Appeal No. UKEAT/0379/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 June 2015
Judgment handed down on 12 August 2015

Before

HIS HONOUR JUDGE PETER CLARK

MR H SINGH

MISS S M WILSON CBE

MR S ELIJAH-JACOBS APPELLANT

SOUTH WEST LONDON & ST GEORGES MENTAL HEALTH TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID STEPHENSON (of Counsel) Instructed by: Magna Solicitors 166 Lansbury Drive Hayes Middlesex UB4 8SG
For the Respondent	MR IAN SCOTT (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St Georges Road Wimbledon London SW19 4DR

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

Whether the Employment Tribunal was entitled to conclude that the Respondent had carried out a reasonable investigation in this "career-ending" dismissal of a carer for vulnerable patients. See **A v B**; **Roldan**; and **Crawford**. They were.

Whether the Employment Tribunal was wrong to limit consideration of the race discrimination claim to two agreed issues. They were not.

Appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This case has been proceeding in the London South Employment Tribunal. The parties are Mr Sandy Elijah-Jacobs, Claimant, and South West London & St Georges Mental Health Trust, Respondent. This is an appeal by the Claimant against the Reserved Judgment of an Employment Tribunal chaired by Employment Judge Martin, promulgated with Reasons on 10 June 2014, dismissing his complaints of protected-disclosure detrimental treatment contrary to section 47B of the **Employment Rights Act 1996** ("ERA") and automatically unfair dismissal under section 103A; alternatively, ordinary unfair dismissal under section 98 and direct discrimination and harassment contrary to the **Equality Act 2010** on the ground of his race.

2. At an Appellant-only Preliminary Hearing held on 13 February 2015 I dismissed the Claimant's challenge to the Employment Tribunal's findings on the protected disclosure claim (ground 9 of the appeal) but allowed the appeal to proceed to an all-parties hearing on essentially two issues: the Employment Tribunal's approach to the question of reasonable investigation, a limb of the **Burchell** test to be applied in conduct unfair-dismissal cases such as this (grounds 1 to 7), and secondly their approach to direct racial discrimination (ground 8). Finally, I permitted an overarching **Meek** compliance complaint (ground 10) to proceed. I also directed that the Full Hearing of this appeal should come before a full division of the EAT on the basis that determination of the reasonable investigation issue would benefit from the practical experience of industrial members. I refer to the Judgment that I gave at the Preliminary Hearing for a fuller explanation of why the appeal was allowed to proceed.

Reasonable Investigation

3. We need not dwell on the **Burchell** test, endorsed by the Court of Appeal in **Midland Bank PLC v Madden** [2000] IRLR 288. Mummery LJ, who gave the leading Judgment in **Madden**, returned to the range of reasonable responses test and its application to questions of procedural fairness under section 98(4) **ERA** in **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23.

4. The present case raises again a subset of the reasonableness approach in cases involving often vulnerable service users and potentially career-ending disciplinary proceedings against their carers, culminating in dismissal.

5. The starting point in the relevant line of authority is often taken to be **A v B** [2003] IRLR 405 EAT, Elias J, as he then was, presiding. In fact, the concept of a sliding scale of necessary investigation can be traced back to the Judgment of Wood P in **ILEA v Gravett** [1988] IRLR 497, cited in **A v B** at paragraph 80.

6. In **A v B** the Claimant was a residential social worker accused of forming an inappropriate relationship with a 14-year-old girl resident in the home at which he worked. Following lengthy disciplinary proceedings he was dismissed. His complaint to an Employment Tribunal was dismissed, the Employment Tribunal finding that the Respondent employer had carried out a reasonable investigation. On appeal the Employment Appeal Tribunal reversed that decision, holding that the Employment Tribunal's finding on the reasonableness of the employer's investigation was, in short, legally "perverse" (see paragraph 91) for the specific reasons set out at paragraphs 81 and 90. At paragraphs 60 to 61 Elias J gave guidance to Employment Tribunals in dealing with "career-ending" cases.

