Appeal No. UKEAT/0361/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 March 2014
Judgment handed down on 8 May 2014

Before

HIS HONOUR JUDGE PETER CLARK

BARONESS DRAKE OF SHENE

MR S YEBOAH

WHITTINGTON HOSPITAL NHS TRUST — APPELLANT

MS STELLA NDUKA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS HAYLEY McLORINAN (of Counsel) Instructed by: Bevan Brittan LLP Solicitors Fleet Place House London EC4M 7RF
For the Respondent	MR JOHN HORAN (of Counsel) Instructed by: Fisher Meredith Solicitors Blue Sky House 405 Kennington Road London SE11 4PT

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Employment Tribunal finding of unfair conduct dismissal set aside. Factors considered by ET irrelevant to reasonable investigation question. Dismissal fell within band of reasonable responses.

HIS HONOUR JUDGE PETER CLARK

1. This appeal raises once again the question of whether an Employment Tribunal properly applied the band of reasonable responses test to the sanction of dismissal in a conduct case.

2. The parties before the Watford Employment Tribunal were Ms Nduka, Claimant, and Whittington NHS Hospital Trust, Respondent. By a reserved judgment with written Reasons, dated 27 March 2013, a full Employment Tribunal chaired by Employment Judge Smail upheld the Claimant's complaint of unfair dismissal against the Respondent, her former employer, but with a two-thirds **Polkey** reduction in her compensation award and no further deduction for conduct on her part contributing to her dismissal. Against the finding of unfair dismissal the Respondent now appeals.

The facts

3. The Claimant was employed at the hospital as a grade 5 staff nurse between 6 December 2004 and her summary dismissal on 7 December 2011.

4. Over the weekend of 25-27 June 2011 the Claimant was working night shifts and was the most senior nurse on duty on Mercer's Ward. The three disciplinary charges subsequently brought against the Claimant, upheld at the disciplinary stage and on appeal, arising from that weekend, were:

(1) administering medication (morphine) to a patient (OW), later than prescribed;

(2) signing for medication that a patient (DL) did not receive on 25 June;

(3) failing to follow the controlled drug policy.

5. The Employment Tribunal accepted that late administration of medication to OW, who was undergoing a sickle cell crisis, caused distress to that patient, who was experiencing extreme pain, and to other patients on the ward. That was the most serious of the three charges.

6. Kara Blackwell, who dismissed the Claimant, had introduced changes resulting in reduced nursing cover on the ward. Her position was that, if the Claimant could not cope, she should have escalated the problem to two site managers who could arrange support.

7. The Claimant's position during the disciplinary process was to apologise for any delay in administering medication to OW and consequent distress to the patient.

The Employment Tribunal decision

8. Having directed themselves to the applicable law the Employment Tribunal found that the reason for dismissal related to the Claimant's conduct and that the Respondent had reasonable grounds for that belief after a full investigation and fair procedure save in respect of their failure to give full and fair consideration to three matters, namely:

(1) contrary to what the Employment Tribunal describe as the hostile report of Ms Gilbride, the matron who carried out the original investigation into complaints by patients to Mercer's ward manager, Sarita Kataria, the Claimant had acknowledged late delivery of medication to OW and had apologised;

(2) the Claimant's clean six-and-a-half year record of service at the hospital;

(3) the Respondent's view that re-training would not help in this case.

9. Both Ms Blackwell and the appeal panel (three very senior executives, one of whom was a qualified nurse) failed to give "full consideration to those three matters and to the option of giving a final warning coupled with re-training by way of sanction".

10. On that basis the Employment Tribunal found the dismissal unfair and went on to find that, had a fair procedure been followed, addressing the three features listed above, there was a one-third chance that the Claimant would have retained her employment, presumably with a warning and re-training.

The appeal

11. Appeals in misconduct unfair dismissal cases still regularly appear in this appeal tribunal and the Court of Appeal. A considerable body of authority has grown up since **BHS v Burchell** [1978] IRLR 379. Departures from the **Burchell** test in the EAT were corrected in **Foley v Post Office** [2000] IRLR 1283 and the range of reasonable responses test affirmed, as was the approach of Browne-Wilkinson P in **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439, that the Employment Tribunal must not substitute its view for that of the Respondent employer. Where it does so impermissibly an appeal will be allowed; see **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA; however, this Employment Appeal Tribunal must not itself substitute its view for that of the ET: see **Bowater v Northwest London Hospitals** [2011] IRLR 331 and **Graham v DWP** [2012] IRLR 759. An Employment Tribunal decision which properly directs itself to the law and correctly applies it to the facts found ought not to be interfered with on appeal.

