Appeal No. UKEAT/0370/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 February 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

DRS TAYLOR, HARRISON, WINFREY, BEESLEY, PEARCE & SHIELDS
(PARTNERS IN THE CORNERSTONE PRACTICE) APPELLANTS

MRS D Y CROCKFORD RESPONDENT

Transcript of Proceedings

JUDGMENT

(Revised)

APPEARANCES

For the Appellant	MR NICHOLAS EDWARDS (Employment Law Advocate) Taylor Rose Law LLP Basildon House 7 Moorgate London EC2R 6AF
For the Respondent	MS LAURA BUTCHER (Representative)

SUMMARY

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Reasonableness of dismissal

The Employment Judge did not err in holding that the dismissal of the Claimant for refusing to agree to a rescheduling of her working hours was a dismissal for some other substantial reason within the meaning of section 98(1)(b) of the **Employment Rights Act 1996**. However the findings of fact did not support the two bases on which the Employment Judge held the dismissal to be unfair.

Appeal allowed. Case remitted to an Employment Tribunal for rehearing to consider the fairness of the dismissal, including if there is a finding of unfairness, any **Polkey** reduction in an award. The finding that the dismissal was for some other substantial reason for dismissal to remain in place.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. This is an appeal by doctors who are partners in a GP practice ("the Respondent") from the judgment of Employment Judge Pritchard-Witts sent to the parties on 28 February 2013. The Employment Judge held that Mrs Crockford ("the Claimant") was unfairly dismissed. The Claimant cross-appeals the decision that, applying **Polkey v AE Dayton Services** [1987] IRLR 503, if a fair procedure had been adopted for her dismissal, the Claimant would have been fairly dismissed at the date when the dismissal in fact took place.

The findings of fact made by the Employment Judge

2. The Claimant was employed by the Respondent from 3 April 2006 until the date of her dismissal on 28 June 2012. The written terms and conditions of her employment provided that she would work 37 hours per week. The contract of employment also stated:

> **"The daily arrangement of those hours will vary between 8 am and 6.30pm, Monday to Friday at present, but may alter in the future."**

3. The Employment Judge made the following additional findings of fact:

> **"5.3 In 2009 the Claimant spoke to the Practice Manager Mr W Ridley. She requested to change her working hours from 37 to 30. That was agreed to and as a consequence the Claimant's weekly hours consisted of the following: Monday 8am to 2pm; Tuesday 12.30pm to 6.30pm; Wednesday 8.30am to 2.30pm; Thursday 8.30am to 2.30pm and Friday 8am to 2pm."**

4. At paragraph 5.9 the Employment Judge held that a meeting took place between two of the partners and the Claimant on 14 February 2012. This was in order to follow up on the Claimant's request to expand her professional interests and to add to the variety of her current duties. The Employment Judge held:

> **"In the course of the conversation the Partners revealed that taking into account the way in which the current rotas were working it would suit the Practice's needs if the Claimant would consent to being available in respect of another afternoon session."**

5. At paragraph 5.10 the Employment Judge held:

> **"The Claimant said that she was not in a position to work an extra afternoon shift up to the early evening period as she cared for a 90 year old lady. "**

The Employment Judge also held:

> **"5.11. It was pointed out to the Claimant by Dr Shields that the rearrangement of her hours would not result in her contract actually being changed this would just be a variation to the hours worked during the week. It was explained that the working patterns were not 'set in stone' and if the business needs require a change in the hours then the employers had such a right under the contract of employment."**
>
> **…**
>
> **5.13. The request for the Claimant to work the additional afternoon harmonised the shift system so that those who had previously been working three late afternoon shifts were reduced to two and the Claimant who had only been working one was increased to two.**
>
> **5.14. On 27 February 2012 Mrs Crockford was asked to attend a meeting with Mrs Powell and Mrs Fox the office manager. The Claimant was informed that the Practice had decided to implement the new rota as the business could not sustain the old one. ... Mrs Crockford would then be requested to indicate whether she would be happy to change her hours in order to suit the new rota. If the position was that she was not prepared to change then she would be given six weeks' notice of termination."**

6. The Employment Judge held at paragraph 5.16 that, in response to a letter from the Practice Manager of the Respondent, on 5 March 2012 the Claimant raised a formal grievance and complained that no reason had been provided for a request for her to attend another meeting.

