Appeal No. UKEAT/0394/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 March 2014

Before

HIS HONOUR JUDGE PETER CLARK

MR M CLANCY

MR G LEWIS

TEW — APPELLANT

T — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR T R SMITH (Solicitor) Messrs Ward Hadaway Solicitors Sandgate House 102 Quayside Newcastle upon Tyne NE1 3DX
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Finding of procedural unfairness by Employment Tribunal based on a misreading of Respondent's grievance procedure. Finding unsupported by evidence. Appeal allowed and finding of air dismissal made.

HIS HONOUR JUDGE PETER CLARK

1. This case was heard in the Teesside ET. The parties are referred to as T, Claimant, and TEW, Respondent. By a reserved judgment, promulgated with reasons on 13 June 2013, the Tribunal upheld the Claimant's complaint of unfair dismissal, subject to a 100 percent **Polkey** deduction extinguishing any compensatory award. He was to receive his full basic award.

2. Against the finding of unfair dismissal, this appeal is brought by the Respondent. It was allowed to proceed to a full hearing on the paper sift by HHJ David Richardson. The Claimant does not appear today, having earlier indicated in an e-mail dated 26 August 2013 to the EAT that he was "unable to oppose the appeal as I have do not have the strength, physical, mental or financial means to do so." We do not treat that as a consent to the appeal being allowed; in any event before interfering with a reasoned Tribunal decision we would need to be satisfied that an error of law exists.

Factual background

3. The Claimant commenced employment with this Respondent in November 2007. He may have had earlier continuous service but that is not material to our considerations. He worked as a Desktop Project Manager.

4. On 15 or 16 February 2012 ST, a female member of staff who reported to the Claimant, raised a ten-page written grievance about his conduct towards her. Specifically she alleged five acts of sexual harassment, which are listed at paragraph 4.5 of the reasons. That grievance was submitted to Linda Blenkinsopp, the appropriate manager. What then happened is set out at paragraphs 4.2 and 4.3.1, which we should set out in full:

"4.2 On 15th or 16th February 2012, ST submitted a grievance... to her manager in relation to the behaviour of T. The grievance which runs to 10 pages contains a number of complaints dating back to 2007. ST submitted the grievance to Linda Blenkinsopp as the appropriate manager to deal with it. Ms Blenkinsopp made contact via the telephone with T at about 3.30pm on 16th February. The evidence from the Claimant was that he was told that a grievance had been made against him, he was not told who had made that grievance nor was he told what the allegations were that were being made against him. The telephone call was to set up a meeting with Miss Blenkinsopp and at 5pm the same day. T returned to his base site at approximately 4.45 in the afternoon however he did not meeting with Miss Blenkinsopp at the pre-arranged time of 5pm. Miss Blenkinsopp attempted to telephone him and he text her to say that she should not do that or contact him at all. Sometime during the evening of 16th February T took a large amount of medication; it appears that this was as a result not only of the grievance but also issues and stresses at home. On 17th February Ms Blenkinsopp visited ST at home and spoke to her about the grievance that she had raised against T. According to a letter addressed to ST [that is a letter dated 20 February 2012, to which we shall return] Miss Blenkinsopp explained the procedures to ST ie that the matter would be put into a formal grievance and a stage 1 grievance hearing would be arranged. ST explained that she simply wanted any inappropriate behaviour to stop. However Miss Blenkinsopp said that due to the serious nature of the allegations that she would be commissioning a disciplinary investigation into the alleged actions of T. The letter also reveals that at that time ST was considering whether the matter should be reported to the Police and later the same day she informed Miss Blenkinsopp that she had in fact contacted the police. The letter concludes you advised that as the matter was being investigated this resolves your grievance and an agreement was reached the matter would not proceed to a Stage...1 and it had already been informally resolved.

