Appeal No. UKEAT/0310/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 December 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MRS L S TINSLEY

MR S K YEBOAH

MS D ROBINSON APPELLANT

COMBAT STRESS RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR KEIR HIRST (Solicitor) Wace Morgan Solicitors 2 Belmont Shrewsbury Shropshire SY1 1TD
For the Respondent	MR BRIAN CAMPBELL (Solicitor) Brodies LLP Solicitors 2 Blythswood Square Glasgow G2 4AD

SUMMARY

UNFAIR DISMISSAL

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Reasonableness of dismissal

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The Claimant was dismissed for three matters. In one of these (probably the most serious) the investigation was seriously flawed; and a second was raised with the Claimant for the first time at the disciplinary hearing itself. The Employment Judge thought that the third was one which the Respondent was entitled to view as gross misconduct, and held the dismissal not unfair; but the evidence before the Tribunal was that the employer did not view it as sufficiently serious. Evidence was given by the Respondent that the second was serious enough to merit dismissal, but the Employment Judge did not deal with the procedural criticisms made in the ET1, nor accept that was the Respondent's view, nor evaluate it. Held: the Employment Judge should have applied section 98 **Employment Rights Act** and had regard to the actual reasons the employer had for dismissal, rather than the justifiable reasons he could have had; the actual reasons included the first matter, and needed to be viewed and evaluated as a whole and not by isolating artificially those parts in respect of which the procedure was less troubling from the whole. Remitted to a fresh Tribunal. Observations made about the proper approach where an employer actually relies on a number of distinct grounds for dismissal but an Employment Tribunal considers only some are justified (substantively or procedurally).

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. The circumstances of this appeal against a Decision of Employment Judge Warren at Telford, Reasons for which were distributed on 13 November 2013, raises the difficult question which arises in applying section 98 of the **Employment Rights Act 1996** which arises where a Tribunal concludes that the reason for dismissal involves the acceptance by the employer that a number of incidents have occurred, but in respect of which the Tribunal is satisfied that some of those incidents do not bear examination. Is the dismissal then capable of being fair within section 98(4) given that part of the actual reason advanced by the employer has been rejected by the Tribunal?

2. The decision in this case was to reject a claim for unfair dismissal.

The Facts

3. In summary the Claimant was a Registered Mental Health Nurse at a residential facility which provided psychiatric and psychological therapy for military veterans of both sexes. She was dismissed for gross misconduct on 28 November 2012 following a disciplinary hearing before a Mr Taylor. He dismissed her for the cumulative effect of three matters. The first in time, though Incident No 3 as the Tribunal regarded it, occurred six months before the disciplinary hearing. The Claimant held a discussion with a veteran on a one-to-one basis in her car. It was raining hard. He had approached her. He wanted to speak to her. This was in the car park. The veteran became upset and she was in a hurry to get home, so she drove him to the front steps of the centre and dropped him off there without there being any form of handover to other staff. Veterans at the facility can be volatile and are vulnerable. The employer thought that she had placed herself at risk by inviting him into her car. She had

placed a vulnerable service user at risk when she dropped him off, upset, on the steps of the centre without a handover, and by doing so placed both him, staff and other service users at risk. This was the "car-park incident".

4. The second allegation in time was that she had adopted inappropriate sexualised behaviour. Thus it was alleged by three members of staff that they had been touched inappropriately by the Claimant over the previous four years. To this, but as part of the second allegation as the Tribunal treated it, was added an allegation that the Claimant had discussed her underwear with the receptionist, asking if she had a visible panty line. On being told that she had, she went to the toilet, removed her pants and left them on top of her open handbag in reception. This we refer to as an allegation of sexual assault.

5. The third matter, which was that which prompted the disciplinary hearing, was that in a one-to-one meeting within the centre with a veteran, she inappropriately used sexualised examples and references to demonstrate a point. This was the "one-to-one incident".

