Appeal No. UKEAT/0410/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 February 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MS TERESA HOLT — APPELLANT

RES ON SITE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GRAHAM WATSON (of Counsel) Instructed by: Quality Solicitors Dunn & Baker 21 Southernhay East Exeter EX1 1QQ
For the Respondent	MR OLIVER ISAACS (of Counsel) Instructed by: Ellis Whittam Ltd Woodhouse Church Lane Aldford Chester CH3 6JD

SUMMARY

UNFAIR DISMISSAL

Employment Judge considering dismissal process as a whole; holding that the decision was fair notwithstanding some of the reasons initially relied on did not survive the appeal stage.

No error of law. Applying **Taylor v OCS Group Ltd** [2006] IRLR 613 EAT, the EJ had adopted the correct approach.

There could be no challenge to the EJ's case management decision to exclude certain evidence and the decision reached on contributory fault was not susceptible to appeal on the basis of perversity.

HER HONOUR JUDGE EADY QC

1. I refer to the parties as the Claimant and the Respondent as they were below. This is an appeal by the Claimant against a judgment of the Employment Tribunal, sitting at Bristol on 22 and 23 October 2012 under the chairmanship of Employment Judge Walters, sitting alone; the judgment and Reasons being sent to the parties on 29 October 2012. The representation below was as it is before me today.

2. The Claimant's claims before the Employment Tribunal were of unfair and wrongful dismissal. Both claims were dismissed.

The background facts

3. The Claimant worked for the Respondent from 6 April 2009, latterly as Project Purchasing and Supply Chain Coordinator. The Respondent is part of a larger group and employed some 55 people at the relevant time.

4. From January 2011 to 11 October 2011 the Claimant's line manager had been a Dr Andrea Buckley, somebody she held in high regard; less so others in the company, particularly the Managing Director, a Mr Atkinson.

5. The termination of Dr Buckley's employment was, the Claimant felt, a retrograde step. During October and November 2011 the Claimant forwarded two internal emails to Dr Buckley. She should not have done so. This became known to the Respondent and, on 6 December 2011, there was a disciplinary investigation meeting. At that stage the Claimant accepted she should not have sent the emails and apologised. She was nevertheless suspended

and instructed that she should not make any contact with colleagues or former colleagues during her period of suspension.

6. Notwithstanding that instruction, the Claimant had contact with a Mr Bateman, another colleague, and the Respondent became aware of that.

7. On 13 December 2011 there was a disciplinary hearing, conducted by a Mr Neilson of the Respondent, who took the decision to dismiss the Claimant for reasons set out in the dismissal letter. Although emphasising the potential seriousness of the second e-mail that the Claimant had forwarded to Dr Buckley, the evidence before the Employment Tribunal was that, of itself, Mr Neilson would not have dismissed the Claimant for that alone. At that stage it was felt that there were a number of acts of misconduct, which were all part of a cumulative picture, which included the contact made with Mr Bateman.

8. The Claimant appealed that decision to a Mr Povall, and the appeal hearing took place on 12 January 2012. Albeit that the Claimant had previously apologised for sending the second e-mail, her position at the appeal hearing was that there was no confidential information in that e-mail and that she would still have sent it, although perhaps using slightly different means. Mr Povall concluded that the later matters had not truly been the reason for dismissal. The real mischief was the second e-mail the Claimant had sent to Dr Buckley. The contact with Mr Bateman informed him how the Claimant viewed her relationship with the Respondent. It was not part of his reason for upholding the decision to dismiss.

The Tribunal proceedings and Reasons

9. Before the Employment Judge there was some issue regarding the evidence that could be adduced on both sides. The Employment Judge records this at paragraph 5 and 6 as follows:

> **"5. I was also provided with an agreed list of issues which I approved. The parties were, therefore, obliged to focus on the issues as identified therein. I therefore restricted the Claimant's counsel's questioning of the lawfulness of the acquisition of the information which ultimately led to the Claimant's dismissal as it was not relevant to the issues which had been expressly agreed between the parties. Furthermore, and in any event, the conduct which led to the dismissal itself i.e. the sending of the two emails had been admitted by the Claimant subsequent to their discovery and the evidence of those admissions was obviously admissible and relevant to the issues: no submission to the contrary was made to me. Consequently, no useful purpose was served by debating and deciding whether the acquisition of the evidence was tainted by illegality.**
>
> **6. I similarly restricted the questioning of the Respondent's witnesses in relation to the background employment relationship of the Claimant because the alleged motivation for her dismissal as identified in the list of issues had nothing to do with that background and it was therefore irrelevant."**

