Appeal No. UKEAT/0437/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 February 2014

Before

THE HONOURABLE MR JUSTICE WILKIE

(SITTING ALONE)

DR A NABILI — APPELLANT

NORFOLK COMMUNITY HEALTH AND CARE NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RUSSELL HOLLAND (of Counsel) Direct Public Access Scheme
For the Respondent	MR SINCLAIR CRAMSIE (of Counsel) Instructed by: Messrs Birketts LLP Kingfisher House Gilders Way Norwich NR3 1UB

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

The Employment Judge erred, on a strike out application in respect of a claim of unfair dismissal, in asking the "prohibited" question identified in **Polkey**. He asked whether an, apparent, procedural flaw would, if corrected, have made any difference to the outcome rather than whether it made the decision fair or unfair, leaving the question of whether it would have made any difference to be considered on the issue of remedy, if the dismissal was found to be unfair on the basis of that flaw.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. This is an appeal against a decision of an Employment Tribunal on 20 June 2012 at a Pre-Hearing Review. The Employment Judge, on the application of the Respondent, Norfolk Community Health Care Trust, struck out the Appellant's claim for unfair dismissal pursuant to rule18(7)(b) of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004,** Schedule 1, as having no reasonable prospect of success. There is no dispute as to the approach Employment Judges should take to such applications. That, very restrictive, approach has most recently been summarized in the decision of this Tribunal in **Qdos Consulting v Swanson** UKEAT/0495/11/RN, summarized in the following terms:

> **"Applications to strike out on the basis that there is no reasonable prospect of success should only be made in the most obvious and plain cases in which there is no factual dispute and which the applicant can clearly cross the high threshold of showing that there are *no* reasonable prospects of success. Applications that involve prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of the witnesses should not be brought under rule 18(7)(b) but must be determined at a full hearing. ... In cases where there are real factual disputes the parties should prepare for a full hearing rather than dissipate their energy and resources and those, of Employment Tribunals, on deceptively attractive shortcuts. Such applications should rarely, if ever, involve oral evidence and should be measured in hours rather than days."**

The facts

2. The Appellant was summarily dismissed by the NHS Trust with effect from 5 May 2011 for alleged gross misconduct. The dismissal letter referred to two instances of gross misconduct, but it was common ground that the first of those two, although the second in time, was by far and away the most serious and was described in the dismissal letter in the following terms:

> **"...that whilst formally excluded from Norfolk Community Health and Care you undertook employment with the Royal Berkshire NHS Foundation Trust by a third party agency without the knowledge of NCH&C and so in contravention of your exclusion and the terms of your employment contract."**

3. The Claimant's contract of employment, which she had signed on 23 February 2009, at paragraph 7.7, dealing with extra programmed activities and spare professional capacity, said as follows:

> **"Where you intend to undertake private professional services other than such as are carried out under the terms of this contract, whether for the NHS, for the independent sector or for another party, the provisions in Schedule 6 of the terms and conditions will apply."**

4. Schedule 6 states, in paragraph 2:

> **"Where a consultant intends to undertake such work**
>
> - **the consultant will first consult with his or her clinical manager."**

5. The disciplinary policy and procedure of the Respondent made specific reference to a Department of Health document entitled *Maintaining High Professional Standards in the Modern NHS*, and the rules themselves identified as gross misconduct a number of matters, including "refusal to carry out a reasonable management instruction" or "any other breach of discipline or any other matter not covered above which in law or the opinion of the Trust justifies dismissal."

6. The Department of Health document already referred to, in chapter 2, deals with the exclusion process and states, at paragraph 27, under the general rubric "Informing other organisations", as follows:

> **"In cases where there is concern that the practitioner may be a danger to patients, the employer has an obligation to inform such other organisations including the private sector, of any restriction on practice or exclusion and provide a summary of the reasons for it. Details of other employers (NHS and non-NHS) may be readily available from job plans, but where it is not the practitioner should supply them. Failure to do so may result in further disciplinary action or referral to the relevant regulatory body as the paramount interest is the safety of patients. Where an NHS employer has placed restrictions on practice, the practitioner should agree not to undertake any work in that area of practice with any other employer."**

7. The immediate background to the dismissal of Dr Nabili was that the Respondent had suspended her from clinical practice on 7 April 2010. The suspension letter indicated the reason for it was that the Respondent was initiating an investigation:

> **"...due to concerns we have regarding your conduct and performance. In the interests of patient safety, we have made the decision to exclude you from work with immediate effect."**