7. Elias LJ returned to this theme in two subsequent cases that reached the Court of Appeal, **Salford Royal NHS Foundation Trust v Roldan** [2010] ICR 1457 and **Crawford v Suffolk Mental Health Partnership NHS Trust** [2012] IRLR 402. In both cases decisions of the Employment Tribunal on liability, overturned by the Employment Appeal Tribunal, were restored by the Court of Appeal. As to the scope for interference on appeal, Mr Scott, now appearing for the Respondent in this appeal, draws our attention to paragraph 51 of **Roldan** where Elias LJ said this:

> **"51. Before considering these grounds of appeal, I would make this preliminary observation. It is not disputed that the employment tribunal properly directed themselves in accordance with the principles established in *British Home Stores Ltd v Burchell (Note)* [1980] ICR 303, as further explained in a case of this kind by *A v B* [2003] IRLR 405. In these circumstances, 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. In *Yeboah v Crofton* [2002] IRLR 634, para 93, Mummery LJ said that this would require an "overwhelming case" that the decision was one which no reasonable tribunal, properly appreciating the law and the evidence, could have made."**

8. Those words of caution to the appellate Tribunal, whose jurisdiction is limited to correcting errors of law, have been echoed on numerous occasions by the Court of Appeal in the context of conduct unfair dismissal cases (see, by way of example: **London Ambulance Service v Small** [2009] IRLR 563, paragraphs 41 to 42; **London Borough of Brent v Fuller** [2011] ICR 806, paragraph 28; and **Bowater v North West London Hospitals NHS Trust** [2011] IRLR 331, paragraph 19). Just as it is not for the Employment Tribunal to substitute its view of the case for that of the employer (see **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17), so it is not for the Employment Appeal Tribunal to substitute its view of the facts for that of the Employment Tribunal on appeal.

9. Against that background we now turn to the particular facts of the present case as found by the Employment Tribunal and the challenge to the Employment Tribunal's conclusion as to the reasonableness of the Respondent's investigation.

10. The Claimant was a registered mental-health nurse of long standing with an unblemished career. He commenced his employment with the Respondent in December 2006 and in 2007 moved to Old Church working for patients who were deaf and had mental-health and learning disabilities. Some had other physical impairments such as blindness or incontinence; plainly, a vulnerable group of patients.

11. On 19 May 2012 a service user alleged that she had witnessed "someone" physically assaulting by pushing or pulling another patient, SH. He was deaf with mental-health issues. He has however mental capacity to a certain level, and there was evidence (particularly from a consultant psychiatrist, Dr Miller) that he was able to know when something wrong was done to him and to identify the perpetrator. He had communication difficulties (Reasons, paragraph 31).

12. That allegation was investigated by two nurses, Ms Nicole Collins and Mr Sean Cahill. They interviewed SH, although communication was difficult. He was taken to a noticeboard where photographs of permanent but not agency staff were displayed. SH pointed out a photograph of the Claimant as the person who had assaulted him, although the Claimant's description was not entirely consistent with SH's earlier verbal description. The following day he took Dr Miller, who had received training in communicating with the deaf, back to the noticeboard and again pointed out the Claimant (paragraph 32). The Claimant was suspended.

13. The SH allegation was investigated by the safeguarding team and also reported to the police. The Claimant denied the allegation throughout. The police took no action, and an internal disciplinary process ensued. The Claimant was also charged with mimicking another

service user, DM, an allegation raised by Mr Cahill, who was himself alleged to have assaulted SH.

14. There followed a disciplinary hearing on 17 April and 13 May 2013. That hearing came before a panel consisting of Mr Clenaghan (service director, Sutton and Merton services), Mr Childs (modern matron) and an HR representative. The panel upheld the charges and summarily dismissed the Claimant. An appeal against dismissal, heard by Ms Fisher, was dismissed by letter dated 13 September 2013.

15. Although the Employment Tribunal do not refer expressly to the **A v B** line of authority in their Reasons, we note that both **A v B** and **Roldan** were cited by Mr Stephenson in his detailed written closing submissions below, and at paragraph 72 the Employment Tribunal said this:

> **"72. The Tribunal is very conscious also that the Claimant was a long-standing member of staff and that the consequence of a summary dismissal in these circumstances may have a devastating effect on his career. The Respondent had a very difficult balancing act in both protecting the needs of its very vulnerable service users and its duty of care towards them, and its duty of care to its staff. …"**

16. They go on, at paragraph 73, to find that the Respondent's investigation was within the range of reasonable responses and that based on that investigation and the clear evidence of Dr Miller in particular they had reasonable grounds for their belief that the Claimant was guilty of the misconduct alleged. In those circumstances dismissal was a reasonable sanction.

