Appeal No. UKEAT/0112/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 & 2 October 2019

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

PARKVIEW CARE LIMITED — APPELLANTS

MR D FENN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR RAD KOHANZAD (of Counsel) Instructed by: Moorepay Limited Lowry Mill Swinton Manchester M27 6DB
For the Respondent	MR JOHN HENDY QC (of Counsel) Instructed by: Foot Anstey LLP High Water House Malpas Road Truro Cornwall TR1 1QH

SUMMARY

CONTRACT OF EMPLOYMENT – Incorporation into contract

CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term

UNFAIR DISMISSAL – Constructive dismissal

UNFAIR DISMISSAL – Contributory fault

The Employment Appeal Tribunal heard this appeal against the judgment of the Employment Tribunal. It was argued that the Employment Tribunal should have paid more heed to the underlying misconduct of the employee, the Claimant, who had lied to the Appellants about his whereabouts and taken time away from work when driving a company car although ostensibly working for the Appellants. However, the Employment Appeal Tribunal was satisfied that the primary cause of the constructive dismissal was the unfairness of the disciplinary meeting and that the Claimant's resignation was primarily due to the handling of his misconduct and not his prior misconduct. The Appellants appeals in this connection were rejected. The Employment Appeal Tribunal was persuaded however that the deduction for contributory fault was perversely low. His dishonesty and misuse of company time was a significant factor. The Employment Appeal Tribunal indicated that it was minded to assess the contributory at 20% but invited submissions in writing before making a final decision. The Employment Appeal Tribunal was also persuaded on a construction of the contractual documentation that the Appellants had agreed to pay an allowance for time spent "sleeping in", when the Claimant was providing care in the course of his employment. The Employment Appeal Tribunal therefore overturned the Employment Tribunal's finding that he was entitled to be paid at his normal hourly rate.

THE HONOURABLE LORD SUMMERS

Ground One

1. The Appellant argued that the EJ failed to consider whether dismissal was within the range of reasonable responses and that the ET erred in holding that issuing a first and final written warning was outside the band of reasonable responses. I have decided to reject this ground of appeal. It does not seem to me that the Employment Tribunal ("the ET") required to look beyond the circumstances of the disciplinary meeting when assessing whether or not the Respondent had been constructively dismissed. As the ET found, the conduct of the meeting was unfair and this led the Respondent to walk out. I consider that the ET was entitled to conclude that he was constructively dismissed. The underlying behaviour did not in fact lead to dismissal since as a matter of fact the Appellants having considered the behaviour of the Respondent decided to issue a warning. They did not dismiss him. The circumstances relevant to the constructive dismissal were subsequent in time and largely unconnected with facts giving rise to the need to discipline. The fact that Mr Fenn's mis-use of the Appellant's time had led to the meeting did not seem to me to be sufficiently connected to the reason for the constructive dismissal. The ET found that the Respondent walked out because he felt he was being treated unfairly. The ET found that the hearing lacked the elementary requirements of natural justice. The conduct of the hearing was not within the band of reasonable responses and Mr Fenn's departure was entirely predictable.

Ground Two

2. The appellant argued that the EJ erred in holding that they were not entitled to continue the disciplinary hearing after the claimant Mr fen raised a grievance. I likewise reject this ground of appeal. I consider that the Appellant here mis-reads the approach of the ET to the

ACAS guidance. It is true that paragraph 46 is expressed in permissive terms but I consider that on a proper interpretation of the Employment Judge's reasoning he considered that given the circumstances of the case and the fact that a grievance had been raised, the Appellants should have stopped the hearing as a matter of fairness and not brushed the complaint to one side. Alternatively they might have continued with the hearing but then returned to the grievance. What they were not entitled to do is ignore it. I consider that the ET was entitled to conclude that in order to follow ACAS guidance the hearing should have stopped or re-arranged so as to take account of the grievance.