12. In this case the Employment Tribunal correctly asked themselves these four questions (Reasons paragraph 3.2):

(a) Was there a genuine belief in misconduct?

(b) Were there reasonable grounds for that belief?

(c) Was there a fair investigation and procedure?

(d) Was dismissal a reasonable sanction open to a reasonable employer?

13. The Employment Tribunal answered questions (a) and (b) in the affirmative. It is in relation to question (c) that this appeal is focussed. Having answered that question other than affirmatively, the dismissal was unfair without going on to consider separately question (d).

14. Miss McLorinan submits that the factors relied on by the Employment Tribunal, set out at paragraph 26, to found their conclusion on question (c) simply do not arise in that context. If anything they go to the reasonableness of the sanction under (d), as to which she asks us to infer that the Employment Tribunal, in finding that dismissal was plainly an option (paragraph 28), acknowledged that dismissal for the particular offences in this case fell within the range of reasonable responses.

15. In reply, Mr Horan argues that the three factors identified by the Employment Tribunal were relevant to question (c). Having made their findings of fact, it is not open to this Tribunal to interfere.

16. The purpose of the employer's investigation in a conduct case is threefold: to enable the employer to discover the relevant facts as to the offence(s) charged; to allow the employee an opportunity to respond to the allegations made and thus defend himself against the charges laid; and thirdly to provide him with an opportunity to put forward any factors which might mitigate the offence, if admitted or made out.

17. On the Employment Tribunal's findings of fact all three objectives were achieved. The Respondent established the facts of what happened on the night shift in Mercer's ward over that weekend, not least from the "balanced assessment" provided by Dr Linda Thompson (see paragraph 11). The Claimant was given every opportunity to state her case, including her

mitigation, to the investigator, Ms Gilbride (see paragraph 14) at the disciplinary hearing before Ms Blackwell and again before the appeal panel on 27 February 2012 (paragraph 19). There was a full investigation (paragraph 28).

18. As to the procedure followed by the Respondent (described above) it was reasonable "save in respect of the Respondent's failure to give full consideration to [the 3 matters set out at paragraph 26]". See paragraph 28 also.

19. The importance of procedural safeguards in a disciplinary process are clear from the ACAS Code of Practice and were emphasised by the House of Lords in **Polkey v AE Dayton** [1987] ICR 142. In the present case it is apparent, on the Employment Tribunal's findings, that the Respondent followed a proper procedure: investigation, disciplinary, appeal at which the Claimant had every opportunity to put her case.

20. Against that background we return to the three factors identified by the Employment Tribunal at paragraph 26.

(a) Going back to the findings at paragraph 14-15 it is clear that the Claimant gave an apology in her written statement to Ms Gilbride. The Employment Tribunal (paragraph 15) express their assessment of the Claimant's level of insight in contrast to that of Ms Gilbride. However, the point is that the Claimant put her case before the employer during the investigation process.

(b) The Claimant's six-and-a-half year employment history was a matter of record. That was not a fact overlooked in the investigation.

(c) The Employment Tribunal express their view as to the value of re-training the Claimant in contrast to that expressed by the Respondent's witnesses.

21. In short, in our judgment, the three factors relied on by the Employment Tribunal had nothing to do with question (c). Either they went to the sanction question (d) or the Employment Tribunal has, contrary to their self-direction, substituted their view as to the appropriate disciplinary outcome. However, there is no express finding on question (d); unless "dismissal was plainly an option" suggests that dismissal fell within the range.

22. We are thus persuaded by Miss McLorinan that the Employment Tribunal fell into error when dealing with question (c). On their relevant findings they concluded that a reasonable investigation was carried out and a fair procedure followed.

Disposal

23. It follows that this appeal must be allowed. Given that only question (d) remains to be answered, we feel able to answer that question ourselves.

24. Given the neglect of the patient OW and the pain and suffering which she suffered, balancing the Claimant's length of unblemished service and subsequent apology, it cannot be said, in our collective judgment, that dismissal fell outside the range of reasonable responses. Some reasonable employers may well have imposed a penalty short of dismissal, final warning and re-training; but another group of reasonable employers could conclude that dismissal was the appropriate sanction on the facts of this case.

25. Accordingly we shall set aside the Employment Tribunal's finding of unfair dismissal and substitute a finding that the dismissal was fair.