Appeal No. UKEATS/0022/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 24 February 2015

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

ETHNIC MINORITIES LAW CENTRE APPELLANT

MR RAGHUBIR DEOL RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Ms Amanda Jones, Solicitor Maclay Murray & Spens LLP Quartermile One 15 Lauriston Place Edinburgh EH3 9EP
For the Respondent	Mr Julius Komorowski Counsel, instructed by : D.Duheric & Co Solicitors 23 Castle Street Edinburgh EH2 3DN

SUMMARY

Unfair dismissal. The claimant was employed as office manager by the respondent. Suspicions arose in the mind of one of the directors of the respondent that the claimant was working elsewhere while claiming to be off sick. An investigation of that and of insubordination by the claimant was carried out and he was dismissed. He appealed and the dismissal was upheld. They ET found the dismissal unfair as the disciplinary process was chaired by the director who had lost faith in the claimant. The appeal did not cure that as it was superficial. The respondent argued that the ET had substituted its own view for that of the respondent. Held: appeal refused. The ET found that the process was unfair as it was entitled to do.

THE HONOURABLE LADY STACEY

1. This is a full hearing. I will refer to the parties as the claimant and the respondent as they were in the tribunal below. The decision against which appeal is taken was notified to parties on 30 July 2014. It was made by an ET consisting of Employment Judge J Hendry, Mr WS Gray and Mr T Lithgow. The decision was to the effect that the claimant's application for a finding of unfair dismissal succeeds and the case shall proceed to a hearing on remedy. It had been accepted during the hearing that the claimant had not made a request in terms of section 80(b)(2) of the Employment Rights Act 1996 (ERA) concerning a request for flexible working and that there was therefore no finding that the dismissal was automatically unfair.

2. At the ET the claimant was represented by Mr D Duheric, solicitor, and the respondent by Ms A Jones, solicitor. Before me, Ms A Jones appeared once again for the respondent, and the claimant was represented by Mr J Komorowski, counsel.

3. The respondent appeals on the basis that the ET substituted its own opinion for that of the respondent; that it failed to make a proper analysis of the evidence, failing to record certain important matters; and that its decision was perverse. The solicitor for the respondent requested the Employment Judge's notes in advance of the hearing. On enquiry as to the purpose by the EAT, she maintained that important parts of the evidence had not been referred to in the judgment. At the hearing there was no agreement on this matter, but as I will explain I did not find that anything turned on it. While I did not find this ground of appeal made out, it is of no real significance as there were matters of procedural fairness relating to the chairmanship of the disciplinary hearing and the superficial nature of the appeal which the ET found rendered the dismissal unfair. Thus questions of particular pieces of evidence, if they should have been referred to but were not, would make no difference to the outcome of the case.

4. The background facts are set out by the ET. The claimant is a national of India. He was a lecturer in maths before coming to the UK in 2002, aged 26. He speaks and understands English well although it is not his first language. He set up home in Glasgow. The respondent is an organisation set up in 1991, through the efforts of Mr J Squire MBE, its founder member. It is a charity with about 30 staff and volunteers. Its purpose is the provision of legal advice and assistance with immigration, benefits, housing and so forth, to the various ethnic minority groups in the Strathclyde area.

5. Mr Squire spent some time each week at the centre. He had a long and distinguished career in psychiatric nursing; he had been a member of the Mental Health Tribunal, and a Nursing Advisor with Greater Glasgow and Clyde Health Board. He had also been a full time trade union official. He was a director of the respondent and convenor of the law centre run by the respondent. He was well known and well respected in the local community. He regarded the respondent as having a secondary role in providing members of ethnic communities with work experience and training which would assist them in moving on to better paid employment elsewhere.

6. The claimant met Mr Squire through working in a grocery shop, where Mr Squire was a customer. The two men became friendly, with the claimant confiding in Mr Squire and taking advice from him. Mr Squire suggested that the claimant should volunteer with the respondent, which he did, starting in July 2003. The respondent employed him to do administrative work in January 2004. He continued for some time to work in the grocery shop as well, which was known to Mr Squire. The claimant was a hardworking and competent employee. By October 2011 he had become Office Manager at the centre run by the respondent. There was

no formal variation of the claimant's contract of employment between his starting work and his dismissal, although his working pattern did in fact vary.