6. She admitted the first and the third of these matters, broadly, and accepted the incident related to the removal of her underwear. She strenuously denied the sexual assaults by touching. The Tribunal found that the investigation into those allegations was deeply flawed. No reasonable employer would have carried it out in that way. It set out at paragraph 16 a number of aspects of the process which had inadequately been adopted.

7. It was also said in the ET1 and therefore it is accepted was raised before the Tribunal that in respect of the car-park incident the Claimant heard of that for the first time at the hearing. She had been invited to the hearing in respect of the other two matters, but not this. She

asserted in the ET1 that the introduction of a new allegation at the hearing was unfair and in breach of natural justice. The Tribunal did not deal with that particular procedural allegation, which plainly, if substantiated, has force - and it is accepted before us that indeed the allegation was raised for the first time at that hearing.

8. The central reasoning of the Tribunal, which despite the considerable procedural flaws it had identified and the allegation of this further significant flaw which it did not discuss, is contained at paragraph 17 and 18, which require setting out in full:

> **"17. However, there are two other allegations; the first in relation to the car park incident and the second in relation to the 1:1 incident.**
>
> **In relation to both incidents, the claimant has always admitted the facts.**
>
> **There can be no doubt therefore at all about the respondent's genuine belief based on the claimant's own admissions.**
>
> **The issue here is whether or not the interpretation of those submissions [we think it should probably be admissions] falls within the range of reasonable responses.**
>
> **Whether or not the respondent is entitled to find breaches of the Nurses and Midwifery Council Code, they are entitled to look at the admitted facts and to interpret the claimant's admissions.**
>
> **I can find nothing to suggest that the interpretation by either the disciplinary officer or the appeals officer in relation to those two incidents is anything other than within the range of reasonable responses. Other employees may have interpreted them differently but it must be within the range of reasonable responses to interpret them as they did.**
>
> **18. I turn now to whether or not it is within the range of reasonable responses to dismiss for gross misconduct in these circumstances. The claimant admitted one incident six months earlier but more particularly an incident that occurred within a day or two of her suspension. Whether or not the service user was being malicious, whether or not he was put up to it, the fact remains that the claimant admitted to holding a conversation with a service user which the respondent was entitled to say was inappropriate. Such conduct was misconduct and in the circumstances, the particularly sensitive circumstances, in which the claimant was working, it is within the range of reasonable responses for the respondent to find it to be gross misconduct.**
>
> **In the circumstances, therefore, I find that this was a fair dismissal."**

9. By way of explanation for matters which might not otherwise be apparent, the reference to breaches of the Nurses and Midwifery Council Code were references to matters which the employer had specifically taken into account in concluding that what had occurred was

sufficiently serious to justify it dismissing. It thought they were. That was challenged. The Tribunal did not deal with the challenge.

10. In respect of the appeal, the reference was to an appeal which came before a Miss Stiles. We have been taken to the disciplinary appeal notes by Mr Hirst, who appears for the Claimant. In what are fairly extensive notes there is precious little which relates to the car-park incident. It is accepted by Mr Campbell, who appears for the Respondent, that Miss Stiles appears to have said at the start of the appeal hearing that she would come back to the car-park incident, but there is no record of any further discussion in which she did so.

11. The finding at paragraph 18 plainly concentrates in its language on the one-to-one incident and not upon the car-park, and not at all upon the allegations of sexual assault. In respect of the one-to-one incident, it might be thought from what the Tribunal said that the employer suggested and found that acting as the Claimant did was gross misconduct and therefore justified dismissal. In fact, the evidence in his witness statement given by Mr Taylor, who was the dismissing officer, at paragraph 43, was that:

> **"Although I made a finding that [the Claimant] had displayed inappropriate conduct / language as outlined above and which she admitted to, I did not think that this, on its own, was enough to justify dismissal. I felt that her actions in this respect amounted to misconduct but had this been my only finding against [her], then I think that an alternative sanction, such as a written warning, may have been more appropriate. …"**

12. Mr Hirst argues that the Tribunal's conclusion at paragraph 18 so misunderstood the evidence that it was, at least in this respect, perverse. He argues that given what Mr Taylor had said, it was perverse for the Tribunal to conclude that the conduct amounted to gross misconduct and therefore the dismissal was within the range of reasonable responses. He submitted in the alternative that the Tribunal substituted its own view for that of the Respondent. When the Judgment is read overall, whether it is seen as relying upon the one-to-

one incident on its own or together with the car park, it does not say sufficiently why it was reasonable in response to that for there to be dismissal.

