Appeal No. UKEAT/0047/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 June 2014

Before

THE HONOURABLE MRS JUSTICE SLADE

(SITTING ALONE)

MR I ADAMA — APPELLANT

PARTNERSHIPS IN CARE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS FRANCES ALDSON (Representative)
For the Respondent	MR SATINDER GILL (of Counsel) Instructed by: Partnerships in Care Legal Services Unit 2 Imperial Place Maxwell Road Borehamwood Herts WD6 1JN

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Employment Tribunal failed to consider for itself the fairness of the dismissal under **Employment Rights Act 1996** section 98(4). **Miss Perry v Imperial College Healthcare NHS Trust** UKEAT/0473/130 and **Ms Brito-Babapulle v Ealing Hospital NHS Trust** UKEAT/0358/12 applied. Case remitted to a differently constituted Employment Tribunal to consider the fairness of the dismissal. Original decisions as to the reason for the dismissal and the adequacy of the investigation into gross misconduct to stand.

THE HONOURABLE MRS JUSTICE SLADE

1. Mr Adama, the Claimant, appeals from the Judgment of an Employment Tribunal (Employment Judge Moore and members), which by a Decision sent to the parties on 19 December 2012 dismissed his claim for unfair dismissal. The appeal raises a single but important point, whether the Employment Tribunal erred in failing to consider and give reasons as to whether the dismissal was fair in all the circumstances within the meaning of the **Employment Rights Act 1996** section 98(4). It is said that the Employment Tribunal failed to consider whether the sanction of dismissal for the misconduct which the Respondent found the Claimant to have carried out was within the band of reasonable responses of a reasonable employer.

The Background Facts

2. The Claimant worked at the Respondent's care home as a nurse from October 2004 until his dismissal on grounds of gross misconduct on 22 September 2011. The care home is for people with learning disabilities, who are detained under the **Mental Health Act 1983**. The incident which led to the Claimant's dismissal occurred on 13 June 2011. Although the Employment Tribunal made no express finding as to the reason for the Claimant's dismissal, Miss Aldson, representing the Claimant, and Mr Gill, Counsel for the Respondent, rightly agree that the reason for dismissal is to be inferred from paragraph 28 of the Tribunal's Judgment in which the Tribunal held that the person dismissing the Claimant:

> **"...considered there was sufficient evidence to conclude on the balance of probabilities that the Claimant had utilised excessive force while restraining ME by exerting pressure with his knee to her chest. This was an action that was in contravention of the management of violence and aggression policy and procedure in Part 1 Chapter 18 and the adult safeguarding policy in Part 5 Chapter 11, and constituted ill treatment of the patient."**

3. The Employment Tribunal observed, at paragraph 5:

> **"Our findings are confined to the question of whether or not the Respondent's subsequent assessment of the facts and the belief that it came to in relation to them were reasonable."**

4. The final paragraph in the Judgment of the Employment Tribunal, at paragraph 49, reads:

> **"In conclusion, for all the reasons above, we consider that the investigation and conclusion of the Respondent was a reasonable one. Although the Respondent had to be mindful of the implications of its decision on the Claimant's career it also had to be mindful of the its absolute duty to its patients who are particularly vulnerable and entirely dependent upon those who look after them."**

5. There is no appeal from the conclusion that the Respondent undertook a reasonable investigation into the incident, nor is there a ground of appeal challenging the failure of the Employment Tribunal to make explicit its implicit finding as to the reason for the dismissal. The Claimant's representative, Miss Aldson, referred to the importance of a decision by an Employment Tribunal on the fairness of a dismissal. In this regard, she cited the Judgment of the EAT in the case of **Perry v Imperial College Healthcare NHS Trust** UKEAT/0473/10/JOJ and also that of the Employment Appeal Tribunal in **Miss Brito-Babapulle v Ealing Hospital NHS Trust** UKEAT/0358/12/BA and in the latter case, in particular, to paragraphs 38 and 40 of that Judgment.

