Case No: EA-2019-001183-RN
(previously UKEAT/0246/20/RN)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 June 2021

Before :

HIS HONOUR JUDGE SHANKS

- -

Between :

MR J STONE **Appellant**

- and -

BURFLEX (SCAFFOLDING) LIMITED

Respondent

- -
- -

Mr R Lassey (instructed by Thompsons Solicitors) for the **Appellant**
Mrs H Winstone (instructed by Hamers Solicitors) for the **Respondent**

Hearing date: 22 June 2021

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The appellant raised a grievance about his level of pay; following a meeting with the respondent's management he was summarily dismissed. The appellant brought a claim for unfair dismissal under section 104 **ERA**. The respondent's primary case had been that he was not dismissed but had resigned but the employment judge found that the appellant had been dismissed. But the employment judge decided that he had not asserted a statutory right (namely the right not to suffer unauthorised deductions from pay) and that the principal reason for his dismissal was not such an assertion but related to the availability of work and was the withdrawal of a concession to provide him with alternative work and was therefore redundancy or some other substantial reason.

The EAT considered that, on all the evidence, the finding that the appellant had not asserted a statutory right was perverse and substituted a finding to the contrary. The finding as to the reason for dismissal involved errors of law in that (a) the employment judge had not asked himself why the respondent had decided to withdraw the concession, and (b) the employment judge had identified a reason for dismissal which neither party had contended for without raising the matter with the parties before making a decision, when there were a number of submissions the appellant might have made if the matter had been raised (in particular relating to section 105 **ERA**).

HIS HONOUR JUDGE SHANKS:

1. This is an appeal against a decision of Employment Judge Lancaster sitting in Hull, which was sent out on 14 November 2019, dismissing the claimant's claim for automatically unfair dismissal under section 104 of the **Employment Rights Act 1996** based on the assertion of a statutory right not to have unauthorised deductions from pay.

2. The claimant started work for the respondent company on 31 October 2017 as a scaffolder's labourer (not, it should be noted, as a qualified scaffolder). Until his dismissal on 30 October 2018, he worked on different sites and was paid fluctuating amounts, though often at the rate of £200 per day, or £1,000 a week. The employment judge found that he was told at the outset that he would be paid £10 an hour (i.e. about £80 a day) and this figure was recorded in a contractual document, but he did not sign the document and he was not given a copy.

3. In the employment tribunal, the claimant asserted that he was indeed entitled to £200 per day under an oral agreement made with a man called Mike Purvis. The employment judge rejected his case that there was such an oral agreement. He decided that in fact the claimant was entitled to be paid either £10 per hour or on the basis of what was called "price work": basically, as I read it, that is such sum as the respondent might decide he should get based on the value of the particular scaffolding contract that he was helping the respondents to work on.

4. On the week starting 29 October 2018, the gang of scaffolders with whom the claimant was working were due to take holiday and it was arranged that the claimant would work at the respondent's yard in Hull because he was not able, obviously, to work with the scaffolders as a scaffolder's labourer. He did not go to work on 29 October 2018 because he was attending a funeral

that day, but he had earlier consulted a union representative and the outcome of that consultation was that he wrote a letter which was emailed to the respondent. That letter reads as follows:

> "29 October 2018
>
> Dear Sir,
>
> I wish to arrange an urgent meeting between management, myself and my union representative to discuss a formal grievance regarding my wages and underpayment on holiday pay. I was verbally contracted to work away from home for £200 per day, then, without consultation, my wage was cut to £150 per day. Following a verbal communication with Mike Purvis regarding this matter I was put back on £200 per day. Then following my return to work after my accident, I was again told my wages were to be £170 per day. Only to be told on 22.10.18 it was now price work, and up to a non management employee to decide what I would be paid.
>
> Trusting we can discuss this matter very soon.
>
> Yours respectfully
>
> John Stone."

5. The following day, he went to the yard in Hull and was almost immediately called to a meeting with Richard Fieldhouse and Gareth Kay. A secret recording was made of that meeting by Mr Kay and the employment judge had a transcript of the recording before him, which is also in my papers at pages 78 to 112. Towards the end of the meeting, the claimant said that he would have a word with his union representative that night and left but, soon after, he was summoned by another manager, Mr Long, and dismissed. The claimant's evidence was that Mr Long told him, "Your service is no longer required, I have to let you go, I have to finish you. I was just told to finish you." The respondent denied that any such conversation had taken place and said that in fact the claimant had resigned following the meeting with Mr Fieldhouse and Mr Kay. The employment judge disbelieved the respondent's evidence on this issue and accepted the claimant's case that he had been dismissed.