13. As a second ground he argued that the Tribunal erred in law by failing to apply the correct test in accordance with section 98(4) of the **Employment Rights Act** because, as paragraph 18 indicated, the Tribunal had looked to see whether there was gross misconduct. That is a contractual test, or one which relied on the policies of the employer, rather than the test set out in section 98(4). **Brito-Babapulle v Ealing Hospital NHS Trust**, [2013] IRLR 854 and the later case of **Burdett v Aviva Employment Services Ltd** UKEAT/439/13, a Judgment of 14 November 2014, showed this approach to be in error. What is needed is an evaluation of its own by the Tribunal, as to whether or not, taking all the circumstances into account, the employer acted reasonably or unreasonably in treating the reason it had for dismissal as sufficient.

14. The third ground attacked the Tribunal's failure to deal properly with the procedural failings in respect of the car-park incident.

15. In his response Mr Campbell urges, rightly, that a Tribunal's Judgment should be read as a whole, and a considerable margin given to it when understanding what the Tribunal wished to say. He relies, in particular, on the observations made by Mummery LJ in **Fuller v Brent** [2011] IRLR 414 at paragraph 31. We entirely accept that a Tribunal's Judgment should not be subject to an unduly pernickety critique, as if it were to be expected to be the finest piece of legal draftmanship. It will almost inevitably contain infelicities and sometimes conclusions spread liberally throughout the text rather than identified as such at one particular part of its reasoning.

16. Secondly, he urges that the Tribunal here were considering not just whether dismissal was justified on the basis of the one-to-one conversation but on that conversation taken together with the car park incident. He points to the witness statement of Mr Taylor, in which he sets out on paper his reasons for having thought that incident particularly serious. He argued that the reasoning was adequate and, if not, the **Burns-Barke** procedure could be adopted. The decision was, in his submission, not perverse.

Discussion

17. It is often necessary in a jurisdiction which is entirely statutory to remind ourselves of the wording of the statute. Whatever glosses may be put upon it by cases, it is that wording which is central. Section 98 of the **Employment Rights Act 1996** begins as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> >
> > **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."**

18. Some observations. First, the reason for dismissal is a set of facts, or it may be beliefs, which the employer actually has for making the dismissal which occurred when it occurred. The section requires identification of that reason, not whether there might have been a good reason for the dismissal which in fact occurred. Second, the reason is not "capability" or "conduct" or "redundancy" or "breach of enactment", though it must be capable of falling within a category to which some or one of those labels would be appropriate. They are broad summary categories. The reason to be focussed on by the Tribunal is the reason which the employer actually had, not the one which he might have had albeit that the same broad label could be applied to it. Third, where the reason for dismissal is a composite of a number of conclusions about a number of different events, it is the whole of that reasoning which the

Tribunal must examine, for it is that which the employer held as the actual reason for its dismissal of the employee.

19. We turn to section 98(4). The opening words provide:

> **"[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."**

20. The determination thus has to have regard to the reason. The reference to the reason is not a reference in general terms to the category within which the reason might fall. It is a reference to the actual reason. Where, therefore, an employer has a number of reasons which together form a composite reason for dismissal, the Tribunal's task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss. An example might be where there had been a chain of events in which it is suspected that an employee had his "hand in the till". If only some of those events are sustained before a Tribunal, nonetheless that might be quite sufficient - indeed perhaps usually would be - for a dismissal for that reason to be sustained even if the employer believed that all the events had occurred whereas the Tribunal thought the employer was only entitled to

consider that some had. Similarly, if an employer thought there to have been several different occasions on which racist language had been used by an employee, but a Tribunal concluded that some of those incidents did not bear close examination; or if the employer thought there had been a number of sexual assaults, but the Tribunal thought the number smaller, nonetheless a dismissal - "having regard to the reason shown by the employer" - might easily fall within the scope of that which it was reasonable for an employer to have done.

