Neutral Citation Number: [2022] EAT 66

Case No: EA-2020-000244-BA

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 October 2021

**Before** :

**THE HONOURABLE MRS JUSTICE STACEY DBE**

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**Between :**

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| **SM TRUCKING LTD** | **Appellant** |
| **- and -** | |
| **MR A DIXON** | **Respondent** |

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**Mr Simon Peter Moore** for the **Appellant**
The **Respondent** was represented on the basis of written submissions

Hearing date: 26 October 2021

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# JUDGMENT

## SUMMARY

### CONTRACT OF EMPLOYMENT, UNFAIR DISMISSAL

The Tribunal found as a fact that the claimant before the Tribunal, an HGV driver, was wholly to blame for a road traffic accident that wrote off the respondent's HGV. That accident (together with the claimant's accident history) also resulted in the respondent's insurer's refusal to continue to provide cover for the claimant to the respondent. The Tribunal erred in finding that the claimant had been wrongfully dismissed when on the Tribunal's findings he had been entirely to blame for the accident.

It was also inconsistent to reduce the basic award for unfair dismissal by only 50% on grounds of conduct under s.122(2) **Employment Rights Act 1996** when the Tribunal had effectively found gross negligence or gross misconduct by the claimant.

The Appeal Tribunal substituted the Tribunal's decision with a finding that the claimant had not been wrongfully dismissed and that his basic award be reduced to nil.

However there could be no criticism of the Employment Judge for refusing to allow the respondent to adduce new, previously undisclosed, evidence relating the claimant's holiday pay claim, part way through his cross-examination and that part of the appeal was dismissed.

**THE HONOURABLE MRS JUSTICE STACEY:**

1. This matter comes before the Appeal Tribunal on the appeal of SM Trucking Ltd against the decision of the Employment Tribunal that it had both unfairly and wrongfully dismissed its employee, Mr Dixon, and awarded him compensation for holiday pay owing at the date of dismissal. The financial award comprised three elements. The compensation for wrongful dismissal was calculated as the notice period of £2,220; a basic award for unfair dismissal of £1,905 was made but no compensatory award was ordered; and, a payment of £370.54 for the holiday pay claim was ordered.

2. The hearing took place before Employment Judge Reed on 27 January 2020 in the Southampton Regional Office of Employment Tribunals and the judgment and reasons were sent to the parties on 25 February 2020.

3. The appellant was the respondent before the Employment Tribunal and the respondent to the appeal was the claimant before the Tribunal. To avoid confusion, I shall continue to refer to the parties as they were before the Employment Tribunal, so SM Trucking Limited as the respondent and Mr Dixon as the claimant.

4. The Employment Tribunal found that the road haulage company employed the claimant as a lorry driver. He commenced employment on 27 November 2013 until his summary dismissal five years and 1 day later on 28 November 2020. It is a small company and the claimant was its only employee and Mr Moore is the sole director and shareholder of the firm, assisted by his partner. It owned 1 HGV vehicle.

5. On 27 November 2018 the claimant was involved in an accident whilst at work driving the respondent's HGV articulated lorry when he collided with a lorry in front of him as he approached a set of traffic lights. The respondent's lorry was written off. The claimant was injured, thankfully not

too seriously, but two ribs were broken, and it must have been very unsettling. The matter was reported to the police who visited the scene but no prosecutions were brought.

6. The claimant reported the event to Mr Moore and the next day Mr Moore decided to "part ways" with the claimant on the telephone. He had spoken to his insurers who said that they would be unlikely to renew cover for the claimant because of the claimant's past driving history and Mr Moore had decided not to have the vehicle repaired which was substantially damaged.

7. There were a number of disputes of fact before the Tribunal. The claimant's account was that the next day, Mr Moore told him that because the lorry was off the road and there was no vehicle for him to drive and so no job to come back to, they would have to part company. The claimant understood that he was being dismissed. Mr Moore's account was similar to some extent. He agreed that the explanation given for the parting of ways was because of the lack of insurance cover. He said to this Tribunal, but it was not clear if this had been his evidence before the First Tier Tribunal (the respondent had not put his witness in the bundle) that he had wanted to keep matters amiable and amicable as he was very mindful that his employee had been involved in a nasty accident the day before and he did indeed use the explanation of the lack of insurance cover and the damage to the vehicle as the reason for the parting of ways but it was really the fact of the accident which he believed to have been all the claimant's fault.

8. Before the Tribunal Mr Moore disputed that there was a dismissal but instead it was a consensual agreement for Mr Dixon to no longer be his employee. The Tribunal understandably and quite rightly rejected that account and found that the conversation amounted to an actual dismissal. Permission has not been given to appeal against that aspect of the judgment.

9. From Mr Dixon's perspective, he thought he would get a redundancy payment but nothing was received, and when he later heard nothing and asked for written reasons, he said he discovered

that he had been dismissed. After consulting with the Citizens Advice Bureau he brought a claim before the Employment Tribunal for unfair dismissal, no notice pay, and outstanding holiday pay that was accrued and untaken over the current leave year in the sum of £1,300.