7. The claimant decided to train to be a nurse. The respondent knew of that, as did Mr Squire. The respondent as an organisation and Mr Squire as an individual were supportive of the claimant. The claimant completed a degree in nursing through part time study, while continuing to work for the respondent. He was allowed time off and changes in his work pattern to facilitate his study. He completed his degree in 2009.

8. In order to keep up his registration as a nurse the claimant discovered he would have to take up a post, and keep his practice up. He discussed this with Mr Squire and they agreed that he could work part time in the respondent's centre, and work in a local hospital to gain post degree experience as an intern. This was not recorded in writing. The ET found that arrangement, namely the claimant working for the respondent part time instead of full time was to be limited in time until the claimant completed his intern training. The claimant started an internship on a fixed term contract for 22.5 hours per week, to last from 22 November 2011 to 1 July 2012.

9. The claimant was unsure about a career in nursing. He applied for a number of NHS posts, for which both Mr Squire and the claimant's line manager in the respondent, Ms Seyal, agreed to give references. The claimant decided he wanted to work in the NHS and keep his post with the respondent. He discussed this with Mr Squire who did not see any difficulty. The ET made findings about part time work on the basis of evidence led and emails produced. The emails were bedevilled with errors in dates, and the findings of the ET between paragraphs 17 to 26 do little to correct errors; there may be some errors added by the ET. It seems tolerably clear that what is intended is a finding that the claimant worked for 2 days per week in the

hospital and for 3 days per week with the respondent; he then applied for and got a permanent full time post at the hospital, formally offered to him on 31 March 2013. He hoped to be able to carry out that job and keep his job as office manager with the respondent. His hours with the hospital were 37.5 per week, with shifts usually of 12.5 hours. There was flexibility, and an informal system of swapping shifts with other nurses. The ET found that the claimant made no secret of his work at the hospital; he thought that Mr Squire would know from his experience that 3 days would be likely to equate to 37.5 hours, generally regarded as a full time contract. He also thought he could take on additional shifts if the opportunity arose.

10. The respondent had no policy on the number of hours an employee could work, nor had they any requirement for employees to notify them of hours worked in other jobs. The claimant had no knowledge of the Working Time Regulations 1998 ("the regulations"). The respondent did have a policy about notice of holidays, which they changed in late 2010 or early 2011. The new policy required notice of requests for annual leave to be submitted by 21 January 2011. The claimant did not adhere to this policy, and submitted requests for annual leave four weeks in advance. The respondents did not challenge this. The claimant was unsure of his holiday entitlement due to changes in his working patterns, and he sought clarification of this. He notified Mr Squire of his requirements who in turn notified Ms Seyal. In March 2012 there was an email exchange between the claimant and Ms Seyal in which he explained that he had agreed with Mr Squire that he would reduce his hours to part time. The claimant emailed Mr Squire about this in September 2012, noting that Mr Squire had said it would be fine for him to work three days per week until March 2012. The date is an error; it should have been 2013. The claimant's email finished by saying "you advised me to send you an email". The claimant worked three days per week until March 2013, without anyone in the respondent's organisation raising any query about it. There were discussions by email between the claimant and Ms Seyal

about his leave. The dates appear to be mistaken; but what is clear is that Ms Seyal was aware that the claimant had made an agreement with Mr Squire about his hours.

11. In March 2012 the claimant felt stressed at work due to personal difficulties between him and another worker. He spoke to his doctor about it, and he asked Ms Seyal for a referral to occupational health, reminding her of this in June 2012. In November 2012 there was an email between Ms Seyal and the claimant in which the claimant said that he had agreed with Mr Squire that he would carry on working 3 days per week until March 2012, that being an error for 2013. In early 2013 the claimant's wife was in the last stages of pregnancy. The claimant emailed Ms Seyal on 11 February 2013 asking to be allowed to work "flexible days" after his paternity leave. He gave "unforeseen family circumstances" as his reason. The claimant's baby was born on 17 March 2013, and mother and baby were both unwell, requiring inpatient treatment. The claimant felt very stressed. He reminded Ms Seyal of his request for a referral to occupational health on 15 February and again on 27 March both 2013.

