Appeal No. UKEAT/0297/16/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 April 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR A M COLETTA — APPELLANT

BATH HILL COURT (BOURNEMOUTH) MANAGEMENT COMPANY LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS BETSAN CRIDDLE (of Counsel) Instructed by: Paris Smith LLP 1 London Road Southampton Hampshire SO15 2AE
For the Respondent	MR MARK GREEN (of Counsel) Instructed by: Ashfords LLP Ashford Court Blackbrook Park Avenue Taunton TA1 2PX

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

PRACTICE AND PROCEDURE - Admissibility of evidence

In the course of an unfair dismissal hearing, where there were issues as to the true reason for dismissal and whether the Respondent reasonably concluded that the Claimant was guilty of dishonesty, a witness of the Respondent said that he understood that the police had referred the file concerning the Claimant to the Crown Prosecution Service. The Employment Judge proceeded to hear the issue of unfair dismissal without the Claimant giving evidence because (he said) there was nothing relevant to be cross-examined at that hearing. It was argued (1) that the Employment Judge should not have taken this course because the Claimant's evidence was relevant; and (2) the Employment Judge should have adjourned the case.

Held: The Claimant's evidence, and cross-examination upon it, was relevant to the issues the Employment Judge had to decide. He should not have proceeded without hearing it, and the Claimant's representative did not consent to that course. The Employment Judge had not, however, been bound to adjourn the case. He could and should have waited to see if the Claimant had claimed any privilege against self-incrimination and made an application to adjourn. He should then have considered any application to adjourn having regard to the submissions of both parties.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Anthony Michael Coletta ("the Claimant") against a Judgment of the Employment Tribunal sitting in Southampton, Employment Judge Reed sitting alone. The Claimant had brought a claim of unfair dismissal against Bath Hill Court (Bournemouth) Management Company Ltd ("the Respondent"). It was heard on 19 May 2016. By his Judgment dated 23 May the Employment Judge dismissed the claim.

2. On the day of the hearing the procedure took an unusual course. I will have to describe the circumstances more fully in a moment. The hearing began as planned; the Respondent's witnesses giving evidence and being cross-examined. It emerged that one had learned, or thought he had learned, that the Claimant's case had been or was to be referred to the Crown Prosecution Service by the police. It had been planned that the Claimant's evidence would follow that of the Respondent's witnesses. In the end, however, he was not called to take the oath and he was not cross-examined. Rather, the Employment Judge read his statement, listened to submissions and then reached his conclusion.

3. On behalf of the Claimant, Ms Betsan Criddle submits that the course taken was fundamentally unfair and unsatisfactory. If necessary an adjournment should have been ordered but it was ordered wholly unfair not to take the Claimant's evidence. On behalf of the Respondent, Mr Mark Green submits that it was fair in the circumstances to take this course and, in any event, it can have made no difference to the outcome.

The Background Facts

4. The Respondent is the management company for a substantial block of apartments in Bournemouth. At all material times it has had a team of porters. In the year 2000 the Claimant took up employment as a porter. In about 2007 he became head porter. He had an apartment to use. He worked on-call hours in addition to his ordinary hours. Among his many responsibilities he prepared records for overtime and the like.

5. In 2014 the Claimant commenced proceedings against the Respondent claiming that he had been underpaid by reference to the national minimum wage. In due course that claim was upheld by a Judgment dated 9 September 2015; and I am told the Claimant has now been awarded substantial compensation.

6. In the meantime, however, the Respondent had commenced disciplinary proceedings against the Claimant. It found some 41 instances between 2007 and 2014 when the Claimant claimed overtime on the basis that another porter was on leave, whereas on those dates records showed that that other porter was at work. The amount involved was of the order of £7,000. The Respondent brought disciplinary proceedings on the basis that the Claimant was dishonest. He accepted that the overtime was wrongly claimed but said it was by reason of error not dishonesty. The Respondent did not accept that explanation. The Claimant was dismissed for dishonesty on 24 April 2015. An internal appeal was heard on 4 August 2015 and dismissed.

The Employment Tribunal Proceedings

7. On 18 September 2015 the Claimant brought his claim. By the time of a Preliminary Hearing on 26 January 2016 it had been refined so that he claimed unfair dismissal, asserting that the dismissal was for an automatically unfair reason, namely that he had brought a claim

under the **National Minimum Wage Act** (see section 104(A) of the **Employment Rights Act 1996**). Alternatively, there was no genuine belief that he was guilty of misconduct and, if there was, the belief was unreasonable and the dismissal was unfair (see section 98 of the **1996 Act**).

