Appeal No. UKEAT/0265/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 April 2018

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR F AFZAL — APPELLANT

EAST LONDON PIZZA LTD t/a DOMINOS PIZZA — RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MS SUSAN CHAN (of Counsel) Direct Public Access
For the Respondent	MRS HILARY WINSTONE (of Counsel) Instructed by: Wise Geary Solicitors The Courtyard Chapel Lane Bodicote Banbury Oxon OX15 4DB

SUMMARY

UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal

The Claimant was dismissed when he failed to produce evidence of an in-time application which extended his right to work. He was not afforded an opportunity to appeal. The Employment Judge decided that it was not unfair to dismiss the Claimant without affording him the opportunity to appeal because, against the immigration background, there was "*nothing to appeal against*". Appeal allowed. The Claimant at all material times had a right to work; the requisite evidence of that right could have been established during an internal appeal process; and if it had been the Respondent was not prohibited by any law, criminal or civil, from reinstating him. Provisions of the **Immigration, Asylum and Nationality Act 2006** and the **Immigration (Restrictions on Employment) Order 2007** considered.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Fahim Afzal ("the Claimant") against a Judgment of Employment Judge Foxwell sitting alone in the London (East) Employment Tribunal ("the ET"). He rejected a complaint of unfair dismissal which the Claimant brought against East London Pizza Ltd trading as Dominos Pizza ("the Respondent"). The sole question on appeal is whether the Employment Judge erred in law in concluding that the dismissal was fair not withstanding that the Respondent offered no right of appeal against its decision to dismiss.

The Background

2. The Claimant was employed by the Respondent with effect from 27 October 2009. He started as a delivery driver. He was a competent, capable and well-regarded employee. By August 2016 he had risen to be an acting assistant manager and a manager in training. He was seen as a future branch manager. He had a good working relationship with his line manager, Mr Sahota.

3. The Claimant is from Pakistan. In 2011 he was married to a European national. He acquired time-limited leave to work in the UK, which expired on 12 August 2016. After that time, having been a permanent resident for five years, he had a right to apply for a document evidencing his right to permanent residence that would continue his right to work. He could not apply before 15 July. So long as he applied by the expiry of the current leave, he was entitled to work while it was considered.

4. An employer is liable to prosecution and to the payment to substantial civil penalties for employing a person who has no right to work. The relevant criminal offences in August 2016

were section 21(1) and section 21(1A) of the **Immigration, Asylum and Nationality Act 2006**:

> **"21.** ***Offence***
>
> **(1) A person commits an offence if he employs another ("the employee") knowing that the employee is disqualified from employment by reason of the employee's immigration status.**
>
> **(1A) A person commits an offence if the person -**
>
> > **(a) employs another person ("the employee") who is disqualified from employment by reason of the employee's immigration status, and**
> >
> > **(b) has reasonable cause to believe that the employee is disqualified from employment by reason of the employee's immigration status."**

5. The relevant provision imposing penalties in August 2016 were section 15(1) and (3) of the **2006 Act**. This provides:

> **"15.** ***Penalty***
>
> **(1) It is contrary to this section to employ an adult subject to immigration control if -**
>
> > **(a) he has not been granted leave to enter or remain in the United Kingdom, or**
> >
> > **(b) his leave to enter or remain in the United Kingdom -**
> >
> > > **(i) is invalid,**
> > >
> > > **(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or**
> > >
> > > **(iii) is subject to a condition preventing him from accepting the employment.**
>
> **…**
>
> **(3) An employer is excused from paying a penalty if he shows that he complied with any prescribed requirements in relation to the employment."**

6. The **Immigration (Restrictions on Employment) Order 2007** provides various exceptions to the penalty regime. Certain provisions within the **Order** provide for periods of grace. F or example, an employer may apply for and obtain a Positive Verification Notice issued by the Home Office Employer Checking Service, which indicates that that person named in it is allowed to stay in the United Kingdom and to do the work in question. That will trigger a period of grace: see Rule 4A of the **Order**.

