Appeal No. UKEAT/0062/10/ZT

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 7 October 2010

Before

HIS HONOUR JUDGE PETER CLARK

MRS C BAELZ

MR D EVANS CBE

WESTON RECOVERY SERVICES APPELLANT

MR N C FISHER RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR R HOPKINS & MR A SMITH (Representatives)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

CONTRACT OF EMPLOYMENT – Wrongful dismissal

Employment Tribunal found Claimant guilty of serious misconduct for which dismissal fell within the range of reasonable responses; but that it did not amount to gross misconduct therefore the dismissal was unfair.

Applying s98(4) **Employment Rights Act 1996**, finding of unfair dismissal was reversed on appeal. However, in light of Employment Tribunal's finding that conduct was not gross misconduct (entitling employer to summarily dismiss Claimant) his claim for notice pay, representing damages for wrongful dismissal, was upheld and compensation adjusted accordingly.

HIS HONOUR JUDGE PETER CLARK

1. The parties before the Bristol Employment Tribunal in this matter were Mr Fisher, Claimant and Weston Recovery Services, Respondent. We shall so describe them. Neither party was represented below, the Claimant appearing in person and the Respondent by its proprietor, Mr Hopkins who, again, represents the Respondent before us today.

2. This is an appeal by the Respondent against the judgment of the Tribunal chaired by Employment Judge Simpson promulgated on 3 July 2009 following a hearing held on 11 June 2009 by which the Tribunal upheld the Claimant's claim of unfair dismissal and awarded him compensation totalling £2,118 made up as follows:

Basic award 4 weeks at £330	£1,320
Notice pay 4 weeks at £279	£1,116
Total	£2,436
Less already paid	£ 318
Grand Total	£2,118

Mr Hopkins explained to us today that £318 represented paid holiday taken by the Claimant before termination of his employment to which he was not then entitled on a pro rata basis. Written reasons for that judgment were promulgated on 1 December 2009.

Background

3. The Respondent operates a vehicle recovery business in which the Claimant was employed from 2 August 2004 until his summary dismissal on 28 November 2008. Mr Hopkins permitted the Claimant to take one of the firm's mini buses on a fishing holiday to France in October 2008. On returning the vehicle he failed to check that it was in a safe condition. The rear step was missing and the seats were insecure. Mr Hopkins considered this

state of affairs to amount to a safety hazard and arranged for Mr Stride, then the General Manager, to hold a disciplinary hearing. He did so and the Claimant was summarily dismissed for gross misconduct at that hearing on 28 November 2008. An appeal by the Claimant against that sanction was dismissed by Mr Hopkins on 11 December 2008.

The Tribunal Decision

4. It seems that the Tribunal treated the claim as solely one of unfair dismissal (reasons paragraph 1). In fact, looking at the Claimant's form ET1, in addition to a claim of unfair dismissal at section 5, he also included at section 8 a claim for notice pay. That claim will arise by way of an assessment of the compensatory award in a successful unfair dismissal claim. However, it also gives rise to a free standing common law claim for damages for wrongful dismissal brought under the **1994 Extension of Jurisdiction Order**. We shall return to that juridical distinction later.

5. The Tribunal directed itself as to the law, at paragraph 7, in these terms:

> **"The law:**
>
> **The relevant law is to be found in the Employment Rights Act 1996 and the Employment Act 2002 both of which we interpret with the benefit of judgments of the EAT and the courts."**

6. As to which provisions of the 1996 Act or the 2002 Act and which decided cases the Tribunal had in mind, their reasons are silent.

7. The Tribunal expressed their conclusions at paragraph 8 under the heading "Decision" in this way:

> **"We are unanimous in our findings detailed above and in our conclusion that although dismissal was within the range of reasonable responses to what must be regarded as serious misconduct in that the Claimant's failure to secure the seats could have placed the**

Respondent's customers' well being at risk, it was not such conduct as should be seen as gross misconduct justifying summary dismissal. We therefore find that such dismissal was unfair and make the following award to the Claimant, being satisfied that his employment would not have continued beyond the expiration of notice which could properly have been given."

8. The Tribunal went on to calculate the award of compensation omitting reference to the credit of £318 given to the Respondent in their earlier judgment and as to which we have earlier given an explanation based on Mr Hopkins' submissions this morning.

The Appeal

9. The appeal was originally sifted to a preliminary hearing by HHJ Serota QC. At that preliminary hearing before a division presided over by HHJ McMullen QC, the appeal was permitted to proceed to this full hearing on the basis of an amended Notice of Appeal. The sole ground of appeal now before us complains of an apparent inconsistency in paragraph 8 of the Tribunal's reasons, between the Tribunal's finding that although dismissal was within the range of reasonable responses to what must be regarded as serious misconduct on the part of the Claimant, that conduct did not amount to gross misconduct justifying summary dismissal and accordingly the dismissal was unfair. As we have observed, the Tribunal went on to limit compensation for unfair dismissal to the basic award and notice pay of four weeks net pay.