7. On 9 March 2012 a grievance hearing took place. The Employment Judge held:

> **"5.18. The hours were the first topic to be discussed. The Claimant was informed that the new rota would be effective from 1 April 2012. The Claimant was asked if she would be able to do the 6.30 shift on Wednesdays or any other afternoon shift. The Claimant's position remained unchanged. Mrs Powell told the Claimant that other staff had been asked to consider whether they could accommodate the 6.30 finish on Wednesday but nobody else could.**

> **5.19. She [the Claimant] was unhappy with the way in which the matter was being handled exclaiming 'you don't want me here' and that it was not really a way forward just to tell her that her contract of employment would be terminated if she would not work until 6.30pm on Wednesday."**

8. On 13 March 2012 the Claimant's grievance was dismissed. On 19 March 2012 the Claimant appealed against the dismissal of her grievance. She said that the threat of losing her job made her feel bullied and harassed.

9. The Employment Judge further recorded, at paragraph 5.29:

> **"The Claimant indicated that as she was not able to do what the Practice wanted, the Practice were unable to come up with a reasonable solution other than to tell her that she would be dismissed."**

At that point, by 10 April, the Claimant stated that she "was currently unwell due to lack of support and understanding on the Respondent's part".

10. The Employment Judge records:

> **"5.34. The Claimant was written to on 11 June 2012 to indicate that the grievance appeal had not been upheld and it is clear from the minutes that issues relating to bullying and harassment, contract versus oral agreement, and lack of flexibility were addressed.**
>
> **…**
>
> **5.36. ...There was an operational need to change the office rota because of the way in which the Doctors managed their workload and this was a consequence of the new triage system. ... Mrs Crockford was only working one afternoon and by asking her to work a second late afternoon it brought her into line with the other members of the reception staff in accordance with their own contracted hours."**

There was an operational need to change the rota.

11. On 18 June 2012 the Claimant was asked to attend a disciplinary hearing. That hearing was to take place on 22 June. The Employment Judge quoted from the letter inviting the Claimant to attend the hearing. It stated:

> **"The Practice would like to discuss issues relating to the performance of your contract of employment, in particular complying with rota changes made by management.**
>
> **...**
>
> **If your explanation is not considered satisfactory and there are no extenuating circumstances, one possible outcome of the meeting will be your dismissal in accordance with the Practice disciplinary procedure."**

12. On 21 June the Claimant wrote to the Practice Manager informing her that she would be pleased to attend a disciplinary meeting when she and her doctor felt that she was ready to return to work. However, the disciplinary hearing proceeded in her absence. The Employment Judge held at paragraph 5.43:

> **"After reviewing all the evidence Dr Beesley [who conducted the disciplinary hearing] came to the view that the Claimant had refused to accept the new rota times and in doing so was in breach of contract and refusing to carry out a reasonable management instruction.**

Accordingly on 28 June 2012 Dr Beesley wrote to confirm the Claimant's dismissal.

13. The Employment Judge quoted from the letter of dismissal as follows:

> **"Your last day of employment with the Practice was 28 June 2012. The reason for your dismissal is that you have repeatedly failed to follow a reasonable management instruction that you work within the scheduled hours within the terms of your employment contract. In refusing to cooperate you are additionally in breach of an express term of your employment contract. We have done our best to accommodate the preferred working hours of all staff and have no legal obligation to allow you to work the hours that you demand."**

14. On 11 July 2012 the Claimant appealed from her dismissal. On 1 August 2012 Drs Taylor and Beesley convened an appeal meeting in order to consider the written submissions of the Claimant. The Claimant again had stated that she was unfit, because of her current illness, to attend. The appeal against dismissal was rejected. In the letter rejecting the appeal, it was stated that the Claimant was in fundamental breach of her contract in refusing to work her required hours.