7. The Respondent was accustomed to dealing with immigration issues concerning its employees. They were handled by a member of its HR team, Mr Cunningham. He wrote to the Claimant on 3 June 2016 and 15 July 2016 reminding the Claimant that he should present to the Respondent evidence that he had made an in-time application and should do so before 11 August to avoid last minute problems. No evidence was received. Mr Cunningham continued to monitor the situation and to correspond with Mr Sahota about it.

8. It was common ground before the ET and remains common ground on this appeal that the Claimant did make an in-time application. He was therefore at all material times entitled to work in the UK; but the application was made very late in the day and the Claimant did not send any evidence about it to the Respondent at all events until an attempt at 4.28pm on 12 August. At that time he sent to Mr Sahota an email with two attachments which (he said) contained evidence of the application.

9. However, as the Employment Judge found, Mr Sahota could not open the attachments to the email. He told the Claimant; and he thought the Claimant would send them in a form he could read. In the result, the Respondent did not have any evidence that an in-time application had been made before the expiry of 12 August. As it happens, Mr Cunningham, concerned to avoid any risk to the Respondent from continuing to employ the Claimant, had posted notice of dismissal to him on 12 August. He received it on 15 August. That was the effective date of termination of his employment. No procedure was followed prior to dismissing the Claimant and no right of appeal was afforded to him.

The Employment Judge's Reasons

10. At the hearing both sides were represented by counsel as they are today: Ms Susan Chan for the Claimant, and Mrs Hilary Winstone for the Respondent. The Employment Judge heard evidence from the Claimant, Mr Sahota, and Mr Cunningham. There were disputed findings of fact, which he had to resolve. I have already drawn on those findings of fact.

11. The Employment Judge said correctly that the reason for dismissal was not that the Claimant's employment was prohibited by statute; rather it was some other substantial reason, namely that the Respondent genuinely believed that his employment was prohibited by statute. The Employment Judge found that it was reasonable for the Respondent to hold this belief and that it was reasonable for the Respondent to act decisively on 12 August for fear of exposure to criminal and civil penalties, especially bearing in mind the advance warning which had been given to the Claimant.

12. He then turned to the question of appeal. He said at paragraphs 31 and 32:

> **"31. That leaves the question of appeal. It is generally good employment practice to include a right of appeal. Mrs Winstone suggested that it might be inconsistent with immigration law for such a right to be included because it could convey the impression that some form of employment relationship was continuing. I cannot accept that submission for two reasons. Firstly, there is no legal argument before me to support it, so it is a submission made without any substantiation. Secondly, it is clear that in earlier cases there was an appeal and that does not appear to have given rise to any particular difficulty. Nevertheless, I accept Mrs Winstone's submission that in this case there was nothing to appeal against: the test which the employer had to apply is whether before the date of the expiry of the permission it had reasonable grounds for believing that the Claimant had made a valid application for an extension. So, once the date had passed, there was no basis for the employer to, as it were, back calculate or back-fill a belief it did not have on 12 August. In those circumstances, while not ideal, I cannot say looking at it as a whole that it was unfair to fail to offer a right of appeal in the dismissal letter.**
>
> **32. In reaching this conclusion, I also bear in mind the continued contact between the parties after dismissal, which included an open offer to reengage the Claimant, albeit as a new starter. So, there was no question of the Respondent not wanting to have the Claimant back, it simply was a question of what terms should apply as to continuity and back pay."**

13. It is relevant to mention one other matter which the Employment Judge considered. The Claimant compared his treatment with that of another employee, "T", whose permit expired

after his. Mr Cunningham did not have documentary evidence in T's case but allowed him to continue in employment. Mr Cunningham's explanation was that he had received a telephone call from T's solicitor informing him of the application before the deadline which he felt able to accept at face value. That was the distinction which made the difference.

