Appeal No. UKEAT/0212/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 November 2014
Judgment handed down on 5 December 2014

Before

HIS HONOUR JUDGE SHANKS

MR B BEYNON

MR S YEBOAH

SOUTH LONDON AND MAUDSLEY NHS FOUNDATION TRUST APPELLANTS

MS O BALOGUN RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR BEN COOPER (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR
For the Respondents	MR O ADIEZE (Solicitor Advocate) Instructed by: Employment Rights Representation & Advisory Service 1 Anglesea Road Woolwich SE18 6EG

SUMMARY

UNFAIR DISMISSAL

Procedural fairness/automatically unfair dismissal

Polkey deduction

The Employment Judge found that the Claimant had been unfairly dismissed and that there should be no **Polkey** deduction.

She erred in three respects:

(1) she wrongly found that the reason for the dismissal was not potentially fair, when on any view it was a reason relating to the Claimant's conduct;

(2) she adopted a flawed approach to the question of whether the dismissal was fair under section 98(4) **Employment Rights Act**;

(3) having implicitly found that a fair procedure may have resulted in the Claimant's dismissal, she decided wrongly that it was not open to her to make a **Polkey** reduction.

HIS HONOUR JUDGE SHANKS

Introduction

1. Ms Balogun was employed by the Trust as a registered mental health nurse from January 2005 until she was summarily dismissed on 2 July 2013 following an incident on 1 September 2012. In a Judgment sent to the parties on 27 February 2014 Employment Judge Morton found that she was both wrongfully and unfairly dismissed and that there was no basis for a **Polkey** reduction. The Trust says the Judge made errors of law in relation to unfair dismissal (1) in finding that the Trust had not discharged the burden of showing a potentially fair reason for dismissal; (2) in her treatment of a breach of the Trust's disciplinary procedure in relation to obtaining evidence from a service user; and (3) in rejecting a **Polkey** reduction.

Background facts

2. On 1 September 2012 Stuart Brownings, a fellow member of staff, reported to senior staff that he had witnessed Ms Balogun repeatedly slapping a service user, WB. He provided the Trust with a statement describing what he had seen. The investigating officer, Ms Kensall, took the view that the incident fell within the Trust's Safeguarding Adults Policy and, as part of the safeguarding procedures, on 4 September 2012 she interviewed another service user, JS, who had told Mr Brownings immediately after the incident that he had also witnessed it. Unsurprisingly perhaps, the account given by JS was not exactly the same as that given by Mr Brownings but he was clear that Ms Balogun had slapped WB. On 5 September 2012 Ms Kensall suspended Ms Balogun and reported the matter to the police.

3. After considerable delay the police decided to take no further action and recommended that the matter be dealt with under the Trust's internal disciplinary procedure. Ms Kensall interviewed Mr Brownings but decided not to try to re-interview JS (who had been discharged

in the meantime). She recommended that a full disciplinary panel consider the allegation that Ms Balogun had slapped WB.

4. After considerable further delay, the disciplinary hearing was held on 2 July 2013. Mr Brownings gave evidence and was cross-examined by Ms Balogun's union representative; he confirmed his previous accounts which were all consistent. Ms Balogun gave evidence denying that she had hit WB. The panel (whose decision was announced by Mr Power) found that Mr Brownings was a credible witness who had no issues with Ms Balogun and noted that he "… was supported by another witness [JS]". They concluded:

> **"On the balance of probability the panel believe that the incident did occur. You failed to admit the incident or give any credible explanation when prompted. Therefore the panel concluded that dismissal is the only option to us as we are very concerned a similar incident could occur again."**

An internal appeal was refused on 26 September 2013.

Reason for dismissal

5. It is not entirely clear what finding the Judge intended to make about the reason for the dismissal. At paragraphs 6 and 13 of the judgment she stated that it was "for misconduct". But at paragraph 58, apparently in the context of a discussion about the appeal she said this:

> **"I find that the [Trust] has not discharged the burden of showing that it dismissed … the Claimant for misconduct in question in this case. On the contrary it clearly states that it dismissed for something else - a refusal to admit to wrongdoing - that does not amount to a potentially fair reason to dismiss under s 98 ERA."**

It appears that the latter finding was based on evidence from Mr Power, which concerned the Judge, to the effect that if Ms Balogun had admitted slapping the patient she would have been given a final written warning rather than dismissed.

6. Assuming that the Judge did intend to make a finding of unfair dismissal based on a failure to satisfy the requirement on the employer in section 98(1) to show a reason for dismissal falling within section 98(2), we have no doubt that she fell into error for two reasons:

(1) We accept Mr Cooper's submission that, on a proper analysis of the evidence, including that of Mr Power, the only reasonable conclusion in this case was that the *principal reason* for the dismissal was the misconduct on 1 September 2012 and that the failure to admit it thereafter (which was something which could properly be taken into account in deciding on the appropriate sanction) was an additional, subsidiary, reason for the dismissal.

(2) In any event, even if the failure to admit what the panel found Ms Balogun had done had been properly considered to be the principal reason for the dismissal, that reason clearly *related to the conduct of the employee* (as required by section 98(2)(b)), because it was itself a form of conduct and/or because it related to her conduct on 1 September 2012.

We are afraid that a finding of unfair dismissal based on section 98(1), if made, was unsupportable.