4.3.1 T did not attend work on 17 February; on the same day Miss Blenkinsopp wrote to T to suspend him from duty. In particular she points out that she was concerned and disappointed that T although at the site...did not attend the meeting and although there was a telephone call T did not answer but responded with a text message advising he did not want to be contacted. The grievances were outlined in brief. In particular that they may amount to sexual harassment and it was pointed out to T that if substantiated it could be construed as gross misconduct, therefore the decision was taken to suspend T on full pay, it was suggested at that time that the investigation could be up [to] a 3 month period but would be reviewed monthly as would his suspension."

5. From those facts, we note that an arrangement was made for T to meet with Miss Blenkinsopp at 5pm on 16 February to discuss a grievance taken out against him and he returned on site at 4.45pm but did not keep the appointment. He later responded to a telephone call from Miss Blenkinsopp saying that he did not want to be contacted. He did not attend work the following day.

6. Miss Blenkinsopp suspended the Claimant on full pay pending an investigation, having decided with the agreement of ST not to proceed to a Stage 1 grievance hearing but to take the disciplinary route with the Claimant.

7. Miss Blenkinsopp did not give evidence before the Tribunal, but the Tribunal accepted (see paragraph 8.9.4) that what actually happened is set out in the letter from Miss Blenkinsopp to ST dated 20 February 2012. The material parts of that letter read:

> **"I explained that as your grievance had been put in writing in line with the Trust Grievance Police and Procedure, this would be classed as a formal grievance. The next stage would therefore be to arrange a Stage 1 Grievance Hearing in order for you to discuss your grievance, and advise what you were looking for as a resolution.**
>
> **During our meeting you explained that the resolution you were looking for was for the inappropriate behaviour to stop. I explained that due to the serious nature of the allegations you had raised, I would be commissioning a disciplinary investigation into the alleged actions of [T]...**
>
> **You advised that as the matter was being investigated this resolved your grievance and agreement was therefore reached that the matter did not need to proceed to a stage 1 grievance hearing as your grievance had been resolved informally."**

8. Thereafter a disciplinary investigation was carried out by Ms Dawson who prepared a report. A disciplinary hearing took place before a panel chaired by Mr Kendall, and following a hearing on 16 September the panel concluded that the Claimant was guilty of inappropriate sexual behaviour in the five respects mentioned for which the appropriate sanction was dismissal. The Claimant appealed the dismissal decision. His appeal was dismissed by a panel chaired by Dr Briel following a hearing on 26 November 2012.

The Tribunal decision

9. The Tribunal directed themselves correctly as to the law at paragraph 7. They expressed their conclusions on the issues raised in the case at paragraph 9 in this way:

> **"(1) The tribunal is satisfied that the facts/beliefs of the respondent, in particular Mr Kendall was that the claimant was guilty of acts of sexual misconduct towards a female member of staff. That that was the reason for the claimant's dismissal.**
>
> **(2) The acts related to the claimant's conduct towards another member of staff during working hours.**
>
> **(3) The respondent acted reasonably, save as indicated below, in dealing with the allegations. Both Mr Kendall and Dr Briel had a genuine belief in the guilt of the claimant. The investigation although protracted was such as a reasonable employer would undertake in the circumstances.**

(4) The procedure followed, after the decision, was taken to institute disciplinary procedure was a reasonable [sic]. However the Tribunal concluded that a reasonable employer would have first dealt with the grievance in accordance with its own policy and instigated a first stage hearing. The impact of failing to do that was described above and the dismissal was therefore unfair.

(5) Dismissal was within the range of reasonable responses. These were serious allegations of misconduct by a Senior Manager to a junior member of his team.

(6) The principles in *Polkey* apply, if there had been a fair procedure the claimant would have been dismissed. The compensatory award is therefore reduced.

The basic award will not reduced because of any behaviour by the Claimant."

10. It follows that, but for the procedural failing identified by the Tribunal at paragraph 9(4), failure to instigate a first stage hearing into ST's grievance, the Tribunal would have found the dismissal fair. This appeal by the Respondent necessarily focuses on that procedural failing as characterised by the Tribunal.