15. The Employment Judge reached the following conclusions, having made those findings of fact. As for the reason for dismissal, the Employment Judge held, at paragraph 6(1):

> **"The reason why Mrs Crockford was dismissed was because she and the Respondents could not agree upon the rescheduling of her hours so that she would work an additional late afternoon session on Wednesday."**

16. The Employment Judge further held that the Respondents were advancing a management requirement that they were entitled to insist upon:

> **"In such circumstances, where an employee finds herself or himself in a position for whatever reason whereby she cannot accede to new contractual hours then there is, inevitably, a parting of the ways."**

17. The Employment Judge continued that the dismissal was not for misconduct, gross or otherwise. His conclusion was:

> **"It was for the substantial reason for business requirement which satisfied her dismissal from the post of receptionist." [sic]**

18. As for whether the decision to dismiss fell within the range of reasonable responses, the Employment Judge held:

> **"In a situation where there is an impasse with the employee consistently refusing to accommodate the employer's need to vary their rota for good reason dismissal does fall within the band of range of reasonable responses open to a reasonable employer."**

19. The Employment Judge concluded that the dismissal was unfair because of the procedure leading up to the dismissal. At paragraph 6(3) the Employment Judge held:

> **"...The procedures in this case only became problematical when, after the grievance process is exhausted, the Respondents immediately and with very little notice at all in the overall scheme of things decide to dismiss Mrs Crockford for misconduct. First, they fail to make it patently clear within the body of the disciplinary hearing that that is what they are about to do and the**

> **Tribunal is satisfied that although the context of the disciplinary proceedings were known to the Claimant such a process was unreasonable procedurally in all the circumstances of the case. It is one thing to be dismissed for misconduct and is quite another to be dismissed on the basis that you cannot agree your new rota hours. Accordingly, the needs of the business is the substantial reason for dismissal under Section 98(1) rather than any of the reasons under Section 98(2). ... In those circumstances therefore the Tribunal finds that the procedures adopted by the Respondent after the exhaustion of the grievance procedure were not those of a reasonable employer and therefore taint the dismissal with unfairness."**

20. Having concluded that the Claimant succeeded in her claim that the dismissal was unfair, the Employment Judge continued to consider whether there was a basis for holding that had a correct procedure been followed, the dismissal would nonetheless have occurred and following **Polkey v AE Dayton Services**, whether there should be an award or whether the award for compensation should be in respect of a reduced or limited period.

21. The Employment Judge held:

> **"Although this dismissal is procedurally unfair the Tribunal is satisfied that the process that stretched from February through to August was one which gave the Claimant every opportunity, had she wished, to have revisited her position if she felt she could have done so in order to accommodate the reasonable needs of the Practice. Should the matter have been consistently dealt with from a procedural point of view on the grounds of some other substantial reason then this Tribunal cannot comprehend how it would have taken any longer to have dismissed the Claimant. It is effectively the label of the action rather than the substantive nature of it that has led to the unfairness here. ... That being the case had the appropriate procedure been carried out immediately after the refusal of the appeal then the Claimant's dismissal would have followed at the same time as night follows day. That being the position then the percentage chance of the Claimant remaining in employment is zero. Accordingly although the Claimant was unfairly dismissed the question of remedy does not arise."**

The submissions of the parties

22. Mr Edwards, for the Respondent, contends, first that the Employment Judge erred in failing to find that the dismissal for failing to obey a lawful instruction is not a dismissal for misconduct. He submitted that the Employment Judge had held that the Respondent was entitled to require the Claimant to work until 6.30pm on a Wednesday and that she had refused to do so. Mr Edwards referred to the case of **Farrant v Woodroffe School** [1998] ICR 184 as an example of the proposition that, where an employee refuses an instruction which the

Respondent believes is a lawful instruction, then the consequential dismissal may be a dismissal for gross misconduct. Mr Edwards contends that the Employment Judge erred in failing so to hold.

23. As for ground 2, Mr Edwards contends that it was perverse for the Employment Judge to hold that the Appellant (Respondent) "immediately and with very little notice in the overall scheme of things decided to dismiss Mrs Crockford for misconduct".