10. Having heard the evidence and the submissions of the parties, the Employment Judge had regard to section 98(4) **Employment Rights Act 1996** and to **BHS v Burchell** [1980] ICR 303, **Iceland Frozen Food Ltd v Jones** [1982] IRLR 439 and **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 22. Looking at the question of an internal disciplinary appeal, the Employment Judge reflected that it was necessary to see that as part of the whole disciplinary process, see **Taylor v OCS Group Ltd** [2006] IRLR 613 EAT. An appeal could, however, be unfair if it led to a dismissal on a new ground, see **Perry v Imperial College Healthcare Trust** [2011] UKEAT/0473/10. Further, it would be unfair to increase the sanction or to penalise different misconduct on appeal, see **Sarkar v West London Mental Health NHS Trust** [2011] EWCA Civ 289.

11. Here the Employment Judge was satisfied that the Respondent had established that the sending of the second e-mail was the reason for the dismissal. Given the Claimant's admission that she sent it, the Respondent had a genuine and reasonable belief in that reason. Although the Employment Judge noted from Mr Neilson's evidence that he would not have dismissed for the second e-mail alone, the Employment Judge was extremely surprised by that given the seriousness of the allegation. In any event, per **Taylor v OCS**, the Employment Judge concluded that the disciplinary process should not be compartmentalized. The appeal should not

be separated out but the process should be viewed as a whole when considering whether or not the decision was fair.

12. On the **Iceland Frozen Foods v Jones** question, (i.e. if satisfied that the elements of the **Burchell** test were met, was the decision to dismiss within the range of reasonable responses open to the reasonable employer in these circumstances?), the Employment Judge concluded that it was within the range for the Respondent to take the view that the sending of the second e-mail - done deliberately and in a way to avoid detection - was gross misconduct. In particular, the Employment Judge concluded as follows:

> **"58. As to my conclusion on the *Jones* question I can find no fault whatsoever with the Respondent deciding that the sending of the 2nd email was an act of gross misconduct justifying summary dismissal. It was on any view of it a gross breach of trust. It was sent deliberately and sent in a manner which sought to avoid detection. I accept that it was not sent to deliberately harm the Respondent but that is not the end of the matter because I am entirely satisfied that potentially it could have harmed the Respondent's commercial interests.**
>
> **59. I am satisfied that the rules of natural justice have not been breached and nor has the ACAS Guidance been ignored. There was not an increase in sanction: the result was the same both at dismissal and appeal stage. There was no unfairness to the Claimant in the appellate officer deciding that the 2nd email merited dismissal."**

13. And, at paragraph 60:

> **"I am also satisfied that the principle in *Perry* is not engaged as the dismissal was not for a new reason: it was for the same reason i.e. misconduct, the principal act in respect of which was the same."**

14. Given the Employment Judge's finding on the unfair dismissal claim, it had been accepted that the wrongful dismissal claim would fall away. The Employment Judge considered that right: given that the dismissal had been for a repudiatory breach, the wrongful dismissal claim could go nowhere.

15. In the alternative, on the unfair dismissal claim, however, the Employment Judge considered the question of contributory fault and concluded, at paragraph 67, as follows:

> **"I consider the conduct was an extremely serious breach of the duty of trust and confidence. It was an act which was properly visited by dismissal and in the circumstances and compensation would have been significantly reduced. However, this is not a case where a 100% reduction would have been appropriate as the act was not one where it was intended to cause harm to the Respondent. However, a reduction of 80% would have been entirely just and equitable both under s.122(2) and s.123(6) Employment Rights Act 1996."**

The appeal

16. On the original consideration of the Notice of Appeal on the papers, Recorder Luba QC considered that there was no error of law disclosed such as to warrant a full hearing in this appeal and he gave his reasons, as set out in the Employment Appeal Tribunal's letter of 15 February 2013. The Claimant exercised her right under rule 3(10) of the **EAT Rules 1993** to an oral hearing, which came before HHJ Shanks, who was persuaded that this matter should proceed to a full hearing.

