Appeal No. UKEAT/0129/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 September 2016

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MRS C APPIAH — APPELLANT

COMPASS GROUP UK & IRELAND LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ESTHER GODWINS (Legal Representative) Equip Law Ltd Tottenham Green Enterprise Centre Town Hall Approach Road London N15 4RX
For the Respondent	MR DANIEL DYAL (of Counsel) Direct Public Access

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal

The Respondent's decision to dismiss the Claimant took into account a final written warning to which she was subject. At the appeal against her dismissal the Claimant complained about the final written warning. The Employment Judge found that the Respondent's appeal officer had investigated and considered the final written warning. The Claimant argued that this finding was perverse; the Respondent argued that the finding was not perverse, and in any event that the issue of internal appeal had not been raised by the Claimant in her ET1 claim form, so that it was not permissible for the Employment Judge to consider it.

Held. (1) The Employment Judge had been correct in law to consider the issue: it is part of an Employment Judge's task under section 98(4) to consider the substance of what happened throughout the dismissal process including the internal appeal, and to consider whether the process overall was fair by the standards of section 98(4): **West Midlands Co-operative Society Ltd v Tipton** [1986] ICR 192 HL and **Taylor v OCS Group Ltd** [2006] ICR 1602 CA applied. This is so well established, and such a core feature of unfair dismissal law, that an Employment Judge will be expected to adopt this approach as a matter of course: **Langston v Cranfield University** [1998] IRLR 172 EAT applied. (2) The Employment Judge's finding was not perverse: it was a permissible inference from the primary facts. Appeal dismissed.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Ms Christina Appiah ("the Claimant") against a Judgment of Employment Judge Jones dated 17 November 2015. By her Judgment Employment Judge Jones, sitting in the East London Hearing Centre of the Employment Tribunal, dismissed a claim of unfair dismissal which the Claimant had brought against her formers employers, Compass Group UK & Ireland Ltd ("the Respondent"). The grounds of appeal focus upon a final written warning which the Claimant received in the year prior to her dismissal.

The Background Facts

2. The Claimant was employed by the Respondent as a domestic assistant at Homerton Hospital. She had long service. I am told today that she does not read and write and that her command of English is not good. On 7 July 2014 she was given a final written warning, which was to remain on her record for 12 months. The Respondent found, after an investigation and disciplinary meeting, that the Claimant had committed a serious act of insubordination by refusing to comply with a management request to do work at another site. She did not appeal against the warning.

3. In January 2015 the Claimant was again charged with a disciplinary offence. The Claimant had applied for leave to be granted for the period between 15 December and 8 January. It was granted only for 15 December to 5 January; but the Claimant did not return to work until 8 January. She had already booked a flight prior to obtaining leave. There was an investigation followed by a disciplinary hearing on 27 January. The Claimant was dismissed. The final written warning was taken into account.

4. At the disciplinary hearing, where the Claimant was represented by her union, no point was taken about the final written warning. The Respondent was not told that she considered it to have been wrongly imposed or that she had wished to appeal against it.

5. The Claimant then went to solicitors. They prepared documents for her internal appeal. One of these documents was a witness statement. In that witness statement the Claimant set out in some detail her case about the final written warning. The relevant passage reads as follows:

> **"11. Further, the assertion in the letter that I had a live level 3 warning is inaccurate. It was not a reasonable management request to demand that I go to work in Mary Seacole as I was unwell.**
>
> **12. I was not given adequate notice of this new arrangement to enable me to familiarise myself with the new routine. Nonetheless, I did comply with this request as evident from your investigation meeting notes.**
>
> **13. I stated that I did go to Mary Seacole as requested and reported to Gosha who refused to let me carry out my duties as Djahid Sadi had advised that I been suspended [sic].**
>
> **14. Morever [sic], you do acknowledge in the above referenced notes dated 30/05/14 that I did infact [sic] attend at May Seacole [sic] as required.**
>
> **15. Further, I did not refuse to go to the above named place but rather expressed my view that I did not want to go to Mary Seacole as I was unwell, a reasonable explanation.**
>
> **16. Expressing ones opinion is not insubordination as you wrongly state but rather an exercise of ones legal right to freedom of thought and speech.**
>
> **17. As per your meeting notes on the 30/05/2014, I further re affirmed my willingness to go and work in Mary Seacole once I got better.**
>
> **18. I was acting in good faith and in compliance with health and safety regulations by refraining myself from going to Mary Seacole, as breach could constitute gross misconduct.**
>
> **19. In her witness statement dated 9th May 2014 Diana Dyer confirms that she used threating language [sic] to get me to breach the above said Health and Safety Regulations, fully aware that this constituted gross misconduct instead of resulting to reasoned dialogue."**