8. The case management Order at the Preliminary Hearing provided for the Respondent's witnesses to give evidence first and for the Claimant to follow. Provision was made, as is standard practice, for witness statements to stand as evidence-in-chief. It was plainly intended that the Claimant should be cross-examined. One and a half hours were allowed for it.

9. By the time of the Employment Tribunal hearing on 19 May 2016 a bundle had been prepared and witness statements had been exchanged. The Respondent's witnesses set out why they believed the Claimant to be guilty of misconduct. Given the nature of this appeal it is not necessary to set out their evidence in any detail.

10. It is, however, necessary to describe the Claimant's witness statement. It ran to some ten pages. It contained assertions that the Respondent really dismissed him because of the minimum wage claim, but it also contained evidence as to why, in his belief, it would not be reasonable to conclude that he had dishonestly claimed overtime.

11. The following are salient points:

(1) He said he worked incredibly hard while he was employed by the Respondent, being expected to work a "96 hour shift cycle". As a result he was often tired.

(2) He had an exemplary disciplinary record and was held in high regard by residents. He produced letters of thanks and commendation.

(3) He was not adept at completing timesheets, overtime and the like. It was not even a listed duty, although he undertook it. As he put it, he struggled with administrative tasks but was not employed to be an administrator. He had no assistance or supervision either from the Respondent or its agents. No one checked to make sure he was not making a mistake.

(4) A major problem was that he had to estimate what to include for the last 11 days of the month given the deadline by which he had to submit forms to the Respondent's agents. This inevitably left room for error.

(5) Generally he had to complete timesheets and overtime records when he was at work, inevitably being interrupted and disturbed. He also had to complete them when he was off work due to sickness, since there was no cover for this task. These were other potential sources of error.

(6) Between 2006 and 2014 he would have made about 16,200 entries into timesheets and overtime forms. The 41 errors equated to just a few mistakes each year. In 2014 there was just one incorrect claim, hardly evidence of sustained dishonesty.

(7) The way he completed the forms is, he said, crucial to understanding how some mistakes were made. He explained it in some detail. It is sufficient to say that the juxtaposition of the other porter's records and his, coupled with the fact they usually worked opposite shifts, lent itself, he said, to error.

(8) He did not accept the account of the Respondent there was a pattern in the dates when he made mistakes. The dates appeared to be random, scattered across the whole month.

(9) He pointed out that he had always been responsible for petty cash. There was no suggestion that he mishandled petty cash despite the obvious potential there for fraud.

12. At the hearing both parties were represented: the Claimant by Mr Willshire, a solicitor; the Respondent by Mr Mark Green, who appears today. The Respondent's witnesses were cross-examined. Mr Shieldhouse had said in his statement that the Claimant had been interviewed by the police on 16 December 2015 and that the matter was still under active consideration by the police.

13. In the course of his evidence, Mr Shieldhouse purported to update the position. He said the police had now referred the file to the Crown Prosecution Service. It was following this information that proceedings took a turn which had not previously been anticipated. I will devote a separate section of this Judgment to making findings as to what actually happened. In the result, the Employment Judge confirmed that he would take the witness statement into account, but the Claimant did not go to the witness table to take the oath and confirm the oath, the truth of his witness statement and, most importantly, the Respondent did not cross-examine at all.

The Employment Judge's Reasons

14. The Employment Judge described in paragraph 2 the evidence he heard. He said the Claimant was "not required to give evidence". In full, he said:

> **"2. On behalf of the Company, I heard evidence from two directors, namely Mr Taylor in relation to the dismissal and Mr Shieldhouse in relation to the appeal against dismissal. Mr Coletta was not required to give evidence but I read his statement and my attention was directed to a number of documents. I reached the following findings."**

15. His primary findings of fact were very brief. They were contained in two paragraphs and did no more than outline the background. He then stated the issues in brief:

> **"6. Under s98 of the Employment Rights Act 1996 there are five potentially fair reasons for dismissal and the Company asserted that the reason in this case was conduct, the Company having believed that Mr Coletta had acted dishonestly. Mr Coletta, however, contended that the real reason for his dismissal was the fact that he made allegations in relation to the minimum wage regulations and took the Company to a tribunal - in other words that he was being victimized."**