6. The remaining issues for the employment judge were therefore:

(a) whether the claimant had alleged that the respondent had infringed a statutory right (i.e. the right not to have unauthorised deductions) and, if so,

(b) whether that was the reason or the principal reason for his dismissal.

The employment judge rejected the claimant's claim because he found against the claimant on both these points. The claimant now appeals against both conclusions and must obviously succeed on both if his appeal is to bear any fruit.

7. I remind myself, first, of the relevant legal provisions in section 104. It is headed, "Assertion of statutory right". Subsection (1) says this:

> "(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 the employee -
>
> [(a) is not relevant]
>
> (b) alleged that the employer had infringed a right of his which is a relevant statutory right."

As I have said a number of times, the right in this case was not to suffer unauthorised deductions: that is a relevant statutory right. Subsections (2) and (3) say this:

> "(2) It is immaterial for the purposes of subsection (1) -
>
> (a) whether or not the employee has the right, or
>
> (b) whether or not the right has been infringed;
>
> but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
>
> (3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was."

Those are the basic provisions in section 104. I should say that the right not to have unauthorised deductions implies with it that there is a contractually-due payment of wages from which the deductions are made. But, of course, in this context, section 104(2) means that the employee may be wrong about his right (in other words, there may not be a contractual right to a certain amount of pay) and he may be wrong as to whether the right has been infringed, provided he is alleging that right to have been infringed and provided he acts in good faith.

8. So far as issue (a) is concerned (ie whether the claimant had indeed alleged an infringement of his statutory right) the claimant says that the employment judge's decision was perverse. The judge decided that Mr Fieldhouse and Mr Kay had not seen the claimant's letter of 29 October before the meeting on 30 October 2018. He therefore looked only to the transcript of the meeting to see whether the relevant allegation had been made and at paragraph 30 he decided that the claimant's concern at the meeting was not that he had been paid less than he was entitled to but rather that there was a lack of transparency about the way he was paid and that his pay fluctuated and that he was asserting that he felt victimised and thought he had been badly treated, rather than necessarily having been underpaid in accordance with his contract. At paragraph 32, the judge refers to various parts of the transcript where the claimant effectively said that he was advised by his union representative and the judge says that:

> "32. … He [the claimant] obviously and understandably was taking a lead from his union representative but he is not positively asserting himself that he understood there had been a concluded contract with Mr Purvis to pay him £200 whenever he was working away. The fact that the claimant did not have an actual valid claim for unauthorised deductions, as I have already held, is of course not fatal to this part of the case provided he acted in good faith, but looking at the context of what he told the respondent on that occasion he is acting on the instructions of his union on a possible interpretation of the contract. And as he says on more than one occasion he is acting on the advice of Mr McIntyre [who I take to be the union representative] in order "to get the ball rolling" and start a discussion. That falls short of a positive assertion of an infringement of his right."

9. I am afraid I accept the appellant's submission that it was perverse of the employment judge to find that there had been no allegation of an infringement of the right not to have unauthorised deductions. I recognise fully the high threshold that has to be crossed before such a finding can be made by this Appeal Tribunal. However, the following factors lead me to that conclusion.

10. First, the decision to ignore the claimant's letter just makes no sense. I have not been shown any evidential basis for the finding that the letter had not been seen by Mr Fieldhouse and Mr Kay before or indeed during the meeting but common sense would certainly indicate that it was the reason

for the meeting, and it is a short letter which would not have taken more than a moment to digest. Further, I note that in Mr Fieldhouse's witness statement (at page 123 in my bundle) the matter is dealt with simply like this:

> "18. The Claimant submitted his grievance in writing on 29th October 2018 complaining about his rate of pay … That meeting took place on 30 October 2018 and was recorded and a transcript produced … This transcript illustrates the conversation which we had with the Claimant in explaining the rates of pay allocated to his job."

That suggests that the letter was seen and the letter led to the meeting. Indeed it is right that the transcript shows that, at the meeting, the position taken by the respondents was: you were not entitled to £200 and this is how your contract operated. There are also a number of references to what must be the letter in the transcript of the meeting. At page 78, the first page of the transcript, it says:

> "John Stone - … He [and that is clearly a reference to his union representative] told me to start the ball rolling by sending you that.
>
> Richard Fieldhouse - Ok
>
> John Stone - And giving you that one.
>
> Richard Fieldhouse - I mean, what I want to do it [sic] explain your Contract and where you have been since you came into the Company."