Breach of Trust's disciplinary procedure

7. The Trust's disciplinary procedure contained specific provisions about interviewing service users which were designed for the protection of staff. In brief, the procedure provided that a service user should be interviewed in the presence of a senior nurse, who should meet the investigating officer in advance to plan the interview with a view to avoiding leading the service user, and, at the end of the interview, the service user's doctor should confirm that he understood what he was saying and its implications. Although JS was interviewed on 4

September 2012 in the presence of three members of staff, including a mental health consultant, that interview was carried out as part of the safeguarding procedure and it was accepted that the interview did not comply with the requirements of the disciplinary procedure. It is clear that this was a significant factor in the Judge's decision that the dismissal was unfair.

8. Mr Cooper directed our attention to three relevant passages in the Judgment dealing with the evidence of JS which, he said, indicated a fundamentally flawed approach by the Judge. In paragraph 49, she said this:

> **"… JS had been discharged and the decision was taken that it was not appropriate to recall him to give further evidence. The [Trust] explained why that decision was taken by reference to the nature of the patients who were being cared for on the ward and their vulnerability. However the consequence of that decision in this particular case was that the Trust did not follow its own prescribed procedure for the purpose of interviewing a patient who has raised a complaint against a member of staff … However explicable the [Trust's] decision in this respect a Claimant who is facing the loss of her livelihood as a potential consequence of a disciplinary investigation is entitled to expect high standards of fairness in both the investigation and the procedure followed by the [Trust]…"**

In paragraph 54 she said:

> **"… I recognise the quandary that the Trust was in when faced with the need in the first place not to prejudice a potential police investigation and in the second place not to cause distress to a discharged patient by recalling him for the purposes of internal disciplinary proceedings. However the fact that the [Trust] could proffer an explanation for the decisions that it made does not detract from the unfairness to the Claimant of it having proceeded in the way that it did. I therefore find that the … dismissal was substantively unfair because the [Trust] formed a belief in the Claimant's guilt on the basis of an investigation and witness evidence that contained serious flaws.**

And in paragraph 59 she said:

> **"… I recognise that in a case involving potential abuse of a vulnerable elderly patient the need to protect patients from further abuse is, and should be uppermost in the [Trust's] mind. However the tribunal's task is not to consider how the Trust should protect its patients, but to consider whether the Claimant was treated fairly in accordance with the requirements of the ERA and the relevant case law and I find that in this case she was not."**

9. Mr Cooper referred us to well known passages in two Court of Appeal authorities (see **Bailey v BP** [1980] ICR 642 at 648E and **Taylor v OCS Group** [2006] ICR 1602 at 1615E-1616A) dealing with the proper approach to procedural defects when a Tribunal is considering

whether a dismissal was fair or not. As this Tribunal has said countless times, the crucial thing is the statutory test in section 98(4) of the **Employment Rights Act 1996**, namely whether in all the circumstances the employer acted reasonably in treating its reason for dismissing the employee as sufficient. A procedural defect is a factor to be taken into account but the weight to be given to it depends on the circumstances and the mere fact that there has been a procedural defect should not lead to a decision that the dismissal was unfair. The fairness of the whole process needs to be looked at and any procedural issues considered together with the reason for the dismissal as the two will impact on each other.

10. Having regard to these principles we are persuaded that the Judge did indeed adopt a legally flawed approach which is demonstrated by the passages in the Judgment to which Mr Cooper referred us. It seems to us that in those passages the Judge is clearly attaching too much importance to the procedural issues relating to JS's evidence and forgetting to look at the overall process and consider whether the Trust was acting reasonably. The Trust's explanations for not complying with the disciplinary procedure in relation to JS's evidence and the importance it ascribed to protecting patients and not prejudicing the police investigation were clearly important factors to be taken into account in deciding whether it acted reasonably, and should not simply have been put to one side.

11. Mr Adieze reminded us of the passage from **A v B** [2003] IRLR 405 quoted by the Judge at paragraph 51 of her Judgment where Elias J stated that serious allegations of criminal misbehaviour must always be the subject of careful and even-handed investigation and drew our attention in particular to the inconsistencies between Mr Browning's statement and JS's interview. It may be that, if the matter is looked at afresh applying the law properly, another

Tribunal will come to the view that the dismissal was indeed unfair; however, in our view, the decision made by the Judge involves an error of law and cannot stand.

Polkey

12. At paragraph 62 the Judge stated that it would not be open to her to make a **Polkey** deduction. She referred to her findings as to the defects in the manner the Trust had dealt with the matter and concluded:

> **"… This is not a case in which there were procedural defects that had no effect on the outcome. There is a real and distinct possibility that the outcome would have been different if the [Trust] had properly engaged with the problems with JS's evidence."**

Quite apart from the question of whether it was appropriate for the Judge to attempt to classify the defects she had found as substantive or procedural, it is clear that her finding that there was a possibility that the outcome would have been different in the absence of the defects involves an implicit finding that there was a possibility that the outcome would have been the same. That is precisely the possibility which a **Polkey** reduction is intended to deal with. Assuming her finding of unfair dismissal had been right, she ought therefore to have considered the appropriate reduction and she made a clear error of law in not doing so.

Disposal

13. Although Mr Cooper invited us to do so, we do not think this is an appropriate case for the EAT to substitute it own findings: in particular, the section 98(4) question needs to be remitted and, if a **Polkey** reduction is relevant, the amount of the reduction can only be assessed by an Employment Tribunal. We are therefore forced to remit Ms Balogun's unfair dismissal claim to a fresh Tribunal.