Appeal No. EATS/91/95

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 20 March 1995
Judgment delivered 21 June 1995

Before

THE HONOURABLE LORD COULSFIELD

DR A H BRIDGE

MR J D POLLOCK

MALCOLM D KERR APPELLANTS

NATHAN'S WASTESAVERS LTD RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	S BRIGGS Central Employment Advice Project Stirling
For the Respondents	IS Meth IRPC Hinton Ltd Callandernrs

LORD COULSFIELD (reading the judgment of the Tribunal):

This is an appeal against a decision of an Industrial Tribunal, dated 14 December 1994, by which it was held by a majority, the Chairman dissenting, that the appellant was not dismissed for a reason falling within Section 57A of the Employment Protection (Consolidation) Act 1978. The appellant was employed by the respondents as a driver from August 1993 until 12 April 1994, when he was dismissed. He did not, therefore, have the length of service necessary to enable him to claim unfair dismissal apart from Section 57A of the 1978 Act.

Under Section 57A, a dismissal is automatically unfair if the reason, or principal reason, for it was one of several listed in sub-section (1). The reasons so listed include:-

> **"(c) being an employee at a place where –**
>
> > **(i) There was no such representative or safety committee, or**
> > **(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,**
>
> **brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,**
>
> **(d) in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, left, or proposed to leave, or (while the danger persisted) refused to return to, his place of work or any dangerous part of his place of work, or**
>
> **(e) in circumstances of danger which he reasonably believed to be serious and imminent, took, or proposed to take, appropriate steps to protect himself or other persons from the danger."**

The work which the appellant was employed to do included the collection of bags of waste from a number of different locations, such as charity shops. The respondents had at least two vans, one a Volkswagen and the other a Ford Cargo. The appellant, apparently, normally drove the Ford Cargo and had done some work to improve that vehicle. The Volkswagen had a carrying capacity of 1.2 tonnes: the carrying capacity of the Ford Cargo is not specified in the findings of the Industrial Tribunal, but appears to have been greater, perhaps substantially greater. On 12 April 1994, in the afternoon, the appellant was given the collection run for the following day, and instructed that he was to use the Volkswagen van for that run. There was some dispute in the evidence as to precisely what then took place, and the findings of the Industrial Tribunal are, perhaps, a little unspecific on this point. It is clear that the Industrial Tribunal rejected evidence given on behalf of the respondents which was to the effect that there was some discussion on 12 April, but that the dismissal did not take place until the following day. It is also clear that the

appellant did apprehend that, if he used the Volkswagen van for the whole run, the van would be overloaded and that he raised that question with the respondents. The Industrial Tribunal also accepted the appellant's evidence that he did not completely refuse to go out in the Volkswagen and said that he would do the local run with the Cargo van. It appears, although the Industrial Tribunal do not expressly say so, that they must have held that the dismissal followed immediately thereafter. There is a reference in the Chairman's statement of his own views, which indicates that there was no evidence that the appellant was told, or reminded, that there was any possibility of him contacting the depot for instructions or assistance if he should find that his vehicle was in fact overloaded. The position therefore appears to be, according to the Industrial Tribunal findings, that the appellant's expression of his concern about overloading and refusal to do the run with the Volkswagen was immediately followed by his dismissal, without further discussion.

The Industrial Tribunal devote some time to the question whether there was justification for the appellant's concern about possible overloading. A driver making a collection was required to call at a number of locations, of which there were twenty in the list given to the appellant on 12 April, and collect bags of used clothing, enclosed in black bin-liners. The respondents produced a list of the bags and weights which they said had been collected in fact on 13 April. Some of the bags were collected from Red Cross shops, and those were weighed before being collected. The remaining bags were not weighed until they arrived at the depot. On a consideration of the weights given in the list, the Industrial Tribunal reached the view, to put it bluntly, that the respondents were systematically under-stating the weights of the bags collected from the shops, other than Red Cross shops. There was certain other evidence pointing to the same conclusion: for example, the appellant told the Industrial Tribunal that in the previous week he had taken the Cargo van to a public weighbridge because he was concerned at overloading, and found that the weight was in excess of the total permitted maximum. There was also evidence that, on a previous occasion, the appellant had raised the question of overloading but, on that occasion, some arrangement was apparently made to meet the situation, although it is not clear what that was. Having considered all the evidence, the Industrial Tribunal reached the conclusion which they express as follows:-

> **"On all the evidence, the Tribunal accepted that as he had done the run several times before, the applicant reasonably estimated that it would be overloaded by the time he finished the run, although of course he could**

> **not tell exactly until he did the run, as he did not know the quantities of bags which shops would have on any particular day. But on the basis of his previous experience he was entitled to assume that the complete run would result in the vehicle being overloaded."**

All the members of the Industrial Tribunal also accepted that the appellant had honestly believed that the circumstances were potentially harmful to safety; and that the appellant had brought his concern to his employers' attention by reasonable means, for the purposes of Section 57A(1)(c). By that, we take it that the Industrial Tribunal were finding that, what passed between the parties on the afternoon of 12 April, whatever precisely that was, amounted to steps taken by the appellant to draw his concern to the attention of his employers, rather than as an outright refusal to carry out the work or accept an instruction to do so, which might raise rather different issues.