The Respondent's grievance policy

11. The Tribunal consider the policy at paragraph 8.9. We have read it. They note that at the end of the executive summary it is said:

"Investigations into alleged bullying, harassment and misconduct will be carried out under the disciplinary policy and procedure."

12. At paragraph 8.9.7 the Tribunal observe that, in contrast to the word "will" in the executive summary, the word "may" is used in the body of the policy. The context there is as follows:

"In cases of bullying and harassment the Determining Manager may consider it appropriate to instigate a disciplinary investigation into the actions of the individual alleged to have carried out bullying or harassment."

13. Thus, construing the policy as a statute, which it is not, it may be thought that under the executive summary a disciplinary investigation will necessarily follow a grievance about harassment; in the body of the policy it is discretionary.

14. Nevertheless at paragraph 8.9.7 they held:

> **"In considering this, however, the Tribunal considered that the Respondent clearly breached its own grievance procedures in that it did not hold a formal stage 1 meeting with the Complainant ST before it immediately swung into action with disciplinary procedures."**

15. That finding appears to have informed their conclusion at paragraph 9(4).

The appeal

16. Mr Smith, who represented the Respondent below, the Claimant appearing in person, puts this appeal on two grounds: impermissible substitution of view by the Tribunal, against which the Tribunal expressly warned themselves at paragraph 7.4 by reference to **Iceland Frozen Foods v Jones** [1982] IRLR 439 (to correct the citation there) and secondly perversity.

17. We do not accept the substitution argument, reminding ourselves that in turn it is not for this EAT to substitute its views for that of the EAT, as Longmore LJ observed in **Bowater v NW London Hospitals NHS Trust** [2011] IRLR 331, paragraph 19.

18. Perversity is often seen as an ugly word in this jurisdiction. All too often it is a peg for appellants to hang a re-arguing of the facts. That is not permissible, as Mummery LJ made clear in **Yeboah v Crofton** [2002] IRLR 634.

19. In this case, Mr Smith evokes May LJ's folksy dictum in **Neale v Hereford and Worcester County Council** [1986] IRLR 168 "My goodness that was certainly wrong" and we have some sympathy with that approach. However, we prefer the more forensic approach of Lord Donaldson MR in **Piggott Bros v Jackson** [1991] IRLR 309, where he said

that, in concluding that the ET decision was an impermissible option, the EAT will almost always have to identify a finding of fact which was unsupported by any evidence, absent a patent misdirection in law.

20. In the present case we are each of us, and collectively, entirely satisfied that the Tribunal based their finding of unfair dismissal on a plain misunderstanding of the Respondent's grievance policy. On no reading of the policy was Miss Blenkinsopp required to proceed to a stage 1 hearing of ST's grievance. First, because, on the findings of fact (see the letter of 20 February) ST did not want such a hearing, given the manager's decision to proceed to a disciplinary investigation and, secondly, because at the least the manager, Miss Blenkinsopp, had a discretion to proceed straight to a disciplinary investigation under the policy.

21. As Mr Smith asked rhetorically, where is the unfairness in doing so to the Claimant? The grievance policy is there to resolve employees' grievances, not to protect sexual predators, as Mr Kendall characterised the Claimant's behaviour following the disciplinary hearing. Further, he was given the opportunity to explain himself to Miss Blenkinsopp on 16 February and declined to engage in that process. In these circumstances, proceeding to a disciplinary investigation was plainly within the range of reasonable responses open to Miss Blenkinsopp under the Respondent's procedure.

22. Absent any breach of the procedure, the substratum of the Tribunal's unfair dismissal finding falls away. In these circumstances, the appeal succeeds. We shall substitute a finding that the dismissal was fair. No compensation entitlement arises.

23. Finally, I should like to add this. Judge Richardson exercised his discretion in this case in directing that lay members sat on this appeal. The input of my industrial colleagues has been

invaluable. It confirms my own view that this finding of unfair dismissal cannot stand both as a matter of law and of industrial common sense.