16. On the substantive issues, the Employment Judge's reasons are also brief. I will set them out in full:

> **"7. In the light of the matters discussed in more length below, I was inclined to believe the evidence given on behalf of the Company and accept that the reason for dismissal was a genuine belief in dishonesty. The dismissal was therefore potentially fair and I was then obliged to consider, under s98(4) of the 1996 Act, whether the Company acted reasonably in treating that reason as justifying dismissal.**
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> **8. There were over forty occasions spanning a period of roughly eight years on which Mr Coletta had improperly claimed overtime and as a consequence he had unjustly enriched himself to the tune of several thousand pounds. [There] were clearly two possible explanations - firstly that he had deliberately done this in order to obtain money to which he knew he was not entitled or secondly that he had made mistakes. The Company was at liberty reasonably to believe either of those explanations. The fact that Mr Coletta had a very good work record would not greatly assist the Company in resolving that question. Nor was the fact that he had never been dishonest before: if he had been, the likelihood is that he would have been dismissed then. The evidence against Mr Coletta was of a repeated mode of operation over an extended period. It was not surprising that his claim - that this was all accidental - was not felt to be credible. The Company was reasonably entitled to believe that Mr Coletta was not telling the truth and that he deliberately carried out the acts in question ie that he had acted dishonestly. It was not suggested that the sanction of dismissal was inappropriate in that situation."**

17. The Employment Judge went on to deal with a procedural issue concerning the process adopted by the Respondent. I am not concerned with that issue. It is sufficient to say that he found a procedural shortcoming: the board which took the decision to dismiss also heard the appeal. He considered that, given the nature and small size of the company, this was not sufficiently serious to render the dismissal unfair.

What Happened at the Hearing?

18. It became clear in the run-up to this appeal hearing that the parties were not entirely in agreement as to what occurred before the Employment Tribunal. The Employment Judge had

not dealt with it at all in his Reasons beyond the Delphic comment in paragraph 2, which I have quoted.

19. The Employment Judge was asked for his notes and comments. His notes are exiguous and contain no relevant record of this matter. He commented as follows:

> **"For what it is worth, my recollection is that the question of self incrimination was indeed raised during the evidence of Mr Shieldhouse, when it was apparent that there might be criminal proceedings. I also seem to recall that all parties agreed that on the question of fairness the claimant could not give relevant evidence and so, having got to a hearing, it made sense to proceed. I have no recollection of a postponement being sought on behalf of the claimant (and indeed the notice of appeal does not expressly state that it was). I suppose it might be being suggested that I should have postponed on my own initiative but where both parties appeared to accept my analysis (that the issue of fairness could be satisfactorily addressed without the claimant giving evidence), I cannot see why I would have done so.**
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> **I also confess I regard it as somewhat unlikely that I would have indicated that "because the standard of proof in the criminal proceedings would be far higher", the claimant would not be prejudiced if the hearing went ahead. I would only ever have dealt with fairness at that hearing and therefore I would not have been adjudicating on the claimant's "guilt" in any way. He therefore could not have been prejudiced in any criminal action. I may well have expressed the view, however, that if I found for the claimant on fairness, we would have to put remedy over until after any criminal proceedings. Clearly, if he was convicted of that fraud that would have an impact on any remedy hearing."**

20. In addition to what the Employment Judge said, the parties have an excellent note from the Claimant's trainee solicitor and recollections of Mr Wiltshire and Mr Green, both here today. It is important that the Employment Appeal Tribunal should have a sound basis in fact when it decides whether there was an error of law of a procedural nature. In a case of this kind it is, therefore, important to establish key parts of what took place. Shortly before lunchtime during this hearing I drafted what I hoped was a distillation of the position for the parties to consider. They have done so with some minor points of difference which neither counsel nor I consider to be material. I will go through this document.

21. I will begin with the four paragraphs which are entirely agreed. (1) During the morning Mr Green and Mr Shieldhouse informed the Employment Tribunal that the police were going to send the file to the Crown Prosecution Service for intended prosecution. (2) The Employment

Judge raised the issues stated at the top of page three of the attendance note (relating to fairness, whether his findings would bind someone else and the impact on remedy). He said he would only consider liability not remedy. (3) At the end of the morning the Employment Judge suggested that it would be preferable for the Claimant not to give evidence because of the privilege against self-incrimination; no conclusion was reached on this point. (6) There was no application for an adjournment by either party.

22. I turn then to the two paragraphs that are not completely agreed, although they are largely agreed. (4) At the beginning of the afternoon Mr Green accepted the Claimant's evidence on the subject of why the Claimant said the Respondent's belief was not genuine, he said he did not need to cross-examine on that. The Employment Judge confirmed that there was nothing in the Claimant's witness statement that was relevant to be cross-examined today. I would add that thus far the matter is agreed. The small addition remembered by one person is, "as he would have to decide the question of reasonable belief based on what the Respondent had before them at the investigation disciplinary hearing and appeal". I do not regard that as a material difference.

