Appeal No. UKEAT/0205/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 April 2014

Before

HIS HONOUR JUDGE PETER CLARK

MR C EDWARDS

MR T M HAYWOOD

AUTISM SUSSEX LTD — APPELLANT

MISS LOUISE ANGEL — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services Ltd Legal Services The Peninsula 2 Cheetham Hill Road Manchester M4 2FB
For the Respondent	MR MICHAEL FOSTER (Solicitor) Lacuna Place Havelock Road Hastings East Sussex TN34 1BG

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

CONTRACT OF EMPLOYMENT – Wrongful dismissal

Employer appeal against finding of unfair dismissal based on no reasonable investigation in conduct case dismissal.

No substitution of Employment Tribunal's view/perversity. Unfair dismissal appeal dismissed.

Wrongful dismissal appeal allowed. Inadequate reasons. That aspect remitted for reconsideration by same ET at remedy hearing.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This is an appeal by the Respondent before the Ashford Employment Tribunal, Autism Sussex Ltd, against the reserved judgment of a Tribunal chaired by Employment Judge Vowles, promulgated with Reasons on 17 December 2012, upholding the Claimant, Miss Angel's, complaints of both unfair dismissal and wrongful dismissal.

2. The Claimant began work for the Respondent as a Senior Support Worker in September 2005 on the bank, becoming a permanent employee in November 2007 until her summary dismissal on 29 November 2011. The reason for dismissal was the Respondent's belief that she had falsely claimed payment for some 600 hours' work done partly at home when she had either not done the work or the work had not been authorised.

3. The Tribunal found that the Respondent did not carry out a reasonable investigation before dismissing the Claimant for the reasons given, particularly at paragraphs 33-39 of their Reasons. Further they found the involvement of Mr Lord, in carrying out the investigation into the Claimant's conduct and presenting the management case at the disciplinary hearing before Mrs Young, was procedurally unfair, he having signed off most of her worksheets. They found that the decision to dismiss fell outside the range of reasonable responses. The dismissal was unfair. Finally they also found the dismissal to be wrongful at common law (see paragraph 50).

The Appellant's case

4. In challenging the finding of unfair dismissal Mr Rees submits that the Tribunal impermissibly substituted their view for that of the Respondent: see **London Ambulance Service v Small** [2009] IRLR 563 (CA) or otherwise reached a legally perverse conclusion.

5. We remind ourselves, first, that we must not substitute our view for that of the ET: see **Bowater v NW London Hospitals NHS Trust** [2011] IRLR 331, paragraph 19, per Longmore LJ and, secondly, the high hurdle presented to an Appellant relying on the perversity challenge: see **Yeboah v Crofton** [2002] IRLR 634.

6. We note the Tribunal's correct self-direction against substituting its own view at paragraph 31.3 of the Reasons. Did the Tribunal nevertheless breach that self-denying ordinance in finding, in particular, that the Respondent had failed to carry out a reasonable investigation in accordance with the well-known **Burchell** test?

Conclusions

7. Despite Mr Rees' carefully constructed submissions, we are persuaded by Mr Foster, first, that there was ample material to support the Tribunal's findings at paragraphs 33-39 and, secondly, that, in making those findings, the Tribunal were astute in applying the standards of the reasonable employer and not simply their own subjective view as to how they, standing in the shoes of the employer, would have conducted the internal disciplinary investigation. In these circumstances we reject the appeal against the finding of unfair dismissal.

8. The wrongful dismissal finding is a different matter. First, there is no self-direction by the Tribunal as to the proper legal test. It is, in general, for the Respondent to show, on the balance of probabilities, that the Claimant was in fact guilty of the misconduct alleged such as to amount to a repudiatory breach of contract by her entitling the Respondent to dismiss her without notice or pay in lieu. There is no reasoning by the Tribunal at paragraph 50, or elsewhere, to show how they answered that question on the facts found.

9. Further, there is this additional feature in the present case. Whereas after-acquired knowledge of pre-termination misconduct is not relevant to the fairness of a dismissal (see **W Devis & Sons v Atkins** [1977] ICR 662 (HL), although it may be relevant to compensation for unfair dismissal, at common law an employer may rely upon post-termination knowledge of pre-termination misconduct as an answer to a claim of wrongful dismissal (see the old case of **Boston Deep Fishing v Ansell** [1888] 39 CHD 339 (CA). That would be a relevant consideration if, contrary to the Claimant's protestations of innocence, she were to be convicted in criminal proceedings yet to be determined in connection with the matters touched on at paragraphs 42-44; matters irrelevant, as the Tribunal found, to the question of unfair dismissal, but potentially relevant to the wrongful dismissal claim.

10. In these circumstances we think that the proper course is to allow the Respondent's appeal in relation to the wrongful dismissal finding and to remit that matter for reconsideration and full reasons to be given by the same Employment Tribunal, chaired by Employment Judge Vowles, at the deferred remedy hearing, which is yet to take place.