Appeal No. UKEAT/0154/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 15 October 2019

Before

THE HONOURABLE MR JUSTICE GRIFFITHS

(SITTING ALONE)

SUNSHINE HOTEL LTD T/A PALM COURT HOTEL — APPELLANT

MR R GODDARD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NICHOLAS SINGER (of Counsel) Instructed by: Peninsula Business Services Ltd The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR MICHAEL SMITH (of Counsel) Instructed by: S O Legal Solicitors 15 Gildredge Road Eastbourne East Sussex BN21 4RB

SUMMARY

UNFAIR DISMISSAL – Procedural fairness/automatically unfair dismissal

A fair dismissal compliant with section 98(4) of the **Employment Rights Act 1996** requires "as much investigation into the matter as was reasonable in all the circumstances of the case" **British Home Stores v Burchell** [1978] ICR 303. The decision of the Employment Judge identified the correct principle and had to be read as a whole. On that basis, there was no error of law. The decision, read as whole, was not based on a suggestion (which would be erroneous) that a separate investigatory hearing and disciplinary hearing is required in every case by right. It was based, rather, on a conclusion that on the facts of the case there had been a lack of proper investigation and a lack of opportunity to prepare for a disciplinary hearing which rendered the dismissal procedurally unfair.

THE HONOURABLE MR JUSTICE GRIFFITHS

1. This is an appeal by the Respondent, Sunshine Hotel Limited t/a Palm Court Hotel, against the Decision of the Employment Judge Keaton QC which he gave on 13 November 2018 after a Hearing on 31 October 2018. He had to decide a claim for unfair dismissal and wrongful dismissal. The dismissal had been based on a conduct reason. The Employment Judge decided that the dismissal was unfair. I will go into that in a little more detail in a moment. He found that the Claimant contributed to his dismissal to the extent of 25%. He considered whether if a fair procedure had been followed, it would have made any difference and he decided that there was a 50% chance that it would have done. He also ordered a 5% uplift for a failure to follow the ACAS code.

2. The appeal was originally brought on a number of different grounds, but, of those, the only ground allowed through as a reasonably arguable question of law under Rule 3(10) by Her Honour Judge Eady QC (as she then was) was the first ground, namely whether the Employment Tribunal erred in apparently considering that a failure to hold an investigatory meeting was determinative in rendering the dismissal unfair, and she allowed the appeal to proceed to Full Hearing having particular regard to paragraph 17 of the Employment Judge's decision.

3. It is common ground that if one takes paragraph 17 of the Employment Judge's decision in isolation, there might be some grounds for concern. However, it is also common ground that one has to look at the decision as a whole when deciding whether it has identified the correct principles and whether it has applied those principles correctly.

4. An employee has a right not to be unfairly dismissed: that is the right conferred by Section 94 of the **Employment Rights Act 1996** ("ERA"). By Section 98(4), the question of whether the dismissal is fair or unfair having regard to the reasons shown by the employer for the dismissal:

> **"4....**
>
> **(a). depends on whether, in the circumstances, (including the size and administrative resources of the employer 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.**
>
> **...."**

5. Mr Goddard's dismissal was based on an allegation of misconduct, and so the well-known three-stage guidance in **British Home Stores v Burchell** [1978] ICR 303 applied to it. First, there must be established by the employer the fact that it believed the employee to be guilty of the misconduct for which he is being dismissed. That is not in issue here. In addition (quoting from **Burchell**):

> **"…. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case…"**

Examining the decision of the Employment Judge in the light of that law and that guidance, one sees that, in paragraph 2, the Employment Judge said:

> **"2. The dismissal was by reason of conduct, so, the issues for the tribunal were whether the Respondent had a genuine belief in the Claimant's guilt, based upon reasonable grounds and following a proper investigation. It was of particular relevance in this case whether the procedures followed were fair and also whether the Claimant contributed to the dismissal through his actions and, in the event of the dismissal being unfair, if there was a chance that the Claimant would have been dismissed in any event."**

6. Focusing on the first sentence of that paragraph, it seems to me quite clear that the sentence is directly referring to and correctly paraphrasing, albeit briefly, the three-stage test in **British Home Stores v Burchell**, indeed, that test is so well known, and so frequently

considered and applied in the Employment Tribunal, that there is no reason to be surprised that the Employment Judge had it explicitly in mind and proceeded to apply it, as it was right that he should, when considering his decision on the allegation of unfairness in this case.