10. Also in dispute between the parties was whether Mr Dixon had been at fault in causing the accident or if it had occurred through no fault of his because of, perhaps, oil on the road or a fault with the vehicle. The claimant was adamant that he had not been to blame at all. Mr Moore considered that the claimant must be to blame because of the nature of the damage to the vehicle and because it was a rear end shunt: the claimant must have been going too fast if he collided with the vehicle in front of him and was unable to brake in time. He reasoned before the Tribunal that if there had been oil on the road, the police would have stopped other vehicles and closed the road. In addition Mr Moore wondered why, if there was oil on the road, the lorry in front had not also skidded. So Mr Moore considered the claimant to be to blame 100 per cent for the accident although did not say so when he had the conversation about "parting ways".

11. The Tribunal found that the claimant had been summarily dismissed and held:

> "He would only be disentitled to notice if he committed gross misconduct. That was not the case here."[8]

12. No explanation was provided by the Tribunal as to why that was not the case. He was awarded the notice pay due under the contract of one week's pay per year, which is the statutory minimum. In relation to the unfair dismissal complaint, the Tribunal found that the reason for dismissal fell into the category of some other substantial reason justifying dismissal and that the reason for the dismissal was the insurance issues and the non-availability of a vehicle for the claimant to drive.

13. Having found that the respondent had established a potentially fair reason for dismissal, the Tribunal next considered s.98(4) Employment Act 1996 ("the Act), where the Tribunal has to

consider whether a dismissal was fair or unfair having regard to the reasons shown by the employer and which depends whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. The Tribunal is also required to determine the question in accordance with equity and the substantial merits of the case.

14. The Tribunal found that the dismissal was procedurally flawed for obvious reasons. There had been a fait accompli. The decision to dismiss had been made before the matter was discussed with the claimant and there had been a dismissal in a telephone call with no meeting, no opportunity for Mr Dixon to put forward other proposals and no fair procedure had been followed. The Tribunal concluded that the dismissal was unfair.

15. The Tribunal next turned to the assessment of unfair dismissal compensation, On the dispute between the parties as to where responsibility for the accident lay, the Tribunal stated as follows:

> "I was not convinced by Mr Dixon. I concluded that the lorry was working satisfactorily and the overwhelming likelihood was that he was entirely to blame for the accident. In those circumstances I concluded that it was appropriate to reduce the basic award by 50%, to £1,905"

instead of the sum approaching £4,000 that he would ordinarily have received.

16. The law in relation to the approach to deductions to a basic award is set out in section 122 of the Act, which provides that:

> **"(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce**

**that amount accordingly ."**

17. The Tribunal followed and applied s. 122(2) of the Act in deciding that it would be just and equitable to reduce Mr Dixon's compensation to half.

18. No compensatory award was made as the Tribunal found that if a formal procedure had been followed it would have made no difference whatsoever and nor would it have delayed the date of dismissal.

19. In relation to the holiday pay claim, the Tribunal rejected the claimant's initial contention that he had some £1,300 holiday owing, but did conclude, after hearing and believing his evidence, that 4.3 days' holiday was owed.

## Appeal

20. In seeking to appeal the decision, Mr Moore first lodged an appeal which was rejected at the sift stage by Lavender J under rule 3(7). He had considerable sympathy with Mr Moore and the position in which he found himself when Mr Dixon crashed the company's lorry but he did not consider that Mr Moore's company had an arguable ground of appeal because he could not identify an error of law, rather he saw the appeal as a challenge to the facts of the case.

21. Mr Moore applied, as was his right, for an oral hearing which took place before HHJ James Taylor at a hearing which took place on 23 February 2021. The judge allowed three of the six proposed grounds to proceed to a full hearing. Ground 1 asserted that the Tribunal erred in finding for the claimant on wrongful dismissal as he had committed gross misconduct, Ground 2 challenged the finding and lack of reasoning for the conclusion that the claimant should be awarded 50% basic award when the correct percentage should have been 0%. Ground 6 challenged the holiday pay claim finding, arguing that the Employment Judge had not allowed him to give the evidence in support of

his contention that the claimant had received all his holiday pay entitlement.

## Submissions

22. Before me today, the claimant has not appeared. He has explained in correspondence that he has another job now and could not afford the time off but reiterates that he considers he was not to blame for the accident in any way. He points out his new job, with a small local company, demonstrates that there would have been no insurance problems with Mr Moore's insurance company. He also seeks to criticise the Tribunal decision and says that it was wrong to make any reduction and was also wrong to conclude that he was to blame for the accident, but he does not bring a cross-appeal in relation to it and it is too late to do so.

23. Mr Moore has appeared before me today and he remains considerably aggrieved at the decision of the Tribunal and explains today that his only mistake was that he was trying to be nice. He had not called it gross misconduct in the telephone call when in fact he considered it was gross misconduct: the claimant had destroyed the tools of his trade and Mr Moore considers that he is being punished for trying to be kind to an employee who had worked for him for five years with a number of ups and downs which he had forgiven and had then destroyed his vehicle and considers that all three grounds should succeed.

