Appeal No. UKEAT/0126/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24th September 2018

Before

HER HONOUR JUDGE STACEY

(Sitting Alone)

MR B HAMILTON — APPELLANT

SOLOMON AND WU LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

PRELIMINARY HEARING - APPELLANT ONLY

APPEARANCES

For the Claimant	MR LIAM VARNAM (of Counsel) Instructed by: Direct Public Access

SUMMARY

VICTIMISATION DISCRIMINATION – Health and Safety

In considering a claim under section100(1)(d) of the **Employment Rights Act 1996** ("ERA"), there are no arguable grounds for concluding the Tribunal erred.

The Tribunal made the necessary findings on the evidence before it to conclude (1) that there were no circumstances of danger; (2) the Claimant did not have a reasonable belief in serious or imminent danger that he could not reasonably be expected to avert: and (3) he was dismissed for his inability to accept instructions, which had been an ongoing problem prior to his raising any concerns about dust in the workplace.

Appeal dismissed.

HER HONOUR JUDGE STACEY

1. This is a Preliminary Hearing to consider whether the proposed Appellant, who was the Claimant below, has raised arguable grounds in his appeal. I shall continue to refer to the proposed Appellant as the Claimant and to the Respondent to the appeal, who was the Respondent below, as the Respondent.

2. The Judgment sought to be appealed was held in the Watford Tribunal region before Employment Judge Hyams, sitting alone, on 13 and 14 November 2017 and a Reserved Judgment with Reasons was sent to the parties on 1 December 2017. It found that the Claimant, who had insufficient length of service to claim ordinary unfair dismissal, was not unfairly dismissed contrary to either section 103A or section 100 of the **Employment Rights Act 1996** and consequently his claim for automatically unfair dismissal under those provisions was dismissed. It also found that he had not been subjected to a whistleblowing detriment, under section 43B of the Act.

3. The grounds of appeal concern only the finding in relation to section 100(1)(d) of the **Employment Rights Act 1996** and its correct interpretation. Section 100(10(d) provides as follows:

> **100 Health and Safety cases**
>
> **"[1] An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –**
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> **…**
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> **(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or**
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> **….."**

4. On receipt of the grounds of appeal by this Tribunal and on the sift procedure, His Honour Judge Peter Clark directed an Appellant-only Preliminary Hearing, with permission for written submissions from the Respondent. His opinion was that whilst the grounds of appeal settled by counsel who did not appear below, appear to raise arguable questions of law, his concern was that the appeal may be seeking to raise new issues that were not before the Tribunal (see **Kumchyk v Derby City Council** [1978] ICR 1116). This is that Preliminary Hearing.

The Tribunal Judgment

5. The facts and the history of the case are as follows. The Claimant was employed by the Respondent company from 30 August 2016 until 22 November 2016 as a joiner. The Respondent is a small innovative materials supplier company to the construction trade. The Tribunal set out careful findings of fact about the Claimant's short employment history with the Respondent. The Claimant had started work for the Respondent as a worker supplied by an agency for three months when his conduct and performance were satisfactory, but when he became a direct employee of the Respondent, he became a rather less satisfactory as far as Mr Thompson and more importantly, Mr Solomon (a Director of the eponymous company) were concerned. The Claimant was line managed by Ms Paula Groves, Head of Resin Panel Production, who in turn reported to Mr Solomon. The Claimant's work was to sand and polish and sometimes cut the resin panels in the workshop and occasionally install the products on site. On 26 September 2016, the Claimant walked out of work without permission as he had become frustrated with Ms Groves' management of him. Mr Solomon followed him down the street, caught up with him and explained that he would not be permitted to act in the same way again and he would have to find a way of dealing with his feelings differently.

6. On 21 November 2016, Mr Solomon gave the Claimant a task to do under Ms Groves' instruction using a new belt sander, the Wadkins sander. Ms Groves was also collecting data about the new sander. The Claimant felt that he was doing Ms Groves' job and was frustrated by the manner in which she was managing him. He went to complain to Mr Solomon and in addition told Mr Solomon that he was concerned about the level of dust in the workplace. Mr Solomon asked the Claimant to continue doing his job and that he would speak to Ms Groves.

7. Mr Solomon set up a meeting with the Claimant, Ms Groves and Mr Currer, who had worked with Ms Groves to create the production schedule, hoping that between them they could make clear to the Claimant how the company worked and how he had to work within it. Things did not go according to plan as when the Claimant entered the room he asked to have a solicitor present. When the request was refused, he became increasingly agitated and raised a number of health and safety matters that he said had occurred during the course of his employment and said that he would be going to the Health and Safety Executive about his concerns.

8. The Tribunal found that Mr Solomon was of the view that the Claimant was angry with Ms Groves and that his problem was an inability to take instruction from the Respondent's management. Mr Solomon decided to give the Claimant one final chance, mindful that his end of probationary period review meeting was due a few days later on 25 November 2016. In view of Mr Solomon's concerns about the Claimant's ability to follow the instructions of his manager he decided the Claimant should work at the workshop the following day, and not go out to an installation as previously planned. When the Claimant returned the next day, and was told he would be working in the workshop, the Tribunal found that: "he said that he would not do that because it was unsafe because of the dust that was in the atmosphere when he did it. Mr Solomon then dismissed the Claimant for refusing to do what he was being required to do" (paragraph 23).

