THE EMPLOYMENT TRIBUNALS

Claimant Mr Elliott Todd

Respondent Northscape Grounds Services Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS On 2 September 2019
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances
For Claimant Mr C Henshall Solicitor
For Respondent no attendance

JUDGMENT

The Judgment of the Tribunal is:

1. The claim of wrongful dismissal is well founded. I award damages of £ 3557.60 gross of tax and National Insurance.

2. The claim of unfair dismissal is well founded. I award compensation of £ 6484.65 being a basic award of £ 3557.60 and a compensatory award of £ 2927.05 inclusive of a 25% uplift under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). The Recoupment Regulations do not apply.

REASONS (bold print is my emphasis and italics quotations)

1. Introduction and Issues

1.1. The claimant, born 11 October 1983, was employed by the respondent from September 2008. He worked a 40 hour week for pay of £355.76 gross £ 306.94 net. His employment was terminated without notice on 22 November 2018. He claims unfair and wrongful dismissal.

1.2. The liability issues are:
1.2.1. What were the facts known to, or beliefs held by the employer which constituted the reason, or if more than one the principal reason, for the dismissal?
1.2.2. Were they related to the employee's conduct ?
1.2.3. Having regard to that reason for dismissal, did the employer act reasonably in all the circumstances of the case:
(a) in having reasonable grounds after reasonable investigation for its beliefs
(b) in following a fair procedure
(c) in treating the reason as sufficient to warrant dismissal ?
1.2.4. In the wrongful dismissal claim, was the employee guilty of gross misconduct ?

1.3. The respondent company was set up about 14 years ago by Mr Colin Gradon and his wife Deborah ("the Gradons") and the claimant's father Michael Todd and his wife Glynis ("the Todds"). In the middle of 2018 a dispute arose between the two couples and on 31 July the Todds resigned as directors. The claimant remained an employee. In a response form completed by the Gradons they say the correct respondent is "*Countrywide Grounds Maintenance t/a Northscape Grounds Services Ltd*." Emails to the tribunal from the respondent show the logo Countrywide Grounds Maintenance. A company search reveals a company called Countrywide Grounds Maintenance Ltd, but its registered office is at the address of a firm of solicitors in London, and a search of the people who had significant control of the company or were directors does not reveal the name of either of the Gradons or the Todds at any stage in its history. The claimant said today that company franchises others to use its trade name. It is unusual for a non-company to have as a trade name that of a limited company. The probability is the claimant's employer was Northscape Grounds Services Ltd trading as Countrywide Grounds Maintenance.

1.4. The case was originally listed for a hearing on an earlier date but, with the consent of both parties, postponed for a two-day hearing originally to take place today and tomorrow. At one stage the respondent instructed as its representative an employment law adviser from the company Supportis but he came off record.

1.5. The parties had agreed a date for exchange of witness statements being 22 July 2019. On that date the claimant was ready to exchange but when his solicitor emailed the respondent , Mrs Gradon emailed in reply the respondent had ceased trading as of 4 July , was no longer operating and was now "*a nullity*" . She said any further queries should be referred to Ian Thomson, O'Hara's Insolvency Practitioner, Moorend House, Snelsins Lane, Cleckheaton, West Yorkshire BD19 3UE. Mr Henshaw on 15 August sent a copy of this to the Tribunal and the file was referred to me. Company searches I performed on 21 August showed the respondent was still an active company and at its original address Chestnut Lodge, Medburn, Newcastle upon Tyne NE20 0JS. When I repeated that company search on 30 August, it showed an extraordinary resolution was passed to wind up the company on 7 August which was filed at Companies House on 22 August together with notice of the appointment of a liquidator in a creditors voluntary liquidation and a change of registered office to his address as shown above in Cleckheaton . A statement of affairs filed that day, signed by Mrs Gradon, shows the respondent has assets expected to realise £17850 which is not enough even to pay its preferential creditors. In view of my suspicion the respondent would not attend today, I shortened the hearing length to one day. They did not attend and the Employment Tribunal Rules of Procedure enable me to proceed in their absence. That does not mean I will accept without question whatever the claimant says especially as to remedy.

2. The Relevant Law

2.1. Section 98 of the Employment Rights Act 1996 (the Act) includes

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –

(a) the reason (or if more than one the principal reason) for dismissal

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it
(b) relates to the conduct of the employee."