8. During the period of exclusion, the Claimant received a letter from the Respondent dated 21 April 2010. That said, amongst other things:

> **"During your exclusion you are not permitted to contact your work colleagues, patients, or attend any work premises unless agreed in advance with the Medical Director or HR director. During your suspension you must be available to attend any investigation meetings as required.**
>
> **You may only undertake any voluntary work, study leave, or annual leave with prior consent from the medical director. If you have any other part-time work with an NHS organisation, we will also notify them of your exclusion from work."**

9. It came to the Respondent's attention, at the end of July 2010, that the Claimant had, during the period of her suspension or exclusion, been working via the services of an agency for the Royal Berkshire NHS Foundation Trust. That Trust confirmed, on 11 August 2010, that the Claimant had commenced employment with them on 5 July 2010 for an initial period of 16 weeks but, once they had been made aware that she was already in employment with the Respondent and of the circumstances of her suspension, that engagement was terminated on 22 July 2010. That Trust also confirmed that the CV she had provided to them made no reference to her being employed by the Respondent.

10. The Respondent conducted an investigatory meeting, out of which there came an investigation report. The report, as well as the record which is in the form of a transcript of the investigatory review, was before the Employment Tribunal as well as before the body which decided to dismiss the appellant on 4 May 2011. In the course of the investigatory interview,

on 22 December 2010, the transcript has the Claimant saying, of her taking up work with Royal Berkshire, the following:

> **"I felt I was at a dead end. Nothing happened. I wanted to go back to work. I felt my only chance to show I am a good doctor was to work. I decided to work in an unbiased environment at the Royal Berkshire."**

11. She also said that she was aware of the document *Maintaining High Professional Standards*. But she, nonetheless, maintained that she believed that, during her period of exclusion, she could work for other NHS Trusts without informing the Respondent. In answer to the question: "...did you believe that you could work elsewhere without advising your employer?", her answer was "Yes, normally I would tell my employer but this was not normal." She also stated that her interpretation of the Respondent's letter to her of 21 April 2010 was that she was only required to advise the trust or obtain the agreement of her Medical Director or HR Director in relation to any voluntary work or study leave or annual leave. This stance was maintained by the Claimant in her claim form to the Tribunal in which she said:

> **"In desperation in order to show Dr Crayford that I was a really good doctor and save my career, I decided that working at another Trust being observed by an unbiased professional would demonstrate my level of expertise and working standard.**
>
> **I was appointed to do a locum at the Royal Berkshire Hospital that has a wide variety of senior paediatricians who could provide such references to Dr Crayford.**
>
> **The Trust's letter of 21 April explained the condition of my formal exclusion as follows..."**

12. Then she quotes the passage to which I have already referred. She then says:

> **"I understood that this means I needed the Trust's consent only for volunteer work, study leave or annual leave, a condition everyone agrees I fulfilled.**
>
> **I cannot find written guidance from the Trust about other work. The Trust did not make it clear that I could not work for another NHS organisation or if I worked that I should first inform the Trust. In fact the formal exclusion letter was clearly indicating that 'if you have any other part-time work with an NHS organisation' I could continue this work. The Trust wrote 'we will also notify them of your exclusion from work' which was setting the consequence of working for another NHS organisation.**

Therefore I believe that it clearly indicated that I could work for another organisation during my suspension if I accept the consequence of the Trust notifying the other NHS organisation, I did not mind as I had nothing to hide."

13. The Respondent proceeded to a disciplinary hearing, which was finally scheduled, after, it would appear, a couple of occasions when it had been adjourned, to take place on 19 April 2011. One of the complaints which the Claimant made in her ET1 was that the disciplinary hearing went ahead in her absence, even though the Respondent knew that at that time she was abroad, attending her sick mother and had initially agreed that that hearing should be postponed. There was, it would appear, a dispute of fact as to whether that meeting took place as a result of the Respondent pressing ahead in the face of opposition by the Claimant and her representative. In their Respondent's Answer, at paragraph 35, the Respondent stated that the Claimant's representative, a Mr Milbourne, had agreed that the hearing could go ahead in the Claimant's absence because he would attend on her behalf. This stance appears to have been maintained at the hearing of the strike-out application, as it was recorded at paragraph 41 of the Employment Judge's decision that the Respondent stated there was a discussion between the Respondent and Mr Milbourne and that it was agreed that the hearing would proceed in the Claimant's absence, with Mr Milbourne in attendance.

14. In fact the hearing did proceed on 19 April, but neither the Claimant nor her representative attended. The Employment Judge records, at paragraph 42 of his decision, that the panel decided nonetheless to proceed with its deliberations. It decided to dismiss her and notified her by letter of 4 May.

