Judicial Communications Office

7 December 2023

COURT OF APPEAL DELIVERS JUDGMENT IN APPEAL FROM INDUSTRIAL TRIBUNAL

Robert Martin Colhoun
and
Royal Mail Group Ltd

Mr Justice O'Hara, today delivering the judgment of the Court of Appeal[1] quashed the decision of the Industrial Tribunal who rejected a claim made by Robert Colhoun for unfair dismissal. The Court of Appeal today ordered that the case be sent back to a freshly constituted tribunal.

Background

The appellant was employed by the respondent for 15 years until he was dismissed summarily for gross misconduct on 30 April 2021. His claim that he had been unfairly dismissed was unanimously rejected by an Industrial Tribunal in January 2023. His case essentially is that in view of his relatively long service which was without any disciplinary blemish the sanction of dismissal was excessive and quite disproportionate to his very limited wrongdoing.

The claimant was employed as a OPG (Postman) on a 21-hour part-time contract providing annual leave reserve cover. In this role the claimant was required to cover delivery and collection duties whilst an OPG was on annual leave.

Part of the claimant's workload during week of 1 March 2021 was the delivery of three Door-2-Door (hereinafter referred to as the "D2D") contracts by the end of that week, ie by Saturday 6 March 2021. D2D contracts are unaddressed mail. In terms of substance they are predominantly advertisements from businesses. D2D contracts are required to be completed during the working week that they are issued to an OPG to deliver.

The claimant failed to deliver any of the D2D mail for all three of the D2D contracts that he was required to deliver while working during the week in question, ie 1-6 March 2021. The claimant maintained that his workload that week was extremely challenging due to a variety of factors. The claimant contended that he would have delivered the D2D mail if he had not experienced extra work pressures.

There was a dispute between the parties as to whether the claimant's workload that week was achievable. The Tribunal found that the claimant could have raised any concerns with one of his managers about his workload and, in doing so, had every reason to believe that those concerns would be addressed.

[1] The constitution of the court was Treacy LJ and O'Hara J. O'Hara J delivered the judgment of the court.

The respondent sets standards of conduct for its employees. Those standards are set out in its Conduct Code (Disciplinary) Policy which was agreed with the CWU. The Conduct Code states that it is to be known as the "Conduct Policy." In substance it is the respondent's disciplinary policy. All the respondent's employees are subject to the Conduct Policy. The claimant accepted that he was aware of the Conduct Policy and that it applied to him in his employment with the respondent.

The conduct policy states that wilful delay of mail is an example of gross misconduct which could result in dismissal without notice.

On 12 March 2021, the respondent discovered that the three D2D contracts assigned over the week 1-6 March 2021 had not been delivered. This revelation was brought to the attention of the delivery office manager Mr Heekin who spoke to the claimant about this on 14 March 2021. Having heard the claimant's explanation of events the delivery office manager decided to send the claimant home for a cooling off period.

The Court of Appeal noted that the Tribunal decided that it was not necessary to make a finding on the disputed issue of the extent of the appellant's workload that week. Mr Justice O'Hara said that this approach was wrong.

The Court then examined a fact finding meeting which was held on 18 March 2021 at which the appellant was accompanied by a representative from his union. Mr Justice O'Hara indicated that the Court were surprised by some of the exchanges at this meeting: "*We find these exchanges surprising. Mr Heekin was supposed to be conducting a fact finding meeting. If he was true to his role, he would have restricted himself to facts rather than forming a view as to the appellant's intention, a critical matter because intentional delay is quite different from unintentional delay in terms of the Code of Conduct.*"

The appellant continued to remain on precautionary suspension after this meeting until a formal conduct meeting was held on 8 April 2021. During the course of this meeting, the appellant largely maintained his position but also made the point that "*the blame for the failure to deliver the D2D contracts…should be at least partially attributed to the OPG who covered this duty…and to the* ***management team*** *within the delivery office as they should have identified that the D2D contracts had not been fulfilled through their requisite checks*".

The manager who conducted this disciplinary hearing, Mr Montgomery, decided to uphold the complaint and further decided that the appropriate sanction for this employee with an unblemished record over 15 years was summary dismissal with immediate effect. The appellant appealed against this dismissal, but that appeal was dismissed by a Mr Walker on essentially the same basis as Mr Montgomery had acted.

Decision of the Industrial Tribunal

The Tribunal summarised its findings as being that the appellant had failed to complete a fundamental part of his role which was contractually required of him. It held that there was no reasonable excuse for these failings on his part. The Tribunal was satisfied that the dismissal was a sanction permissible because it fell within the band of reasonable responses of a reasonable employer. In all the circumstances, the Tribunal concluded that it was reasonable for the respondent to decide that the appellant did not deserve a second chance.

Discussion

Mr Justice O'Hara noted that the Appeal Court is confined to considering questions of law arising from the case before the Tribunal. He went on to say "*However profoundly the appellate court may disagree with the tribunal's view of the facts, it is not to upset the tribunal's conclusions unless there is no or no sufficient evidence to found them or the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion*."

Mr Justice O'Hara in summing up the judgment of the court, indicated that the court considered the legislative context and the judicial precedents extremely carefully and reached the conclusion that the appellant's appeal against the tribunal decision must succeed for the following reasons:

- One of the fundamental aspects of fairness in employment law is that there should be some equivalence between the treatment of employees whose misconduct or failings overlap. In the judgment of the Court, that aspect of fairness is entirely absent from this present case.

- The employer ignored, to the extent that the appellant failed to live up to his duties, so also did the line managers who were responsible for overseeing him every day from 1-6 March.

- The Tribunal decided that it did not need to decide whether the applicant's workload during the week in question was achievable. The Appeal Court held that this was a fundamental error. Mr Justice O'Hara stated:

> "*This is not a case where there is any suggestion that the appellant was not working diligently. To put it colloquially, there is no suggestion that he was skiving whether by sitting at home or taking prolonged breaks or anything of that nature. That fact immediately brings into question the issue of how blameworthy his conduct actually was. Should he have told his employer that he was under pressure and just could not add the D2D mail to his existing workload? Yes, he should. Should the managers who oversaw his work every day have noticed day after day that this mail was going undelivered? Yes, they should have… but they did not… One way of interpreting this is that while the appellant was busy on the job (if not on the full job) his line managers were asleep on (part of) their job. Yet it was the appellant who was sacked summarily while the line managers went entirely unpunished.*"

The Court concluded by stating that the Tribunal's decision to uphold the dismissal of the appellant as fair was perverse: "*It appears to us that the decision to dismiss was a gross over reaction to the appellant's very limited wrongdoing*."

It is, therefore, the order of the court that the appeal from the decision of the Tribunal succeeds and that the decision of the Tribunal be quashed. The Court further ordered that the case be remitted to a freshly constituted tribunal.

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NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on www.judiciaryni.uk

ENDS

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