17. The grounds advanced in the appeal are, essentially, fourfold. First, that the Employment Tribunal erred in law in not finding that there had been an increase in sanction on the appeal and that this, accordingly, rendered the dismissal unfair. Second, the Employment Tribunal erred in law in not finding that the Claimant had been disadvantaged by the different approaches by the disciplinary and appeal panels. Third, the Claimant was denied a fair hearing in that the Employment Judge refused to permit questioning on relevant evidence. The point made here was that the Claimant had put forward an alternative ground for her dismissal, namely her continuing association and friendship with Dr Buckley, asserting that that was the real reason for her dismissal. In support of this contention, the Claimant had sought to adduce evidence from Dr Buckley that the Respondent could not have come across the Claimant's emails to him in any routine or accidental way. The restriction of the evidence that could be given in this regard was, the Claimant submitted, an error of law. (4) On contributory

conduct, the Employment Tribunal wrongly criticised the Claimant's explanation for sending the second e-mail and reached a conclusion that was perverse.

The legal principles

18. The relevant legislative principles are those set out in section 98(4) **Employment Rights Act 1996**:

> **"In any other case 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."**

And, on contributory fault, sections 122(2) and 123(6) **Employment Rights Act 1996**, providing as follows:

> **"122**
>
> **…**
>
> **(2)Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.**
>
> **…**
>
> **123**
>
> **...**
>
> **(6). Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.**
>
> **…"**

19. There is no dispute before me but that the Employment Judge correctly set out the applicable legal principles to be derived from the legislation, the case-law and the ACAS Guidance in this case (see paragraphs 13-36 of the Reasons). In particular, on the approach to

be taken on an internal appeal, it was common ground that, given the Employment Tribunal's role to consider the fairness of the process as a whole, the appeal should not be seen separately but should be seen as part of the entire disciplinary process, see **West Midlands Co-operative Society v Tipton** [1986] 1 ALL ER 513 and **Taylor v OCS Group Ltd** [2006] IRLR 613 CA.

20. Finally, I was reminded of the need for caution expressed in **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721, that:

> **"[Where] the Tribunal properly directed themselves in accordance with the principles established in *Burchell v British Home Stores*... In these circumstances, save at least where there is a proper basis for saying that the Tribunal simply failed to follow their own self direction, the EAT should not interfere with that decision unless there is no proper evidential basis for it, or unless the conclusion is perverse. That is a very high hurdle. In *Yeboah v Crofton* [2002] IRLR 634 Mummery LJ said that this would require an 'overwhelming case' that the decision was one which no reasonable tribunal, properly appreciating the law and the evidence, could have made."**

Submissions on appeal

21. For the Claimant, it was submitted that the real point on grounds 1 and 2 was that the Tribunal had erred in how it approached the treatment of the Claimant at the disciplinary appeal stage. The matters which had tipped the sanction into dismissal had not survived the appeal and the Claimant was therefore dismissed for a reason which would not have led to her dismissal at the first instance disciplinary hearing, albeit that the Claimant accepted that this was not a case (per **Monie v Coral Racing Ltd** [1981] ICR 109), where she could assert a change in reason for the dismissal between the disciplinary and appeal stages. The reason relied on at appeal in this case was one of those underpinning the original dismissal decision.

22. Secondly, the Claimant had been prejudiced by the approach adopted because she had effectively been denied the opportunity to appeal against the revised reasoning relied on. The position was analogous to that considered in **McMillan v Airedale NHS Foundation Trust** [2013] EWHC 1504, where it was held that it is only where the appeal is by way of complete

re-hearing that the appeal officer would be in a position to reach factual conclusions of a more serious kind than those reached at first instance. Alternatively, the appeal stage was unfair, as it did not take sufficient account of the fact that the original decision taker would not have dismissed solely for the only surviving reason ultimately relied on.

23. Third, on the exclusion of evidence point, the Claimant had put forward an alternative positive case as the reason for her dismissal and was seeking to question what was the real reason relied on by the Respondent. On her case, it was all about her continuing friendship with Dr Buckley. The Employment Judge stopped questions going to this alternative case. This was a point proximate to the reason relied on by the Respondent - the second e-mail - because it was the Claimant's case that it was the recipient of the e-mail that was crucial. It was also an issue that went to credit, which was important because the reason relied on by the Respondent was an issue.

