Appeal No. UKEAT/0035/15/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 May 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

BLACK COUNTRY PARTNERSHIP NHS FOUNDATION TRUST APPELLANT

MRS L HERLOCK-GREEN RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS GEMMA ROBERTS (of Counsel) Instructed by: Mills & Reeve LLP 78-84 Colmore Row Birmingham West Midlands B3 2AB
For the Respondent	DR MIRZA AHMAD (of Counsel) Direct Public Access

SUMMARY

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Reasonableness of dismissal

The ET's Reasons stated it had found that the Respondent had established its reason for dismissing the Claimant, which was a reason related to her conduct. If (as the Claimant contended) it had not so found, its reasoning was inadequate.

In assessing the fairness of the dismissal for that reason, the ET had fallen into the substitution mindset; in particular, it had erred in substituting is view of the witnesses (who it had not given evidence before the ET) rather than engaging with the evidence of the Respondent's decision takers (who had seen and heard those witnesses) on the credibility of the material before them.

Generally, the ET's reasoning failed to demonstrate the application of the range of reasonable responses test. This was also true to the extent that the ET criticised the Respondent's procedure. It failed to explain why proceeding with the disciplinary hearing in the Claimant's absence fell outside the range in the particular circumstances of this case and further failed to identify why any such procedural error was not remedied at the appeal stage.

Mindful of need for caution before interfering with an ET's judgment call on an unfair dismissal case, this decision could not stand and the appropriate course was to allow the appeal and remit this matter to be heard by a freshly constituted ET.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent as below. The appeal is that of the Respondent against a Judgment of the Birmingham Employment Tribunal (Employment Judge Lloyd, sitting with members on 29 and 30 September 2014; "the ET"), sent to the parties on 17 October 2014. Before the ET, the Claimant was represented by her solicitor, now by Dr Ahmad, counsel. The Respondent was and remains represented by Miss Roberts, counsel.

2. By its Judgment, the ET found the Claimant was unfairly dismissed but any award of compensation should be reduced by 25%, due to her unreasonable failure to comply with the provisions of the **ACAS Code of Practice 2009**, albeit it made no reduction for contributory conduct. The Respondent appeals against the unfair dismissal finding, arguing the ET: (1) erred in law in failing to apply the correct test; (2) erred in substituting its view for that of the Respondent; (3) failed to provide comprehensible or adequate reasoning for its conclusions.

3. Considering this matter on the papers I was satisfied the Notice of Appeal disclosed reasonable grounds to succeed. That was, however, simply a preliminary view on the papers. It is now for the Respondent to make good its arguments, and the appeal has been resisted by the Claimant, who has had the opportunity to counter the Respondent's case.

The Background Facts

4. From 5 November 2011, the Claimant was employed by the Respondent as a Clinical Support Worker at a facility for adults with mental health difficulties in West Bromwich. On duty, on 9 June 2013, along with another Support Worker, the Claimant was alleged to have

taunted and humiliated a service user, JM. Subsequently, on 14 June 2013, the Claimant was assaulted by JM and thereafter reported sick and was signed off work never to return.

5. The evidence against the Claimant included the written complaint made by a Joga Singh, a more junior colleague present at the incident on 9 June. That evidence was broadly supported by one of the housekeeping staff, Sue Jackson. The other Support Worker involved in the incident was subsequently dismissed by the Respondent because of it.

6. The Claimant did not attend the investigatory fact-finding meeting, although her input was obtained in written form. Although she was still signed off work for health reasons, the Occupational Health advice was that there was no medical reason why she could not attend the disciplinary hearing. An issue then arose as to her union representation but the Respondent had previously rescheduled the disciplinary hearing and the Claimant was advised that it would go ahead in her absence if she did not attend. That is indeed what happened on 4 December 2013, when Ms Staples, the Respondent's Divisional Manager, determined that the Claimant should be dismissed for gross misconduct. The Claimant appealed and attended a hearing before Mr Campbell, the Respondent's Chief Operating Officer, accompanied by a law student (providing support rather than advice). The Claimant alleged her working environment had been tainted by discrimination, bullying and harassment and the complaint was fabricated. Mr Campbell heard from both witnesses - Joga Singh and Sue Jackson - and accepted their evidence as credible, preferring it to that of the Claimant. He upheld the decision to dismiss.

