Appeal No. UKEAT/0499/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 March 2014
Judgment handed down on 28 August 2014

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

MRS V PITTERSON-DONALDSON APPELLANT

MANCHESTER CITY COUNCIL RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTHONY PHILPOTT (of Counsel) OJN Solicitors 7B London Road Enfield Middlesex EN2 6BN
For the Respondent	MR CHRISTOPHER TAFT (of Counsel) Manchester City Council Legal Services P O Box 532 Town Hall Albert Square Manchester M60 2LA

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Appeal against dismissal on grounds of (a) perversity and (b) substitution. No evidence of either. Appeal dismissed.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is the Full Hearing of an appeal from the Judgment and Reasons of an Employment Tribunal sitting in Manchester in January 2013. The unanimous judgment of the Employment Tribunal was that the Claimant's complaints of unfair dismissal and disability discrimination contrary to the **Equality Act 2010** failed and were dismissed.

2. At a Rule 3(10) hearing on 22 November 2013 Langstaff P permitted the first two grounds of appeal in the Amended Notice of Appeal to go forward to a Full Hearing. Both of those grounds of appeal related to unfair dismissal. The remaining grounds of appeal were dismissed.

3. The Appellant (the Claimant below) is represented by Mr Anthony Philpott of Counsel. The Respondent (the Respondent below) is represented by Mr Christopher Taft of Counsel. I am grateful to both Counsel for their written and oral submissions.

4. I heard the appeal on 20 March 2014 and reserved Judgment.

The Factual Background

5. I have been greatly assisted by the chronology provided by Mr Philpott. The facts found by the Employment Tribunal, insofar as they related to unfair dismissal, were as follows:

> **"29. Although this matter was a complaint of disability discrimination and unfair dismissal, the parties took the view that it was appropriate for the claimant to commence. This may have been because the claimant had only one witness (the claimant) and the respondents had five *plus* Mr Calvert who was called late to give evidence about the claimant's request for reinstatement or re-engagement. In the event Mr Calvert was not called as it was deemed inappropriate at this stage.**
>
> **30. The claimant complained that the respondent's decision to dismiss her was unfair. The facts surrounding this dismissal are as follows. The claimant was a Social Worker for a Mr**

F.I, an elderly gentleman who suffered from dementia. He lived at home and evidence was given that the claimant was reluctant to carry out a Mental Capacity Assessment because Mr F.I's nephew believed that he had sufficient capacity to remain at home. When the nephew – who appeared to be the principal carer for Mr F.I – went on holiday, Mr F.I was admitted to Hall Lane for respite care during the nephew's absence on holiday. He was discharged from Hall Lane on 11 January 2011 when a report was sent to the claimant, his Care Manager [pages 518-520]. The claimant accepted that she had not read this report at any relevant stage. The final paragraph of the report under 'Recommendations', reads:

> **'Safety is an issue with F...I... as his mental health deteriorates, the period of assessment at Hall Lane has identified that F.I. now requires 24-hour support to minimise the risks and enable F.I. to enjoy an acceptable quality of life.'**

31. On 4 January 2011 in the morning, Lynne Kelly, the Acting Senior and as such the claimant's manager, e-mailed the claimant [page 271] asking her to 'contact Hall Lane to ascertain how F.I has been whilst in respect and request a report. Also we still need to make an appointment as urgent as I have grave concerns regarding this customer's health, safety and wellbeing...'

32. As a consequence, it appears that the claimant contacted Ruth Kirkham who the claimant refers to as 'Manager' at paragraph 25 of her witness statement. Mrs Pitterson-Donaldson states... 'We had a discussion regarding F.I.. RK said that F.I. was fine to return home with existing support. They had no issues and his nephew would be picking him up the following day. I requested a report at the same time as RK agreed to send the report.'

33 Mrs Pitterson-Donaldson's note of this telephone call with Hall Lane and Ruth Kirkham is at page 1113. The Tribunal notes that there is no reference to it being 'okay for Mr F.I to return home with existing support.' The claimant's note does record that RK 'agreed to send me a written report'. This report was sent on 5 January by e-mail and was addressed to the claimant. The claimant accepted that she had not read the report although she asked administrative support to scan it. In her witness statement she said, '"*Urgent*" was not written on the report and there was no telephone call to follow up.'