The meeting then goes on. In context, there cannot be anything other than the letter referred to by the word "that". Then, later on in the transcript at page 109, Mr Kay is talking about what had happened when other jobs had come to an end:

> "Gareth Kay - [On the other jobs] …did you go to your union representative and tell them that you wanted to continue working even though the job had finished?
>
> John Stone - Say that again sorry
>
> Gareth Kay - Do you know like this letter here, when the other jobs with Mike finished, did you take that approach at the end of them jobs[?]"

Then there is an answer to that. Mr Kay is clearly referring there to the letter sent the day before. Then there is another reference at page 111 to "start the ball rolling" where Mr Stone says:

> "… And you know what he [that is the representative] said was put that in just to start the ball rolling …"

All that seems to me to be overwhelming inferential evidence that the respondent's managers had seen the letter and, as I say, it is extremely short. It seems to me abundantly plain that the letter was making the relevant type of allegation (and indeed it seems that the judge himself accepted that when he said he was excluding the letter from his considerations).

11. Second, in any event, leaving the letter out of it, it seems to me that there are a number of indications that the suggestion that no relevant allegation was made at the meeting is also perverse. At paragraph 29, the judge found that, at the meeting, the claimant was "unhappy about the situation regarding the way his work was allocated and paid" and that was the understanding of the managers. At paragraph 31, he refers to the conversation with Mr Kay and Mr Fieldhouse, who were, as I have already indicated, seeking to explain the rationale of price work fluctuations as authorised by Mr Purvis and they constantly returned to the theme that the claimant, as a labourer, would not ordinarily expect to receive £200 per day, that that was excessive and that no one would agree to pay that as a matter of course. It must follow from that that they were saying that they had not agreed to pay that sum in this case, so they must have understood that the claimant was suggesting that that had been an agreed sum. Then, looking at the transcript itself, it seems to me clear that there are a number of statements where the claimant is making the relevant allegation. At page 80, Mr Stone said:

> "… Then, Mike phoned me up and he said "I have been talking to Shaun, he said and he has asked us if we will go away and work, on a minimum of £200 per day and if we go any further [than] Chevin Park [which was one of the sites] then they will up the price". …"

That was the allegation of an oral contract which it is fair to say the employment judge rejected, as I have already explained. At page 81, Mr Stone said:

> "On every job I've worked on for Burflex, I've had £200 up until I broke my foot and then when I came back I was on at £170."

At the bottom of page 85:

> "John Stone - But I did mention that to the Union man and my representative said to me, he said if you look at your pay slips and you have been on £200 for last 2/3 months, he said that is what you should be getting.

> Richard Fieldhouse - It's an option of price.
>
> John Stone - Well like I say, I am only telling you what I have been told because I do not know myself."

Then, at page 90:

> "John Stone - Like I said, I go anywhere which I do, I have never complained. This is the first time that I have had to put any complaint in to be quite honest
>
> Richard Fieldhouse - But I don't know what grounds you are complaining on
>
> John Stone - Well, because I told you what I started on with Shaun."

That is a reference back to the verbal contract of £200 a day.

12. It seems to me, drawing all this material together, that it is absolutely plain that the claimant was alleging an entitlement to £200 a day, wrongly as the judge found, but nevertheless that that was being alleged. The fact that he also referred to victimisation and unfairness in this context and indeed that he personally was somewhat equivocal about whether he could maintain that entitlement does not seem to me to undermine the basic position that that was the allegation being made. I am afraid, for those reasons, I find the judge's decision was perverse on this.

13. On issue (b), the employment judge's decision about the principal reason for the dismissal is at paragraphs 34 to 38 of the judgment. Paragraph 34 starts by the judge saying:

> "34. Underlying all of this are the particular circumstances of that week [and that is the week beginning 29 October]. The claimant could not continue to work on site because his colleagues were on holiday. He was not laid off or not immediately. There was an attempt to provide him with work albeit at the yard in Hull. …"

Then, further on in the paragraph, he says:

> "… it was generally anticipated to be coming up to a quiet time before Christmas. Therefore when, as I have found, a decision was taken to instruct Mr Long to finish the claimant, in that context I consider the proper interpretation is that the [principal] reason was that at that juncture Mr Fieldhouse was withdrawing the concession to give alternative work to the claimant. There was no actual scaffolding work to be done and he was therefore being finished."

Then, at paragraph 35, he says:

> "35. … That I think is entirely consistent in fact with the claimant's own account of what Mr Long said to him [I will not repeat that]. I can very readily and do read that as an indication that Mr Long had been given instructions that the provision of alternative work was now to be withdrawn."

