Appeal No. UKEAT/0228/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 May 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

STOKE ON TRENT CITY COUNCIL APPELLANT

MRS D SAVIGAR (DEBARRED) RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR IAIN LOVEJOY (Solicitor) Legal Department Stoke on Trent City Council PO Box 631 Civic Centre Glebe Street Stoke on Trent ST4 1HH
For the Respondent	Respondent debarred from taking part in this appeal

SUMMARY

UNFAIR DISMISSAL

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal

Though the Claimant's complaint was that she had been unfairly dismissed because her employer had failed to consider disclosures she had made about the behaviour of a contractor, had rejected her grievance causing her to become ill, and had then dismissed her for the resultant incapability or for making a protected disclosure (all of which the Employment Tribunal rejected) and had expressly said she took no issue with the fairness of the procedure by which dismissal was effected, the Employment Tribunal proceeded nonetheless to consider the latter. It did not alert the Respondent to the points it ultimately decided rendered the dismissal unfair. There were three, none of which bore examination. First, the Employment Tribunal considered it was unfair to dismiss summarily in breach of contract, when if the employment had continued throughout the notice period the Claimant might have had the chance of alternative employment to her contracted job (to which she could not return for health reasons). This was contrary to established authority (starting with **Treganowan v Knee**) which is to the effect that the method of dismissal is irrelevant to the issue of fairness; and was inconsistent with the implicit finding when deciding that there should be a 100% **Polkey** reduction that there was no chance of obtaining any such alternative employment. Second, the Employment Tribunal concluded that the employer had ceased looking for suitable alternative employment 12 days prior to the dismissal, when there was no proper evidential basis for this finding, and the unchallenged evidence was that on the occasion of dismissal the dismissing officer was told that there was then no suitable alternative employment available. Third, the Employment Tribunal thought it unfair of the Respondent not to have asked Occupational Health to clarify whether a double negative in its last report, which read as such said the Claimant was suitable

for her original job, was intended. However, not only had the Employment Tribunal not suggested to the dismissing officer (who had not noticed the double negative, and had assumed that the document said that the Claimant was unfit for her old job) that she ought to have read the document more carefully, but that is what, on any proper view in context of the report, it said. The Employment Tribunal had adopted a wholly artificial reading of the document in context when it was clearly stating that the Claimant was not fit, and she accepted she was unfit. Indeed, it was never asserted by the Claimant at the hearing that the decision was flawed because she was fit to do her original work. In any event, an employer was not absolutely bound by the views of an Occupational Health Practitioner anyway (see **Gallop v Newport**).

Further, on its face the finding as to **Polkey** left open no chance that the Claimant could return to work within a reasonable time, thereby suggesting that the Employment Tribunal's view of the context was that the evidence did not suggest any prospect of this.

Since the decision was based on matters which the Claimant had not put into contention before the Employment Tribunal, there was no basis on which the case could be remitted for further consideration. A decision that the dismissal was not unfair was substituted.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Mrs Savigar was a Care Manager working in the Learning Disability Social Work team of the Respondent Council ("the Council"). She made complaints about a provider of care services, known as Creative Support. Those complaints were public interest disclosures. She brought three claims against the Council, alleging that she had suffered detriments because she had made those protected disclosures. In the course of the history she raised a grievance about the way in which she had been treated, which she said had caused her to suffer stress, which provoked illness. The grievance was rejected. She remained unwell and ultimately was dismissed when it appeared to the Council that she was unlikely ever to be fit for her substantive role again and that there was no alternative suitable employment.

2. Her three claims came before an Employment Tribunal at Birmingham (Employment Judge Findlay, Mr Macdonald and Mr Murphy), which in a reasoned Judgment sent to the parties on 21 March 2014 rejected her claims of detriment for having made a public interest disclosure but upheld her claim that she had been unfairly dismissed. As to remedy, although it awarded a basic award, it made no compensatory award since it thought that there was a 100% chance (it must be inferred) that she would fairly have been dismissed anyway.