7. Therefore, the Employment Judge, when referring to, "a proper investigation," was, undoubtedly, in my Judgement, referring to and aware of the formulation in **British Home Stores v Burchell** which is that the employer should have, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

8. The Employment Judge, in paragraphs 4 to 10 of the Decision, considered the facts underlining the allegation of misconduct, including the circumstances in which it was discovered. The Employment Judge also made a finding about the relative credibility of the key witnesses, which was favourable to the employer.

9. In paragraph 11, the Employment Judge said this, "The Claimant was then suspended and Mr McCabe carried out what he described as an investigation, but which was no more than sitting down with Mr Shehata to view the CCTV." Mr Shehata was one of the people concerned in the investigation of the alleged misconduct. That seems to me a clear criticism of the adequacy of what was done at this point, although it was described by Mr McCabe as an investigation.

10. The Employment Judge then goes on to say this at paragraph 12:

> **"12. On 14 April, the Claimant was invited to an investigation meeting to take place on 16 April. The letter said that that, if there was any substance to the allegations of breaching company rules by sleeping whilst on duty, there would be a disciplinary hearing. In fact the meeting on 16 April was the disciplinary hearing; there was no investigation meeting."**

The Decision goes on at paragraph 17 to say this:

> **"17. Plainly there was a serious procedural failing, because there was no investigation hearing. The Claimant was therefore never given the opportunity of providing a full explanation before any disciplinary hearing. That is a basic employment right, just as it is a basic right that an employee knows the case that they are facing and can prepare for a disciplinary hearing. That did not happen here. Mr McCabe said that the Respondent was relying upon its legal advisers, but whether or not that is the case, it does not alter the position."**

11. This is the paragraph upon which the appeal is based. Particular criticism is directed at the sentence, "That is a basic employment right," because it is said that that sentence, or phrase, should be understood as meaning that it is a basic employment right that there should be both an investigation hearing and a disciplinary hearing. It is said that the basis of the Employment Judge's decision is that, because there was only one hearing and not a separate investigation hearing followed by a separate disciplinary hearing, there was a failure to grant "a basic employment right."

12. The ACAS code, paragraph 5, under the heading, "Establish the facts of each case" says this:

> **"5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing."**

13. In **ILEA v Gravett** [1988] IRLR 497, this Employment Tribunal, presided over by the then president, Wood J, said at paragraph 16, "There will no doubt come a moment when the employer will need to face the employee with the information which he has. This may be during an investigation prior to a decision that there is sufficient evidence upon which to form a view or it may be at the initial disciplinary hearing."

14. It is clear that neither the ACAS code nor the guidance in **ILEA v Gravett** nor, indeed, Section 98 of the **ERA** itself, make it a basic employment right that there should be an investigation hearing in every case, distinct from a disciplinary hearing, and it is because it is

A suggested that the Employment Judge said that there was a such a basic employment right that this appeal is pursued and argued.

15. However, on careful reading of the decision appealed from, and consideration of the B arguments addressed to me by counsel on both sides, I am not persuaded that that is a fair reading of the decision, or even of paragraph 17 of the decision.

C 16. It seems to me clear from the decision as a whole that the Employment Judge not only bore in mind and applied the correct test from **British Home Stores v Burchell** (that is, that the employer should have, "carried out as much investigation in the matter as was reasonable in all the circumstances of the case"), but also, after a careful consideration of the evidence and the D facts, made findings, which were sufficiently stated and reasoned, that the investigation in this case fell short of that test, so as to make the dismissal unfair.

E 17. I have already referred to the criticism in the Employment Tribunal's decision of what was described as an investigation, which was simply two people at the Respondent sitting down to view the CCTV in the absence of the Claimant.

