number of clear findings. Before doing so, he had set out in paragraph 10 of the Written Reasons, verbatim, the provisions of section 98(4) and he had reminded himself of the important dicta contained in the case of **A v B** [2003] IRLR 405 as to the requirement of a careful investigation where there were serious allegations of criminal misbehaviour. That dicta, as the Employment Judge himself noted, was approved by the Court of Appeal in **Salford Royal NHS Foundation Trust v Roldan** [2010] ICR 1457.

19. Armed with the statutory test and the relevant authorities, the Employment Judge was able to reach what, in the event, were clear conclusions. At paragraph 64 he says as follows:

> **"The Tribunal also concludes on balance that the Respondent's investigation fell within the range of reasonable responses."**

20. Looking at the whole of the investigatory and disciplinary process, in the light of the criticisms made of it by the Claimant and his representative, the Employment Judge then finds as follows at paragraph 71 of the Written Reasons:

> **"On balance, having full regard to the nature of the allegations, the process fell within the range of reasonable responses."**

The Amended Grounds of Appeal

21. For the reasons I have already explained, it took some time at the outset of this appeal hearing to precisely identify what the amended grounds of appeal were. I shall set them out shortly. However, before coming to the two grounds of appeal, Ms Malick made what she described as an overarching or underpinning submission relevant to both of them. That submission was that the Tribunal Judge had erred in law by failing to direct himself that any reasonable employer, in the context of this case, would have stopped the investigatory and disciplinary process to await the outcome of the criminal prosecution.

22. In support of that proposition, she took me to the decision of HHJ McMullen and members in this Employment Appeal Tribunal in the case of **Ali v Sovereign Buses (London) Ltd** UKEAT/0274/06/DM, which was handed down on 26 October 2006. She took me to that case not for any point of principle it establishes but because it contains a convenient recitation of the relevant authorities, which establish that there is an issue, in the case of alleged misconduct constituting a crime, as to whether it is right for an employer to proceed with an investigation and disciplinary process if criminal charges are extant. Included among other citations in the **Ali** case is a passage from the Judgment of Phillips J in **Harris (Ipswich) v Harrison** [1978] ICR 1256. Ms Malick in particular took me to the text of that Judgment in relation to the following passage:

> **"Sometimes it may be right to dismiss the employee, sometimes to retain him, sometimes to suspend him on full pay, and sometimes to suspend him without pay. The size of the employer's business, the nature of that business and the number of employees are also relevant factors. It is impossible to lay down any hard and fast rule. It is all a matter for the judgment of the industrial tribunal."**

23. Relying on that passage and the other authorities gathered in **Ali**, Ms Malick pursued her "overarching submission" to the effect that the Tribunal here had erred because it ought to have held that, in the circumstances of this case, any reasonable employer would have stopped the investigatory and disciplinary process to await the outcome of the criminal proceedings.

24. Ms Malick's first difficulty with that proposition is that it is not sustainable by reference to any part of either of the two amended grounds of appeal on which she has been able to pursue this matter to a Full Hearing. In my judgment, it would have been essential, for this Appeal Tribunal to properly entertain this matter, for it to have been formulated into a proper amended ground of appeal and been made subject to an application to re-amend the grounds.

25. But I am not satisfied that it is a ground that I should entertain even if it had been so formulated. The first and most important question is whether the Tribunal was seised of any contention that it had been unfair for the employer to proceed with a disciplinary/investigatory process in the light of extant criminal charges. In this case there is not a scintilla of material which sustains the contention that this issue was before the Tribunal. Indeed, as Mr Peacock reminded me, in the form ET1 which was before Employment Tribunal, the Claimant makes it plain that he has not even been charged in relation to any criminal matter. There is no hint that the case was put to the Employment Judge on this basis. Ms Malick submitted that the Employment Judge in this case ought, on the facts, to have taken the point for himself and pursued it with the parties. That is, in my judgment, an extraordinary submission to make. It is

clear from the authorities to which Ms Malick herself took me that everything in this field turns on context. The Employment Tribunal can only properly investigate matters of context, such as the size of the undertaking, the impact of suspending as opposed to dismissing the individual staff member, and so on, if the point is properly explored by being taken before the Employment Tribunal. Here it was not so taken. So I reject this "submission", firstly on the basis that it has not been properly advanced as a ground of appeal and, secondly, that even if it had been, it would have no prospect of success in the absence of the point having been taken before the Employment Tribunal or it having been so clear a case that the Employment Tribunal should have taken the point for itself. For the reasons which I have mentioned and those yet to come, this is not such a case.