The Tribunal Hearing, Decision and Reasoning

7. The Claimant's claim was of unfair dismissal. The ET heard from Ms Staples and Mr Campbell, the two decision takers for the Respondent, and also from the Claimant. It had

before it a trial bundle of some 326 pages. It concluded that the reason for the Claimant's dismissal was conduct, specifically her alleged gross misconduct in the abuse of a service user in her care. It states (paragraph 7.5) that the Respondent had "shown the reason for dismissal" and, considering the test laid down in **BHS v Burchell** [1980] ICR 303, concluded:

> **"7.5. … The respondent having shown the reason for dismissal, we must by reference to the evidence as a whole address the issue of whether the respondent acted reasonably in relying upon gross misconduct as the reason for the claimant's dismissal. We find that this is where the respondent failed applying *Burchell* in the following ways;**
>
> > **7.5.1. In respect of the level of its belief in the misconduct alleged against the claimant**
> >
> > **7.5.2. There was a further failure in the context of the respondent's reliance upon the evidence which constituted the grounds of the belief which it purported to express. The reliance upon the evidence of Joga Singh and Sue Jackson was flawed to the extent that - in the case of Mr Singh - the evidence was personally emotive and it had a strong subjective thread running through it in terms of what truly had been observed at the time. There was a great deal of ambiguity in relation to the motivation of the two support workers in handling a very difficult service user, namely JM. Mr Singh's report was very belated for which no proper explanation was offered by him. Sue Jackson was to say the least a somewhat reluctant witness to the events forming the substance of the allegations against the claimant and her co-worker.**
> >
> > **7.5.3. There were potentially devastating repercussions for the claimant. A decision by the respondent to dismiss her in the context of alleged abuse of a vulnerable person and the attendant safeguarding issues would ruin any future career in the caring professions. We believe that the respondent did not act consistently with the *Burchell* principles in coming to its decision to dismiss on the grounds of gross misconduct."**

8. Although the ET found the Claimant had been let down by her trade union advisor it considered she had herself failed to reasonably engage and co-operate with the Respondent's investigation and must bear some responsibility for that. On the other hand, the ET found against the Respondent as follows:

> **"7.6. … The respondent indeed did what it had said it would do, namely proceed with the disciplinary hearing in the claimant's absence. That may have been ill-judged by the respondent but the claimant herself was remiss in her attitude to the final hearing and the defence of her position generally.**
>
> **7.7. The procedural failing by the respondent in that respect was not wholly addressed by the appeal; though we compliment Mr Campbell on the way in which he assessed what it was necessary to do at the appeal stage, by the calling of witnesses and their careful examination. … However, that was not entirely sufficient in our finding to restore fairness to an otherwise unfair decision to dismiss when looked at in *Burchell* terms."**

9. The ET ultimately concluded (paragraph 7.8) that this was an unfair dismissal on a substantive level. It reflected its findings as to the Claimant's procedural failings in the 25%

reduction in her award, pursuant to section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**.

Submissions

The Respondent's Case

10. On behalf of the Respondent, accepting that the ET had rightly referred to section 98(4) of the **Employment Rights Act 1996** ("ERA"), given itself a correct self-direction in terms of **BHS v Burchell** and reminded itself of the range of reasonable responses test (**Iceland Frozen Foods v Jones** [1982] IRLR 439 EAT), it had failed to apply those principles when considering the evidence and reaching its decision, apparently substituting its view for that of the reasonable employer, and/or simply failing to adequately explain its reasoning. Thus, if the statement at 7.5.1 was intended to stand as a finding as to the Respondent's failure, it simply made no sense. The question was whether the Respondent had a genuine belief that the Claimant had misconducted herself. There was no requirement that this had to meet a particular level.