Ground Three

3. I reject this ground also. I accept that the conduct in question, in the abstract, could have amounted to gross misconduct. However, these matters are not to be judged in the abstract. Having regard to the facts and the circumstances and the obligation of the EAT to defer to the ET as the primary evaluator of fact, I accept that the ET's conclusion in this connection should not be disturbed. In any event, I am unable to see how even if they had been willing to accept that Mr Fenn's frolic was capable of being gross misconduct it would have altered the fashion in which the Appellants chose to dispose of the matter. Since the sanction is determined by the nature of the behaviour giving rise to the need to discipline not the label attached to the behaviour I consider that they would have issued a first and final even if the conduct had been described as gross misconduct. As I have explained, the decision of the ET was based on the conduct of the hearing and was not in any important sense connected to the Respondent's antecedent behaviour. That being so whether or not an appropriate label was applied to his behaviour was not a significant issue.

Ground Four

4. The Appellants also argued that the ET erred in failing to apply a **Polkey** reduction. This argument proceeded on the basis that the claimant would have left the Appellants' employment in any event whether or not the disciplinary procedure was vitiated by the procedural flaws identified by the ET. The Appellants advert to a variety of other complaints made by the claimant that it is said would have led to him leaving the Appellants' employment. I reject this ground as speculative in character. I am quite unable to accept that there is any factual basis for the proposition that the Respondent would have left his employment irrespective of the conduct of the hearing.

Ground Five

5. Ground five is based on the proposition that the ET were not entitled to conclude that 5% was a just and equitable deduction for the purposes of Section 123(6) of the **Employment Rights Act** ("ERA"). Given the serious nature of the underlying conduct 5% would appear to be a very low assessment of the Respondent's contribution to the dismissal. I have carefully considered the submissions of Lord Hendy QC and acknowledge that I should not simply substitute my view for the ET's view. I am also mindful of the fact that I was not present at the ET and am deprived of the advantages that accompany seeing and hearing the witnesses. In the oral discussion of this issue it seemed to me that Lord Hendy QC's submissions as to why 5% might have been an appropriate deduction ventured into the realm of speculation. I am not minded to speculate as to why 5% might have been appropriate. I have confined myself to the facts and reasons that appear in the Judgement.

6. I consider that on the facts found proved and affording a generous degree of latitude to the ET as the finders of fact, a 5% deduction is a perversely low assessment of Mr Fenn's

contribution to his unfair dismissal. I do not consider that 5% is a sufficient acknowledgement of the gravity of the underlying behaviour. The Respondent was plainly using a company vehicle for clandestine purposes. There was a period of at least two hours when according to the tracking device on the vehicle there was no satisfactory explanation for where he had been or what he was doing. The ET accepted that he lied to his employers as to what he was doing. He firstly lied in saying he had been stuck in traffic and he also when he said he was at a friend's house trying to get the car fixed. It remains unclear what he was doing at the material time.

7. Lord Hendy QC acknowledged that in appropriate circumstances this might amount to gross misconduct justifying dismissal. I treat this acknowledgement as a rough cross check on the ET's assessment of contributory fault. It seems to me that the ET's view, under reference to the company disciplinary policy, that his frolic should have been dealt with by means of counselling reflects an unduly benign view of the Respondent's behaviour. The ET described the task of assessing contribution as an "arbitrary" exercise. The ET also described their assessment as a "gesture to signal our disapproval". I do not consider that the task of assessing contribution is arbitrary. While it involves the exercise of discretion it must be amenable to explanation and justification. It is not an arbitrary exercise. Nor is it meant to be a "gesture". This language suggests that the ET approached the task of assessment in the wrong way. In assessing contribution the ET must carefully assess the competing arguments and come to a conclusion that is amenable to rational explanation. I accept that the ET should be afforded significant latitude in the exercise of its discretion and that it is entitled to take a "broad brush", but it is not appropriate to describe the assessment as a "gesture".

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8. In my view, Lord Hendy QC was wrong to say that the Appellants had not challenged the ET's conclusion on the grounds of perversity (see the final sentence of the Ground of Appeal number five). I consider that it is open to me to entertain this ground of appeal and I am satisfied that the grounds for doing were articulated in advance of the appeal.