Ground 1: The investigation

26. Having dealt with that "overarching submission", I now turn to the specifics of the two amended grounds of appeal. Ground 1 challenges the Employment Tribunal's finding that the investigation conducted by the Respondent employer fell within the range of reasonable investigations that a reasonable employer might have undertaken. The terms of ground 1 are as follows:

> **"The Tribunal erred in law in making its finding that the Respondent's investigation fell within the range of reasonable responses, and therefore having directed itself properly to the right question, it failed properly to consider the question, in that the Tribunal failed to consider that the Respondent had not adequately investigated those matters that pointed to his innocence but merely considered the evidence that pointed to his guilt."**

27. It was a little difficult, from that formulation, to understand the precise basis upon which Ms Malick was advancing this ground. It might have appeared to be a ground contending that the Tribunal had misdirected itself in law in some way or, alternatively, had failed to have regard to some relevant consideration. In the event, Ms Malick explained to me that the ground

should be understood as one of 'perversity': that is to say that, on the material available to it as to the content and quality of the Respondent's investigation, no reasonable Tribunal Judge could have found that it was an investigation falling within the reasonable range. In support of that submission, Ms Malick relied on her Skeleton Argument, from which she drew out for my assistance a number of points which she suggested demonstrated that the investigation was inadequate. With that assistance, I managed to assemble a checklist of some half a dozen points. Adding them all up, or taking them separately, Ms Malick contended that they demonstrated that the investigation had gone so wrong that no reasonable Tribunal could have thought it adequate or reasonable.

28. In the event, it will not be necessary for me to descend into the particulars of those alleged inadequacies. That is because, as Mr Peacock pointed out in reply, the only particular of inadequacy given in relation to the Notice of Appeal is that which appears in the text following the terms of the ground which I have already read out. The only particular relates to the proposition that the employer failed to investigate what the Claimant was himself contending about other people having "access to his log-in details to his PDA". As explained by Ms Malick, what was being suggested was that the Claimant was advancing an exculpatory case, capable of demonstrating his innocence, by pointing out that other people had had access to his recording device, known as a PDA. I am satisfied that Mr Peacock is both procedurally and substantively correct. That is the only criticism or illustration of the inadequacy of the investigation that emerges from the Grounds of Appeal as drafted. If that one does not get home, it does not assist the Claimant that his Counsel has set out a scattergun of other matters in her Skeleton Argument.

29. The Respondent's rejoinder to this particular alleged deficiency is comprehensively given in Mr Peacock's helpful Skeleton Argument. What that demonstrates it that neither before the Investigating Officer, nor before the Appeals Officer, and nor in his ET1 did the Claimant suggest that there was exculpatory evidence of his innocence available through the means of establishing that other people had had access to his PDA or recording device. In those circumstances, Mr Peacock submitted, and I accept, it is impossible to castigate the investigation as not being even-handed when the criticism is that a point was not investigated that the Claimant himself did not raise. True it is that the Claimant raised a more general point that he was, as it were, "set up" by others. But I have already outlined how that matter was dealt with in the investigation and in the appeal and what the Employment Judge had to say about that process. In those circumstances, it seems to me that the Claimant has failed to make out ground 1 of the Grounds of Appeal.

30. I do not, however, determine ground 1 solely on what might be described as the technical or sterile pleading point, limiting the matter as it was limited in the particulars of Ground 1. I have considered more broadly the several other particulars that Ms Malick sought to elaborate in her Skeleton Argument and her oral submissions. Whether taken individually or together, they do not, in my judgment, amount to such a deficiency in the investigation that any right-minded Employment Judge must have decided that the investigation was conducted unreasonably or inadequately.

Ground 2: The disciplinary and appeal procedures

31. I turn, then, to the second ground of appeal. The terms of that ground are as follows:

> **"The Tribunal erred in law...when it stated that on balance, having regard to the nature of the allegations, the process fell within the range of reasonable responses."**

32. This, then, is a challenge to the Tribunal's conclusion that the procedure followed by the employer in respect of disciplinary process and appeal was unfair. That obviously was the way in which the case was advanced to the Tribunal. I am only concerned with whether the Employment Judge made any error in rejecting it. On being pressed to explain what nature of error this ground of appeal was intended to encapsulate, Ms Malick made it plain that this was another 'perversity' challenge: that is to say that no Tribunal Judge, faced with the material this Tribunal was faced with, could have done otherwise than to hold that the process was unfair.

33. In relation to this ground of appeal, the particulars accompanying the ground take two specific points. The first point relates to the disciplinary process. What is said is that that was vitiated and unfair because the investigating officer, Mr Hunt, who conducted the disciplinary hearing, did not have access to the full transcript of the police station interview, which had taken place some three months earlier.

34. The Employment Judge dealt with that matter expressly in his Written Reasons. Firstly, at paragraph 25, he records that Mr Hunt did not have the taped interview because it had been withheld by the security team because it was part of the ongoing court criminal proceedings. The Judge records in the same paragraph that Mr Hunt had seen the executive summary and he had been taken through that summary by the investigation or security team. Moreover, it transpires that, in the course of the disciplinary hearing, the content of the executive summary was read out so that Mr Okhiria could also know what material Mr Hunt had received.