17. In challenging the finding on investigation Mr Stephenson repeats a number of forensic points advanced below: the investigating officer, Ms Jan Annan, limited her enquiries to those covered by the safeguarding panel; witnesses on duty at the time of the alleged SH incident were not interviewed, in particular Mr Guranireama, a student nurse whose description

appeared to fit that originally given by the Claimant; the original allegation from a service user was that SH had been assaulted by another service user not a member of staff; and too much weight was placed on Dr Miller's evidence without consideration being given to the possibility that SH's identification of the Claimant to her may have been influenced by his identification from the noticeboard the previous day. Reference was made to the cross-examination of Dr Miller at the disciplinary hearing held on 17 April 2013; complaint is made that the Claimant was not given access to relevant RIO notes, withheld on grounds of confidentiality. It is contended that the disciplinary panel ought to have adjourned to question other witnesses. Mr Childs was involved in the safeguarding panel's investigation and then sat on the disciplinary panel.

18. These were all matters fully advanced by Mr Stephenson before the Employment Tribunal. They had them in mind. Nevertheless, having taken account of the relevant legal principles they formed the judgment that the Respondent's investigation fell within the range of reasonable responses. In our judgment, we cannot say that that conclusion was legally perverse in the sense identified by Elias LJ in **Roldan**, paragraph 51. Whilst the members of this Appeal Tribunal might have reached a different conclusion at first instance, that is not sufficient to interfere with the Judgment of the fact-finding Employment Tribunal. Accordingly we dismiss this first basis for appeal.

Direct Race Discrimination

19. The Claimant is black and of Asian/Mauritian ethnic origin. Attached to the Employment Tribunal Judgment is an agreed final list of issues. Paragraph 2 identifies two allegations of less favourable treatment on grounds of the Claimant's race, his actual comparator being Mr Cahill, who is white:

> **"2.1. The Respondent's acceptance of Mr Cahill's evidence over the Claimant's that the Claimant had 'mocked or mimicked' one of the Respondent's service users;**
>
> **2.2. The Respondent's summary dismissal of the Claimant for gross misconduct."**

20. Those allegations were considered and rejected by the Employment Tribunal; see Reasons, paragraphs 77 to 78.

21. The point that struck me as arguable at the Preliminary Hearing (Judgment, paragraph 13) was the comparison made between the fact that Mr Cahill's suspension was lifted before he attended a disciplinary hearing (at which the charge against him was dismissed) whereas the Claimant remained suspended up until his hearing.

22. That seems to us, as Mr Scott submits, to raise a different allegation to those identified in the list of issues; see **Chapman v Simon** [1994] IRLR 124. An Employment Tribunal cannot be criticised for not deciding a point that was not argued before them. True it is, as Mr Stephenson points out, that in his written closing submissions (see paragraphs 129 to 130) he alludes to the difference in treatment over the continuation of suspension between the Claimant and Mr Cahill; however, that is clearly in the context of the two specific allegations set out at paragraph 2 of the list of issues. In our judgment, it is not now open to the Claimant, on appeal, to build on findings by the Employment Tribunal at paragraphs 39 to 41 and 69 of their Reasons to erect a third, freestanding allegation of direct discrimination.

23. In any event, Mr Scott was able to demonstrate to us a reason for the difference in treatment, unconnected with race, arising out of the judgment made by the Respondent that whereas no additional concerns were raised out of patient interviews regarding Mr Cahill the same was not true of the Claimant.

24. In these circumstances we are unable to accede to this second point in the appeal.

Meek Compliance

25. Having considered the Reasons as a whole we are satisfied that they are adequate to tell the parties why they won or lost. There is no ground for setting aside the decision on this basis.

Disposal

26. It follows that this appeal fails and is dismissed.