Neutral Citation Number: [2022] EAT 161

Case No: EA-2021-000497-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 November 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Mrs K Marangakis	**Appellant**
- and -	
Iceland Foods Limited	**Respondent**

- -
- -

Sam Way (instructed through Advocate) for the **Appellant**
Kieran Wilson (instructed by Actons Solicitors) for the **Respondent**

Hearing date: 7 October 2022

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The employment tribunal did not err in law in holding that the claimant had not withdrawn her appeal against dismissal and, as a result, the decision to allow the appeal had resulted in her reinstatement into employment. What amounts to the withdrawal of an appeal considered.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge Loy sitting in the Watford employment tribunal on 27 and 28 July 2020. The judgment was sent to the parties on 3 March 2021.

2. The claimant commenced employment as a part-time Sales Assistant at the respondent's Egham store on 22 September 2013. The claimant was initially dismissed for alleged gross misconduct on 24 January 2019.

3. The claimant appealed by email on 7 February 2019. She stated "It is my wish that I be reinstated back into the position that I held before this alleged Incident took place".

4. The respondent operates a disciplinary policy that states:

> Colleagues have the right to appeal at each stage within five working days of receipt of the letter confirming the disciplinary sanction. … The decision of the appeal hearing is final. …

5. The claimant attended an appeal hearing before Ian Keeble on 22 March 2019. The claimant stated at one stage "I don't want sacked on my record". There was a discussion about the outcome that the claimant wanted should the appeal succeed. The appeal hearing was postponed so that further investigations could take place.

6. On 25 March 2019, the claimant sent an email to the respondent in which she challenged the disciplinary process and stated "Mr Keeble asked at the appeal hearing if my desired outcome was the same as per my original appeal letter, the answer to that is quite simply NO. I believe that the mutual trust, which forms part of the contract between us has been broken". The claimant stated that she was seeking compensation.

7. The claimant attended a reconvened appeal hearing on 27 March 2019. The substance of the appeal was discussed, particularly the relevant CCTV footage. The claimant stated at one stage "I don't want to work for Iceland, I want apologies and compensation". Mr Keeble was recorded as saying "after your reflection you have said that you want an apology, financial compensation and not work for Iceland. I cannot give you this answer. I will respond to you about the appeal".

8. On 10 April 2019, Mr Keeble wrote to the claimant and informed her that her appeal against summary dismissal had been allowed and that she was to be reinstated with continuity of service and backpay. A final written warning was substituted for the original decision to dismiss.

9. The claimant did not return to work. After some delay, the backpay was paid by bank transfer. The claimant sought to repay the backpay to the respondent by cheque, but the payment was refused. In correspondence the claimant suggested that she might consider a return to work but that did not occur. On 16 July 2019, the respondent dismissed the claimant because of her failure to attend work.

The hearing in the employment tribunal

10. The claimant asserted that her original dismissal on 24 January 2019 was unfair. She did not make a claim about the later dismissal on 16 July 2019. When asked, the claimant specifically stated that she was not bringing a claim of constructive dismissal. The respondent contended that the effect of allowing the appeal was that the claimant was reinstated in employment and so the original dismissal disappeared and could not found a claim of unfair dismissal. The employment tribunal noted in its findings of fact [10.2]:

> At no stage did the claimant withdraw her appeal. There was evidence that Acas had advised her to see her appeal through, and that she followed that advice. The claimant was asked by the tribunal whether or not she withdrew her appeal at this stage and she unequivocally confirmed that she had not.

The decision of the employment tribunal

11. In analysing the case the employment tribunal considered, in particular, the judgment of the Court of Appeal in **Folkestone Nursing Home Ltd v Patel** [2018] EWCA Civ 1689, [2019] I.C.R. 273. The employment tribunal identified the core question and gave its conclusion:

> 19.The ultimate question for the tribunal to determine on the matter of dismissal is this: In circumstances where the employee expressly no longer seeks reinstatement, but nonetheless continues with her appeal, does the original dismissal still vanish if the employer in fact reinstates the employee.
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> 20.The tribunal has come to the conclusion that the dismissal does vanish in these circumstances. According to Patel, only if the appeal is withdrawn can an employee "escape" the consequences of a successful appeal in law. If an employee continues with the appeal it is at his or her own risk. Also from Patel, dismissal vanishes upon reinstatement on an objective basis, meaning that the motives or subjective intention or desires of the appellant employee