3. The appeal before me is brought by the Council. The Respondent has been debarred from proceeding, having entered no answer and taken no steps in the appeal. Accordingly I have heard only from Mr Lovejoy, solicitor on behalf of the Council.

The Tribunal's Reasoning

4. In order to resolve the issues on the appeal, it is necessary to deal with the reasoning of the Tribunal in greater detail. The Tribunal found that the reason for dismissal was capability. There had been a referral to Occupational Health on 30 July 2012, which was reported in August. In that the Occupational Health practitioner said that:

> **"3. In my opinion the perceived non completion / unsatisfactory result to the grievance are the major hurdle preventing recovery and Donna's return to work.**
>
> **4. I am unable to for see Donna returning to her substantive role in any capacity certainly within the short to medium term.**
>
> **5. Donna may be fit for alternative duties in the future however timescale for her recovery is unknown."**

She added:

> **"It is my opinion that the issues preventing Donna's return to work are managerial problems. …"**

5. She remained off sick, certificated, until 5 September 2012. A review of her position since she had been off sick for so long was due to take place on 17 September. In order to inform that, a further Occupational Health report was obtained from the same Occupational Health practitioner. She said, under the heading "History":

> **"Donna reports that her condition has improved significantly. She reports that it has now been acknowledged that she will not and can not return to her substantive post and is seeking alternative employment."**

6. Under the heading "Return to work date" she put "Unknown" and under the hearing "Recommendations" as follows:

> **"It is my opinion that Donna is fit for work providing alternative employment other than her substantive post can be found. I do not feel that return to her substantive post is unachievable.**
>
> **I have however agreed to continue seeing Donna as a supportive mechanism and her next appointment is planned for the 8th October 2012. …"**

It might be observed that if she had been fit then to return to work, she would have done so. There was no certainty about any return to work date whether in her original or some other capacity.

7. The Tribunal found that the dismissal on the grounds of capability was unfair. It did so for three reasons: (1) that the employer should have referred back to the Occupational Health practitioner to clarify the meaning of the phrase, which taken in isolation is unclear, "I do not feel that return to her substantive post is unachievable." The double negative might suggest that it was achievable at some unknown time in the future. As to that, it said:

> **"5.13. … no reasonable employer faced with these circumstances would have failed to check what the Occupational Health Advisor meant in her report dated 10th September 2012, that is whether she was saying that a return to work by the claimant to her substantive role was or was not achievable. We consider that this issue was so important that even if the answer could be guessed, every reasonable employer would have checked it, or to put it another way no reasonable employer would have failed to check what the Occupational Health Advisor was saying. …"**

8. The second reason was that the employer should not have dismissed summarily in breach of contract rather than providing a notice period. As to that, it said:

> **"5.14. … we consider that every reasonable employer would have wanted to comply with the terms of the claimant's contract of employment when dismissing her - that is, no reasonable employer would have dismissed her in breach of contract, by terminating her contract before the end of the notice period, as occurred here. Whether or not payment was made in lieu, there was no power to pay in lieu of notice. By terminating the contract prematurely, the respondent deprived the claimant of the opportunity of suitable alternative employment being found for her in the notice period. In our view, no reasonable employer would have wanted to deprive the claimant of the opportunity of finding alternative employment with it during the notice period.**
>
> **5.15. This is effectively what happened here there is no evidence that the respondent actively looked for suitable alternative employment for the claimant after the 5th September 2012 up until dismissal, as we would expect any reasonable employer to do if a person was to be fairly dismissed for capability. As the contract was (unreasonably as we have found) terminated prematurely and without notice, whether or the claimant's [sic] would have been successful in finding alternative employment with the respondent during the notice period, she was deprived of that opportunity. We find that the respondent's conduct in that respect was outside the reasonable range, and the dismissal was unfair for those reasons."**

9. Paragraph 5.15 indicates the third ground of its decision, which was that the employer should have gone on looking for suitable alternative employment after 5 September 2012. This

is predicated upon the view that it did not. As to that, the Tribunal had found at paragraph 5.6 that after a review following the first Occupational Health report I have mentioned, held on 14 August, Amanda Lovatt, the Dismissing Officer, had written to tell the Claimant it would be reasonable to spend up until the expiry of the Claimant's sickness certificate on 5 September looking for suitable alternative roles. At paragraph 5.8:

> **"There is no evidence that the respondent looked for alternative employment for the claimant after 5th September 2012."**

10. It is material to the discussion which follows to note what the Tribunal went on to say in respect of **Polkey**. It said at paragraph 6.2 as follows:

> **"6.2. Looking at section 123(1) and *Polkey* however, that is, what would have happened under an entirely fair process, we note that the 10 September 2012 Occupational Health report does not give a return to work date. Even if [Ms Lovatt] had checked with the Occupational health advisor and she had said that she thought that the claimant could return to her substantive role, there is no evidence that this would have occurred within a reasonable period, or even that the claimant would have agreed to return to it.**
>
> **6.3. There is no evidence, either from which we could conclude that had the respondent actively looked for suitable alternative employment for the claimant after the 5th September 2012, to the end of the 4 week notice period to which she was entitled, it would have been successful in finding her such a position. In those circumstances we find it just and equitable that the compensatory award should be nil, but the claimant is entitled to basic award in the agreed amount."**

11. I have to say, for reasons which I will develop below, I regard the conclusion here, when taken together with the conclusions at paragraph 5, to demonstrate a lack of clear reasoning by the Tribunal. The effect of it was that the Tribunal was at one stage holding it unfair not to give the Claimant the chance of obtaining suitable alternative employment, which at the next stage it thought was zero, that the Respondent was unfair in not looking for suitable alternative employment after 5 September 2012 when, if it had done, there was no evidence on any showing that there would have been any. This, I think, reflects the approach which the Tribunal took to the question of resolving the unfair dismissal claim. Although it set out the issues at the start of its Judgment in respect of the public interest disclosures, it did not set out

what issues it had to determine in respect of unfair dismissal. In failing to do so, it did not do that which Tribunals are encouraged to do by Presidential guidance.

12. Secondly, it began at paragraph 5.1 to say this:

> **"… The claimant originally said that she could not see anything wrong with the procedure adopted by the respondent. She did not withdraw her unfair dismissal complaint, however, so we are obliged to consider it and bear in mind that as an unrepresented claimant she will not necessarily be aware of the approach of tribunals and courts to procedural fairness in such circumstances. We cannot close our eyes to obvious defects in the dismissal procedure."**

13. This is concerning because the ET1, the third ET1, dealing with the dismissal, argued that it was unfair because the Respondents had not dealt with the concerns which she raised by way of protected disclosure. That had led to a fundamental breakdown of the implied term of trust and confidence which led to her being sick. She was therefore blaming her employer for her being sick, a claim which the Tribunal did consider and reject. And she says as a consequence she was dismissed on grounds of capability. She said she believed the dismissal was due to her initial grievance. The only aspect of procedure that she mentioned at subparagraph (6) under paragraph 5(2) of the ET1, was that although Ms Lovatt had referred to the Occupational Health meeting stating they had reported that "a return to your substantive post was unachievable", it had actually stated "I do not feel that a return to her substantive post is unachievable". So what she was not complaining about (and the Tribunal recognised she was not complaining about) was the procedure adopted to dismiss her. She was complaining about the reasons which had inspired the Council to do so.

14. In **Muschett v HM Prison Service** [2010] IRLR 451 the Court of Appeal made it clear what the function of a Tribunal was. It adopted an earlier Judgment of the Court of Appeal (see paragraph 30) in which Rimer LJ had said:

> **"58. … There are … limits to what a judge can and should do in order to assist [a litigant in person]. It is for the litigant himself to decide what case to make and how to make it, and**

> **what evidence to adduce and how to adduce it. It is not for the judge to give directions or advice on such matters. It is not his function to step into the arena on the litigant's side and to help him to make his case …"**

15. Translating that at paragraph 31 to the role of the Employment Tribunal Rimer LJ, with the agreement of Wilson and Thorpe LJJ, said:

> **"… It is not their role to engage in the sort of inquisitorial function that [counsel for the Claimant] suggests or, therefore, to engage in an investigation as to whether further evidence might be available to one of the parties which, if adduced, might enable him to make a better case. Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law. …"**

He made further reference to **Mensah v East Hertfordshire NHS Trust** [1998] EWCA Civ 954, [1998] IRLR 531, in particular paragraphs 14 to 22, which shows that this approach is by no means new.