2.2.Abernethy v Mott Hay & Anderson held the reason for dismissal is a set of facts known to the employer or may be beliefs held by it which cause it to dismiss the employee. At the first stage ,an employer does not have to prove, even on a balance of probabilities, the misconduct he believes took place actually did take place. It simply has to show a genuine belief. That is done by giving evidence at a hearing. In ASLEF v Brady it was said:
Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ….. .
It does not follow, therefore, that whenever there is misconduct which could justify dismissal, a tribunal is bound to find that was indeed the operative reason.. For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what brought about the dismissal..
Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason.
On the other hand, the fact the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding the dismissal was for a fair reason. There is a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords.

2.3. Section 98(4) of the Act says:
"*Where an 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.4. At this stage the Tribunal must determine, with a neutral burden of proof, whether the employer had reasonable grounds for its beliefs and conducted as much investigation in the circumstances as was reasonable (British Home Stores v Burchell as qualified by Boys & Girls Welfare Society v McDonald).

2.5. In Polkey v AE Dayton Lord Bridge of Harwich said :
"*Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal the reasons specifically recognised as valid by (Section 98(2))… But an employer having prima facia grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances*

of the case to justify that course of action. Thus ..in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation; …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 proposed by section 98(4) 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 98(4) this question is simply irrelevant. … In such a case the test of reasonableness under section 98(4) is not satisfied

2.6. Khanum v Mid Glamorgan Area Health Authority held the requirements of natural justice to be complied with during a disciplinary enquiry are (i) the person should know the nature of the accusation against him; (ii) should be given an opportunity to state his case; and (iii) the dismissing officer should act in good faith.

2.7. Ladbroke Racing v Arnott held the standard of acting reasonably requires an employer to consider all the facts relevant to the nature and cause of the breach, and the degree of its gravity. Even an admission of some misconduct will not automatically make dismissal fair as said in Whitbread Plc v Hall [2001] IRLR 275: *" Although there are some cases of misconduct so heinous that even a large employer well versed in the best employment practices would be justified in taking the view that no explanation or mitigation would make any difference, in the present case the misconduct in question was not so heinous as to admit of only one answer.* ***Dismissal had been decided by the applicant's immediate superior who had a bad relationship with him and had gone into the process with her mind made up.*** *In the circumstances, that method of responding was not among those open to an employer of the size and resources of these employers."*

2.8. Taylor-v-OCS Group 2006 IRLR 613 held that whether an internal appeal is a re-hearing of a review, the question is whether the procedure as a whole was fair.

2.9. In all aspects substantive and procedural, Iceland Frozen Foods v Jones (approved in HSBC v Madden) and Sainsburys v Hitt) held a Tribunal must not substitute its own view for that of the employer unless the view of the employer falls outside the band of reasonable responses.

2.10. At common law, a contract of employment may be brought to an end only by reasonable notice unless the claimant is guilty of "gross misconduct" defined in Laws v London Chronicle (Indicator Newspapers) as conduct which shows the employee is fundamentally breaching the employer/employee contract and relationship. An example of gross misconduct is **wilful** failure to obey lawful and reasonable instructions. The main differences between unfair and wrongful dismissal are that in the latter a Tribunal may substitute its view for the employer's and take into account matters the employer did not know at the time (Boston Deep Sea Fishing Co –v-Ansell) Unless the respondent shows on balance of probability gross misconduct has occurred, the dismissal is wrongful and damages are the pay which would have been earned in the notice period, the statutory minimum in this case being 10 weeks.

2.11. Section 207A of TULRCA provides

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Paragraphs 1-28 of the ACAS Code on Disciplinary and Grievance Procedures are best summarised. Whenever a disciplinary process is being followed, it is important to deal with issues fairly. This involves raising and dealing with issues promptly; acting consistently; carrying out investigations to establish the facts; informing employees of the basis of the problem and giving them an opportunity to put their case in response before any decisions are made; allowing employees to be accompanied at any formal disciplinary meeting and to appeal against any formal decision made. Any appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved. I reserve 25% uplifts for situations in which there has been **total** disregard of the ACAS Code.

3 Findings of Fact

3.1. I pre -read written statements of the claimant and his father Michael Todd . I also had a concise bundle of documents. I had read the response form and all information subsequently sent by the respondent to the Tribunal.

3.2. The claimant's case is that since his parents left the respondent the Gradons attitude towards him changed and they appeared to want rid of him, but he, in the words of his statement, just " *put my head down and got on with the job*" . The claimant had his own works van which he drove from his home to the various sites at which he performed his work. He therefore rarely had cause to speak to the Gradons face-to-face. He would post his timesheets through their post box at the end of the week and he did not need to receive any further instruction from anyone

3.3. There was a good deal in both witness statements which I did not need for today purposes but it is clear that after the Todds had left the company relationships between them and the Gradons if anything deteriorated. There was a dispute over the collection of some property during which some very strongly worded texts were sent by Mr or Mrs Gradon to Mr Todd on 12 September . In one Mrs Gradon referred to Mr Todd is an "*untrustworthy lying loathsome pig of a man*". The texts also reveal the claimant was trying to keep out of the crossfire.