Submissions

14. On behalf of the Claimant Ms Chan submits that provision of an internal appeal is a fundamental feature of good employment relations practice; see **Greenall Whitley plc v Carr** [1985] ICR 451. When the fairness of a dismissal is considered all aspects of the prospect should be taken into account including the question whether an appeal was given; see **Polkey v A E Dayton Services Ltd** [1988] 1 AC 344 and **West Midlands Co-operative Society Ltd v Tipton** [1986] 1 AC 536. Applying section 98(4) **Employment Rights Act 1996**, the correct question for the Employment Judge to ask is whether the employer at the time of dismissal could reasonably take the view that in the exceptional circumstances of the particular case the procedural steps normally appropriate would be futile.

15. Ms Chan submits the Employment Judge misdirected himself in law in concluding that an appeal would serve no useful purpose because, as the Employment Judge put it, "*once the date had passed, there was no basis for the employer to … back calculate or back-fill a belief it did not have on 12 August*" (paragraph 31). The Claimant actually had a right to work after 12 August. All the Respondent lacked was the requisite evidence of that right to work. Once it had that evidence it could reinstate him. There was no question of the Respondent being prosecuted or having to pay penalties for doing so because the Claimant always had a right to work.

16. If there had been an appeal, the true position could have been established in several ways. The Claimant might have produced the documents, or the Respondent might have made enquiries of his solicitor and accepted the solicitor's word as in the case of T, or the Respondent might have obtained a notice from the Home Office Employer Checking Service.

17. On behalf of the Respondent, Mrs Winstone supports the reasoning of the Employment Judge. Her submissions include the following. Firstly, she submits that any appeal would have to be on the basis that the Respondent had been wrong to form the belief that it did not, as at 12 August, have sufficient evidence to satisfy it as to the existence of an application and therefore a right to work as at that date. However, on the Employment Judge's findings, the Respondent had been correct to form that view. It did not have such evidence, so an appeal could not have succeeded. The situation could not be reconstructed with hindsight.

18. Secondly, she submits that reinstatement as opposed to reengagement would have been impossible in the circumstances since the Respondent did not have evidence of the right to work as at 12 August. Since the Respondent was at all times willing to re-engage the Claimant, the appeal would have added nothing.

19. Thirdly, she submits that in any event any appeal would have had to consider the Claimant's palpable failure to provide the requisite evidence in time despite reminders. There is no reason to suppose the Claimant would have been reinstated as opposed to reengaged. She said that the Respondent was entitled to and did apply a strict policy and would not reinstate in such circumstances.

Discussion and Conclusions

20. Once granted that the reason for dismissal has been established by the employer, the question whether the dismissal is fair or unfair is to be decided by application of section 98(4) of the **Employment Rights Act 1996**. This provides:

> **"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

21. There is no doubt that in modern employment relations practice the provision of an appeal is virtually universal. The Employment Judge was correct to say that it was good employment practice to provide such an appeal. In disciplinary cases the **ACAS Code of Practice** issued under section 199 of the **Trade Union and Labour Relations (Consolidation) Act 1992** says that an opportunity to appeal should be given. Whether or not a case is classified as a disciplinary case this is the starting point in applying section 98(4).

22. Whether a dismissal is unfair is to be judged on the whole process, including any right of appeal. There will be cases where applying section 98(4) an ET can conclude that an appeal was fair despite the absence of an appeal. The leading case is **Polkey**. In that case Lord Bridge said:

> **"… If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is *not* permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 57(3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied." (Page 364E-G)**

A See also pages 354-355 per Lord Mackay LC and **West Midlands Co-operative v Tipton** at page 548D-F.

B 23. In this case the Employment Judge found that there was "*nothing to appeal against*" (see paragraph 31 of his Reasons, which I have already quoted). This is because he thought the test which had to be applied on an appeal was whether before the expiry of the permission the Respondent had reasonable grounds for believing that the Claimant had made a valid C application for an extension. In my judgment, there is an error of law in that reasoning.