16. It needs to be borne in mind by Tribunals that the purpose of a hearing before a Judge or Tribunal is to determine the dispute between the parties. The parties know best what that dispute is. It is that dispute, as they identify it, which should be resolved. It is, of course, right that a number of litigants in person will not be experienced in law. As a result they may not know quite how to categorise legally the complaint which they are making. But they still have to make the complaint in the first place. Here the claim for unfair dismissal was plainly on one basis. The Tribunal resolved it on a basis which had not been put before it and indeed in respect of which they acknowledged that the Claimant herself had not sought to make any point as to procedure and had said so expressly. The Tribunal thus began addressing the facts by taking what I regard as a misconceived approach to its function.

17. I turn to the effects of this when one comes to the grounds of appeal. As to those grounds, the first which Mr Lovejoy chose to argue before me today was as to the reliance by the Tribunal upon its supposition that no reasonable employer would have dismissed

summarily. He argued that it has been established at Appeal Tribunal level that whether a dismissal was on notice or summarily has nothing to say as to whether the statutory test has been satisfied. It must be remembered that the statutory test is that under the **Employment Rights Act 1996**. It is not a contractual test. Although a breach of contract may give rise as being one of the circumstances leading to a conclusion that the employer acted reasonably or unreasonably, it is not in itself and alone a reason for so concluding.

18. In **Treganowan v Robert Knee & Co Ltd** [1975] ICR 405 in the Queen's Bench Division Phillips J dealt with the point in relation to the statutory predecessor of what is now section 98 of the **Employment Rights Act 1996**. In the report, [1975] ICR 405 at page 412, he said:

> **"… In my judgment, a tribunal has to say to itself, "This man was dismissed in such- and-such circumstances. The reason was so-and-so. Have the employers satisfied us that they acted reasonably in treating that reason, in those circumstances, as a sufficient reason for dismissing him?" If "No": unfair dismissal, and the complaint succeeds. If "Yes": the complaint fails. They are not concerned for this purpose with whether the dismissal was summary or whether the notice was long enough. That would be relevant for a court to consider in determining whether the dismissal, whether unfair or not, was wrongful. Of course, the fact that the dismissal was summary, or the notice was short, may be a fact that the tribunal would want to take into account in determining other questions of fact, for example, what was the real reason for the dismissal, who is to be believed, and so on. …"**

He went on to dismiss the appeal.

19. Those words were subsequently built on by the Appeal Tribunal, presided over by HHJ Burke QC in the case of **MPI Ltd v Woodland** [2007] WL 1157991, a decision of 30 January 2007. In that, under the heading "The summary dismissal ground", the Appeal Tribunal said:

> **"20. It has long been an established principle of the law of unfair dismissal that whether the dismissal was summary or on notice is irrelevant to the issue of the fairness of the dismissal, save in so far as it may bear on the credibility of witnesses. What the Tribunal have first to decide, in a straightforward unfair dismissal claim which does not involve any question of automatically unfair dismissal is what was the reason for the dismissal and, if a reason is identified, was that reason a reason which falls within section 98(1)(b) of the Employment Relations Act 1996 [he meant the Employment Rights Act]. If a reason is identified and the Tribunal conclude that that reason falls within section 98(1)(b), then the Tribunal must go on to consider whether it was reasonable to treat that reason as a sufficient reason for dismissing the employee, pursuant to section 98(4) of the Act. If it was not reasonable to dismiss for that reason the dismissal was unfair. If it was reasonable to dismiss for that reason the dismissal**

was fair. Whether the dismissal was summary or on notice is not a consideration which enters into this framework of statutory consideration."