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9. I pause here to note that although the Claimant raised a number of health and safety matters during his short employment, the only relevant health and safety matter to consider in relation to this appeal and section 100(1)(d) is the amount of dust that would be in the atmosphere. All the other health and safety allegations are not relevant to whether or not the Claimant reasonably and genuinely believed that there was serious and imminent danger by his doing the sanding that he was being asked to do on 22 November 2016. The other concerns raised at the meeting on 21 November 2016 do not have anything like the immediacy required by the subsection 100(1)(d) and are not relied on.

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10. The Tribunal considered the evidence of the witnesses carefully and found in general terms that the Claimant was not a credible witness and that Mr Solomon was a credible witness. Where there was dispute between the evidence of both those protagonists, on each occasion, they preferred the evidence of Mr Solomon. They considered the issues and Mr Solomon's reason for dismissing the Claimant. They examine each of the Claimant's allegations of health and safety problems at the workplace in turn and in relation to each one found that matters were not quite as described by the Claimant. Paragraph 27 and 28 deals with the dust issue and the Tribunal found that there were specific means by which dust created when using any one of the sanding machines and portable saws in the Respondent's possession could be extracted and that the dust was extracted as effectively as was reasonably possible. The HSE had made no criticism of the Respondent's dust extraction methods. They found that suitable dust masks were issued to staff which were changed sufficiently frequently. The Respondent's arrangements for the extraction of dust and protection of employees from the risks to health of dust were sufficient to comply with the requirements of the relevant health and safety legislation.

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11. In paragraph 34, they conclude that the Respondent's workshop was fundamentally a reasonably safe place to work. Partly because of their findings of fact, and partly because they found Mr Solomon to be an honest witness doing his best to tell the truth, the Tribunal concluded that "the real reason for the Claimant's dismissal was his inability to accept instructions from either Ms Groves or (eventually) Mr Solomon. Certainly, I concluded that the principal reason for the Claimant's dismissal was none of the three reasons stated in paragraph 2 above" (one of which was his leaving the workplace in circumstances of serious and imminent danger which he could not reasonably have been expected to avert as provided for by section100(1)(d) **ERA 1996**).

12. The Tribunal's conclusion set out in paragraph 35 of its Judgment was the following:

> **"35. I therefore concluded that the claims had to fail. In fact, I concluded also that the claimant could not in the circumstances reasonably believe that there was a risk to the health and safety of any employee, including him, arising from the circumstances which actually existed at the respondent's workshop on the 21st November 2017. In addition, I concluded that there were not on 22 November 2017 "circumstances of danger which [the claimant] reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert" in the part of the workshop to which Mr Solomon had required him to go and work. That was because I concluded that it was not reasonable for the claimant to believe that his workplace was not safe because its dust extraction arrangements were to any extent inadequate."**

The Kumchyk question

13. The proposed grounds of appeal allege a failure to apply the correct test under section 100(1)(d) and the Claimant's belief in circumstances of serious and imminent danger, a failure to consider whether a dismissal for refusing to follow Mr Solomon's instructions was in fact a dismissal falling within section100(1)(d), and, finally, a perversity challenge.

14. Having heard Mr Varnam's helpful arguments today, I do not share the fear of His Honour Peter Clark that this fails the **Kumchyk** test and I am content that all the matters that have been raised today were raised below and require no further permission to be argued in this proposed appeal.

The proposed appeal

15. Mr Varnam helpfully identified the limited case law in this field of **Oudahar v Esporta Group Ltd** [2011] IRLR 730 and the two stage approach recommended. **Oudahar** provides that firstly, a Tribunal should make findings as to the reasonable belief of the employee of the circumstance, and secondly the reason for dismissal. In that case Judge Richardson found that the Tribunal had erred as it had not made any findings about the Claimant's actions and reasons for refusing to mop the floor which had led to his dismissal. The Tribunal had erred by not addressing the first question and had failed to make findings of fact or reaching conclusions as to Mr Oudahar's reasonable beliefs about serious and imminent danger in the workplace. It had wrongly concluded it was not necessary. The case was remitted back.

16. That mistake did not occur here. Clear findings have been made on both aspects. The Tribunal made the necessary findings of fact to sustain its conclusion in paragraph 35 that the Claimant could not reasonably believe there were circumstances of serious and imminent danger that could not reasonably be averted. On the second question (which it was not strictly necessary for the Tribunal to answer in light of the answer to the first question), it concluded at paragraph 34 that the reason for the Claimant's dismissal was his inability to accept instructions from Ms Groves or Mr Solomon – he would not do as he was told. That was not a reason within section100(1)(d).

17. In an appropriate case, there is an argument to be made that there are three, not two, stages in considering a claim under section100(1)(d) and that **Oudahar** identifies the second and third. On a plain reading of the statute the first question appears to be whether there are, in fact, "circumstances of danger" which is an objective test. The second question then considers the

A Claimant's reasonable belief in whether those dangerous circumstances are serious and imminent and which he could not reasonably be expected to avert, and the third, the reason for dismissal.

B 18. This proposed appeal is not however the vehicle to explore the issue as the Claimant has no reasonable prospects of success in arguing that the Tribunal has erred in law. The Tribunal concluded that the workplace was reasonably safe on 21 and 22 November 2017 and it follows from that finding that the Tribunal did not find that there were circumstances of danger at the C Claimant's workplace. The Tribunal have effectively addressed all three issues in their Judgment.

D 19. Therefore, for those reasons I find that there are no arguable grounds of appeal. The appeal is dismissed and I order that no further action be taken.

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