Appeal No. UKEAT/0043/15/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 June 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

BIGGIN HILL AIRPORT LTD — APPELLANT

MISS A DERWICH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTONY HYAMS-PARISH (Solicitor) Rawlinson Butler LLP Solicitors Griffin House 135 High Street Crawley West Sussex RH10 1DQ
For the Respondent	MISS ALICJA DERWICH (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

CONTRACT OF EMPLOYMENT - Wrongful dismissal

Having referred to **Taylor v OCS** the Employment Judge then failed to consider whether procedural defects found at the dismissal stage were cured on appeal. Arguably they were. Therefore, appeal allowed and case remitted for rehearing before a fresh Employment Tribunal. Also wrongful dismissal claim.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Ashford Employment Tribunal. The parties, for the purposes of this appeal, are Miss Alicja Derwich, Claimant, and her former employer, Biggin Hill Airport Ltd, Respondent. On 16 April 2014 the Claimant presented her Form ET1 to the Employment Tribunal alleging both "ordinary" and whistleblowing unfair dismissal and wrongful dismissal at common law. Those claims were defended and came on for substantive hearing before Employment Judge Kurrein, sitting alone on 2 September 2014. By a Judgment with Reasons promulgated on 25 September the Judge:

(1) dismissed the claim of automatically unfair dismissal under section 103A of the **Employment Rights Act 1996** ("ERA");

(2) upheld the claim of ordinary unfair dismissal under section 98 **ERA**;

(3) found that the Claimant had contributed to her unfair dismissal to the extent of 60%;

(4) declined to make a **Polkey** reduction;

(5) upheld the wrongful dismissal claim.

2. Against paragraphs 2 and 5 above the Respondent appeals. There is no cross-appeal by the Claimant. The appeal was permitted to proceed to this Full Hearing on the paper sift by HHJ Serota QC.

3. At a subsequent Remedy Hearing before the same Judge the Respondent was ordered to pay to the Claimant compensation totalling £7,430.73 together with costs of £1,200, by a Judgment with Reasons dated 22 December 2014.

The Facts

4. The Claimant commenced her employment as a Handling Agent on 1 July 2008. She is of Polish nationality. In October 2013 the Respondent decided to increase the number of supervisors at the airport. An advertisement was placed. The Claimant decided not to apply for the supervisor role, but encouraged her then friend and colleague, Ms Sophia King, to apply for it. The number of vacancies was increased to two. Ms King and a colleague applied and both were appointed supervisor on a temporary "acting up" basis.

5. Before taking up her new post Ms King took the step of "un-friending" the Claimant and her colleagues on Facebook.

6. That did not go down well with the Claimant and some of her colleagues, particularly a Ms Fox. On 19 December 2013 the Claimant and four of her colleagues raised a complaint about Ms King's appointment. That was the alleged protected disclosure later relied on by the Claimant as founding her section 103A complaint. The Judge found that it was not a protected disclosure and dismissed that part of her claim.

7. The Managing Director, Mr Curtis, rejected that collective grievance and wrote to the Claimant and other members of staff on 24 December informing them of that fact and also that he was aware that some staff members had been cold-shouldering Ms King because she had "unfriended" them on Facebook and that a "Witch" image had been placed on Ms King's computer as a screensaver.

8. Mr Curtis then interviewed Ms King, Ms Fox and the Claimant and three other members of staff between 3 and 7 January 2014. Ms King became tearful when she recounted the

"Witch" screensaver incident, which she had photographed on 30 November. Mr Curtis discovered that the previous evening the Claimant, Ms Fox and another member of staff had used Google to search for images using the terms "Witch", "middle finger", "one finger death punch", "up her arse" and "up your crack". Further, Mr Curtis also learned that a recently appointed security officer had told Ms Dennis, the Claimant's line manager, that she had observed the Claimant and her colleagues making obscene gestures towards Ms King behind her back.

9. In interviewing the Claimant on 6 January Mr Curtis established the following. She admitted choosing the Witch image at random and saving it as a screensaver. She did not deny that the image looked like Ms King or making obscene gestures behind Ms King's back. She accepted that the atmosphere in handling was not great. She said that she was upset that Ms King had un-friended her on Facebook.

10. The upshot was that Mr Curtis suspended the Claimant pending a disciplinary hearing, which was fixed for 10 January 2014 before Mr Mellers. He confirmed that suspension in a letter dated 6 January and gave the disciplinary hearing date, referring to three matters discussed: behaviour towards Ms King, the Witch screensaver and the search terms used and browsing history on the computer.