20. He made extensive reference to **Treganowan v Knee**, a case endorsed as far as principle is concerned in **BSC Sports & Social Club v Morgan** [1987] IRLR 391 by the Appeal Tribunal presided over on this occasion by Sir Ralph Kilner-Brown. Mr Lovejoy tells me that he is unaware of any authority to the contrary.

21. I do not approach this matter unguided, therefore, by authority. Had I done so, I would have thought there to be much that might be said for the alternative view, particularly since at the time **Treganowan** was decided the significance of procedural default on its own rendering a dismissal unfair had not been fully appreciated. That had to wait until the House of Lords delivered its opinions in **Polkey v AE Dayton Services** [1987] IRLR 503. It might have been arguable that the timing of a dismissal was part and parcel of the dismissal which the court is considering, not simply a dismissal for that reason but the dismissal which actually occurs, which is a dismissal on a particular date. The date is of significance for various reasons within the statute. Here, the Tribunal was indicating that, had there been a period of notice, there would have been a further opportunity for the Claimant, assuming the employer to behave as one would expect a responsible Council to do, by drawing to the attention of the Claimant any suitable alternative employment which became available during that period. It might therefore have been a matter of real importance to her, which might be one of the circumstances to which regard could be had under section 98(4).

22. I have not found it necessary, however, to develop this line of reasoning any further than to identify it as seeming to me potentially arguable in some cases, depending of course, as the question of fairness always does, on all the circumstances of the particular case because it

seems to me that I should loyally follow the decisions of the Appeal Tribunal thus far, which are all one way, unless I can be satisfied that they are plainly wrong. I am certainly not so satisfied. The law is, therefore, as they have declared. The Tribunal should have been aware of those authorities and therefore could not have adopted the argument which it did.

23. There is a second reason for holding that the conclusion as to summary dismissal was in error. That is that the Tribunal appear to suggest that no reasonable employer would summarily dismiss in these circumstances. This is a very difficult factual conclusion or conclusion of judgment to reach given, says Mr Lovejoy, that in the *Tolley* handbook it is recognised that employers most frequently do exactly as the employers in this case did. Nor does it rely entirely upon the opinion of a textbook writer. In the case of **Abrahams v Performing Right Society Ltd** [1995] ICR 1028 at 1039, the Court of Appeal was considering the questions which arose when there was dismissal and what purported to be a payment in lieu. It identified four factual situations. The fourth of those was where without the agreement of the employee:

> **"… the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. …"**

24. Accordingly the Tribunal without explanation was identifying - as a practice which no reasonable employer would adopt - a practice which the majority of employers actually do. I have some sympathy with the point that that does not mean to say that the majority are necessarily acting reasonably in so doing, but it seems to me that the point would require a much greater explanation and adaptation to the particular circumstances of this case than occurred. In this respect I have a particular difficulty given the way in which this Tribunal approached **Polkey**. In effect the Tribunal was saying that the employer was wrong to dismiss because its effect was to deprive the Claimant of the chance of obtaining suitable alternative

employment. In the next breath, however, in paragraph 6 it was assessing the chance of that suitable alternative employment as zero. It was therefore suggesting it was unfair for the employer to adopt the method of dismissal it did when there would actually have been no advantage to the Claimant in continuing the relationship contractually. This is different in my view from a **Polkey** situation since the whole basis for supposing that it was unfair was because it deprived the Claimant of a meaningful opportunity of further employment. On the facts here it did not.

25. The final complaint under this ground suggested that the Tribunal were approaching the matter as if it were an action for breach of contract where it is one under statute. I do not think that this adds anything to the discussion above.

26. The second ground argued before me was that the Tribunal found that the employer had not looked for alternative employment. The first point here was that it was no part of the Claimant's case that the Respondent had failed to do so. Mr Lovejoy tells me that it was never put to any witness beyond one possible question, which would not bear this weight, addressed to Ms Lovatt. It is borne out by Mr Lovejoy's note, but he was permitted by the Appeal Tribunal by earlier order to rely upon his notes for the purposes of this appeal. When she said that during the next five weeks after 9 August the search went on and then was asked "Are you aware of any attempt afterwards?" and she said "Can't remember", that is not evidence that there was no attempt. It is evidence that she did not know if there was one.