10. We think that analysis requires some unpacking. As to the complaint of unfair dismissal, the dismissal being admitted, the first question under section 98 **Employment Rights Act 1996** (ERA) was, "Has the Respondent shown a potentially fair reason for dismissal?" Plainly they had, it related to the Claimant's conduct on the Tribunal's findings. The next question is whether dismissal fell within the range of reasonable responses, the test applied to section 98(4) ERA by the Court of Appeal in cases such as **Foley v The Post Office** [2000] ICR 1203 approving the well-known **British Home Stores v Burchell** [1980] ICR303 test and **J Sainsbury PLC v Hitt** [2003] ICR 111.

11. Without spelling it out, the Tribunal appear to have accepted that the employer here genuinely believed on reasonable grounds following a reasonable investigation, that the Claimant was guilty of the misconduct alleged and that the sanction of dismissal for that misconduct fell within the range of reasonable responses open to the Respondent. There is no finding of procedural unfairness (see **Hitt**) nor is it suggested that the employer failed to follow the statutory dismissal and disciplinary procedure giving rise to automatic unfairness under section 98(A)(1). How then did the Tribunal reach the conclusion that the dismissal was unfair under, presumably, section 98(4)?

12. We think that the Tribunal fell into error in taking the view that because, in their judgment, the conduct in question did not amount to gross misconduct, that is, conduct justifying summary dismissal at common law, the dismissal was statutorily unfair.

13. It is now well established at Employment Appeal Tribunal level that the question under section 98(4) ERA is not simply answered by deciding whether or not the employer or employee is in breach of the contract of employment. We refer to the analysis by Phillips P in **Redbridge, London Borough v Fishman** [1978] ICR 569 which I gratefully adopted in **Farrant v Woodroffe School** [1998] ICR 184, 195 B-C, a case later followed by the Employment Appeal Tribunal in **Ford v Libra Fair Trades** [2008] UKEAT 77/08.

14. As Mr Justice Phillips put the matter in **Fishman** at page 574:

> **"Many dismissals are unfair although the employer is contractually entitled to dismiss. Contrary-wise, some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee."**

15. In our judgment, on a proper analysis, applying the law to the facts as found by this Employment Tribunal, the present case falls into the latter category. Section 98 is, so far as is material, concerned with the sufficiency of the conduct reason for dismissal. It is not concerned with the common law concept of gross misconduct, that is, conduct by the employee amounting to a repudiatory breach of the contract of employment entitling the employer to terminate the contract without notice or pay in lieu of notice.

16. Applying section 98 as interpreted by the higher courts, this dismissal was fair. The employer passed the **Burchell** test, followed a fair procedure and imposed a sanction, dismissal which fell within the range of reasonable responses. To that extent this appeal succeeds.

17. However, that is not quite the end of the matter. The Tribunal found that the Claimant's conduct, although serious, did not amount to gross misconduct, that is, a repudiatory breach of contract entitling the Respondent to summarily dismiss him at common law. That brings us back to the Claimant's alternative claim for damages for wrongful dismissal; breach of contract. Here the question for the Tribunal is quite different from the statutory question posed by section 98 ERA. Having found as a fact that the conduct did not amount to gross misconduct justifying summary dismissal it would inevitably follow that the Claimant's complaint of wrongful dismissal ought to succeed. On this aspect of the case, having raised it with Mr Hopkins in argument this morning, he strongly submits that the conduct of the employee did amount to gross misconduct. He emphasises the importance of ensuring that all vehicles used in his business are absolutely safe for his staff and members of the public who use them. We have carefully considered that submission but we are driven to conclude that the finding by the Tribunal that this did not amount to gross misconduct was one of fact with which we cannot interfere, our jurisdiction being limited to correcting errors of law only.

18. In these circumstances we have concluded that the Claimant was entitled to four weeks net pay, less any proper deductions, for breach of contract, that is, his wrongful dismissal.

Disposal

19. The appeal is allowed to the extent that the Tribunal's finding of unfair dismissal and compensation therefore, is set aside. We shall substitute a finding of wrongful dismissal and assess compensation for that breach of contract as follows, 4 weeks net pay, £1,160 less £318 paid in respect of holiday taken to which, in the event, the Claimant was not entitled, total £798. That figure is substituted for the Tribunal's award in favour of the Claimant of £2,118. Interest will be added in accordance with the notice issued by the Employment Tribunal appearing at page 6 of the Employment Appeal Tribunal bundle.