12. In February 2013 the respondent received a penalty notice and £50 fine from Glasgow City Council because rubbish had been put out in the wrong type of bags. Ms Seyal emailed the claimant stating that she understood that he had put the rubbish out and asking why he had used the wrong bags. His reply was that he had helped the cleaner to put the rubbish out. Ms Seyal was not satisfied with that response and emailed the claimant stating that as office manager he was responsible for ordering bags, and he should have told the cleaner that the wrong bags were used. The claimant replied stating that "ordering bags is a different matter than disposing bags" and that other bags were there and he did not think there would be a problem. Ms Seyal found the tone of the email unacceptable; she also found the claimant's behaviour unacceptable and told him she would take the matter further.

13. The ET found that at this time Mr Squire had become increasingly concerned at the situation that had developed. He thought the claimant might have been working at the hospital while telling the respondent he was sick. He felt betrayed by the claimant; he thought the claimant had taken advantage of the friendship he had shown him. He was also concerned that the claimant was working long hours, which he believed would "make him a bad nurse."

14. The claimant was called to a meeting with the Principal Solicitor of the respondent (Ms Sorrell) and Ms Seyal on 18 February 2013. He was told that an important matter had arisen; he could have a member of staff present if he wished. He asked for a Trade Union representative and complained of lack of notice of the meeting. He was told that no notice was needed and that there was no time for a Trade Union representative to attend. He was suspended on full pay. He was given a letter which stated that he was suspended because of alleged gross misconduct. The following matters were alleged and were to be investigated:

1. Serious breach of the respondent's rules policies and procedures;
2. Conduct likely to bring the respondent's name into disrepute;
3. Serious acts of insubordination.

15. On 22 February Ms Sorrell wrote to the claimant stating that the respondent was in possession of new information which if proven would constitute an alleged fraud against the organisation. Mr Squire wrote to the hospital seeking information about the claimant's work there. He was informed that the claimant had started work with the hospital on 22 November 2011 on a fixed term basis working 22.5 hours per week until 1 July 2012. That fixed term contract was extended from 2 July 2012 until 31 March 2013 and the hours of work were increased to 37.5 per week. The claimant had been offered a permanent contract from 1 April 2013, working 37.5 hours per week.

16. The respondent wrote to the claimant on 11 March 2013 requiring him to attend a hearing on 18 March to answer allegations set out in the letter. The allegations involved breaching the respondent's rules policies and procedures by failing to submit annual leave request forms as required and failing to comply with the procedure regarding the disposal of office waste. The latter failure was said also to bring the respondent into disrepute. It was alleged that the claimant had committed serious acts of insubordination by sending a derogatory email to his general manager in response to her request to provide an explanation in respect of the disposal of rubbish, by failing to provide annual leave dates despite repeated requests, and by sending an email directly to the board of directors requesting flexible working hours. The fraudulent conduct alleged against the claimant was that he had failed to declare to the respondent that he was working full-time at the hospital and as a result violating the Working Time Regulations 1998 as he had not signed a mandate with the respondent to waive his rights under the regulations; he had fraudulently requested flexible working hours while simultaneously working full-time for the hospital; he had failed to declare that he had been offered a permanent full-time contract with the hospital to start in April 2013. He was also alleged to have breached the terms of the suspension by making contact with members of staff. The claimant was advised that the investigatory panel would consist of Ms Sorrell and Ms Seyal and that he was entitled to be represented by a trade union official.

17. The claimant lodged a grievance against Ms Seyal in respect of her failure to respond to his requests in respect of stress at work. Mr Squire acknowledged receipt of that grievance and stated that it would be considered after the disciplinary process. The claimant also advised that his child had been born and that there were medical complications. He asked for a postponement of the meeting which had been fixed for 18 March. His request was granted.

18. The meeting took place on 26 March 2013. The claimant was represented by a trade union official. Ms Sorrell asked the claimant why he had done the various things alleged against him. The claimant said that he had requested more time to comply with the holiday policy because it was difficult for him to tell what days off he needed. He said that he had tried to help someone else, an older lady, to put out the rubbish. He argued that the tone of his email concerning the rubbish was not derogatory. He said that he did not know the difference between sending his request for flexible working to the Board and sending it to his line manager. When asked why he had failed to declare his full-time work at the hospital, he said that he had been working at the hospital since 2012 and had spoken to Mr Squire in June and August 2012. He indicated that Mr Squire used to be a nurse and that he knew that the claimant was working at the hospital. It was suggested to the claimant that his request for flexible leave was fraudulent. He replied that his request was genuine. He denied contacting anybody in breach of his suspension.