11. The disciplinary hearings for the Claimant and Ms Fox took place on 10 January. The Claimant's account is set out at paragraph 31 of the Reasons. Following the hearings Mr Mellers carried out interviews with Ms Dennis and Handling Agents Ms Bowman, Ms King (Acting Supervisor), Ms Brophy and Mr Colville. He did not disclose the results of those interviews to the Claimant before summarily dismissing her by a letter dated 16 January. Ms

Fox was similarly dismissed. The three charges against the Claimant which Mr Mellers found proved are set out at paragraph 33 and were deemed by him to amount to gross misconduct.

12. The Claimant then exercised her right of internal appeal. The appeal was taken by Mr Lonergan, a Director of the Respondent's holding company and the Second Respondent below. I note, although not recorded by the Judge in his Reasons, that there was documentary evidence before him of an email sent to the Claimant on 14 February, enclosing all witness statements taken during the investigation which had not been previously disclosed to her. The Claimant accepted that that was the case before me today. It follows that by 20 February, when Mr Lonergan held his appeal hearing, she had received all the witness statements taken by the Respondent and knew of the three charges which had led to her summary dismissal from the dismissal letter from Mr Mellers of 16 January.

13. Mr Lonergan dismissed the appeal by a letter dated 7 March 2014. The Employment Judge records (paragraph 37):

> **"… The Claimant has made no complaint regarding the manner in which the [appeal] hearing on the 20 February 2014 was conducted. …"**

The Employment Tribunal Decision

14. The Judge directed himself to four well-known authorities on the section 98(4) fairness question, recorded at paragraph 41. They were **BHS v Burchell** [1978] IRLR 379; **Iceland Frozen Foods v Jones** [1982] IRLR 439; **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23 and **Taylor v OCS Group Ltd** [2006] IRLR 613.

15. He then summarised the principles to be derived from the first three of those cases, unexceptionably, at paragraph 46. However he did not in terms direct himself as to the Court of

Appeal learning to be found in **Taylor v OCS**. Prior to **Taylor** the position in the EAT was that a distinction was thought to be drawn between an internal appeal by way of re-hearing, which may cure a procedural defect at the initial dismissal stage and a review which did not: see, for example, **Whitbread & Co plc v Mills** [1988] ICR 776. **Taylor** disapproved of that distinction. The question, one of fact for the Employment Tribunal, is whether the appeal cured any earlier procedural deficiencies. What those cases have in common is that, since the House of Lords decision in **West Midlands Co-operative Society Ltd v Tipton** [1986] ICR 192, in determining the fairness question under section 98(4) **ERA** the Tribunal must consider both the original dismissal decision and any subsequent appeal (or non-appeal, as in the case of **Tipton**).

16. The Judge then considered the section 98 questions under the following headings: investigation, fair hearing, honest belief etc. and sanction, finding the dismissal unfair. Having dealt with contribution and **Polkey** he concluded, at paragraph 57, with wrongful dismissal, finding that the Claimant's conduct, whilst wrongful, was not repudiatory and that the Claimant was entitled to notice pay.

Preliminary Issue

17. Before turning to the Respondent's appeal I should record first the Claimant's application to adduce fresh evidence on appeal. That application, made late in the day on 18 May 2015, relates to two character references, one from Heidi Maddocks, the other from Tanya Allard, both of whom worked for the Respondent with the Claimant at the Airport. That application was opposed by Mr Hyams-Parish, now representing the Respondent.

18. I note from paragraph 2 of the Reasons that the Judge took account of character references from two people, a Mr Dugdale and a Miss Johnson, adduced by the Claimant. Those references appear to have had no effect on the outcome of the case below.

19. Applying the well-known principles in **Ladd v Marshall** it is clear to me, first, that the references from Ms Maddocks and Ms Allard could have been put before the Judge at the hearing below. Secondly, they would have made no difference to the outcome and certainly will make no difference to the outcome of this appeal. Consequently I refused to admit the new evidence.

The Appeal

20. Mr Hyams-Parish has organised his grounds of appeal under five headings, the principal one being the Judge's failure to deal with the effect of the internal appeal conducted by Mr Lonergan.

21. I am bound to say that I find it surprising that this very experienced Employment Judge, having referred himself to **Taylor v OCS Group** (neither party being professionally represented below) then completely failed to deal with the effect, if any, of the appeal hearing on the procedural defects identified by him at paragraph 49 in relation to the original hearing before Mr Mellers. That he should have taken into account the appeal process is not in dispute (see the Claimant's Answer, paragraph 7).