Then, at paragraph 36, the judge refers to some internal documentation after the claimant's dismissal, referring to redundancy, and the judge says at the bottom of paragraph 36:

> "36. … that documentation from Mr Baker is consistent with a decision having been taken that the alternative work non-scaffolding work will be withdrawn. That gives rise to a situation equivalent to redundancy or lay off. …"

Then there is reference to a guaranteed payment. Then, at paragraph 37, the judge reminds himself that:

> "37. The burden is on the claimant, notwithstanding the lack of complete transparency by the respondent in its account of what happened, to establish … that he had indeed not only alleged an infringement but also that that is the principal reason for the dismissal. On balance I find the principal reason is rooted in the working circumstances of the respondent company at this time in the lead up to Christmas. The simple fact is that the claimant was not currently able to be given scaffolding work. Although the decision may well also have been also influenced by Mr Fieldhouse's perception that the claimant was ungrateful and was "biting the hand that feeds him" if he was seeking to challenge the respondent when they had in fact been paying him way over the normal rate for a labourer for some considerable time and by antagonism towards the involvement of a union where they were not recognised a workplace, and by disgruntlement that a formal grievance had been raised when Mr Fieldhouse thought it more appropriate to deal with it on a one to one basis informally with management, that does not mean that the principal reason was as asserted by the claimant. …"

I interject there because it seems to me the reference to a formal grievance must be another indication that the letter which I have referred to, which purported to start a formal grievance, must have formed part of the material which the respondents had before them when they made their decision. In any event, the judge goes on:

> "… These are all extraneous matters but the principal underlying cause in context and given the contemporaneous document prepared by the respondents, notwithstanding their failure to acknowledge that as the true reason, is the lay off because of lack of work."

Then, in paragraph 38, the judge goes back to the internal document and says he does not accept that it was constructed to disguise the real reason for dismissal, although the respondent has never asserted that that was the reason. The judge then says:

> "38. … It [the respondent] has always denied there was any termination at all. It has not sought to say "oh no, he was fairly terminated on grounds of redundancy or some other substantial reason". But in actual fact I am satisfied that is what happened and it is clear from the content of this email of Mr Baker which has been properly disclosed. …"

That is a reference back to the internal document that I mentioned.

14. That is the judge's reasoning in relation to the principal reason for the dismissal. It seems to me that there are two really fundamental problems with that line of reasoning.

15. First, if the principal reason for the decision to dismiss was that Mr Fieldhouse was withdrawing a concession to give alternative work to the claimant as it is put in paragraph 34, that begs the question, it seems to me, which the employment judge does not ask himself, as to why that should be the decision made by Mr Fieldhouse. Given that there is no reference to any change of circumstances between the Monday (29 October) and the dismissal sometime on 30 October 2018 other than the raising of the grievance, it seems to me that that question must have presented itself as a matter of common sense to the employment judge and should have been addressed.

16. The second problem is that it appears, certainly from paragraph 38, that the employment judge is making a finding that the principal reason for the dismissal was one other than that asserted by the claimant, namely redundancy or something like redundancy. That was a reason for which neither party had contended but the learned judge did not alert the parties to the fact that he was minded to approach the case in that way. Mr Lassey, who has appeared today for the appellant and was acting for him in the lower tribunal, has persuaded me that, if he had been given some warning of this possibility as he should have been, he could and would have made a number of points in response to the suggestion that the principal reason for the dismissal was redundancy or something like redundancy. In particular, he says he would have pointed to the policy on layoff, which is at page 118 in my bundle; he would have reminded the judge of the fact that the dismissal came shortly after the meeting on 30 October and that nothing had changed so far as the work situation was concerned;

he would have referred to a letter at pages 75 to 76 in my bundle which talks optimistically about the amount of work that is going to be available in the near future; and he would have referred possibly to section 105 of the **Employment Rights Act**, which applies to selections for redundancy made for a prohibited reason, which would include the assertion of a statutory right.

17. It therefore seems to me that there are those two fundamental flaws in the reasoning by the learned judge and that his finding as to the reason for the dismissal is therefore based on errors of law and cannot stand.

18. In light of all those findings I will allow the appeal. I will substitute a finding that the claimant had, through the letter and his statements during the meeting, asserted a relevant statutory right. So far as the principal reason for the dismissal, that, it seems to me, must be remitted to be considered again by the employment tribunal (with the agreement of both sides, it will be remitted to a new employment tribunal). The findings of primary fact which have been made obviously stand and the new employment judge will have to decide what further evidence, if any, is required in the light of the original judgment and this decision before he or she can consider what was the reason or principal reason for the dismissal. Then, obviously, damages and so on will follow if the principal reason was one that was not permittable.