19. As part of the investigation, Mr Squire phoned the hospital to try and find out more about the claimant working there. The respondent wrote to the claimant on 5 April asking him to sign a mandate to allow the respondent access to his hospital duty rotas from the start of his employment together with his sickness and absence records. In the letter requesting the signature, Ms Sorrell said that the matter may lead to allegations of criminal fraudulent conduct and that the police might be involved. The claimant was very upset by the terms of the letter and consulted his trade union representative. The representative wrote to the respondent on behalf of the claimant stating that the claimant was not clear why the respondent required all the rotas, and stating that if they indicated the dates they were concerned about, he may consider responding. That invitation was not taken up.

20. Ms Sorrell wrote to the claimant on 16 April with her findings following the investigatory meeting. She found that there was sufficient evidence to proceed to a disciplinary hearing in respect of the serious breach of the respondent's rules policies and procedures; in respect of the failure to comply with the procedure regarding the disposal of office waste; in respect of the bringing the respondent into disrepute by the illegal disposal of waste. She found that there was an insufficiency in respect of bringing the respondent into disrepute by failure to comply with the leave policy requirements. As regards the serious acts of insubordination, Ms Sorrell found that the tone of the claimant's response to his line manager appeared to be derogatory and insubordinate. She found that the allegation of failure to adhere to the policy regarding holiday requests should proceed to a disciplinary hearing and similarly so should the disregard for policy shown by the claimant in sending an email directly to the Board of Directors requesting flexible working hours. As regards fraudulent conduct, Ms Sorrell found that there was sufficient evidence to proceed to a disciplinary hearing. She stated that the respondent was unaware that the claimant worked full-time at the hospital and that his combined working hours were in breach of the Regulations. She also found that there was sufficient evidence to proceed to a disciplinary hearing in respect of what was described as a fraudulent request for flexible working hours while simultaneously working full-time for the hospital. She found that there was insufficient evidence to proceed to a disciplinary hearing in respect of the charge of failing to tell the respondent that he had been offered a permanent full-time contract. Ms Sorrell found that there was insufficient evidence to proceed concerning the allegation of breach of the suspension.

21. Ms Sorrell stated in her letter that since the investigatory hearing she had been conducting further enquiries with the hospital who had advised that the claimant had an exemplary attendance record throughout his employment. She stated that the claimant's sickness absence from the respondent was notably higher since his employment with the

hospital. She noted that this may become a criminal allegation and she noted that she had requested the claimant sign a mandate. She found that there was a sufficiency to go to a disciplinary hearing and she enclosed a copy of the claimant's sickness absence records for his information. Ms Sorrell ended her letter by stating the following:

> "Finally, on the basis of the allegations set out above, I am also recommending that the allegation that your conduct amounts to a fundamental breach of the implied term of trust and confidence, causing an irretrievable breakdown of your employment relationship with [the respondent] should proceed to be considered at a disciplinary hearing."

22. Mr Squire decided that he should chair any disciplinary hearing, and Mr McWilliams, a solicitor employed by the respondent, should sit with him. . He contacted the head of human resources at the hospital both by email and telephone seeking information about the claimant. The hearing took place on 9 May and the result was advised by letter of 31 May. The charge of sending a derogatory email to the line manager was found not proven, as was the charge of disregarding the management structure by sending email to the Board. All other charges were found to be proven. The disposal was summary dismissal. The ET heard evidence from Mr McWilliams and formed the view that he was unwilling to entertain any criticism of Mr Squire's conduct, and was 'very much swayed by Mr Squire.'

23. The claimant appealed against that decision. The appeal was chaired by Mr Michael Ross, a Board member. The management case was outlined and the claimant then had the opportunity to ask questions as did the panel. The claimant was then able to present his case and the management side and panel could ask questions of him. The appeal did not succeed.

24. The ET directed itself as to section 98 of ERA. It found that the claimant was dismissed for reasons relating to his conduct, which is a potentially fair reason for dismissal. The ET accepted that the respondent regarded the claimant as having committed misconduct. It stated that the issue centred around whether that conduct was in fact misconduct and if so whether it

was serious enough to justify a fair dismissal. At paragraph 123 the ET directed itself on the case of **British Home Stores v Burchell [1978] IRLR 379**. The ET directed itself that the questions were whether there were reasonable grounds for the employer to reach the conclusions that it reached; did the employer carry out a reasonable investigation; and was the sanction of dismissal within the range of reasonable decisions. The tribunal directed itself that:

> "All these tests must be looked at from the point of view of a reasonable employer and not from the point of view of the ET substituting its own views."