11. In going on to the reasoning at paragraph 7.5.2, here the ET criticised the Respondent for its reliance on the evidence of Mr Singh and Ms Jackson, but did so by substituting its own view of that evidence - albeit not having heard from either witness - without asking whether the Respondent's acceptance of the evidence fell within the range of reasonable responses. That required scrutiny of Ms Staples and Mr Campbell's reasons for accepting the evidence, not an expression of the ET's view of it. If rejecting an employer's view of the credibility of witness evidence, the ET needed to provide logical and substantial grounds (paragraphs 21 to 24, **Linfood Cash and Carry v Thomson** [1989] IRLR 235). That was absent from the reasoning here.

12. At paragraph 7.5.3, the ET appeared to have in mind the guidance laid down in **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721, that, where dismissal was likely to have a profound effect on the employee such as the loss of their livelihood, an employer must perform the disciplinary investigation with extra care. The Respondent did not take issue with that, but here the ET had not criticised the investigation and its reasoning provided no basis for concluding the Respondent had not met the standards laid down in **Roldan**. There was a later reference to procedural failings at paragraph 7.7, but no basis for that reference was set out.

13. Taken overall: the decision was unsafe; the appeal should be allowed and the matter remitted for rehearing before a different ET.

The Claimant's Case

14. On behalf of the Claimant, whilst accepting that the ET's Judgment might not be a model of perfection, Dr Ahmad reminded me of the injunction of Mummery LJ in the case of **Fuller v London Borough of Brent** [2011] EWCA Civ 267, at paragraph 30:

> **"… The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

15. Here the ET had proper regard to section 98(4) of the **Employment Rights Act 1996**, the **ACAS Code**, and **BHS v Burchell**. The EAT should be slow to infer that it did not then apply the law correctly. See, further, per Elias LJ in **Roldan**, paragraph 51:

> **"… save at least where there is a proper basis for saying that the tribunal simply failed to follow their own self direction, the appeal tribunal should not interfere with that decision unless there is no proper evidential basis for it, or unless the conclusion is perverse. That is a very high hurdle. …"**

16. Dr Ahmad suggests it is reasonable to infer from the ET's Reasons that it found that the Respondent had failed to demonstrate the appropriate level of belief in the Claimant's gross misconduct - the reason it relied on for the dismissal - and had thus failed to show sufficient belief (albeit that Dr Ahmad accepts paragraph 7.5.1 could have been expressed more clearly in this regard). In those circumstances the ET did not need to go further. In so doing it did not fall into the substitution trap. Its findings as to the evidence were derived from the material before it, which included the Respondent's policies (which Dr Ahmad took some time to explore before me) which it had breached or failed to have specific regard to. The requirement upon the ET was only to provide reasons proportionate to the case before it. If it had not done so, the right course would be to refer the matter back under the **Burns-Barke** procedure (see **Barke v Seetec Business Technology Centre Ltd** [2005] IRLR 633 CA).

Discussion and Conclusions

17. This was a conduct unfair dismissal case, bringing into play section 98 of the **Employment Rights Act 1996**, which (relevantly) provides:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
>
> > **(a) the reason (or, if more than one, the principal reason) for dismissal, and**
> >
> > **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this section if it -**
>
> > **(a) …**
> >
> > **(b) relates to the conduct of the employee,**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> > **(a) depends on 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, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

18. It was a case in which, it is common ground, the principles laid down in **BHS v Burchell** applied. It was thus for the Respondent to demonstrate the reason for dismissal and that it was a reason capable of being fair for section 98 **ERA** purposes.