24. Fourth, the Claimant challenged the finding on contributory fault. In so doing, she accepted that this was a perversity challenge and would need to meet the high test laid down in **Yeboah v Crofton**. The Claimant contended that the second e-mail itself was not obviously offensive and indeed the Employment Judge had accepted that she had not been malicious in sending it to Dr Buckley. It only took on the confidential nature ascribed to it because the Respondent had taken the view that it was confidential.

25. For the Respondent, it was stressed, in general terms, that there was no challenge to the Employment Tribunal's self-directions as to law and the correct approach, as laid down in the legislation, case-law and ACAS Guidance. That being so, per **Roldan**, the EAT should be slow to interfere. There would need to be a challenge on the ground of perversity, and that was not asserted here.

26. On the first and second grounds of appeal, it would have been wrong to have required the appeal manager to abrogate his responsibility and effectively remit the question of sanction to the original dismissing officer. The Employment Tribunal had been right to apply the range of reasonable responses test to the decision taken on the appeal, seeing that as part of the disciplinary process taken as a whole. That was entirely the right approach.

27. On the third ground of appeal, the wrongful exclusion of evidence point, the Respondent relied on the Employment Judge's reasoning, but also observed that how the case on relevance was being put before the EAT was different, not only from the Claimant's case as put in the internal process but also as to how she had put her case in her witness statement before the Employment Tribunal. There, she had been suggesting that it was a breakdown in her own relationship with the Managing Director, Mr Atkinson, that was the real issue. Indeed the witness statements of both the Claimant and Dr Buckley made no assertion that he had difficulties with anyone within the Respondent. Moreover the Claimant's case before the Employment Tribunal accepted misconduct. The issue was with the sanction imposed. So the question of the authenticity of the e-mails or as to how they were obtained was not relevant. The only issue was whether sanction was within the range of reasonable responses.

28. Lastly, on the question of contributory fault, the Respondent observed that the Claimant was not saying that any of the Employment Judge's reasoning was wrong and did not challenge the finding of gross misconduct. The Claimant continued to maintain that she saw nothing wrong in the sending of the e-mail. The Employment Judge's finding, on the contrary, was that sending the second e-mail was an act of gross misconduct and a gross breach of trust. Given that finding, the conclusion on contributory fault could not be said to be perverse.

Discussion and conclusions

29. There is an obvious overlap between grounds 1 and 2 on this appeal. In my judgment, neither discloses any error on the part of the Employment Tribunal. In looking at a disciplinary process, the appeal stage is part of that process and should be considered in the round (see **West Midlands Co-operative Society v Tipton** and **Taylor v OCS**). This is not a **Monie v Coral Racing**-type case. The Respondent here did not rely on a subsequent and different reason at the appeal stage to that which formed part of the original reason to dismiss. In **Monie** the original reason related to dishonesty. At the appeal stage it was confirmed there was no evidence of dishonesty, but the Claimant was held to have failed to have acted responsibly, and that became the reason for upholding the decision to dismiss; the goalposts shifted. Here, the second e-mail, and the Claimant's misconduct in sending that to Dr Buckley, had always been in issue. Similarly, I do not find helpful the dicta in **McMillan v Airedale NHS Foundation Trust**. Here, the Respondent on appeal was not reaching a factual conclusion of a more serious kind. It was reaching the same conclusion as part of the original decision to dismiss.

30. Taking the disciplinary process as a whole - including the appeal stage - as it was bound to do, the question for the Employment Tribunal was whether it was within the range of reasonable responses for the Respondent to dismiss for that reason. As part of that assessment, the Employment Tribunal had to take into account the fact that the original decision taker had stated that he would not have dismissed for that reason alone. The Employment Judge had due regard to that evidence. Given the seriousness of the issue in question, the Employment Judge found it to be surprising. Having had regard to that evidence, however, the Employment Judge tested the reason relied on by the Respondent at the end of the entirety of the process and found that the decision to dismiss for that reason fell within the range. The Judge applied the correct approach and was entitled to reach that conclusion. No error of law is disclosed.