21. All must depend upon the employer's evidence and the Tribunal's approach to it. But that approach must be to ask first what the reason was for the dismissal, and to deal with whether the employer acted reasonably or unreasonably by having regard to that reason: that is, the totality of the reason which the employer gives.

22. In the present case, we are concerned that the Tribunal identified three separate complaints which the employer had as the reason for dismissal. One of them might be thought objectively to be the most serious of all - the complaint of sexual assaults - which gave rise to the bulk of the Claimant's complaints about procedure. But the Tribunal simply sidelined that as an adequate reason for dismissal because of the very deep flaws in the totally inadequate process which the employer had adopted to deal with it. It thus looked separately at the other two complaints without appreciating that they were only part of the reasons which the employer actually had. There is no obvious trace that the Tribunal, however generously one reads the decision, was in paragraph 17 and 18 looking at the whole of the actual reason which the employer had.

23. The point is further demonstrated by the reference to the Nursing and Midwifery Council Code. This was part of the employer's reasoning. The Tribunal's approach was not to ask

whether the approach which the employer took was or was not reasonable but whether they "are entitled to look at the admitted facts". In our view what the Tribunal was reasoning here was that the employer could have come to a perfectly fair decision to dismiss if it had eliminated from its consideration the allegations of sexual assault and if it had not had regard to the breaches of the Nurses and Midwifery Council Code. But the fact is that it actually had done so, and that fact needed to be recognised in its analysis. The Tribunal looked at what it would have been reasonable and fair for an employer to have thought, not whether it was what it actually thought and whether having regard to that reason dismissal was reasonable.

24. We accept that the focus in paragraph 18 is upon the one-to-one incident almost to the exclusion of the car-park incident. Though Mr Campbell's submissions pointed out that an error of expression might be forgiven, he accepted that on its face the judgment misunderstood the employer's position. It did not in fact consider the claimant guilty of gross misconduct: the Tribunal appears to have thought that it did. Mr Campbell was right to accept this. Paragraph 18 is the critical paragraph. In its central reasoning the Tribunal attributed to the employer a view which the employer did not have. Since its task was to evaluate the reason the employer actually had, it fell into error by asserting a view it did not have.

25. In dealing with the car-park incident, so far as it did so, it did not deal with the procedural challenge that had been made to the way that was dealt with. Here again Mr Campbell points out that there might have been a powerful case had the Tribunal actually considered it: that is, that when the incident was put to the Claimant during the disciplinary hearing (and for the first time), she accepted the basic facts of what had happened. She did complain about the matter being jumped upon her. In the light of that, when it came to appeal, Miss Stiles offered, prior to the appeal, that that part of the hearing be re-heard. That offer by e-mail was not taken up by

the Claimant. Therefore, he argues, the unfairness which, on any view, was caused by bringing a person to a disciplinary hearing on two broad charges but actually proceeding to hear a third, a matter which as we have indicated the dismissing officer thought the most serious of those which he accepted, was remedied by the fair appeal.

26. The problem with this is that the fairness of a process which results in dismissal has to be assessed overall by the Tribunal. The Tribunal never assessed it in that light. It might have come to the conclusion that, taken overall, the process was fair, or at least not unfair to the Claimant. But it might not have done. There are powerful arguments to the opposite effect, emphasising that it was a breach of natural justice, and contrary to the ACAS Code. The lay members sitting with me are emphatic in regarding it as being unfair not just to the employee but also to the employer, since if the matter comes before a panel, fresh to the topic, it will have had no chance to reflect adequately and properly upon it beforehand. It also suggests that there can have been no proper and adequate investigation of the matter, for any such investigation would inevitably alert the employee to or involve her in what was happening. These matters and their strengths are however not for us to resolve. They are matters essentially for a Tribunal to judge. But they are important matters, which require to be resolved. They were raised in the ET1. They were not answered.