6. Miss Aldson contends that the Employment Tribunal in this case wholly failed to consider the fairness of dismissal. Miss Aldson produced a witness statement, which in paragraph 6 set out the mitigating factors which she stated she asserted before the Employment Tribunal. The Employment Judge was asked to make comment in response to the Grounds of Appeal. The Employment Judge questioned whether those factors were in fact advanced. The import of the Employment Judge's comments was that submissions on the fairness of the dismissal lacked prominence in the Claimant's case before the Employment Tribunal and that a concession was made by the Claimant in cross-examination as to the appropriateness of dismissal if the allegations against him had been proved. The Employment

Judge stated that at the time she did not consider it necessary, in light of those matters, to address the question of the fairness of dismissal in her Judgment.

7. Mr Gill for the Respondent pointed to the following matters. He referred to paragraph 37 of the Judgment of the Employment Tribunal in which it was said:

> **"It was not argued that dismissal was not within the bounds of reasonable sanctions open to the Respondent."**

8. Further, he refers to the comments of the Employment Judge, made following the hearing in response to a request by the Employment Appeal Tribunal, "I did not consider that the reasonableness of the sanction was an issue in the case."

9. Although Miss Aldson cross-examined the Respondent's witnesses on the issue of sanction. In the early part of his cross-examination, when he gave evidence after that of the Respondent's witnesses, the Claimant expressly agreed with the Respondent's Counsel that:

> **"...the allegation against him constituted ill treatment of a patient and that if established (following a reasonable investigation) not only was the sanction of dismissal reasonable, but it was the only option open to the Respondent. My note of the Claimant's evidence states:**
>
> **'If established agree = ill-treatment of patient and if established only option to dismiss.'"**

10. The Employment Judge continued, in paragraph 4:

> **"It is true that in the last part of Ms Aldson's closing submissions she alleged that even if the Claimant had breached the safeguarding policy, the sanction of dismissal was unreasonable: (i) because the Respondent's treatment of the Claimant for breach of its adult safeguarding policy input ('ASP') was harsher than its treatment of his colleagues for breach of the ASP and (ii) because of the equivocal nature of the evidence against the Claimant. My note of this submission takes up over the last few lines of a 4 and ½ page note of Ms Aldson's closing oral submissions and I did not consider that it amounted to a developed submission in respect of sanction."**

11. Reference was also made to paragraph 8, in which the Employment Judge had said:

> **"In retrospect the last part of Ms Aldson's submission should have been addressed in the Judgment but at the time I did not consider it necessary in view of the Claimant's concession in cross-examination, the submission's lack of prominence and the fact that (to my mind) the submission was undeveloped and confused: (this latter point is not intended to be any criticism of Ms Aldson who made well-developed and clear submissions on other matters)."**

12. Mr Gill very fairly acknowledges that, applying the **Employment Rights Act 1996** section 98(4) and well-established authority, it is incumbent on an Employment Tribunal itself to decide whether a dismissal is fair or unfair in all the circumstances and that this Employment Tribunal did not do so. An agreement by the Claimant that dismissal was an appropriate sanction does not relieve an Employment Tribunal of taking a decision itself as to the fairness of the dismissal. Nor does an absence of argument on the point. Evidence given by a Claimant and an absence of argument are matters which an Employment Tribunal would no doubt take into account in reaching their decision, but the issue of fairness of dismissal, the question posed by section 98(4), is for the Employment Tribunal to determine. Although Mr Gill agrees that this Employment Tribunal did not itself decide the issue under section 98(4), he is not instructed to concede this appeal.