24. Mr Edwards submits that, as shown by the findings of fact, throughout the period from 27 February the Claimant was well aware that, if she did not agree to the rescheduled hours which were being put to her, she would be dismissed. Reference was made to many of the findings which have been set out earlier in this judgment. Further, it was said in ground 3 of the Notice of Appeal, that it was perverse for the Employment Judge to find that the Respondent failed to make it patently clear within the body of the notification of the disciplinary hearing that the Claimant could be dismissed. Mr Edwards refers to the text of the letter inviting the Claimant to attend the disciplinary hearing, which makes it clear that a continued refusal to work the new rota could result in her dismissal. Mr Edwards suggests that erroneous findings by the Employment Judge about the notification of the disciplinary hearing were the basis of the finding of unfair dismissal in this case. They led to the finding of an unfair procedure, which in turn led to the finding of unfair dismissal. Accordingly, Mr Edwards contends that the finding of unfair dismissal should be set aside.

25. Mr Edwards contends that the cross-appeal from the **Polkey** reduction of the award to zero must fail because the conclusion of the Employment Judge was that, had a fair procedure been adopted, the outcome would have been the same. Mr Edwards contends that, if the Respondent succeeds in overturning the finding of unfair dismissal on the basis of misdirection

that the procedure used was unfair, a substituted decision that the dismissal was fair should be made.

26. Ms Butcher, lay representative for the Claimant, contends that there was no error of law on liability in the decision of the Employment Judge. There was no evidence that the Claimant was dismissed for misconduct. That term was not mentioned until after the dismissal of the Claimant. It was a term advanced before the Employment Judge and on appeal before this Employment Appeal Tribunal. Ms Butcher pointed out that the Employment Tribunal held, at paragraph 6(3), that:

> **"Mrs Crockford never misconducted herself; she was for many years a model employee who up to the time of her last appraisal was giving good to excellent service."**

The Claimant was a long-serving employee. It was suggested by Ms Butcher that those factors should have been taken into account. Further, Ms Butcher submitted that the Employment Judge should have had regard to the Claimant's attitude at the grievance meeting held on 9 March 2012. The Claimant had said that she has always been flexible and changed her hours four times, but at present she was able to do another 6.30pm finish. Moreover Ms Butcher submitted that regard should have been paid to the Claimant's statement that her situation might change at any time.

27. Accordingly Ms Butcher resisted the appeal. Further, in a Respondent's Answer to the appeal, the Claimant sought to uphold the decision of the Employment Judge on the basis that her refusal to change her hours was reasonable; that the request to change had been unreasonable; and that the Employment Judge failed to take into account that other employees had been asked to work the extended hours on a Wednesday and had refused to do so but were not dismissed.

28. As for the cross-appeal, Ms Butcher again referred to the Employment Judge's failure to consider fully or at all the effect of other employees' refusal to work late on Wednesday. Taking into account all the other matters just referred to in reference to resisting the appeal, Ms Butcher contended that the Employment Judge erred in saying that the Claimant would have been fairly dismissed if a fair procedure had been adopted.

Discussion and conclusion

Ground 1

29. There was no challenge to the finding by the Employment Judge as to the reason for the dismissal. The reason found by the Employment Judge for the Claimant's dismissal was that

> **"...she and the Respondents could not agree upon the rescheduling of her hours so that she would work an additional late afternoon session on a Wednesday."**

30. Whilst the Employment Judge held that the Respondents were entitled to insist upon a change in the working rota and referred to the termination letter, from which it appeared that it was the view of the Respondents that the Claimant had been in fundamental breach of contract in refusing to work her required hours, he made a clear finding that the reason for the dismissal was as stated, namely that the Claimant and the Respondents could not agree on the rescheduling of her hours. In light of that finding, in my judgment, there was no error of law in the Employment Judge finding, that the Claimant was dismissed for some other substantial reason within section 98 of the **Employment Rights Act**. Ground 1 of the Grounds of Appeal therefore fails.

31. As for grounds 2 and 3, the basis of the finding of unfairness of the dismissal was two-fold. First, that after the conclusion of the grievance procedure, which was in June 2012, the

Employment Judge found that the Respondents immediately and with very little notice in the overall scheme of things decided to dismiss Mrs Crockford. In my judgment, on the unchallenged findings of fact of the Employment Judge, from as early on as 27 February 2012, the Claimant was well aware that, if no agreement were reached as to her working schedule, the consequence would be her dismissal. Indeed, she herself complained at various points, as recorded in the Employment Judge's judgment, of that consequence. So, whilst perversity challenges are always difficult to establish since an Appellant has to surmount an extremely high hurdle, in this case, having regard to the clear findings of fact of this Employment Judge, the conclusion that the Respondents immediately and with very little notice decided to dismiss Mrs Crockford is unsustainable.