35. As to whether the failure to obtain the full transcript or have access to the full transcript rendered the process unfair, the Employment Judge said this, at paragraphs 65-66 of his Written Reasons:

> **"65. Because of the Security Team involvement with outstanding criminal proceedings Mr Hunt was reasonably restricted by the amount of the investigation details that he could see and also which he could disclose to the Claimant.**
>
> **66. Mr Hunt was taken through sufficient detail to reasonably assure himself of the position. The Claimant did not view all the information, but he was provided with enough material to provide a sensible and coherent response."**

36. In my judgment, those passages indicate a finding by the Employment Judge that what was done was adequate. Firstly, in the sense of informing Mr Hunt as to the position and the available material and secondly, in ensuring that the Claimant knew all that Mr Hunt knew. Ms Malick's submission, in those circumstances, was of necessity that no reasonable Judge could have reached those conclusions. To have done so was perverse. In my judgment, she does not get anywhere the high threshold of establishing that this Employment Judge must have taken leave of his senses in reaching the conclusions I have outlined. Even if that were not so, the Judge directs himself at paragraph 67 of the Written Reasons that, even if there had been something in the point as to unfairness at the disciplinary hearing stage, any such defect was corrected at the next stage. The Appeals Officer was able to consider, as the Employment Judge records at paragraph 67, "all of the material evidence".

37. The second basis upon which ground 2 is advanced relates to the "missing post" point. This is the matter of the investigation reports generated by Ms Walsh not having reached Mr Okhiria before a final decision on his appeal was reached. Precisely what happened in relation to that post is dealt with in the Judge's findings of fact at paragraphs 40-42. He writes as follows:

> **"40. The Claimant was presented with all of the eleven new further investigation documents in a letter dated 03 January 2012... The Claimant was informed that if he wished to comment on the further investigation documents he should do so by 09 January 2012.**
>
> **41. The Claimant did not receive the appeal investigation notes as the Parcel Force envelope to him was incorrectly addressed to number 14 of his road instead of number 19. It was sent by recorded delivery and was signed for by the person at number 14. Understandably, this error was not spotted by Ms Walsh. However, the Claimant did not raise this matter with the Respondent after he received the appeal report, which refers to that correspondence and the fact that the Claimant did not reply to it...**
>
> **42. The Tribunal accepts the evidence of Ms Walsh that it was not unusual for employees not to reply to further investigation letters and she would have provided an opportunity to respond had he raised the matter, as had happened on occasions when a further investigation letter had not been commented upon because an employee was away on holiday. Accordingly the Claimant could have made representations but did not."**

38. Those, then, were his findings of fact. However, he was manifestly troubled by this issue and he recorded it as "potentially falling outside the range of reasonable responses" (see paragraph 68). However, for the reasons he gives at paragraphs 68-70 the Judge found that there was in fact no unfairness here. The employer had not deliberately arranged for the relevant pack to go to the wrong place and had plainly indicated that, had the Claimant wished to have the matter re-opened on the basis that he had not received the relevant material, the Appeals Officer would have re-opened the matter.

39. Ms Malick submits that these conclusions were perverse. As she put it, no reasonable Employment Judge, faced with such a procedural lapse, could or would have found that a fair procedure had been followed. She drew to my attention two specific aspects of the relevant background. First, she submitted that the posting of the relevant documents had been placed into the hands of one of the persons who were involved in the general poor treatment of the Claimant and the attempt to drive him out. As to that I remind myself that the Tribunal has made a clear finding, at paragraph 63 of the Written Reasons, that there was not any element of sham or set-up, as alleged.

40. The second aspect that Ms Malick relied upon is that any reasonable employer would, she contended, have telephoned to find out why there had been no response from the Claimant. However, the clear answer to that is given by the Tribunal's own acceptance of Ms Walsh's evidence that it was not unusual for employees not to reply to further investigation reports. In those circumstances, I cannot hold that the matters Ms Malick has raised demonstrate that the Tribunal's Judgment was perverse. Moreover, I weigh in this matter Mr Peacock's helpful submissions that this was not the way in which the case was being put for the Claimant in his claim before the Employment Tribunal. It was no part of his ET1 to say that he had been a victim of injustice because the appeal investigations pack had not reached him. Mr Peacock accepted, however, that this had been a live issue at the Tribunal. But, for the reasons I have given, the Judge did not go beyond the bounds open to a reasonable Judge in rejecting the contention that this deficiency vitiated a process he had otherwise found to be fair. In those circumstances, I conclude that neither of the two amended grounds of appeal have been made out, and in those circumstances this appeal must be dismissed.