F 18. There is also paragraph 24 of the decision. It is argued before me that I should ignore that paragraph because it comes in the context of a consideration about whether a fair procedure or a proper investigation would have made a difference, and, therefore, whether any reduction G should be made in accordance with the causation principles of **Polkey v AE Dayton**. As I have mentioned, the Employment Judge did make such a reduction of 50%. I do not accept that submission; the decision, as I have already said, has to be read as a whole. It is artificial and H inaccurate to ignore parts of the decision which indicate why the Employment Judge found, as

A he did, that the dismissal was procedurally unfair on the basis of the investigation. Paragraph 24 said:

> **"24. I cannot agree that it would have made no difference if a fair procedure had been followed. A proper investigation might have made some difference. For example, Mr McCabe could have walked the patrol of the hotel with the Claimant, which would have allowed him to see how long it took and whether, as the Claimant maintained, he would not have been seen by the CCTV. There might have been some investigation into his migraine."**

B

All of those were cogent reasons for deciding, as the Employment Judge did, that there had not been a fair procedure and that there had not been, in particular, a proper investigation.

C

19. Therefore, I do not think it is right to say that the decision was based simply on the points made in paragraph 17 of the Decision. Furthermore, on a careful reading of paragraph

D 17, I am not convinced that it has been correctly construed in the argument before me. The first three sentences, which I have already quoted, say this: "Plainly there was a serious procedural failing, because there was no investigation hearing. The Claimant was therefore never given the opportunity of providing a full explanation before any disciplinary hearing. That is a basic

E employment right." It seems to me that, in the sentence "That is a basic employment right", the word "that" refers to the basic right to a proper investigation and to being given an opportunity of providing a full explanation. It seems to me that, read as a whole, the Employment Tribunal

F found that the dismissal was unfair because there had not been a proper investigation. It would have been possible for such an investigation to take place at a separate investigatory hearing; there was no such hearing. It would also have been possible for such an investigation to have

G taken place by way of an adequate investigation before a hearing; the Judge decided, and explained in paragraphs 11 and 24 of the Decision, that that did not happen either. The Employment Tribunal was therefore making a decision on the facts of the case that there was a

H procedural failing and an unfairness in that there was not as much investigation into the matter as was reasonable in all the circumstances of the case. The Decision is not based on an

A arbitrary statement of principle that there had to be a separate investigatory hearing and a separate disciplinary hearing.

B 20. A further ground is argued, which is that there is a contradiction between paragraphs 12 and 17 of the Employment Judge's Decision. Paragraph 17, as I have said, says, after saying that it was a basic right that the employee knows the case they are facing and can prepare for a disciplinary hearing, "that did not happen here." It said that that is contradicted by paragraph C 12 in which there is reference to the letter summoning the Claimant to an investigation meeting which said that if there were any substance to the allegations of breaching company rules by sleeping whilst on duty, there would be a disciplinary hearing. It is argued that this letter D showed that the allegation he had to meet was that he was sleeping whilst on duty and that this creates a tension with the finding in paragraph 17. I do not think that that is right. It is not enough that the employee is told, simply that a particular act of misconduct is alleged. Enough E of the basis of the allegation has to be conveyed to the employee for the employee to be able to prepare to meet the allegation effectively at the disciplinary meeting. The Employment Tribunal was entitled to find that this did not happen here.

F 21. In this case, the fact that the employee was led to expect that the meeting was only an investigation meeting and not a disciplinary meeting would have meant that the employee was, to some extent, taken by surprise when it turned out that the final decision was going to be G made at the end of this meeting. There had not, therefore, been an opportunity to know the case in advance of the hearing so as to be able to prepare to meet it.

H 22. I do not think that the decision of the Tribunal can be said to have fallen into an error of law or to require a re-hearing. Taken as a whole, the Decision identified the correct questions,

carefully examined the evidence, weighed it fairly (making findings both favourable and unfavourable to each of the parties), made an assessment of the probabilities had things proceeded as they should have done, and, taking it all in all, made a Decision which was reasonable, and framed in terms which disclose no error of law.