34. Had the claimant taken the time to read the 'Recommendations' section, which is at the end of the report and a scant three lines long, she would see that it was the opinion of the 'Duty Coordinator' (whose name has been deleted for some unknown reason) that 'safety is an issue' and that the customer 'now requires 24-hour support to minimise the risks and enable [him] to enjoy an acceptable quality of life.'

35. It was because of her failure to read this report that she was found to have been guilty of gross negligence amounting to gross misconduct and was summarily dismissed. Dunston Clarke was the dismissing officer.

36. The claimant asserted that she decided not to read the report because she had spoken with Hall Lane on 4 January and had been told there was no problem with the existing care pattern, and that she was busy and did not have time to read it although she did intend to do so."

6. Prior to the dismissal, the Appellant was suspended from duty on 11 January 2011 by a Ms Anne Nicholas.

7. An investigation was conducted by Ms Joanne Briggs, Team Manager. On 22 February 2011 she interviewed the Appellant, during which interview the Appellant was questioned about her failure to read the Hall Lane report: Appeal Bundle, pages 140-141 and 151.

8. There was a disciplinary hearing on 27 April 2011, conducted by Mr Dunston Clarke. Ms Joanne Briggs gave evidence about her report and referred to the incident: Appeal Bundle page 176. Ms Anne Nicholas gave evidence and referred to the incident: Appeal Bundle pages 186-187. Lynne Kelly, Senior Practitioner, gave evidence. Appeal Bundle page 187. The Appellant was again questioned about her failure to read the Hall Lane report: Appeal Bundle page 197. The Claimant's representative made submissions on her behalf.

9. The dismissal letter is dated 17 May 2011: Appeal Bundle pages 201-204. The material part says this:

> **"Allegation 3**
>
> **The evidence presented to me states that you failed to read and act upon a report received from Hall Lane on 5 January 2011 regarding the service user in question. This report highlighted safety issue relating to the service user's mental health which was deteriorating and required 24 hours support to minimise the risks. You also failed to inform management of the concerns raised in this report and by failing to do this you placed the service user at significant risk of harm.**
>
> **In your response you admitted that you did not read the report from Hall lane and you were unable to provide any explanation for this. However you informed me that you spoke to a colleague at Hall lane on 4 January 2011 and requested the report. In your mitigation you brought forward your report from Occupational health dated 7 January 2011 which stated you should not deal with complex cases and in your view this particular case involving this service user was complex. However, it was presented to me that between the period of October 2010 and January 2011 you had a caseload of 14 cases compared to the team's average of 20 cases per social worker. I believe that the advice from Occupational Health was in place as your case load had been reduced and this particular case was not considered to be complex.**
>
> **In view of what has been presented to me I find that this allegation is proven. There were clear failings and gross negligence on your part to read and act upon the report from Hall lane dated 5 January 2011 regarding this service user. You did not raise or inform management of the concerns raised in this report. Your failure to action this report left the service user in significant risk of harm.**
>
> **The evidence shows the police have been involved in this case as the service user was found outside the home on 4 occasions. Furthermore in your supervision meeting on 11 November 2011 with your team manager, you informed your manager that you consider this case low priority as the service user was stable.**
>
> **You accepted your performance and practice was not good enough. In your defence you informed me of your underlying medical difficulties, however, the Occupational Health report you submitted considered you to be fit for work and your manager had taken on board the recommendations stated in this report.**
>
> **I believe that as a professional Social Worker with your knowledge and years of experience you failed to recognise significant risk and failed to act in a timely way to protect or safeguard service users. Furthermore I believe that you failed to exercise your duty of care required of a social worker in this case by not reading and informing management regarding this report. Therefore, I do find there is evidence of gross negligence as you did not act to the standard of a qualified social worker placing the service user in significant harm.**

Conclusion

In conclusion I am satisfied that the allegation is proven. I am also satisfied that the allegation constitute gross misconduct. This constitutes gross misconduct because of your failure to read and act upon the report placing a service in significant risk.