3.4. The response says that from the time the Todds left the company the claimant became insubordinate and disrespectful . I have seen no documentary evidence to support that assertion and it is absolutely clear no disciplinary steps were taken against the claimant at all. He has never been warned about his conduct on any previous occasion. Not even in the response form is there any sign of what anyone

would recognise as a fair procedure being followed to address any misconduct before the decision to dismiss was taken.

3.5. On 21 November , the claimant decided to go home after finishing the job he was on because it was raining and there was little he could do in such weather conditions . A key text was sent by the claimant to Mr Gradon at 06 24 " *Colin, due to it being so wet I'm just going to do Asda then go home. There's nothing pressing to be done*" A reply at 07:43 says "*Yes okay thanks for letting me know*"

3.6. By this time the claimant had a supervisor called Simon Nattrass . Later the claimant texted to Mr Gradon "*Simon says he needs us up at yours sorting mowers out .Or not*? " and then later " *Ok thanks for letting us go home*"

3.7. Then Mr Gradon texted " *Just make sure you go to Simon in future as there was stuff to do. It's wet however so everyone's stood down. Colin*" The claimant had permission to go home from the managing director so he texted back
" *I'm not taking orders from Simon when I been working here for over 10 years and know far more than he does. A major gripe of mine. He's just a yes-man. Good for texting and paperwork and asks everyone else what to do. And apart from that 1 job which I was unaware of, that I presumed you are done weeks ago. It's too wet for anything else. I don't regret my decision.* " Mr Gradon replied "*I'll see you tomorrow at mine 10 am we can discuss it then, Colin*"

3.8. On 22 November the claimant met with Mr Gradon who accused him of all manner of behaviours never mentioned before. The claimant apologised for sending the text message but Mr Gradon dismissed him there and then without notice. At 10:06 that day Mrs Gradon sent a text to Michael Todd which read "*It gives me great pleasure to be the first to tell you Elliott has just been sacked ! Have a nice day*"

3.9. The claimant then received a letter saying the reason for his dismissal was serious insubordination but it gave no detail of the allegations against him even after the decision to dismiss. The letter alleged he was disrespectful and rude during the meeting, which he denies. It provided him with an opportunity to appeal to Mrs Gradon but clearly she was not going to be impartial. When the claimant's then representative asked for somebody else to conduct the appeal, Mrs Gradon refused to appoint anybody else. As a result no appeal took place.

4. Conclusion and Remedy

4.1. It is for the respondent to show the reason for dismissal. Even if I accepted the claimant had a bad "attitude" during the meeting and had been insubordinate on 21 November, there was nothing resembling a reasonable investigation. No particulars of misconduct were put to him before the meeting. No employer could have reasonable grounds for any belief other than the claimant had sent one defiant text and no reasonable employer would have dismissed for that alone. In my judgment this is a good example of the situation described in ASLEF v Brady of the respondent putting forward as a reason what was in truth an excuse for dismissal. The dismissal was substantively unfair and procedurally the disciplinary meeting and the proposed appeal well outside the band of reasonableness in all the respects and in total contravention of the ACAS Code.

4.2. I cannot conclude there was any chance he would have been fairly dismissed if a fair procedure had been followed or that he contributed to his dismissal by culpable and blameworthy conduct.

4.3. The claimant was nowhere near guilty of gross misconduct. Due to recent changes in taxation, awards are now made gross of tax and national insurance. The award is 10 weeks pay and that covers his losses up to the end of January 2019.

4.4. There are two elements to unfair dismissal compensation the basic award which is an arithmetic calculation set out in s 122 which in this case is again 10 weeks pay, and the compensatory award explained in s 123 which says it shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. Ss (4)says *In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales ..*

4.5. The claimant obtained a new job from 13 March 2019 albeit earning slightly less and I accept he could not reasonably have done more to mitigate his loss . His losses to that date are 6 weeks net pay £1841.64 . I award £500 for loss of statutory rights and uplift the total by 25%. The claimant was paid no benefits during his unemployment. I make no award for future loss, because Mr Henschel took a pragmatic view that other than the basic award and the notice pay, which will be recoverable from the Secretary of State under part 12 of the Act, there is little prospect of the claimant recovering the balance of this award.

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T M GARNON EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 3 SEPTEMBER 2019