> are not to the point. Put simply, unless there is withdrawal from the appeal process altogether, both the employee and the employer will be bound by the reinstated contract of employment consequent upon a successful appeal. Were it not so, the legal effect of a successful appeal would be dependent on the different motives and/or changing states of mind of a particular appellant, which would be inconsistent with the legal certainty brought about by Patel.
> …
>
> 22.In the circumstances the tribunal considers itself bound by the decision of the Court of Appeal in Patel to the effect that even where Mrs Marangakis had made it clear that she did not wish to be reinstated, but did not formally withdraw her appeal, she took the risk that a successful appeal would mean in law that the dismissal on 24 January 2019 was of no legal effect. It follows that the tribunal having considered itself so bound by this authority has no jurisdiction to consider the claimant's claim for unfair dismissal.

The appeal

12. The claimant appealed. The appeal was sifted out pursuant to Rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended) ("EAT Rules") on the basis that there were no reasonable grounds for bringing the appeal. The claimant had the advantage of assistance under the ELAAS scheme at a hearing pursuant to Rule 3(10) of the EAT Rules. HHJ Auerbach granted permission to amend the grounds of appeal and the appeal was listed for a full hearing. The appellant asserts in the amended grounds of appeal:

> The Employment Tribunal erred in law in concluding that the Appellant had not withdrawn her appeal before it was determined by the Respondent.

13. The parties agree that the words used by the claimant that are said to have communicated an intention to withdraw the appeal must be construed objectively. The claimant contends that on an objective construction her statement that she did not want to work for the respondent meant that she was withdrawing from the appeal, whereas the respondent contends that the claimant was required to state, in terms, that she wished to withdraw from the appeal, if she wanted to avoid reinstatement being the automatic consequence should the appeal succeed. The respondent contends that the employment tribunal held as a matter of fact that the claimant did not withdraw from the appeal and that the appeal is really an attempt to assert that the decision of the employment tribunal was perverse.

The law

14. The concept of a "vanishing dismissal", on an appeal succeeding, is of long standing. If a

person appeals against dismissal, succeeds in the appeal and is reinstated, the original dismissal "disappears", with the consequence that it cannot then found a claim of unfair dismissal. The legal underpinning of this concept has not always been clear.

15. The authorities were considered, and the underlying principle explained, in the context of a contractual appeal process, by Sales LJ in **Folkestone Nursing Home Ltd**. Mr Patel was dismissed. He appealed. He was informed that the appeal had been upheld by a letter that he considered to be unsatisfactory because it left important matters unresolved. The Court of Appeal concluded that the original dismissal was no longer of any effect as a result of the successful appeal, but Mr Patel could rely on the unsatisfactory way in which the employer had dealt with the outcome of the disciplinary appeal as constituting a breach of contract, resign from the employment he had been reinstated into, and claim constructive dismissal. Sales LJ held:

> 26. I consider that the short answer to this ground of appeal is that it is clearly implicit in a term in an employment contract conferring a contractual right to appeal against disciplinary action taking the form of dismissal that, if an appeal is lodged, pursued to its conclusion and is successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout. This is not a matter of implying terms, but simply the meaning to be given to the words of the relevant contract, reading them objectively.
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> 27. By including a contractual right of appeal in the employment contract, the employer makes available to the employee a facility to seek to overturn the disciplinary decision made against him and to have the dismissal treated as being of no effect. If the appeal is successful, then subject to any other contractual provisions, the employee is entitled to be treated as having never been dismissed, to be paid all back pay and to have the benefit of all other terms of his contract of employment through the relevant period and into the future. Those terms include the usual implied duty of an employer to maintain trust and confidence.
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> 28. Conversely, if the employee exercises his right of appeal under the contract and does not withdraw the appeal before its conclusion, it is obvious on an objective basis that he is seeking to be restored to his employment and is asking and agreeing (if successful) to be treated as continuing to be employed under his contract of employment for the interim period since his previous dismissal and continuing into the future, so that that dismissal is treated as having no effect. It is not a reasonable or correct interpretation of the term conferring a right of appeal that a successful appeal results in the employee having an option whether to return to work or not.
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> 29. If an appeal is brought pursuant to such a term and is successful, the

> employer is contractually bound to treat the previous dismissal as having no effect and the employee is bound in the same way. That is inherent in the very concept of an appeal in respect of a disciplinary dismissal.