6. The solicitors also wrote grounds of appeal for the Claimant. These focused upon the dismissal but they did include a ground concerning the final written warning:

> **"5.1. On 9th May 2014 it was alleged that there had been gross misconduct by our clients [sic] conduct by refusing to comply with a reasonable management instruction. However the evidence adduced contradicts this as it confirms that our client did carry out the request but was turned away from Mary Seacole."**

7. The internal appeal was conducted by Mr Alun Watts. The hearing took place on 31 March 2015. The Employment Judge found that although the final written warning was not mentioned in the minutes of the meeting, it was raised at the hearing and it was likely that Mr Watts considered the issue. Although the Claimant had queried the final written warning in the documents prepared for the appeal, she did not actually say that it was issued in bad faith. Minutes of the meeting, which the Claimant largely accepted, showed that her main points were concerned with the question whether her absence between 5 January and 8 January was justified.

8. Mr Watts adjourned the appeal hearing. He said this because "he wanted to make further investigation into what has been said" (see the notes of the hearing of the appeal). He wrote to the Claimant on 7 April to inform her of his decision. He dismissed her appeal. His letter contains two paragraphs. The first paragraph deals with the question whether her absence from work between 5 and 8 January was justified. It makes the point that the level 3 final written warning was live at the time when she took unauthorised leave. It is important to state the concluding paragraph in full. It reads as follows:

> **"Having given careful consideration to your appeal, I am upholding the decision taken by Pawel Jasinski on 27 January 2015 to dismiss you for my reasons as stated above and for the reason that I believe there was a full and transparent investigation carried out, that the disciplinary process was followed, that the sanction imposed by Pawel Jasinski was reasonable in these circumstances and that the level 3 warning that you had on file for misconduct was duly considered."**

The Employment Tribunal Proceedings and Reasons

9. The Claimant's ET1 claim form was prepared by solicitors. Remarkably it alleged that she had a clean disciplinary record. It did not acknowledge the existence of a final written warning at all. Prior to the final hearing of the Claimant's claim, draft lists of issues were exchanged. The Claimant's solicitor recorded as an issue: "Did the Claimant have a clean record of service and if so, what was the length of the Claimant's record of service?" The

Respondent's solicitor responding put the issue as, "Did the Claimant have a live final recorded warning on her file prior to the termination of her employment?" This became the first issue listed by the Employment Judge (see paragraph 5.1 of her Reasons). There were also general issues concerning the fairness of the dismissal:

> **"5.2. Was the dismissal fair having regard to the reason shown by the employer, within the meaning of section 98(4) of the Employment Rights Act 1996 (ERA)?**
>
> **5.3. Whether in the circumstances, including the size and administrative resources of the employer's undertaking, the Respondent acted reasonably in treating the reason for dismissal as a sufficient one in accordance with equity and the substantial merits of the case.**
>
> **5.4. Whether the decision fell within the band or reasonable responses [sic] available to an employer."**

10. At the beginning of the hearing the Claimant's representative sought to introduce a new issue - whether the final written warning had been imposed in bad faith so that the Employment Judge had jurisdiction to get behind it and investigate whether it should have been disregarded. The Employment Judge did not allow this issue to be added. It had not been raised until the hearing.

11. The Employment Judge received evidence from the Claimant and from the person who took the decision to dismiss. The Employment Judge did not receive evidence from Mr Watts, who was no longer employed by the Respondent. The Employment Judge did have minutes of the appeal hearing and Mr Watts' letter dated 7 April dismissing the appeal.

12. In her Reasons the Employment Judge set out findings of fact from which I have already drawn. She was alive to authorities concerning the extent to which an Employment Judge might go behind a final written warning (see, in particular, **Davies v Sandwell Metropolitan Borough Council** [2013] IRLR 374 CA and **Way v Spectrum Property Care Ltd** [2015] IRLR 657 CA). The Employment Judge found that the reason for dismissal related to the Claimant's conduct and the dismissal was fair.