31. Ground 2 effectively makes the same point from a different direction, arguing that the appeal decision rendered the dismissal unfair. I do not, however, see that the Claimant suffered any prejudice. She had known that the second e-mail was in issue and that it was seen as a misconduct issue. She may have been successful in persuading Mr Povall that the other grounds should not be relied on (save as part of the broader background or evidentiary material), but that did not mean that the second e-mail point did not remain at large. Given that it did, Mr Povall was entitled to consider what sanction was appropriate in respect of that matter, and his conclusion in that regard was properly scrutinized by the Employment Judge, applying the correct – range of reasonable responses – test. Section 98(4) **Employment Rights Act 1996** does not require Employment Tribunals to adopt overly technical approaches when judging the fairness or otherwise of an employer's decision to dismiss. They are entitled – indeed, obliged - to look at the decision in the round, as the Employment Judge did here.

32. Turning then to Ground 3, the evidence point. In my judgment, this was a case management decision for the Employment Judge. It is trite law that a trial court has the power to limit the evidence adduced and indeed the cross-examination of that evidence, see **Watson v Chief Constable of Cleveland Police** [2001] EWCA Civ 1547 and, applying the same test in the Civil Procedure Rules to Employment Tribunals, **HSBC Asia Holdings BV & Anr v Gillespie** EAT/0417/10 per Underhill J.

33. Relevance of evidence is not an absolute concept. It has to be judged by reference to the issues to be determined, but not every point, where there is some marginal relevance, should necessarily be allowed. It will be for the first-instance Tribunal to determine in each case.

34. The Employment Judge's observation in this case, in the Reasons provided, was that the conduct that had led to the dismissal had been admitted subsequent to the discovery of the e-mails. The evidence of those admissions was itself clearly admissible and relevant to the issues. That being so, the Employment Judge was entitled to conclude that no useful purpose was served by debating whether the acquisition of the evidence was tainted by illegality.

35. In oral submission before me, it was clarified as to how the Claimant's case had been put within the internal process, both at the disciplinary and appeal hearings. She had not sought to suggest at the disciplinary hearing stage that the emails had been wrongly obtained and should not be taken into account by her employer. There was a reference at the appeal stage to the Claimant contending that she was being dismissed for the company's actions, but that was clarified at the appeal hearing to her making a reference to the fact that the Respondent had failed to stop her sending further emails after it had first become aware of the first e-mail to Dr Buckley, a different point.

36. So, before the dismissing and appeal managers, the evidence was that these e-mails had been sent and the Claimant had admitted them. That was what the Respondent had in mind. The wider issue of motive in obtaining the e-mails was not before the relevant managers. The Employment Judge was charged with testing the Respondent's decisions on the basis of the evidence before it; that was, the admitted sending of the emails in question. This was not a case where the Respondent had taken a decision on the basis of disputed evidence. Moreover, having had regard to the witness statements put before the Employment Tribunal by the Claimant (to which I have been taken at this hearing), I do not accept that the Claimant was putting her case before the Employment Tribunal primarily on the point now suggested. It is clear that the Claimant, in submissions through her counsel, accepted that the sending of the e-mails constituted misconduct. The issue was the application of the sanction of dismissal. That

being so, how the Respondent obtained the e-mails did not arise as a question. That submission was made after the Claimant's counsel had been given the opportunity to cross-examine the Respondent's witnesses as to their relationship with Dr Buckley. It seems that that point, if it had been in issue at some stage, fell away during the hearing.

37. I see no error of law in the Employment Judge's case management decision to restrict the evidence adduced in the way that he did.

38. As for the last ground of appeal, on the question of the finding on contributory fault, this was accepted to amount to a perversity challenge, and I do not find that it begins to meet the high test required for such a challenge, as laid down in **Yeboah v Crofton**. The focus of the Employment Tribunal was properly on the conduct of the Claimant. It found her to have committed an act of gross misconduct, which was a gross breach of trust. On this point I cannot better the reasons given by Recorder Luba QC on the initial sift. The Employment Judge was plainly satisfied that the second e-mail incident was an act of gross misconduct justifying summary dismissal. It cannot be said to be perverse to then conclude that, if there was any unfairness in the dismissal, then in the alternative the Claimant had contributed to her dismissal by reason of her own conduct.

39. For all those reasons, I dismiss this appeal.