In accordance with Section 10.37 of the Council's Disciplinary Procedure, I did consider whether there was any fitting alternative to dismissal. In reaching a decision on this matter I took into account your mitigation. However, as a result of hearing and reading all of the evidence provided during the investigation and the hearing itself; taking into account that you admitted in not reading the report and being unable to provide me with an explanation. I believe that your actions brought about an irrecoverable breach of trust and confidence with the City Council. As such, this makes it impossible for me to consider demotion or transfer as appropriate alternatives. Your actions clearly constitute gross misconduct and on this basis, the appropriate sanction is summary dismissal."

10. There was an appeal hearing on 13 July 2011, which was solely concerned with the reason given in the dismissal letter: Appeal Bundle page 205. The appeal was conducted by Ms Neela Mody. The Appellant was again present and represented by Mr Weinbren. The notes are at Appeal Bundle pages 205-222. It is clear from those notes that the Appellant was examined in detail by her own representative from the British Association of Social Workers: Appeal Bundle pages 212-215. He made detailed submissions at the end of the appeal hearing. The appeal decision letter is dated 22 July 2011: Appeal Bundle pages 223-226. The appeal was dismissed.

The Employment Tribunal's Conclusions

11. The Employment Tribunal considered the submissions of the Claimant's representative in detail. It then reached its conclusion. It said this:

"38 The claimant attacked the decision to dismiss on a number of grounds, the first being that she had not been given notification that this omission might potentially lead to her dismissal.

39. It is clear that Joanne Briggs who conducted the disciplinary investigation into the allegations against the claimant did consider the failure to read the report. Discussion about this is at pages 559 to 560 of the Bundle. Here it is recorded at page 561, 'VPD stated she had not read the report because of what she had been advised by Hall Lane and she assumed the report confirmed the same.'

40. The Tribunal concludes having considered the investigation report that there was a considerable amount of discussion about the failure to read the report.

41. The claimant then asserted that the matter was not discussed at the disciplinary hearing. The claimant was represented at the investigatory meeting by a representative of her union, Unison, and at the disciplinary hearing by a representative of the British Association of Social Workers. The point was put to the dismissing officer Mr Clarke and he asserted that there had been mention of the omission to read the report. We were referred to the contents of the

dismissal letter and are satisfied by the evidence of Mr [Clarke] and the contents of that letter that this matter was discussed [page 324/325]. The Tribunal accepts the evidence of Mr Clarke and Mr Briggs that she presented her report in full to the disciplinary hearing.

42. The Claimant's representative submitted that in making the leap from wilful negligence to gross misconduct that the respondent had acted unfairly towards the claimant. However, the Claimant notes that the claimant's job description – which Ms Pitterson-Donaldson accepted was hers at 370(f) and (g) - reads 'To contribute to the development of an agreed Protection Plan for any *vulnerable adult* and to carry out *interventions* as are deemed necessary to promote the safety and protection of that adult.' [Tribunal's emphasis]

43. The Tribunal has no difficulty in concluding that in failing to read and act on the report that the claimant was in breach of at least paragraph 11 of the 'Main Duties' of her job description, and that this satisfies the definition of 'gross misconduct' set out at page 54 of the respondent's Disciplinary Procedure. Here, 'gross misconduct is regarded as an incident or incidents of misconduct so serious, that the action fundamentally breaches the contractual relationship between the employee and the City Council and justifies the City Council in no longer accepting the claimant's continued employment.'

44. The Tribunal is surprised that the claimant felt able to disregard (or not read) the report and instead to rely on the telephone conversation with Ruth Kirkham. We find that there is no evidence even in the claimant's note that Ms Kirkham assured the claimant that there would be no problem in returning the claimant to his home with the 'present' safeguards in place. This omission in the claimant's note contrasts starkly with that given in her evidence (see her statement at paragraph 25 and 26).

45. The Tribunal notes that in her investigatory report Ms Briggs put the claimant's note [page 113] to Ms Kirkham over the telephone. Ms Kirkham said that this was 'probably' something that she would have said to the claimant. There is no note in the claimant's case record of any assertion made by Ms Kirkham to the effect that the claimant was 'fine to return home with existing support'.