13. It is only necessary to refer to that part of her reasoning which concerns the question whether Mr Watts should have, and did, investigate the final written warning to any extent. There are relevant findings of fact in paragraph 39, and paragraphs 70 and 73 then set out the Employment Judge's conclusions:

> **"39. Having conducted his own investigation on all the matter under consideration at the appeal, including this suitability of the level 3 recorded warning, Mr Watts confirmed in his letter that he was satisfied that it had been properly imposed and that Ms Miller had not authorised the Claimant to go when she was told of the ticket.**
>
> **…**
>
> **70. Mr Watts did consider the earlier warning as it was raised in the appeal documentation sent to him. He investigated it and confirmed that it had been correctly imposed. It was not appropriate for the reasons set out above for this Tribunal to go behind the imposition of that Final Written (level 3) Warning to judge whether it had been fair to do so or not. The Respondent had no prior warning that this would be part of the Claimant's case. There was no application today to amend to include it and it had not been something that had been part of the disciplinary hearing and therefore not considered by Mr Jasinski at the time. In those circumstances, the Tribunal has no authority to question Mr Watts' decision that it had been properly imposed and that it was appropriate to take into account in determining the sanction for the present offence.**
>
> **…**
>
> **73. In the circumstances it is my judgment that the investigation was reasonable and that the Respondent followed their disciplinary process. The Respondent considered the Claimant's representations and she was represented at both the disciplinary and appeal hearings. It was reasonable for the Respondent to rely on her correspondence as accurately setting out her case as they were prepared by solicitors on her behalf. As the Claimant was represented during the process it was reasonable for the Respondent to consider that she understood the charges against her and had been able to put her case at all stages of the process."**

The Background Law

14. This is a convenient moment to set out the essential background law. The Employment Judge was required to apply section 98(4) of the **Employment Rights Act 1996**, which provides as follows:

> **"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

15. The leading case on the extent to which an Employment Judge should reopen a final written warning prior to dismissal is **Davies v Sandwell Metropolitan Borough Council**. Mummery LJ said:

> **"20. As for the authorities cited on final warnings, Elias LJ observed, when granting permission to appeal, that the essential principle laid down in them is that it is legitimate for an employer to rely on a final warning, provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it must not have been manifestly inappropriate to issue it.**
>
> **21. I agree with that statement and add some comments.**
>
> **22. First, the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s.98(4) to particular sets of facts. The broad test laid down in s.98(4) is whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.**
>
> **23. Secondly, in answering that question, it is not the function of the ET to reopen the final warning and rule on an issue raised by the claimant as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a 'nullity'. The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.**
>
> **24. Thirdly, it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, inter alia, the circumstance of the final warning."**

16. Beatson LJ said:

> **"38. The requirement in *Stein v Associated Dairies Ltd* and *Tower Hamlets Health Authority v Anthony* that there be either 'bad faith', 'an oblique or improper motive' or that it was 'manifestly inappropriate' to give the warning shows that what is intended is a restrictive approach. To give 'manifestly inappropriate' the broad meaning the appellant has invited us to give it, a meaning which involves the tribunal and the appellate bodies is either inconsistent with such an approach or significantly lowers the threshold. The appellant's arguments in this appeal, if accepted, open up the prospect of tribunals, the EAT, and this court, when considering the lawfulness of a dismissal, later and sometimes often considerably later than the earlier disciplinary process which led to a formal warning, considering and unpicking the details of that process and having to inquire into the adequacy of the evidence. It would involve doing so even when the earlier process and the formal warning has either not been challenged, has been unsuccessfully challenged, or where a challenge has not been pursued. There is, however, a need for finality. Where there has been no appeal against a final warning, or where an appeal has been launched but not pursued, I consider there would need to be exceptional circumstances for going behind the earlier disciplinary process and in effect reopening it."**

The Appeal

17. In her original grounds of appeal, the Claimant challenged the refusal of the Employment Judge to add an issue concerning the question whether the final written warning

was imposed in good faith. This ground of appeal did not survive the Employment Appeal Tribunal's preliminary procedures. The Employment Judge was entitled to hold that this issue could not be added at the hearing; she would not have been in any position to reach a fair judgment on the question whether the final written warning was issued in good faith.

18. The grounds which have been permitted to proceed to this Full Hearing are more limited. The argument - deployed by Ms Esther Godwins on the Claimant's behalf - runs as follows. (1) Even if the Employment Judge was not required herself to reopen and reconsider whether the final written warning was to be disregarded as being in bad faith, nevertheless, the Employment Judge was required by section 98(4) to ask whether the Respondent had acted reasonably in addressing the Claimant's grounds put forward for the internal appeal. **Davies** is not authority for the proposition that the employer is entitled to ignore points made by a Claimant about a final written warning during the process. It is concerned with the question whether the Employment Judge is required to reopen a final written warning. In **Way** the Claimant was allowed to reopen an earlier final written warning.