The ET went on to direct itself in terms of the case of **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**. It directed itself, at paragraph 126, that the employer, if it succeeded in showing that the reason for dismissal was a potentially fair reason, must show that he acted reasonably in dismissing the employee for that reason under section 98(4). (I pause to note that the onus is not properly on the employer at that stage, but nothing turns on this.) The determination of that question depends on whether 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 is to be determined in accordance with equity and the substantial merits of the case. At paragraph 127 the ET directed itself in terms of the case of **Foley v Post Office 2000 ICR 1283**. In so doing, the ET was clearly aware that the function of the tribunal was to determine whether the decision to dismiss fell within the range of reasonable responses. At paragraph 128 the ET noted that Ms Jones reminded it of the case of **London Ambulance Service NHS Trust v Small [2009] IRLR 563** in which the Court of Appeal cautioned against employment tribunals slipping into the "substitution mindset".

25. The ET then set about its task of making its decisions, bearing in mind the various directions it had given itself. It decided that the dismissal was unfair. It decided that the claimant had used, and had been allowed by Mr Squire to use, his friendship with Mr Squire to

agree matters relating to employment with Mr Squire which were properly more in the sphere of the managers, Ms Seyal and Ms Sorrell. This applied to the working pattern for the claimant. He had been given permission to qualify as a nurse and to work to preserve his registration while still working for the respondent. The ET found that this arrangement was not very clear and its terms were not committed to writing. They found this lack of written agreement surprising. The ET (at paragraph 136) found that the claimant was not transparent in his actions. There was however no term of his contract restricting his employment with others or requiring him to disclose employment to the respondent. The ET found that Mr Squire had lost confidence in the claimant but he did not tell the claimant that. At paragraph 141 the ET stated that it was not confident that it had heard the full reasons for this change in attitude towards the claimant. That remark was the subject of criticism by the solicitor for the respondent. She submitted that it indicated that the ET substituted its own view for that of the respondent.

26. The ET, in a fairly lengthy judgment, traced the development of the respondent's case against the claimant. It noted that the respondent was aware that the claimant was working at the hospital but nevertheless suggested in the disciplinary hearing that the claimant had been guilty of misconduct by not informing the respondents about the hospital job and not having signed a waiver under the regulations. The respondent had not however asked about his work at the hospital and had not sought to put any limit on the hours. Following the investigatory meeting, the respondent added an additional allegation to the effect that they believed that the claimant was working at the hospital on days for which he was getting sick pay from them. The respondent inferred this because the hospital stated that the claimant had an exemplary attendance record. The ET regarded that inference as unjustified. At paragraph 152 the ET noted that the claimant had seven days off from his work with the respondent for sickness in 2012 and one day off in 2013 but had no sickness absences with the hospital. He declined to sign a mandate seeking all of his records. The ET took the view that these facts taken together

were not such as to justify the inference that he must have been working when he was claiming to be sick.

27. The ET found that Mr Squire put himself forward to be the chairman of the disciplinary hearing despite the fact that he knew that he had become disillusioned with the claimant. He had formed the view that the claimant was "at it" and that the claimant was using the friendship and the goodwill of the organisation to accommodate his nursing work. The ET state at paragraph 157 that in the circumstances he could not act impartially given the views he had already formed about the claimant. They note that additionally, it must have been obvious to Mr Squire that there was likely to be a dispute between claimant and respondent about the claimant's right to work in two jobs at the same time. Mr Squire had also been involved in the investigation because he had used his personal contacts and influence in the NHS to try to get information about the claimant's work at the hospital. This matter arose because the claimant produced a letter from the head of human resources at the hospital. The ET treated this letter carefully, as the writer was not called as a witness, but did take the view that the letter confirmed at that Mr Squire had been insistent about getting information about the claimant and that he was feeling frustrated. The ET noted that in many organisations, one person will be involved in both investigation and disciplinary matters but decided that the respondent's resources were sufficient to allow others to carry out some of the duties. They therefore decided at paragraph 162 that the disciplinary hearing was flawed from the outset, because Mr Squire did not approach the hearing with an open mind. Mr Squire was the chairman of the hearing and the other person was Mr McWilliams. He was described by the ET as a relatively youthful employee of the organisation. Ms Sorrell was his line manager. The tribunal took the view that he was in a difficult position.