46. For these reasons, the Tribunal rejects the claimant's first assertion that somehow the disciplinary case was not put to her. The claimant was Mr F.I's main carer and her responsibilities are clearly set out in her job description. The report from Hall Lane, the Council's assessment centre, was addressed to the claimant as the 'Care Manager' and concluded that the customer 'now requires 24-hour support'. At page 519 of the report under the heading 'Personal Care' the report states, 'F.I now requires constant supervision with all aspects of his personal care'. The report notes in the 'Mental Health' section and in the 'Recommendations' that the home had 'identified a deterioration in his mental health condition'.

47. In the circumstances, the Tribunal finds it difficult, if not impossible, to understand why the claimant failed to read the report. This is not justifiable. We are surprised that the claimant's representative attempted to justify the failure to read the report by saying that there had been no adverse consequences. This, in our opinion, was sheer luck. Had the opposite been true then the respondent City Council would have been liable in negligence, principally due to the claimant's own omissions as his Care Manager.

48. The claimant made submissions that the respondent had failed to satisfy the Burchell test insofar as they contend that 'there were no reasonable grounds upon which to sustain a belief in the claimant's guilt of the allegations'. This is on the basis that the claimant's actions were not 'wilful' and therefore that this element of the allegation had not been made out. Mr Jegede said that 'There is no obligation imposed on the claimant to read the report immediately' and that 'The Claimant had every intention to read it when necessary'.

49. The Tribunal is quite satisfied that the dismissing officer was satisfied that the claimant's failure to read the report was 'wilful'. This was her evidence to the Tribunal. The claimant received the report and made a conscious decision not to read it immediately. It was her evidence that the relied on her previous conversation with Ruth Kirkham. We are satisfied that this amounted to a 'wilful' failure to read the report. It was addressed to her and given that she had telephoned the home on 4 January and that she 'two days after F.I. went home' rang his nephew and telephoned the home care provider [paragraph 28]. The Tribunal finds it astonishing, even with her pressure of work, that she did not read the home's report, that was addressed to her.

50. Mr Jegede submitted that this case was somehow analogous to that of *Sandwell & East Birmingham Hospitals v Westwood.* **It appears that he is suggesting that the omission made by the claimant to read the report is not a serious breach of her duty and does not amount to a wilful act of gross negligence. Insofar as we are not satisfied that this does amount to a breach of the respondent's Disciplinary Code (see above) and also of the claimant's duty (see paragraph 11 of her job description) we are comfortable in distinguishing this case from that of Sandwell.**

51. The Tribunal is satisfied that given the e-mail from Lynne Kelly indicating that she had 'grave concerns' for the customer's wellbeing and required the claimant to obtain a report, that the failure then to read the report given the claimant's role as Mr F.I.'s Care Manager does amount to a serious breach. The Tribunal wishes to express our surprise that it is the claimant's view that this is not the position.

52. Mr Jegede then submitted that the dismissal was not within the range of reasonable responses. We disagree. We have already concluded that the claimant's reliance on the telephone discussion with RK was unreasonable and have concluded that she misrepresented part of the discussion. In these circumstances, we are satisfied that dismissal was the appropriate response of the respondent. The Tribunal has already rejected the claimant's assertion that 'F.I. did not actually suffer any harm upon his release'. This was luck rather than good management on the claimant's part.

53. We are satisfied that Mr Clarke in reaching his decision to dismiss did have regard to the claimant's clear disciplinary record, and we are satisfied that the respondent did, in reaching its decision to dismiss because of gross misconduct, have adequate grounds upon which to reach this decision. We also accept that the dismissing officer (and the appeals officer who reviewed all the evidence) had a genuine belief after adequate inquiry into the claimant's conduct. The claimant was dismissed because of gross misconduct and this allegation we find, was made out throughout the disciplinary process. Mrs Pitterson-Donaldson knew – or at least ought to have known – that she was at risk because of the allegations and in particular, her failure to read the report.

54. We conclude that the respondent had reasonable grounds upon which to dismiss and that in doing so did so after a full and fair hearing including a full appeal that satisfied the requirements of the case of *Taylor v OCS Group Ltd.*

55. The claimant was dismissed fairly and for a reason of gross misconduct. We reject therefore the assertion that the dismissal was unfair."