19. (2) The Employment Judge was bound to recognise that the Claimant in her internal appeal was questioning the propriety of the prior written warning. The statement which her solicitor prepared on her behalf plainly indicated that she regarded the warning as invalid. Mr Watts was not necessarily required to re-investigate the circumstances of the final written warning by re-hearing witnesses, but he was required to look at the papers to satisfy himself that the warning was properly imposed.

20. (3) The Employment Judge's finding that Mr Watts investigated the earlier warning and confirmed that it had been properly imposed was perverse. Mr Watts was not a witness. He

gave no evidence to this effect and his letter did not say that he had investigated the earlier warning or confirmed that it had been properly imposed.

21. Ms Godwins also took me in the course of her submissions to the documents concerning the final written warning. These, she submitted, show that the Claimant had told her manager she was unfit to attend the Mary Seacole Ward because she was on antibiotics, and she did attend the ward only to learn when she arrived that she had already been suspended.

22. On behalf of the Respondent Mr Daniel Dyal submits that the Employment Judge did not err in law. He answers Ms Godwin's submissions in the following way. (1) The Employment Judge was not required to consider whether Mr Watts had acted reasonably in considering the Claimant's grounds for the internal appeal relating to the final written warning. This had not been flagged as an issue any more than bad faith had been flagged as an issue. Mr Dyal relied on **Chandhok v Tirkey** [2015] ICR 527 EAT at paragraphs 16 to 18. He accepted that there were some core issues which an Employment Judge was expected to address even if not specifically raised (see **Langston v Cranfield University** [1998] IRLR 172 EAT at paragraphs 21 and 30), but this, he submitted, was not such an issue.

23. (2) The reasoning in **Davies** applies *ipso facto* to the employer. An employer is not expected to reopen a final written warning unless there is a challenge in one of the ways which **Davies** set out. The Employment Judge was entitled, in any event, to find that there was no such challenge here.

24. (3) In any event, the finding of the Employment Judge that Mr Watts did investigate the final written warning so far as was reasonable was not perverse. The Employment Judge found

that Mr Watts had adjourned the appeal to investigate the points which the Claimant made. The last paragraph of the letter dated 7 April shows that he asked himself whether there was anything inappropriate about the dismissing officer taking into account the final written warning. It shows that he considered the matter and decided that there was not. The Employment Judge drew a permissible inference from these pieces of evidence.

25. Mr Dyal also took me to documents concerning the final written warning. They show, he submits, that there was evidence to indicate that the Claimant had been guilty of insubordination; that the matter was investigated and the subject of a hearing at which the Claimant was represented and from which she did not appeal; and that there was nothing manifestly inappropriate about the warning.

Discussion and Conclusions

26. It has long been established that it is part of an Employment Judge's task under section 98(4) to consider the substance of what happened throughout the dismissal process including the appeal, and to consider whether the process overall was fair by the standards of section 98(4): see **West Midlands Co-operative Society Ltd v Tipton** [1986] ICR 192 HL at 202, and **Taylor v OCS Group Ltd** [2006] ICR 1602 CA at paragraph 43. This is so well established, and such a core feature of unfair dismissal law, that an Employment Judge will be expected to adopt this approach as a matter of course (see **Langston** at paragraph 21). To this extent I agree with Ms Godwins' submission. I reject Mr Dyal's submission that it was not part of the Employment Judge's task. **Chandok v Tirkey** was not concerned with an allegation of unfair dismissal and casts no doubt on the **Langston** approach. I would add that issues 2, 3 and 4, even though they do not expressly mention the appeal, were wide enough to cover it. The

A Employment Judge could not have met the basic requirements of section 98(4) without considering the process in the round.

B 27. However, Mr Dyal did not need to succeed on this first submission. It is plain from the Employment Judge's Reasons that she considered it to be part of her task to consider the appeal stage and the way in which Mr Watts dealt with the points put forward on the appeal. Both in her findings of fact (paragraphs 32 to 39) and in her conclusions (paragraphs 70 and 73) she C took into account the process as a whole including what happened at the appeal stage.