23. (5) The Claimant's representative expressed unhappiness about how the evidence had been introduced at this late stage and that his client should/would not be able to give evidence. Slight difference of recollection if as to whether the word was should be able to give evidence or would not be able to give evidence. But, again, I do not regard that as a material difference.

24. Those then are the basic agreed facts and I am satisfied that this basic outline provides a secure basis on which to decide this appeal and that it is not necessary to invoke paragraph 13 of the EAT's **Practice Direction** to the extent of requiring affidavits and oral evidence.

Submissions

25. On behalf of the Claimant, Ms Criddle takes two interlinking points. First she submits that the effect of the Employment Judge's course of action was to close off - effectively to prevent - the Claimant giving oral evidence in the manner envisaged by the parties. It was wrong in law to say that he had no relevant evidence to give or upon which he should be cross-examined. His witness statement and cross-examination upon it was relevant to the reason for dismissal. That question had to be considered in the round where there were competing reasons alleged (see **Kuzel v Roche Products Ltd** [2008] ICR 799). His witness statement, and cross-examination upon it, was also relevant to the question whether the Respondent had reasonable grounds for dismissal.

26. Secondly, she submits that the Employment Judge ought to have adjourned the case in the light of the new information about prosecution. It was essential either to give the Claimant an opportunity to give evidence or adjourn the case to protect his right to a fair hearing. She took me to cases concerning the extent of Article 6 as applicable to civil cases, but I do not think my decision here in any way rests on them and I will not refer to them.

27. On behalf of the Respondent Mr Green replies as follows. By the time the Employment Judge said that there was nothing in the Claimant's witness statement that was relevant to be cross-examined. The main issue was whether the Respondent genuinely believed in his misconduct and whether that was the principal reason for his dismissal. On that issue there was really no dispute about the Claimant's evidence and the Employment Judge took into account the only evidence upon which the Claimant relied (see paragraph 12 of his witness statement). The Employment Judge was entitled to say that in other respects the Claimant had no relevant evidence to give, for the task of the Employment Judge was to decide whether the Respondent

had acted reasonably in dismissing him. It was the Respondent's evidence which was critical. The course which he took was a sensible one, designed to assist the parties. The law did not require the Employment Judge to adjourn the case (see the wide discretion of the Employment Judge in this respect, **Bastick v James Lane (Turf Accountants) Ltd** [1979] ICR 778).

Discussion and Conclusions

28. In the morning the Employment Judge had said that he would only consider liability. I have no doubt that he meant he would consider liability for ordinary and automatic unfair dismissal, but not contributory fault or **Polkey** where he would have to make findings for himself as to the Claimant's dishonesty. When the afternoon hearing started there had been no resolution of the questions raised about the privilege against self-incrimination. The Employment Judge took the lead. At an early stage he made clear his view that there was nothing in the Claimant's witness statement that was relevant to be cross-examined "today", that is to say on the question of liability for unfair dismissal. There was an expression of unhappiness, unfocused, but, to my mind, making it plain that the Claimant and his solicitor were unhappy with this course.

29. The Employment Judge then informed the parties that the Employment Tribunal would proceed with the Claimant's statement as read. I have no doubt that in being proactive in this way the Employment Judge was aiming to assist the parties and move the case forward without adjournment and without any embarrassment caused by the criminal proceedings, but the practical effect was that the Claimant did not take the oath and was not cross-examined.

30. In my judgment, the Employment Judge was wrong to say that there was nothing in the Claimant's witness statement that was relevant to be cross-examined that day. His statement was potentially relevant on the key issues in the case relating to liability.

31. Firstly, on the question whether there were reasonable grounds for dismissal, his evidence was material for the Employment Tribunal to take into account. It is of course true that the question for the Employment Judge was whether it was reasonable for the Respondent to dismiss the Claimant; the focus was upon whether it was reasonable for the Respondent to conclude that he was guilty of dishonesty. But this did not mean that the Claimant's evidence was irrelevant. It was, as counsel before me agreed, a distillation of much material he put before the Respondent, in particular, during the internal appeal hearing. It was relevant for the Employment Tribunal, in deciding whether it was reasonable for the Respondent to conclude that the Claimant committed fraud as opposed to merely making mistakes, to have regard to the Claimant's account. The Employment Tribunal could take account of the factors which he put forward, all of which were before the Respondent, in deciding whether the Respondent acted reasonably. The Employment Tribunal was not restricted to looking at the facts which were before the Respondent solely through the prism of the Respondent's witness.