The Grounds of Appeal

Ground 1: Perversity – no prior notification of charge which led to dismissal

12. In his helpful written and oral submissions, Mr Philpott argued that if one looks at the history of the matter, as set out in his chronology and the findings of fact by the Employment Tribunal I have referred to, the Employment Tribunal misdirected itself in finding that, although the allegation in respect of the Claimant failing to read the Hall Lane report was part of the investigation meeting, it did not form part of the disciplinary hearing and therefore the Claimant had no opportunity to deal with it then. There was therefore no credible evidence to support the Employment Tribunal's conclusion in this respect, and the Decision was therefore perverse. Mr Philpott refers me to a series of cases including **British Home Stores v Burchell**

[1978] IRLR 379; **J Sainsbury plc v Hitt** [2003] ICR 111; **Whitbread plc trading as Whitbread Medway Inns v Hall** [2001] ICR 699; **Crawford & Anr v Suffolk Mental Health Partnership NHS Trust** [2012] EWCA Civ 138; **Strouthos v London Underground Ltd** [2004] EWCA Civ 402; and **Salford Royal NHS Foundation Trust v Roldan** [2010] EWCA Civ 522. Finally, Mr Philpott submits that the appeal hearing did not cure any defect in the disciplinary hearing: **Taylor v OCS Group Ltd** [2006] EWCA Civ 702.

13. Mr Taft disagrees as a matter of fact. He submits that there was evidence before the disciplinary hearing which showed that the Claimant was clear about the fact that this was a clear allegation against her. He refers me to the following:

(a) the ET1 paragraph 10: Appeal Bundle pages 42-43;

(b) the letter dated 14 February 2011 to the Claimant (prior to the investigatory meeting): Appeal Bundle page 122;

(c) the investigatory interview minutes: Appeal Bundle pages 140-141;

(d) Ms Joanne Briggs' report: Appeal Bundle page 158;

(e) Ms Joanne Briggs' conclusions: Appeal Bundle page 166;

(f) Confirmation of Dismissal letter dated 17 May 2011 to the Claimant: Appeal Bundle pages 201-204;

(g) Paragraph 5 of the Respondent's skeleton argument.

At the disciplinary hearing Joanne Briggs' report was read out: Appeal Bundle page 170 and the Employment Tribunal Reasons paragraph 41.

14. I accept that submission. Furthermore, the point was specifically made at the Employment Tribunal hearing and was rejected by it: Reasons paragraph 38-41. Furthermore,

the Claimant's explanations were always the same throughout, that is that she was always aware of the significance of her failure to read the Hall Lane report. The test of perversity is a high one. It is not reached here.

Ground 2: Substitution

15. Mr Philpott submits that in paragraph 42 of the Employment Tribunal's Reasons it referred to the Appellant's job description and concluded in paragraph 43 that the failure to read the Hall Lane report was in breach of at least paragraph 11 of the "Main Duties" of her job description. That satisfied the definition of gross misconduct.

16. He submits that the Respondent did not allege that the Appellant had breached any express term of her contract of employment and it does not appear in the dismissal letter or appeal dismissal letter. Mr Philpott submits what the Employment Tribunal said was wrong and amounted to substitution of its own view for that of the Respondents.

17. Mr Taft pointed out that Langstaff J considered this point in paragraph 10 of his Judgment at the Rule 3(10) Hearing: Appeal Bundle page 72. He said this:

> **"The issue for a Tribunal, therefore, is to assess whether or not the dismissal falls within what is known as the range of reasonable responses. This Tribunal thought it did. In doing so, it embarked upon a complicated and ultimately arguably completely unnecessary consideration of whether the action was gross misconduct within the employer's contract. That would be relevant if there had been a claim of wrongful dismissal. The seriousness of the conduct and the breach is plainly relevant as a matter of fact, which tells upon the overall question of reasonableness, but otherwise whether a matter is or [is] not gross misconduct has little to add to the issues before the Tribunal."**

18. In my judgment, there was no substitution here. The Employment Tribunal was entitled to look at the contract of employment and the fact that it did so adds nothing to its decision that this employer had dismissed on the grounds of conduct which it regarded as gross misconduct. It was entitled to do that.

19. I do not think that **J Sainsburys plc v Hitt** [2003] ICR 111 assists me on the facts of this case.

Conclusion

20. For these reasons the appeal is dismissed.