27. It is unfortunate that this Tribunal did not begin its Judgment by setting out what the issues were which it had to determine, as their presidential guidance asks Tribunal Judges to do. Had it done so, it is likely to have set out the familiar issues arising under section 98. That would have directed it toward looking at the real reasons for dismissal and evaluating those. It would have identified that the question was not whether the Claimant's conduct was gross misconduct within her contract of employment, but whether dismissal was actually outside the

range of reasonable responses to that which the employer reasonably thought she had done, and it would have identified, if they had remained in contention, that procedural issues arose in respect of the car-park incident.

28. We should say here that neither of the advocates before us were present at the Employment Tribunal, though a close colleague of Mr Campbell represented the employer. It may be, therefore, that matters occurred at the Tribunal which justified its approach about which we do not and cannot know. But we can and have to judge the Judgment in the light of what it actually says, making all due allowance in recognition of the same principle as inspired paragraph 31 of **Fuller**. That we have done.

29. It follows that we conclude that here the Tribunal did not take the correct approach. It did misunderstand the evidence which had been given to it. It did not deal appropriately with the issues before it. It did not indicate at any stage what it made of a statement by Mr Taylor that he thought the car-park incident was sufficient on its own to justify dismissal. Whether Mr Taylor's view was regarded as sufficient or not was a matter for the Tribunal to judge. It was not simply a matter of rubberstamping the view by the employer. The Tribunal could have taken that view. There are powerful reasons why it might, but we cannot say necessarily that it would.

30. It follows that for the grounds which have been advanced by Mr Hirst, the appeal must be and is allowed.

31. We would simply say this in closing, bearing in mind the question we posed at the outset of this Judgment. The answer, we think, to the problem that we identified is to have in mind the

provisions of section 98. It is familiar territory that although an employer might be justified in colloquial terms in dismissing an employee by means of a procedure which is totally flawed where what the employee did would plainly merit dismissal, on the present state of the law, as Elias J pointed out in **A v B**, that would be heresy. He pointed out at paragraph 86 that if an investigation is not reasonable in all the circumstances, a dismissal is unfair, and the fact it may have caused no adverse prejudice to the employee goes, at least as the law currently stands, to compensation.

32. So too, it may be in some cases, that where one or two strands inextricably intertwined with others in an employer's decision to dismiss fall away, a Tribunal might conclude, looking at the matter overall and as required by section 98, that the dismissal which actually occurred for that real reason was unfair. But having done so, it might well conclude that it was so obviously justified in other respects that compensation should be limited if not extinguished.

33. We will now turn to consider the consequences of our decision.

34. It is open to the parties to talk. In a case such as this, in which the issue seems to be monetary, there would seem to be obvious sense in mediating or at least talking, because it might be said (it is for the parties to evaluate the strength of this) that on the one hand there have been very significant procedural failings, and not only in respect of the sexual assault allegations; but on the other it might be said that if a dismissal is found unfair any compensation is likely to be significantly limited. We note the views already expressed by a Judge who has seen a lot of the evidence paraded in front of her. It is not for us to judge, but this may well be a case in which is not obvious that one side must win and the other must lose, and that there is much to be gained by discussion.

35. After hearing argument as to whether the matter should be remitted to the same or a fresh Tribunal, by regard to paragraph 46 of **Sinclair Roche Temperley v Heard** [2004] IRLR 763, we order that the matter will be remitted to a fresh Tribunal for re-hearing. Although we take into account proportionality, the case was relatively short. We take into account Tribunal professionalism, but we recognise that the most powerful factor, it seems to us, is "the second bite". The decision under appeal is one of a Judge who expressed a fairly clear view as to where she thought the merits lay, and in that light it is reasonable for the Claimant to think it undesirable that same Judge should hear the matter again. Accordingly it will be remitted for re-hearing. By re-hearing we mean that the evidence will be brought and considered afresh, whatever it may be, and the parties are not to be tied to the evidence or the submissions which they made before.

36. Can I thank you both very much and, in particular, for the succinct and effective way in which you both put your submissions.