16. The analysis of Sales LJ is consistent with many previous authorities and explains the contractual underpinning. When an employment relationship ends, some terms of the employment contract may endure, such as for the payment of commission or providing a right of appeal against dismissal. Unless there are express contractual terms that provide otherwise, as a matter of objective contractual analysis, when a contractual right of appeal is exercised the agreement between the parties is that should the appeal succeed the employee will be treated as never having been dismissed, and will be reinstated with backpay. This is a matter of objective contractual assessment and does not turn on the subjective reason why the employee chose to appeal:

> 31. Mr Jackson pointed out that there may be other reasons why an employee might wish to exercise a right of appeal under a disciplinary procedure. Mr Jackson accepted that, of course, the employee may wish to get his job back, effectively by putting the clock back so that he is treated as not having been dismissed. But Mr Jackson says that the employee might simply wish to clear his name so as to improve his chances of getting other employment elsewhere in the jobs market, without wishing to go back to the original employer. Or the employee might regard it as expedient to bring a disciplinary appeal, as a way as protecting his right to full compensation for unfair dismissal, since if he does not he will by virtue of section 207A(3) of TULRA potentially be exposed to a penalty of a deduction of up to 25% of any monetary award due to him. This is because para 26 of the Acas Code of Practice states that "Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision"; and section 207A(3) says that a deduction may be made if the employee does not comply with such a code of practice. Therefore, says Mr Jackson, the mere fact that an employee commences an appeal under a contractual disciplinary procedure cannot be taken as some kind of offer by him to waive reliance on his dismissal. Nor can it be taken as an acceptance by him that he must take back his old job if his appeal is successful, agreeing thereby to treat his dismissal as if it had never happened.
>
> 32. However, in my view these other possible reasons why an employee might wish to invoke a contractual appeal process are collateral to the object of having such a process included in the contract of employment. That object is, that the employee is contractually entitled to ask the employer to reopen its previous decision to dismiss and to substitute a decision that there should not be a dismissal. Where a contractual appeal is brought, that is the obvious purpose of the appeal, judging the matter objectively. The fact that an employee might have other motives for seeking to appeal does not affect the interpretation of the contract.

17. Thus, if an appeal is lodged, pursued to its conclusion and is successful, the employer and employee are bound to treat the dismissal as not having occurred irrespective of what the employee's subjective wishes may have been in instituting and prosecuting the appeal. The fact that an employee may not wish to return to work for the employer does not mean that pursuing an appeal to its conclusion does not automatically result in reinstatement into employment. Mr Patel did not want to return to work, but nonetheless reinstated he was, although he was then able to resign and claim constructive dismissal.

18. The employment tribunal did not consider whether the appeal procedure in this case was contractual. The parties' position was that it did not matter whether it was contractual or not. It appears that, to the extent the matter was considered, the presumption was that the appeal procedure was contractual. After some investigation undertaken for this hearing, it seems likely that the appeal procedure was not expressly incorporated into the contract and may well have been non-contractual. The parties position in the employment tribunal, and in this appeal, is that **London Probation Board v Kirkpatrick** [2005] I.C.R. 965 is authority for the proposition that the same approach is adopted whether an appeal procedure is contractual or non-contractual. As that is the parties' common position, I have not considered the matter further. I have assumed that the procedure was contractual, or is to be treated as if it was contractual. I have not further considered the legal analysis that might underpin the concept of a vanishing dismissal where there is a non-contractual appeal procedure.

19. I do note, however, that when an appeal procedure is expressly incorporated into a contract of employment, it is important to consider its terms. Express contractual terms could negate a dismissal vanishing if the appeal is successful.