22. I should set out paragraph 49 in full. Under the heading "Fair Hearing":

> **"49. There were a number of aspects relating to the hearing [before Mr Mellers] that caused me concern:-**
>
> > **49.1. The "charges" alleged against the Claimant in the letter of the 6 January 2014, save in respect of the "Witch" image, were not specific. They were referred to as**

> **matters that had been discussed, but did not identify precisely what it was alleged the Claimant had done or omitted to do.**
>
> **49.2. Similarly, no reference was made to "gross misconduct" or the terms of the disciplinary procedure relied on for such a charge.**
>
> **49.3. The Claimant was not provided in advance of the hearing with copies of the various interviews or other documents relied on by the Respondent.**
>
> **49.4. The Claimant had little time to prepare her case and, in the absence of copies of the relevant evidence, no opportunity to prepare evidence in rebuttal.**
>
> **49.5. Mr Mellers carried out further investigations following the hearing of which the Claimant had no notice or knowledge or opportunity to rebut."**

23. It is not for me to retry the question of whether or not the original hearing before Mr Mellers was fairly conducted. However, accepting for the purposes of this appeal each of those five criticisms, it is plain to me that the effect of the internal appeal might have been to cure those deficiencies. In particular: (1) even if the charges were not made plain to the Claimant before Mr Mellers' hearing, she was well aware of them by the time of the appeal before Mr Lonergan because they were clearly articulated in the dismissal letter from Mr Mellers. (2) The suspension letter of 6 January contained a copy of the disciplinary procedure, which included offences said to amount to gross misconduct. (3) All notes of interview including those not provided before the Mellers hearing were provided to the Claimant some six days before the appeal hearing. (4) By the time of that appeal hearing the Claimant had had sufficient time to prepare her case, the Respondent would argue. And (5) the Claimant had full knowledge of Mr Mellers' further investigations by the time of the appeal.

24. It follows, in my judgment, that the Respondent makes out its principal ground of appeal. However, that is not the end of the matter.

25. Whilst I am satisfied that the Judge did find that Mr Mellers had an honest belief in the misconduct found (plainly the reason for dismissal, see paragraph 50), was it open to the Judge

to conclude that his belief was not based on reasonable grounds following a reasonable investigation?

26. As to the investigation, that needs to be viewed in the light of the state of affairs following the appeal hearing. Similarly, did Mr Lonergan have reasonable grounds for believing that the Claimant was guilty of all three charges found proved by Mr Mellers, based on the whole of the evidence before him, by then disclosed to the Claimant, including that of the Claimant herself.

27. Further, it was not for the Judge to substitute his view (as he directed himself, see paragraph 46) as to the seriousness with which a reasonable employer could view the "Witch" screensaver charge in the light of earlier events about which the Claimant gave evidence (see paragraph 48).

28. In these circumstances I am satisfied that the Judge's conclusion that the dismissal by reason of conduct was unfair under section 98(4) **ERA** cannot stand, particularly in light of his failure to consider the effect of the internal appeal.

29. As to wrongful dismissal, I agree with Mr Hyams-Parish that the Judge failed to give sufficient reasons for his conclusion that the wrongful dismissal claim succeeded, particularly in light of his final sentence of paragraph 57:

> **"… Her conduct, whilst wrongful, was not repudiatory …"**

30. Given that he found that she had contributed to her unfair dismissal to the extent of 60% by her conduct, it is difficult to understand his distinction between conduct which is wrongful but is not repudiatory.

Disposal

31. The appeal is allowed. The earlier finding that the reason for dismissal was conduct and not protected disclosure will stand. However, the question of both unfair dismissal and wrongful dismissal will be remitted for hearing by a fresh ET. I accept Mr Hyams-Parish's submission that it would not be appropriate to return the case to the same Employment Judge; whilst his professionalism is not in doubt, the perception if he arrived at the same conclusion having considered the effect of the internal appeal is properly to be avoided. Further, I am persuaded that the new Employment Tribunal should be able to reconsider questions of fairness, contribution, **Polkey** and remedy in the light of its findings, should it conclude that the dismissal was unfair. I need say no more about the wrongful dismissal claim, which is similarly remitted.

Costs

32. Following my Judgment in this case Mr Hyams-Parish makes application for the fees incurred by his clients in bringing this appeal: an initial fee of £400 followed by a hearing fee of £1,200, making a total of £1,600 in all. The appeal has been resisted. The Claimant has had legal advice. But she has nevertheless pursued the matter to a hearing.

33. In principle the Appellant ought to have its fees. On the other hand, Miss Derwich has placed before me her current income and outgoings, a schedule which is very properly not challenged by Mr Hyams-Parish, which shows a net income of £900 per month and outgoings (essential outgoings, it seems to me) of £818 per month. I am entitled to take into account her means and I do. In these circumstances I shall make a limited order of £400 in respect of the initial fee and £600 in relation to the hearing today, a total of £1,000. That sum should be paid at the rate of £50 per month.