28. I do not accept that the Employment Judge misunderstood what the Claimant was D saying about the final written warning. She said it was reasonable for the Respondent to rely on the solicitor's correspondence as accurately setting out the case. By this I am sure she meant the statement and appeal grounds to which I have referred. She accurately summarised the key E points: see, especially, paragraph 33 of her Reasons. The solicitor's document did not, in terms, refer to bad faith, lack of *prima facie* grounds or manifest impropriety, but they said enough for the Employment Judge to conclude that Mr Watts should consider whether it was appropriate for the final written warning to have been taken into account.

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29. At this point it is convenient to say something about **Davies**. The principles set out by Mummery LJ and Beatson LJ in the passages I have quoted were concerned with the question G whether an Employment Tribunal should reopen a final written warning; but they correlate to what a reasonable employer may be expected to do when faced with an argument by an employee at a later stage in the process that an earlier disciplinary sanction ought not to have been imposed. The key point is that there are limits to the extent to which an employer can be H expected to revisit what took place at an earlier stage of the process. If an issue of the kind

mentioned in **Sandwell** is clearly raised - bad faith, lack of *prima facie* grounds or manifest impropriety - it may be incumbent upon an employer to do so. It may also be incumbent upon an employer, if a complaint is made about the imposition of an earlier final written warning, to look at the basic documents on file to check whether there is anything inappropriate about reliance on that final written warning.

30. I agree with Ms Godwins' submission that, while it was not reasonable to expect Mr Watts to reinvestigate witnesses relating to the earlier disciplinary process, it was reasonable to expect him to look at the file to see whether there was anything which rendered it inappropriate to rely on a final written warning. This, I think, was the Employment Judge's approach and, contrary to Mr Dyal's submission, I see nothing wrong in that approach.

31. This brings me to the question of whether the Employment Judge's conclusion that Mr Watts did consider this issue is perverse. Now, I must remind myself of the limits of a perversity ground before the Employment Appeal Tribunal. There is an appeal to the Employment Appeal Tribunal only on a question of law (see section 21(1) of the **Employment Tribunals Act 1996**). There are, therefore, only the most limited circumstances in which a perversity ground, and effectively a complaint about an Employment Judge's findings of fact, can succeed. The principles are well known; they are set out in **Yeboah v Crofton** [2002] IRLR 634 CA at paragraphs 93 to 95.

32. It is true that the Employment Judge did not have any direct evidence that Mr Watts considered whether it was appropriate to take into account the final written warning, but in my judgment she was entitled to draw that conclusion as a matter of inference from the evidence which she had. Mr Watts had adjourned the appeal to investigate the points which were made;

A the imposition of the level 3 warning, although not the main point, was one of the points. The Employment Judge was entitled, especially given the last paragraph of the letter dated 7 April 2015, to reach the conclusion that Mr Watts had indeed considered the point.

B

33. The Employment Judge used the word "investigate". There is no reason at all to suppose that Mr Watts re-investigated the circumstances of the final written warning or, for that matter, of the disciplinary offence leading to dismissal, in the sense of interviewing witnesses
C and reaching fresh conclusions of his own. The word "investigate" is picked up from the appeal notes; and it is plainly used there to refer to Mr Watts taking time to consider the documentary material he had. To my mind it was not speculation but a permissible inference
D that Mr Watts did what he said he would do; and it is supported by the last paragraph of his letter. It is true that the reference to the final written warning is brief; but then it had not been the main point put forward by the Claimant at the appeal.

E

34. I do not consider that a perversity challenge is made out in this case. I consider that the Employment Judge approached the matter correctly in law and that the conclusions she reached were open to her, that is to say not perverse. It follows that the appeal will be dismissed.

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35. I would add the following. I did - as both parties invited me - consider the documents concerning the final written warning. They afford no real basis for supposing that the final
G written warning was issued in bad faith or without *prima facie* grounds or in circumstances where it was manifestly inappropriate to give the warning. At the final written warning stage there were statements which plainly supported the disciplinary charge against the Claimant (see
H the statements dated 5 June 2014 from Mr Sadi and the undated statement from Ms Dyer). I appreciate that there was an issue as to whether those statements were true, but that was an

issue to be resolved at the final written warning stage; and the fact that it was resolved against the Claimant does not mean that the final written warning was issued in bad faith or was manifestly inappropriate, still less that there was any lack of *prima facie* grounds for it. I add that by way of postscript only. The key point is that in the end I am satisfied that the Employment Judge applied correct principles of law and reached a conclusion which was not perverse; so the appeal will be dismissed.