32. In making provision for the Claimant to give evidence, the Employment Judge at the Preliminary Hearing followed the universal practice of treating the evidence of a Claimant as relevant when dealing with a conduct dismissal case. Even though at the end the Employment Tribunal will have to answer the question whether the Respondent acted reasonably in dismissing the Claimant, evidence nevertheless can be given by a Claimant on oath or affirmation, and if it is it should be cross-examined. Experience shows that cross-examination can throw light on the validity of a witness' evidence either way. Sometimes a witness'

credibility is dented. Sometimes a point gains strength as a witness is asked about it and something which seemed unlikely or improbable can be altogether more probable once it has survived cross-examination. The practical effect of the Employment Judge's ruling was that the Claimant was deprived the opportunity of having his evidence assessed when it was relevant to the issues concerned.

33. Secondly, where there are disputed reasons for dismissal, it is important to look at the case in the round. In **Kuzel v Roche Products Ltd** [2008] ICR 799, at paragraphs 57 and 58 Mummery LJ said as follows:

> **"57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
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> **58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable interferences from primary facts established by the evidence or not contested in the evidence."**

34. I, therefore, conclude that the Employment Judge should not have closed off the Claimant from giving evidence as he did on the basis that the evidence and cross-examination was not relevant to the issues which he had to determine. I accept ground 2, which is to the effect that the Employment Judge effectively prevented the Claimant from giving evidence.

35. I would add that the Employment Judge's Reasons in this case are extremely brief. The Claimant who had been dismissed after a lengthy period of employment for dishonesty, who has lost his home and, perhaps, congenial work, was entitled to have his case addressed and considered by the Employment Judge. There were a significant number of points in his witness statement which the Employment Judge did not address in his reasons. For example it is

impossible to see what, if anything, the Employment Judge made of the points in the witness statement which tended to suggest that there was room for error in the keeping of the records. I think that must be because he, indeed, regarded the Claimant's witness statement, and cross-examination upon it, as irrelevant to the question of fairness. It was relevant, and if he had treated it as relevant I would have expected the Employment Judge to address the key points in the witness statement in his Reasons.

36. I turn to ground 1. I do not accept that the Employment Judge should have adjourned the case without more. He was not asked to do so; and there were other options to be considered first. If the Employment Judge, instead of announcing his approach, which I regard as erroneous, had waited to see what, if any, applications were made, he would then have been able to address the case in accordance with the parties' submissions. He had rightly raised in the morning the question of privilege against self-incrimination. That privilege however, can be waived, and it is often in the interests of a party to waive the privilege. The Claimant was due to go in the witness box. He might simply have waived privilege, by no means a fanciful course in a case of this kind, or, if not, he might have applied for an adjournment. If he had applied for an adjournment the Employment Judge should then have heard submissions from both sides and made a determination without the fundamental error that the Claimant's witness statement was irrelevant to the question of fairness. If the application for an adjournment had been refused, the Claimant would effectively have had to consider his position again relating to self-incrimination. The Employment Judge, if he had not taken, no doubt from the best of motives, the course which he took at the beginning of the afternoon, would have been in a position to address the issues carefully in a way which was fair to both sides.

37. I should say that it has been suggested that the Claimant consented to the course in question. I am quite satisfied, having regard to the summary which has been prepared, that he did not do so. I think it was probably, from his point of view, the worst option and the fact that there was an expression of unhappiness and discussion about an adjournment, somewhat inconclusive and ill-focused, after the Employment Judge announced his proposed course, to my mind shows that he was not consenting.

38. I turn then to Mr Green's submission that the Employment Judge's legal error, if such it be, made no difference. The test which the Employment Appeal Tribunal must apply here is the strict test in **Jafri v Lincoln College** [2014] ICR 920, now very well-known. As I have said, cross-examination is a powerful tool. It may affect a case either way. I am in no position to say that the outcome would have been the same if the Claimant had gone into the witness box and given evidence and been cross-examined about his explanations. It follows that the appeal will be allowed, the Judgment will be set aside and the matter will be remitted to a freshly constituted Employment Tribunal for rehearing.

39. On the question of remission, Mr Green suggests that I should allow the Employment Judge's findings about the procedural matter to stand. I do not think I should. Section 98(4) must usually be considered as a whole; while there may be cases where a particular aspect of section 98(4) can be considered in isolation, I am certainly not persuaded that this is one of them. I think the matter should be looked at afresh throughout.

40. In fairness to the Claimant, I add that I was told at the conclusion of the hearing that no criminal proceedings were ever brought against him.