Discussion and Conclusions

13. The **Employment Rights Act 1996** section 98(4) provides:

> **"(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."**

14. It is plain from the wording of the well-known section 98(4) that the mandatory determination imposed by that subsection is for the Employment Tribunal to take and not for a party to concede or agree. This Employment Tribunal did not undertake that necessary step and exercise in their determination of the case. Langstaff P in the case of **Ms Brito-Babapulle** held, at paragraph 40:

> **"It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case."**

15. To similar effect, Wilkie J, in the case of **Perry**, observed at paragraph 11, criticising the Judgment of the Employment Tribunal in that case:

> **"...It is, in our judgment, a startling omission that the Employment Tribunal, having taken it upon itself to identify the relevant questions and to cite the well known authority of** *BHS v Burchell* **omitted entirely to remind itself of the final question which, in subsequent decisions of the Court of Appeal, is said to be fundamental and to be inferred from what was said in** *BHS v Burchell***; that is, whether the decision to dismiss was one which was within the range of responses available to an employer acting reasonably; (the reasonable range of responses test)."**

16. In a gross misconduct case such as this, as Langstaff P held in **Brito-Babapulle**, the assessment of fairness in all the circumstances requires consideration of whether there are mitigating factors such that dismissal is not reasonable. In paragraph 40 of that case he observed, "...this general assessment necessarily includes a consideration of those matters that might mitigate." No decision was taken by this Employment Tribunal themselves as to whether the decision to dismiss was fair or unfair. With respect to the learned Employment Judge, her response in paragraph 8 makes clear that she considered that such a decision was not necessary to be set out in the Judgment as:

> **"...in view of the Claimant's concession in cross-examination, the submission's lack of prominence and the fact that (to my mind) the submission was undeveloped and confused."**

She fairly states:

> **"In retrospect, the last part of Ms Aldson's submissions should have been addressed in the Judgment."**

17. The omission to consider and address the issue of fairness of the dismissal, a question required to be decided by the Tribunal under 98(4) is a fundamental error in this Tribunal's judgement. Accordingly the decision cannot stand and must be set aside. Rightly, this Employment Appeal Tribunal is not asked to substitute a decision on the fairness of the dismissal. Accordingly there will be a remission to an Employment Tribunal to consider the fairness of the dismissal under section 98(4).

18. Since no other issue is challenged, on remission the Employment Tribunal will have before it the original Employment Tribunal Judgment. The finding of the reason for the dismissal which is to be inferred from the decision and the finding of the adequacy of the investigation are to stand. Miss Aldson contends that the remission should be to a differently constituted Tribunal and Mr Gill that it should be to the same Employment Tribunal. Mr Gill referred to the Judgment of the then President, Burton J, in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. He says, rightly, there is no question in this case of the professionalism of the Employment Tribunal, nor is there any issue of bias. He contends that there would be a saving of costs and time if the remission were to the same Employment Tribunal.

19. Whilst there is no question of lack of professionalism in this expert Employment Tribunal or of bias, this Employment Tribunal made a fundamental omission in failing to give reasons or decide for itself whether and why the dismissal was fair in all the circumstances. The hearing of the case was on 4 and 5 November 2012. That was a long time ago, and it is most unlikely that evidence given would be fresh in the memory of those sitting on the Employment Tribunal. Accordingly, this matter will be remitted to a differently constituted Employment Tribunal for decision under section 98(4) of the **Employment Rights Act 1996**, which will hear any additional relevant evidence and submissions on the point. Since the original decision of the Employment Tribunal as to the reason for the dismissal and the adequacy of the investigation is to stand, the evidence on remission will be limited to the issue of fairness under section 98(4), which would include evidence on mitigation. There will also be submissions on the material, and that material may well also include disparity in treatment and the gravity of the misconduct or gross misconduct found the basis of the dismissal.

20. Finally, this matter is not suitable for a **Burns-Barke** remission partly for the reasons set out above as to why the matter is not to be remitted to the same Employment Tribunal. The hearing was a long time ago. The Employment Tribunal has already been asked for information, which has been provided, and the time for a **Burns-Barke** remission is well past. Accordingly, for these reasons, the appeal is allowed and the case remitted to an Employment Tribunal, differently constituted, for determining the fairness of the dismissal under section 98(4).