28. The ET considered whether or not the appeal cured the difficulties that they had found in the disciplinary hearing. They found that it did not. The appeal was not a rehearing; rather it took the form of a review of the disciplinary decision. While appreciating that it is not essential that an appeal panel does have a rehearing, the ET came to the view in this case that the appeal panel seems to have "showed little interest in critically exploring the evidence." The panel seemed to ask very few questions and in the view of the ET did not explore matters sufficiently. For example, the appeal panel did not explore the claimant's failure to produce the mandate in order that the respondent might see his rotas in the way in which the ET found a reasonable employer would. This was a matter of importance in the view of the ET because the allegation against the claimant was that he was claiming to be sick when he was in fact working. Therefore the matter merited more investigation than the appeal panel give it. At paragraph 187 the ET found that this failure was enough to render the dismissal unfair.

29. The ET considered what had happened regarding flexible working days. The claimant had asked for flexible days to start after his paternity leave which was due to end on 15 April. The respondent held no meeting with the claimant find out what exactly he wanted and why he wanted it. At the appeal hearing the claimant was asked why he had not applied to the hospital for such flexible working and he said that he had asked for it. No further exploration of that matter ensued. The ET was concerned that the respondent had referred to this request as "fraudulent". They found it difficult to understand what the respondent meant by that but decided that it seemed to be a suggestion that flexible working was not to assist with helping with his family but rather to allow him to continue to work at the hospital. The ET took the view that the claimant, like many working parents, would be trying to juggle his family responsibilities with his work but could not see why that should be described as fraudulent.

30. There were other matters which were prayed in aid by the respondent, for example that the claimant had been "caught out lying" by sending on the part of an email, trying to suggest that he had reached an agreement with Mr Squire when he had not done so. The ET took the view, at paragraph 202 that these matters were not explored in detail or in context by the respondent. Essentially the ET found that there was not a reasonable investigation. They made the same finding regarding the timing of the offer of a permanent job to the claimant.

31. The ET summed up its view at paragraph 211 in this way:

> "This was a case where the respondents have little or no evidence of wrongdoing but what can be described as a febrile atmosphere began to form at an early stage. Whilst mindful that we are concerned with the substance of matters rather than their form it is often the case that rather high flown language when used to frame disciplinary charges can indicate, as it did here, a failure to view the evidence coolly and frame allegations in a more measured way. Taking a step back and looking at the matter overall considering as we did the issues we have set out above we had no doubt that a reasonable employer would not have regarded the circumstances as being sufficient for dismissal and accordingly the dismissal was unfair in all the circumstances."

32. The ET had agreed at the outset that it would consider the issue of contribution, if any, by the claimant. It ended is written reasons by stating the following:

> "We agreed to consider the issue of contribution. However, on reflection, having made the findings we have we take the view that this matter should be reserved to remedies hearing to allow us the benefit of full submissions on the matter. This will also give parties the opportunity to properly consider the position in the light of the judgment."

33. The findings by the ET that the dismissal procedure was unfair because it was chaired at the disciplinary hearing by Mr Squire and because the appeal panel did not consider matters in any depth are sufficient to render the dismissal unfair.

34. Ms Jones summarised her grounds of appeal in her notice of appeal in 5 headings as follows:

> 1. the tribunal has substituted its own opinion on the reasonableness of the dismissal of the claimant contrary to **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**

2. the tribunal has failed to consider whether the respondent had a reasonable belief in the misconduct of the claimant.

3. the tribunal has failed to properly analyse what impact the appeal hearing had and the fairness or otherwise of the claimant's dismissal. In particular at paragraph 187 the tribunal records that the appeal panel's conclusions in relation to the allegation that the claimant was working at the hospital when off sick alone rendered the claimant's dismissal unfair. This amounts to an error in law.

4. the tribunal has failed to give proper consideration whether the claimant was dismissed for some other substantial reason or a breach of mutual trust and confidence as was alleged. This issue was dealt with peremptorily at paragraph 209 only and no consideration is given to the allegation is established.

5. in the alternative, the tribunal's finding that the claimant was unfairly dismissed was perverse for the reasons set out above.