19. Here, as the ET found (paragraph 7.3), the reason was conduct. Dr Ahmad contends that is simply a repetition of the Respondent's stated case and that the ET in fact can be taken to have rejected the Respondent's discharge of the initial burden upon it in terms of establishing its genuine belief in the Claimant's gross misconduct. He says that is the correct inference to be drawn from the statement that the Respondent had failed in respect of "the level of its belief in the misconduct alleged against the claimant" (paragraph 7.5.1). I had not read the decision in that way and, notwithstanding Dr Ahmad's best efforts, I am not persuaded it is correct. It would make it very hard to understand the ET's express statement at paragraph 7.5: "The respondent having shown the reason for dismissal …".

20. Even if I am wrong, and Dr Ahmad has identified the correct reading of the Judgment, then the reasons given would be inadequate to explain why the Respondent's case was rejected. In this respect, I do not find it helpful to distinguish, as Dr Ahmad does, between "conduct" and "gross misconduct". A dismissal might be fair if for a reason relating to the conduct of the employee (section 98(2)(b)). That was the question the ET had to address; not some other.

21. I am, however, satisfied that I was correct in my initial reading of the ET's decision: it found the Respondent had discharged the primary burden upon it to show the reason for the dismissal, and that was one related to the Claimant's conduct. That, in my judgment, is what paragraphs 7.3 and 7.5 state. That being so, the ET was then obliged to consider - applying a neutral burden of proof - the question of the fairness of the dismissal for that reason (section

98(4)). In so doing, it would need to ask whether the Respondent had reasonable grounds for its belief and whether those were based on a reasonable investigation (**Burchell**). In carrying out that assessment, however, it would not be for the ET to reach its own view (**London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220); its job was to apply the range of reasonable responses test: did the Respondent's decisions fall within the band of reasonable responses of the reasonable employer in those circumstances (**Iceland**)?

22. True it is that, given the seriousness of the matters alleged for the Claimant, the ET was entitled to expect that the Respondent would have carried out the investigation process with particular care (**Roldan**). That would be the standard of the reasonable employer in such circumstances. That said, in carrying out the necessary assessment, the ET had to be careful not to substitute its own evaluation of a witness - particularly when it had not heard the witness itself - for that of the employer, see per Wood J in **Linfood**, paragraphs 21 to 24 (approved by the Court of Appeal in **Morgan v Electrolux Ltd** [1991] IRLR 89, per Balcombe LJ at paragraph 11).

23. I turn then to the ET's reasoning. I am unsure where the ET's statement at paragraph 7.5.1 fits in to this assessment. The best I can do is to assume that the ET must have had in mind the question of reasonable grounds for the Respondent's belief, albeit that does not make sense of the subsequent reference (paragraph 7.5.2) to "a further failure".

24. Paragraph 7.5.2 does at least seem to explain the ET's thinking rather more clearly. In so doing, however, that makes it plain that the ET was reaching its own conclusions as to the evidence even though it had not heard from the witnesses concerned.

25. I am mindful of the need not to substitute my view for that of the ET. I am particularly conscious of that requirement when I, sitting alone, am reviewing the decision of a three-member ET. That said, I am unable to see the reasoning at paragraph 7.5.2 as anything other than a substitution of the ET's own view for that of the employer. There is a complete absence of the application of the range of reasonable responses test; no assessment of the evidence of Ms Staples or Mr Campbell (who had both set out explanations for the emotional nature of the evidence before them, observing that the witnesses were seen to be genuinely upset by what they had witnessed and were concerned about giving evidence against a colleague); and no engagement with their evidence as to why they had accepted the statements of those witnesses.