24. The Respondent was justified in dismissing the Claimant urgently on 12 August because D it did not have evidence that he was entitled to work in this country. Therefore, it had a genuine belief that his employment was prohibited by statute. In fact, however, this belief was wrong and the Respondent was always entitled to employ him. If an appeal had been offered and the E Claimant had produced evidence which satisfied the Respondent that he was entitled to work, the Respondent could immediately have rescinded the dismissal without fear of prosecution or penalty. There was never a time when the Claimant was not entitled to work. The key issue on appeal would therefore have been whether the Claimant actually had an entitlement at all F material times to work properly backed by evidence. If he had, there was no reason why he should not have been reinstated.

G 25. It is, in my judgment clear that an employer cannot be prosecuted or made subject to a penalty if the relevant employee was in fact entitled to work. Section 21(1)(b) and section 15(1) are explicit to this effect. It is implicit in section 21(1) that the employee must actually be H disqualified from employment by reason of immigration status. As we have seen, the Respondent was justified in dismissing the Claimant only because it did not have evidence of

an in-time application which extended the right to work. If in the course of an appeal process it received that evidence, it was entitled to reinstate the employee. It would not be committing a criminal offence or incurring liability to a penalty by doing so.

26. I accept Ms Chan's submission that potentially this could have happened during an appeal process in various ways. The Claimant could have provided requisite documents himself demonstrating the in-time application. The Respondent might have accepted the word of a solicitor as it did in T's case. The Respondent might have obtained the relevant number from the Claimant and then made its own enquiry of the Employment Checking Service. Or it may have wished to do more than one of these things. However, it would have been entitled to satisfy itself at an appeal hearing that the Claimant had always had the right to work and it would have been entitled to reinstate him without fear of prosecution or penalty.

27. I do not therefore accept that reinstatement was impossible or an appeal futile. I do not accept Mrs Winstone's submission and that reinstatement was impossible as a matter of law if evidence was provided after the expiry of the period. I note she also says that the Respondent would never reinstate in such a case. As a matter of fact, I do not see why there should be any such inflexible rule. If it has been satisfied by the provision of evidence and/or by its own enquiries that an employee was always entitled to work, there is no inherent reason why it should refuse to reinstate.

28. It follows that the appeal will be allowed. The question then arises whether I should substitute my own decision that the dismissal was unfair. The law on this question is now settled at Court of Appeal level by **Jafri v Lincoln College** [2014] ICR 920; the test is set out by Laws LJ at paragraph 21. I would have to be satisfied that without the error of law the result

would be different and I would have to be able to conclude what it must have been. If **Jafri** had stopped at that point, I would - and I believe most Employment Appeal Judges for many years would - have substituted a decision that the dismissal was unfair. However, Laws LJ went onto say that the Appeal Tribunal was not to make any factual assessment for itself or any judgment of its own as to the merits of the case. While I believe that in the circumstances of this case the dismissal ought to be held to be unfair in the absence of an appeal, that does involve some degree of judgment of my own and therefore I will not substitute my own decision. I will remit the matter for it to be considered.

29. Applying the overriding objective and the guidance in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, I have no doubt that that remission should be to the same Employment Judge. I would expect him to deal with the question of unfair dismissal along with questions of **Polkey**, contributory fault and any other questions relating to remedy at the same time. I make it clear that I express no opinion about any question relating to remedy.

30. Finally, I would add the following. In my judgment, it is good employment relations practice for an employer in circumstances of this kind to offer an appeal. Experience shows that it is an anxious time both for employer and employee when a limited leave to remain or work expires and a further application has to be made. Difficult technical questions may arise; relevant documents may be difficult to find; and I might add that experience shows that the Employee Checking Service is not always fully informed or up to date. Affording an appeal gives an opportunity for matters of this kind to be considered again rather more calmly than can be done as the time limit expires. There will be cases, and in my experience they are not particularly uncommon, where an employer wrongly believes that an employee does not have a

A continuing right to work. The appeal process affords an opportunity for this kind of case, which can result in real feelings of injustice, to be looked at again.

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