The point which led to the division of view between the majority and the Chairman arises from the Industrial Tribunal's findings about a practice which they describe in the following passage from the statement of reasons:-

> **"However the applicant accepted that there was a practice that drivers who found their vehicle was going to be overweight could either return to the depot at Denny if convenient, or could telephone in an arrange for a second vehicle to meet them at some place such as Grangemouth and do a swap of vehicles. But the applicant said that that would be eating into his driving hours and, because most of the charity shops were only open between 10am and 4.30pm, it was difficult to fit in all his stops. It was only just possible to do that particular run in the available hours. He might also receive a telephone call to go somewhere else while he was out on the road, and the shop at Alva closed at 1pm. In his view this would have made it impracticable to return to the depot at Denny after doing the eastern half of the run and unloading that half, before going on to do the northern half. It also depended on which new vehicle was sent out and whether it had the necessary carrying capacity.**
>
> **If he had sent the Volkswagen back full to the legal limits of its weight capacity, it would only have been about half full by volume, but if he had telephoned to say that it was full and then the respondent found it was half empty he would have been likely to have faced disciplinary procedure."**

The Industrial Tribunal discuss the meaning of Section 57A(1), and reach the conclusion that, in order for it to be shown that the applicant reasonably believed there was a risk to safety, it had to be established, firstly, that he did believe that the circumstances were harmful, or potentially harmful; secondly, that he had in his mind reasonable grounds on which to sustain that belief, and, thirdly, that those grounds were based on all the relevant circumstances of the case. With that direction in mind, the majority express their conclusion as follows:-

> **"The majority of the Tribunal, being the Members, considered that in all the circumstances it was not established that the applicant reasonably believed that the circumstances were harmful or potentially harmful to health or safety. The majority considered that while he honestly believed that the circumstances were potentially harmful to safety, in all the relevant circumstances, despite his explanation about the difficulties of changing vehicles, he did not have reasonable grounds for doing so, as he did not take account**

of the practice by which he could have telephoned in or returned to the depot when in his view his load reached the maximum permitted amount. To that extent the majority considered that his belief was not reasonable and therefore that his dismissal did not fall within section 57A(1)(c), and so was not unfair."

The Chairman's view was that it was reasonable for the appellant to believe that it would not have been practicable to return with the vehicle or telephone in, because it was likely that if he did so he would have been disciplined because his perception of the point at which the load was overweight differed very much from that of the respondents. The Chairman also drew attention to the fact that there was nothing to indicate that, when the discussion took place on 12 April, anyone drew attention to the practice of returning to off-load or telephoning for assistance.

For the appellant, it was submitted that the Industrial Tribunal had found that the appellant genuinely believed that there was reason for concern over safety, and had brought his concern to his employers' attention by reasonable means. Further, the Industrial Tribunal had taken the view that the appellant thought that he would face disciplinary procedure if he failed to carry out the collection run, whether or not he would actually have done so. The purpose of Section 57A was one of employment protection. It had always been open to an employee to complain about a safety matter, but until the amendment, which was made in response to a European Directive, an employee had no protection against dismissal unless he had two years' service. The only issue was that of reasonable belief. In assessing that, the Industrial Tribunal majority should have had regard to the whole facts of the case, including the consequences which the employee understood or feared would follow if he did, for example, return to the depot with a van which his employers would treat as half-full. If the employee had an honest belief, that would come close to being a reasonable belief. If the employee's belief fell within the range of beliefs which it was reasonable for an employee to have in the circumstances, that was enough. The Industrial Tribunal must, therefore, either have misdirected themselves or acted perversely in holding that the employee did not have a reasonable belief.

For the respondents, it was submitted that the Industrial Tribunal had not fallen into any error of law. It should be remembered that dismissal to which Section 57A applied was automatically unfair, and there was no room for consideration of the question whether or not the employer acted reasonably. The findings of the Industrial Tribunal established that there had been an honest

belief, but they had not found that there were reasonable grounds for that belief. There was really no dispute that there was a practice by which drivers were able to phone or return to the depot. To succeed, the appellant required to accept all the findings in fact but to ignore that one. If the employee had in fact gone back because the van was overloaded and been dismissed, he would be protected under Section 57A(1)(d). The majority's conclusion was perfectly reasonable, and the Industrial Tribunal had not misdirected themselves in any question of law.

In our opinion, the Industrial Tribunal have correctly directed themselves as to the matters which had to be considered under Section 57A(1)(c), subject only to the comment that, in considering what is reasonable, care should be taken not to place an onerous duty of enquiry on an employee in a case such as this. The purpose of the legislation is to protect employees who raise matters of safety about which they are concerned; and the fact that the concern might be allayed by further enquiry need not mean that it is not reasonable. Given that the Industrial Tribunal have directed themselves correctly as to the law, the question whether or not a given course of action is reasonable is one to be decided by the Industrial Tribunal on the whole evidence before them. It is clear that the Industrial Tribunal in this case have reached conclusions adverse to the respondents on a number of issues, such as how, precisely, the dismissal came about, and what the anticipated weight of the goods to be collected on the run on 13 April would be. It might not have been surprising, in the circumstances, if the Industrial Tribunal had accepted that the appellant's fears of disciplinary action (which would ex hypothesi have been unjustified action) were reasonable and realistic. However, they have not done so. They have expressly accepted that there was a practice of returning to unload or telephoning for assistance, if a load became too heavy. The fact that they have done so, in the general state of the evidence, is of some significance. It indicates that the Industrial Tribunal accepted that it was really open to the appellant to follow the practice which they described. In these circumstances, we do not think that we can hold that the Industrial Tribunal feel into error, and the appeal must be dismissed.

The only additional point we would mention is that it was conceded, in our opinion rightly, on behalf of the respondents, that if the appellant had undertaken the run and been dismissed on either returning with a part-load or telephoning for assistance, in the circumstances of this case, he would have had an unanswerable case under Section 57A(1)(d).

Appeal dismissed