35. Ms Jones argued that despite setting out the law in its directions, the ET had failed to apply those directions. She submitted that the hearing had taken place over six days in January and March 2014, and the written reasons had been issued at the end of July 2014. Having obtained some of the notes of the hearing, Ms Jones submitted that the ET had proceeded on the basis of impression and had not recorded or considered all of the evidence led before it. I did not accept that proposition as it is clear that the ET had a factual basis for the conclusions it drew. Ms Jones argued that the ET put insufficient weight on admissions from the claimant that he had failed to give information to the respondent. That argument ignores the pointed

remarks made by the ET about the claimant's lack of transparency, and their declining to decide remedy in order to allow parties to consider all that the ET had said in it written reasons. While it is in any event for the ET to place such weight and draw such conclusions as it thinks fit, it seems to me that the criticism made by Ms Jones is misplaced as the ET clearly did find some fault with the claimant's actings.

36. The ET found that the claimant was inclined in giving evidence to think about what the most plausible answer was, rather than simply to tell the truth. Ms Jones argued that standing such a finding, the ET should not have accepted the core of his evidence. She argued it was "astonishing" that the ET accepted Mr Squire's evidence as generally honest, although a little vague, but also accepted the evidence of the claimant. I do not accept her submission. The ET took a careful view of the evidence before it. It is perfectly entitled to decide that a witness lacks credibility in some answers but is believed in others. This ET made clear that it was not convinced it had heard the whole story of the disillusionment between Mr Squire and the claimant. It found the claimant to lack transparency, and to be capable of tailoring answers. It nevertheless accepted the core of his evidence. That shows a mature and nuanced approach. Ms Jones argument about individual details of evidence does not persuade me that the ET came to conclusions for which it had no basis.

37. Ms Jones criticised the ET for the way in which it dealt with Mr McWilliams involvement in the disciplinary panel. It described him as "relatively youthful and an employee of the respondent." She argued that by the time he gave evidence he was no longer an employee and that his youth was irrelevant. In my opinion the ET was entitled to note his employment at the time he was on the panel; and he was youthful, in comparison to Mr Squire. They were making the point that Mr McWilliams was in a difficult position because he had less seniority than Mr Squire, and was being asked to sit on a panel to decide a case in which his line

mangers, Ms Seyal and Ms Sorrell, had investigated and presented the allegations. The ET heard him in evidence and were entitled to regard all of these matters as showing his involvement was not such as to balance the unfairness caused by Mr Squire being the chair.

38. The respondent had been concerned about the claimant working in two places and it thought that the claimant had taken sick leave from his employment with respondent while in fact working elsewhere. Ms Jones argued that the ET had lost sight of that. She argued that the ET spent time deciding what the claimant had done rather than concentrating on the reasonable belief of the respondent about what he had done. I do not agree with that submission. The ET took a view that the respondent had decided that the claimant was lying about sick leave without having a reasonable basis to hold that view. They make that clear in paragraph 152 where they say:

> "We must say that it is seldom that a suspicion such as this, and not one based on primary or direct evidence of wrongdoing is elevated so readily to fact."

39. Ms Jones argued that a recent example of the Court of Appeal applying the approach which the ET should have applied was found in the case of **Shrestha v Genesis Housing Association [2015] EWCA Civ94**. She argued that the case did not add to the already well known law as set out in **Sainsbury's Supermarket v Hitt**, but cited it for the dicta at paragraph 23 to the effect that :

> "To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell Test. The investigation should be looked at as a whole when assessing the question of reasonableness."

40. Counsel for the claimant, Mr Komorowski, argued that the respondent was attempting to argue the facts of the case. Further, it was seeking to have the ET state in a mechanical fashion that it found that "no reasonable employer would act as had the respondent". He argued that was unnecessary, as the ET had directed itself correctly. He argued that the ET did not have to

narrate every line of the evidence given before it. Credibility and reliability were matters for the ET. It did not require to set out in detail exactly why it accepted one piece of evidence and not another. Failure to do so does not amount to an error of law. Any submission that there had been a perverse decision was bound to fail, counsel argued, as the ET gave clear and cogent reasons for its decisions.

41. While I agree with Ms Jones that the test in this case is as stated by her, I disagree with her that the ET failed to apply it correctly in this case. As stated above, I find that the ET considered carefully and at length the investigation carried out, and found it lacking. It found that Mr Squire did not have an open mind. It set out its basis for those findings. I cannot find any error of law in the approach of the ET. The detailed analysis undertaken by the respondent of the written reasons was misconceived. The ET asked itself the correct questions and came to answers which were open to them. The decision gives a clear exposition of the thought process of the ET.

42. This appeal is dismissed