26. The ET then moves on to consider the process and makes criticisms of the Claimant. Having done so, it then also makes reference to the Respondent's decision to proceed with the disciplinary hearing in her absence as possibly "ill-judged" but does not explain why. That, of itself, might not matter; something can be ill-judged but not render a dismissal unfair. The ET then goes on, however, to describe this as a procedural error by the Respondent, which was not wholly addressed by the appeal (paragraph 7.7). That raises a number of questions as to the ET's reasoning. First, the Respondent's decision to proceed with the rescheduled disciplinary hearing in the Claimant's absence fell to be assessed against the range of reasonable responses test, but there is no indication that the ET did so. There is certainly no explanation as to why so proceeding was found to be (if it was) outside the range. Second, the ET had to identify what were the failings at the initial dismissal stage, so as to be able to assess whether those were remedied by the appeal. It does not do so. Third, the ET had then to explain why it found those failings had not been remedied by the appeal. Again, it does not do so.

27. In making these observations, I am mindful that it would be wrong to be overly critical of an ET's reasoning. The Judgment is to be read as a whole without the introduction of a fine-tooth comb; I should not focus on particular passages or turns of phrase to the neglect of the decision read in the round (**Fuller v Brent**); the ET had only to do sufficient to enable the parties to understand why they had won or lost (**Meek v City of Birmingham DC** [1987] IRLR 250 CA). And, I accept Dr Ahmad's observation that the reasons need only be proportionate to the significance of the issue (Rule 62(4) **ET Rules 2013**).

28. For clarity, I make clear that my criticisms of the ET, in terms of substitution and the failure to apply the range of reasonable responses test, amount to findings that it erred in its approach, not simply its reasoning. That said, even the failings of reasoning I have identified - even if not reflective of more fundamental failings in approach - are substantial. They take this firmly outside the category of case which might be addressed by use of the **Burns-Barke** procedure in any event. As I have stated, I would not lightly interfere with an ET's judgment call on an unfair dismissal case. Here, however, for the reason I have given, I am obliged to do so; this decision cannot stand.

29. Having given my Judgment, I allowed the advocates the further opportunity to address me on disposal. Both were in agreement that, in the light of my reasoning, the appropriate course is for this matter to be remitted for an entirely fresh hearing in front of a different ET. Having in mind the guidance given in **Sinclair Roche Temperley v Heard** [2004] IRLR 763, the nature of the criticisms that I have made, and also the fact that this is, and should remain, a short matter where it is proportionate for it to be heard afresh, I agree with the advocates. The matter will be remitted for a fresh hearing before a new ET.

30. The Respondent has, further, made an application for recovery of its costs pursuant to Rule 34A(2A) of the **EAT Rules 1993**, limited to the fees incurred in pursuing this appeal (the £400 lodgement fee and the £1,200 hearing fee). I have a broad discretion as to whether or not to grant such an application and, if so, as to whether it should be for the full or partial amount. It has been observed (see, e.g. **Look Ahead Housing and Care Ltd v Chetty and anor** UKEAT/0037/14/MC) that, in the times in which we now live, it is not an unreasonable expectation that the successful party will recover these fees, although other parties might avoid liability by not seeking to resist the appeal (albeit the Appellant would still incur the fees of pursuing the appeal). A further relevant factor in the exercise of the discretion is also likely to be the means of the potentially paying party. If the Appellant, this is something taken into account when lodging the appeal in any application for remission. If responding to an appeal, the assessment can only be done by the court upon an application under Rule 34A(2A).

31. In this case, I do not have clear information as to the Claimant's means. The best evidence is her ET statement, where she spoke of her difficulties in mitigating her loss and finding alternative work. On the other hand, she paid for representation below and before this court, albeit I am told that is at a very low level. I have noted that the Respondent did not seek (either in advance of lodging the appeal or before incurring the hearing fee) to warn the Claimant of the risk of such an application or to ask her to provide a statement of means for the court to take into account. Taking a practical view, I am not minded to make the full order for costs that I might make against a party with more obviously substantial means and/or where they had been put on notice of the need to provide evidence in this respect. On the other hand, I do not consider it would be right for the Respondent to meet all the costs. Doing the best I can, in those circumstances, I order the Claimant to pay £400 towards the Respondent's costs incurred by way of fees in this matter.