## Conclusions

24. Against that background, my conclusions are as follows. I firstly remind myself that appeals can be only on legal points. It is the Tribunal's role to make findings of fact from the evidence before it. There are rare circumstances when an Appeal Tribunal can go behind the facts that a tribunal has found from the evidence before the First Tier Tribunal which this Appeal Tribunal has not had the benefit of hearing.

25. There was no expert evidence concerning the cause of the accident before the Tribunal. There was no police report before the Tribunal and the Tribunal did the best it could from the evidence available to it after hearing the witnesses. Both sides in different ways were dissatisfied with the judgment, the claimant with the finding that he was at fault for the accident, the respondent for the fact that it was a dismissal, that the dismissal was both wrongful and unfair and the holiday claim.

26. The holiday pay claim argument evolved like this. The claimant claimed a significant amount of unpaid holiday in his claim form. He claimed three weeks' holiday at page 20 of the bundle, and the response did not address that particular complaint. The parties were asked to exchange relevant documents and to include these in a bundle, and the respondent did not supply the holiday records. He said that he instead took them to the Tribunal on the first day of the hearing and he did not show these to the CAB representative for the claimant.

27. Mr Moore told me that when he was in the witness box, part way through giving his evidence, he had asked the employment judge if he could show him the holiday records which were somewhere amongst his papers on the desk where he had been sitting before he went into the witness box. If he was given some time he would be able to find them, but the judge refused his request.

28. Starting firstly with ground one, the complaint about the finding of wrongful dismissal. Here it seems to me that the issue for the Tribunal was whether, as a matter of fact, the claimant had committed gross misconduct so as to repudiate the contract of employment and entitle the employer to dismiss without notice. It is a question of fact for the Tribunal to decide whether or not the employee's conduct constituted gross misconduct, no matter by what terms it was described at the time by either party. It seems to me that the Employment Tribunal's finding that the accident was caused entirely by the fault of Mr Dixon and that, as a result of the accident the lorry was written off, falls within the definition of either gross misconduct or gross negligence. So the finding that the claimant was entitled to notice pay cannot stand and the Tribunal was wrong to have made an award

of £2,200 for the accident which the Tribunal found was the claimant's fault entirely. That is not to say that every case where an employee driver who has a road traffic accident for which s/he is responsible will entitle an employer to summarily dismiss. These cases are all fact sensitive and fact specific. However on the facts found in this case the respondent was entitled to summarily dismiss in those circumstances. I therefore allow the appeal in relation to the award for wrongful dismissal.

29. Since the Tribunal has made clear findings as to the facts, it is not necessary to remit the case to a fresh or the same Tribunal, but the Appeal Tribunal should exercise its substitution powers and substituting it with a finding that the claimant was not wrongfully dismissed.

30. Ground two is the unfair dismissal claim. A reason for the dismissal of an employee is a set of facts known to the employer, or beliefs held by him, which cause him to dismiss the employee. The Tribunal accepted the reason proffered by the respondent namely lack of insurance and the vehicle being a write-off when deciding it came within the category of some other substantial reason. There is a slight tension between that conclusion and the express finding that Mr Moore considered the claimant to be entirely to blame for the accident, but the two statements are not irreconcilable. The underlying, or ultimate reason, behind the dismissal is the fact that the claimant's blameworthy conduct wrote off his employer's only HGV, but the reason given by Mr Moore can also be said to be the proximate reason, or a reason which is an aspect of the whole factual matrix as the accident lay behind the reason for dismissal.

31. When it comes to consider a reduction for the basic award, the Tribunal has a wide margin of discretion and I have already set out the provisions of section 122. However, although I am conscious that the judge had a margin of appreciation to consider what would be just and equitable, in light of the Tribunal's finding that the claimant was entirely to blame for the accident, for the sake of consistency, it must follow that, although there is a technical finding of unfair dismissal for procedural failings, there should have been a 100 per cent reduction for conduct under section 122(2) of the **Act**.

To find that the accident was all the claimant's fault and that there was no mechanical failure or oil slick on the tarmac or other non-driver culpability explanation, cannot lie with only a 50% contributory fault deduction. It follows that the award of £1,905 must be revoked and replaced with zero. As with ground 1, it is not necessary to remit the matter back to the Tribunal as all the facts necessary to make the decision have been found by the Tribunal. The finding of unfair dismissal however is unaffected.

32. I turn next to the third ground, the holiday pay claim. It was for Mr Moore to produce the documents that demonstrated how many days holiday the claimant had or had not taken pursuant to the Tribunal's order. He did not disclose them when they should have been disclosed. He did not ask for them to put them in the bundle. The Tribunal was entitled to accept Mr Dixon's evidence and to refuse Mr Moore's request to admit new evidence, long after the time for disclosing it was passed and in breach of the Tribunal order. It was a case management decision and the Tribunal was acting within its wide discretion to manage its own proceedings not to allow such a move by the respondent. The ground of appeal fails and the finding of £370.54 stands.

33. In summary therefore, I find that the appeal is allowed in part. The finding of wrongful dismissal is revoked and the award for the basic award is revoked as to its finding of award of compensation for wrongful dismissal, but the holiday pay claim still stands. Ground six is refused, ground one and two, granted.