20. In **Folkestone** Sales LJ refers to a person who "exercises his right of appeal under the contract **and does not withdraw** the appeal before its conclusion" [emphasis added]. The concept of withdrawal from an appeal has been considered in a number of cases, albeit obiter, because the appeals in the cases under consideration were not withdrawn. In **Roberts v West Coast Trains Ltd** [2003] 0312/03/ZT Elias J stated [15]:

> Plainly, if the employee, having lodged the appeal, withdraws from it, then the employer cannot seek to determine that appeal. In those circumstances, the employee can rely upon the original decision to dismiss. But, in our judgment, if the employee chooses to keep the appeal alive, then he takes the risk that if he is subsequently reinstated in employment, his unfair dismissal claim will be defeated

21. When **Roberts** reached the Court of Appeal Mummery LJ noted [20]:

> The decision of the appeal tribunal, contained in the judgment given by Elias J on its behalf, is so comprehensive and so careful that there is difficulty improving upon it.

22. The parties to this appeal agreed that once an appeal is instituted an employee can withdraw from it. They also agreed that the determination of whether there is a withdrawal from the appeal is a matter of objectively construing the words used.

23. The appellant contends that by stating on 25 March 2019 that she no longer wanted to be reinstated back into her job and stating at the reconvened appeal hearing on 27 March 2019 "I don't want to work for Iceland" the claimant was objectively and unequivocally withdrawing from the appeal. I reject that contention, because:

(1) On an objective analysis of the words she used, the claimant stated that she did not want to return to work for the respondent rather than that she wanted to withdraw her appeal. Without requiring an excessive level of formality, she could have said "I withdraw my appeal", if that had been what she wanted to do.

(2) The claimant told the employment tribunal that she had <u>not</u> withdrawn her appeal because she believed that Acas had advised her not to do so. The employment tribunal accepted her evidence and found <u>as a fact</u> that the appeal had not been withdrawn.

(3) While the necessary consequence of an appeal succeeding is reinstatement into employment, this does not mean that a desire to be reinstated into employment is the only reason why a person might pursue an appeal. Sales LJ noted a number of other subjective reasons a person might have for pursuing an appeal. He merely stated that such subjective intentions were irrelevant to the objective construction of a contractual appeal procedure which, subject to express terms to the contrary, would

automatically result in reinstatement into employment.

(4) It does not necessarily follow from a statement that a person does not wish to return to work that the person does not wish to pursue an appeal. As noted above, in **Folkestone Nursing Home Ltd** Mr Patel did not wish to return to work. After his appeal was successful his reinstatement into employment did not prevent him then resigning and claiming constructive dismissal. In this case, the employment tribunal found as a fact that the claimant did not withdraw from the appeal because she wanted to pursue it in accordance with what she considered to be the advice of Acas.

(5) An employee who has been dismissed for gross misconduct might well wish to establish in an appeal that they were not guilty of gross misconduct because this will make it easier to find a new job and/or to obtain back pay, even though they will resign after being reinstated.

(6) It is not unusual for people to invoke a process that cannot provide what they want. Claimants in unfair dismissal claims often state that they want to clear their names although the employment tribunal can only consider whether the employer acted fairly in dismissing. The fact that a process cannot provide what a person wants does not alter the outcome. The fact that a person does not wish to return to work for a former employer does not prevent a successful appeal resulting in reinstatement into employment.

(7) The claimant's approach could result in an appeal procedure grinding to a halt if an employee states, in exasperation, that she feels that trust and confidence has broken down, and she so does not feel able to return to work. It is not unusual for an employee to say that trust and confidence has broken down, but to change their minds if an appeal is successful and their arguments are accepted.

(8) The claimant despite stating that she did not wish to return to work for the respondent did continue to participate in the appeal.

24. In all the circumstances, I consider that the employment tribunal was entitled to conclude that the words used by the claimant did not, on an objective analysis, indicate a decision to withdraw from the appeal. The employment tribunal was correct to hold that the claimant had not withdrawn from the appeal and so the original dismissal could not be relied upon. It may not have been quite correct for the employment tribunal to state that it was bound to reach this conclusion because of the decision of the Court of Appeal in **Folkestone Nursing Home Ltd**, because that case did not involve a withdrawal from an appeal, but the determination reached by the employment tribunal was correct. Accordingly, the appeal is dismissed.