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9. Of greater difficulty is what I should do in the light of my conclusion that 5% is perversely low. Although I have an appellate role and a jurisdiction confined, in broad terms, to questions of law, I am also responsible to consider issues of cost and expedition. The decision on contribution is one that involves the use of the proverbial "broad axe." The findings of fact germane to the decision appear from the ET's judgement and have been discussed before me. In these circumstances I came to the view that it would be best if I fixed the element of contribution rather than allow the case to proceed to the ET for re-determination. I raised this issue with parties when I gave my extempore judgement and advised that I had come to the provisional conclusion that contribution should be assessed at 20% was appropriate. I was conscious however that I had not heard submissions on the point. Mr Kohanzad was content for me to assess contribution but submitted that an opportunity should be given for parties to provide written submissions on the appropriate level of contribution. I was also conscious of the fact that during the adjournment before giving extempore judgement, Lord Hendy QC had been called away to business in the House of Lords. In this situation I gave parties an opportunity to provide submissions in writing on the level of contribution and that this should be done within 14 days. I refer to the outcome of this procedure in the Postscript below.

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Ground Six

10. In this connection I have come to the conclusion that the ET erred in deciding that the Respondent was entitled to his hourly rate of work when sleeping-in.

11. The term "on-call" does not in my opinion cover "sleeping-in". Being on-call as the "Hours of Work" paragraph suggests covers queries and emergencies. Nor do I consider that sleeping in is covered by the paragraph entitled "additional hours". As it states this is designed to cover emergencies. Sleeping in is not covered by that category of work. In my judgment, the Principal Statement of Terms and Conditions of Employment makes no explicit provision for "sleeping in". In my view, the covering letter of 4 August 2014 addresses this issue. I see no reason for excluding it from the scope of the Respondent's terms and conditions of employment. It seems to me that the term allowance, reflects the hybrid nature of this form of employment. Time spent "sleeping in" may as the term suggests be spent sleeping. That may be characterised as a benefit for the employee or the time may be spent assisting the person being cared for by the Appellants. The word "allowance" it seems to me reflects the idea that the carer may derive benefit from time spent sleeping while at the same time he may be required to offer his services. Contrary to the impression I formed when first considering the term it does not describe a sum paid to defray expenses.

12. Lord Hendy QC noted that the allowance did not satisfy the requirements of National Minimum Wage legislation. That in turn begged the question whether the relevant legislation applied to the allowance. I am told that that the law on this issue is unsettled and that the Supreme Court is expected to rule on the matter in the near future. That dispute however is not one I have to adjudicate on. The narrow question for me is that of contractual interpretation. I have concluded that this is indeed what the contract provides. I have derived little assistance

from the ET's reference to and observations on **Focus Care Agency Limited v Roberts** [2017] UKEAT/0143/16/DM. The EAT in that case was occupied with an issue of statutory construction. Here the issue is one of contractual construction. In these circumstances, I will uphold this ground of appeal.

POSTSCRIPT

I have considered the written submissions supplied to me. Neither party sought to persuade me to remit back to the ET. Lord Hendy QC argued that I should leave the finding of 5% contribution undisturbed on the basis that the ET was best placed to assess issues of fact. This submission however did not take account of the fact that in my extempore judgement of 2 October 2019 I held that the finding of 5% contribution was perversely low. As I indicated (see above) an award of 5% does not take adequate account of the gravity of the Respondent's misconduct. Even if I had been persuaded that the decision was not perverse, I note that the ET's approach is vitiated by a misunderstanding of the correct approach to contribution. In these circumstances I consider that I am entitled to reconsider the decision. Mr Kohanzad argued that I should make a finding of 100% contribution. This submission contrived to ignore the gross ineptitude displayed by the Appellants in their conduct of the investigation and hearing that led to his constructive dismissal. Since I consider that the primary reason for the dismissal was the inept conduct of the investigation and hearing, I do not consider that I can find that the Respondent was the primary contributor to the dismissal. On the other hand, I do accept that the Respondent's use of a company vehicle for clandestine purposes during the course of employment amounted to serious misconduct. I note that he used the vehicle for an extended period and sought to conceal his wrongdoing when he was challenged to explain his absence. Balancing these factors, I have come to the conclusion that the Respondent's contribution should be set at 25%.