27. However, what was unchallenged (and there is no evidence before me that it was ever challenged) is that when she gave evidence she adopted a witness statement in which she said in relation to the meeting of 17 September that she had been informed by a Mr Pilmore that Mrs

Savigar had submitted an application for a particular post but had not been shortlisted and "that no other suitable alternative roles had been identified and that Mrs Savigar had no other outstanding applications at that time." The evidence thus does not suggest that the employer deliberately stopped looking after 5 September although it is not absolutely clear. The weight of what was said suggests that there were indeed ongoing enquiries. The best position from the Claimant's point of view if she had wished to rely upon it was that it was not altogether clear. But the Tribunal's reasoning, coming as it did without Mr Lovejoy being asked to address it in the course of submissions, was unfair: it is axiomatic that if a point occurs to a Tribunal it should raise it with the parties so that they may deal with it. Mr Lovejoy tells me (and there is no contradiction in the circumstances of this case) that that did not happen. There is no indication from the papers that it did. And, as I have indicated already, by starting this discussion in respect of dismissal by saying in effect that the Tribunal was going to decide the fairness of the dismissal on a basis which the Claimant had not herself put forward because the Tribunal thought it knew better, it appears to me that there was an error of law.

28. The third ground argued was that relating to the paragraph in which the Tribunal dealt with the Occupational Health report. The Claimant had not said that she was fit for work. The issue here is not the fine wording of the Occupational Health advice. The recent decision of **Gallop v Newport City Council** [2014] EqLR 141 is authority to the effect that it is for the employer to make up its own mind upon it, although it will obviously and must take proper account of what the Occupational Health advisor is saying. But here it seems to me that Mr Lovejoy is right to say that the Tribunal has focussed upon one particular phrase in isolation from the totality of the report. More fundamentally, he submits that the Tribunal was here examining the question of fairness of the employer's procedure. The Tribunal accepted that Ms Lovatt did not read the double negative in context as being a double negative. It did not

criticise her for that. It followed, he submitted, that in the absence of suggesting that she really ought to have looked more closely, which was never put to her, and never suggested by the Tribunal in its Decision, it could not conclude that the employer had acted unfairly. In my view this criticism is justified.

29. If it had put the point, and had been entitled to criticise Ms Lovatt for not realising there was a double negative, then in any event I think there is considerable force in Mr Lovejoy's points that, sensibly read, the Occupational Health report was all one way. It was saying that the Claimant herself accepted that she was not fit for her substantive post. She might be fit for some suitable alternative work but none had been identified. The double negative was only part of the totality of a document which had to be looked at in whole and in the context of the case. Although in this respect there was a comment as to the double negative made in the ET1, and therefore the Tribunal was entitled to look at it, it came to a conclusion which seems to me to be such a wholly artificial way of reading the document as not to be justifiable in law. Moreover I turn again to the way in which the Tribunal dealt with **Polkey**. It seemed to think that there was no reasonable prospect, or any prospect to which any percentage chance could be assigned, that the Claimant would have been able to return within a reasonable time to her post. If so, I simply do not understand how the Tribunal could conclude that in this particular case the dismissal was unfair for the reasons it gave.

Further Remarks

30. It is always difficult to deal with an appeal against a Tribunal when the Respondent to the appeal is not represented and is not here to put her view of the matter. Accordingly some of the conclusions which I have expressed with some strength might, had the fuller facts been appreciated, have had to be viewed with greater qualification. However, I have to resolve the

appeal as it is put upon the basis on which it is placed before me. On that basis I see no answer to any of the three points of appeal which have been raised and accordingly this appeal is allowed. The conclusion as to unfair dismissal is overturned since there is no basis which was argued before the Tribunal by the Claimant upon which it could be upheld. This is not a case for remission. The Claimant's primary case, indeed the only case made in her ET1 with the one exception of the side remark about the health report, was as to the reason which had inspired the Council to dismiss her and which the Tribunal resolved in favour of the Council. Accordingly I substitute a finding here that the dismissal was not unfair.