32. Turning now to the second basis upon which the Employment Judge held that the procedure adopted before dismissing the Claimant was unfair, namely that, in the letter summoning the Claimant to a disciplinary hearing, the Respondents failed to make it clear that they were about to dismiss the Claimant is not borne out by the language of the letter itself. The Employment Judge sets out the material part of that letter in paragraph 5.40 of the judgment. It is a letter of 18 June 2012 referring to certain matters, in particular not complying with rota changes made by management. The quotation by the Employment Judge from the letter ends, "...one possible outcome of the meeting will be your dismissal in accordance with the Practice disciplinary procedure." The statement by the Employment Judge that there was no such indication in the letter inviting the Claimant to a disciplinary hearing is not borne out by the clear language of the letter. Again, with respect to the Employment Judge, on this occasion as on the previous occasion, the conclusion he reaches is perverse.

33. Those two matters are the basis upon which the Employment Judge reached the conclusion that the procedure leading up to the dismissal of the Claimant was unfair and that

because of the unfairness of the procedure the dismissal was unfair. Since the foundation of the findings that the procedure leading to dismissal was unfair are, in my judgment, perverse, the conclusion that the dismissal was unfair cannot stand.

34. I add that the fact that the Respondent may now, and may have before the Employment Tribunal, labelled their complaint against the Claimant as misconduct does not affect this conclusion.

35. The consequence of the setting aside of the finding of unfair dismissal must be considered. Mr Edwards submits that this Employment Appeal Tribunal should substitute a finding of fair dismissal. For that to occur, the high hurdle erected in the case of **Dobie v Burns International Security Services (UK) Ltd** [1984] ICR 812 has to be surmounted: in other words, that no reasonable Employment Tribunal, properly directing itself, could reach a conclusion other than that the dismissal was fair. In my judgment, that cannot be said in this case. There are various matters which, in considering the disciplinary process which was held, may arguably have led to a different conclusion. Without positing all of those I merely mention, for example, whether the disciplinary hearing should have been adjourned because of the ill-health of the Claimant; whether the position of the Claimant should have been reviewed as she had suggested in her grievance hearing; whether her record and the attitude of others to being asked to alter their schedules had been adequately considered; and whether, taking into account all relevant matters, had a fair procedure been pursued, the same outcome would have been reached. The same outcome or conclusion may be reached on the remitted hearing, but, on the facts of this case, in my judgment, it cannot be said that no reasonable Employment Tribunal, properly directing itself, would have dismissed this claim.

36. Accordingly, this claim is remitted to an Employment Tribunal for rehearing to consider the fairness of dismissal in the light of the finding of the Employment Judge that the reason for the dismissal was some other substantial reason. I will hear submissions from the parties as to where it should be remitted.

37. So far as the cross-appeal on **Polkey v AE Dayton Services** [1987] IRLR 503 is concerned, clearly the importance of that will depend on the outcome before the Employment Tribunal of the consideration of the fairness of the dismissal. However, in my judgment, the Employment Judge did not misdirect himself in law in considering the **Polkey** issue. Had that issue stood alone, the Employment Judge was not in error in reaching his decision. That is not to say that if, on a remitted hearing, there were a conclusion that this was an unfair dismissal and if the **Polkey** argument were run again, that same conclusion is bound to be reached. Having regard to other considerations of procedure and other evidence that there may be which may affect the fairness of the dismissal, no doubt those matters will be taken into account by the Tribunal to whom this matter is remitted. If the issue is raised in those circumstances, the Tribunal considering the matter will no doubt consider, and properly direct itself or themselves, in accordance with **Polkey**.

38. Accordingly this appeal is allowed, and the matter remitted to an Employment Tribunal to consider the fairness of the dismissal in light of the finding, which stays in place, that the reason for dismissal was some other substantial reason. I would like to hear from both of you as to the identity of the Tribunal to which this matter is to be remitted.