15. On the face of it, there appears, therefore, to have been a dispute of fact as to whether the Claimant's representative agreed that the disciplinary hearing should go ahead and agreed to attend to act on her behalf. Before the Employment Judge there was a certain amount of

correspondence in the form of various e-mail strings as well as the transcript of the disciplinary hearing. A textual analysis of those e-mails, coupled with the transcript of the hearing, tends to suggest that the Respondent may have been overly optimistic in asserting that there was a final agreement that the disciplinary hearing should go ahead and that the Claimant would be represented by the BMA representative, Mr Milbourne. It appears that, initially, Mr Milbourne had notified the Respondent on 14 April that the Claimant had had to leave the country to attend to an urgent family matter concerning her mother's health and that she had requested compassionate leave as well as requesting that the proposed hearing be postponed.

16. Initially, the response of the Respondent, the following day at 10.22, was to grant compassionate leave and to agree that the hearing should be postponed and that an alternative date would be proposed. It appears that a member of the disciplinary body, the Director of Quality and Risk and Executive Nurse, Quality and Risk, raised with the Respondent's administration whether it was necessary for the hearing to be postponed as the whole matter had taken such a long time to progress. It appears there was then a discussion between Mr Milbourne and the Respondent and, on one version, evidenced by the e-mail string internally within the Respondent, it was being indicated that it had decided that the hearing would proceed in the Claimant's absence with Mr Milbourne in attendance. Externally, however, it appears that Mr Milbourne was simply being informed that the Respondent had changed its mind and that the hearing would proceed, either with the Claimant there or with Mr Milbourne acting as her representative, or providing written representations. In addition, the Respondent was requesting some evidence in support of her inability to attend on account of her mother's illness.

17. The position, on the morning of 19 April, at 9.30, the time arranged for the disciplinary hearing to commence, was that it was clear to the Director of Human Resources that neither the

Claimant nor her representative would be there. It was indicated that a Mr Green, from HR, would attend later to provide further information. He did so, about 20 minutes into the meeting, to inform the disciplinary body that Dr Milbourne did not have authorisation to attend on behalf of the Claimant and that he could not provide evidence to support her absence given the short timescale. The disciplinary body did not have before it, nor did the Employment Judge have before him, an e-mail which the Claimant has produced at this hearing.

18. That document is an e-mail from Mr Milbourne on the morning of the hearing in which it is said that it would be unreasonable for them to proceed in her absence or representation and, therefore, requested the panel to reconsider its decision and postpone and reschedule the hearing.

19. The timing of that e-mail, which was sent to Barbara Wilson, who was chairing the disciplinary panel, as well as to Nicholas Green, who was informing the disciplinary panel, appears somewhat problematic. It seems to be at 8.45, but it may have been at 9.45 because there is, in the heading, an indication that time may be plus one hour, to reflect, perhaps, British Summer Time. What, however, on any view, appears to be the case is that the disciplinary hearing took place from the outset in the knowledge that neither the Claimant or her representative would be present and that Mr Green gave information that Mr Milbourne would not be present because he was not authorised by the Claimant. Mr Green does not appear to have placed before the body the assertion from Mr Milbourne that the decision to proceed would be unreasonable, though they plainly had to decide whether to proceed in the light of the information Mr Green was providing.

The Employment Tribunal's decision

20. On the face of it, this, quite complicated and disputed, area of fact would seem to make this case inappropriate for a decision to strike out the claim as having no reasonable prospect of success as it would seem to be an issue which was clouded in uncertainty and which might require oral evidence from the various participants in the conversations and the e-mails. Some criticism has been made of the Employment Judge, insofar as it is said that he has assumed, for the purpose of his decision to strike out the claim, that an agreement had been reached that the hearing could proceed in the Claimant's absence with Mr Milbourne in attendance. In my judgment, that is not a proper criticism that can be made of the Employment Judge because he made it clear that the assertion of an agreement on this issue was no more than that: just an assertion of the Respondent's case. It is clear that, at the beginning of paragraph 43, the Employment Judge assumed, for the purpose of the exercise he was being invited to undertake, that there were flaws in the Respondent's procedure. Although he does not directly identify what those flaws were, it is very clear from the surrounding paragraphs and the remainder of paragraph 43 that the flaw in the procedure which he had identified was their proceeding with the disciplinary hearing in the absence of the Claimant even though, initially, the Respondent had agreed to postpone it to enable her to attend when she was able.

21. The Employment Judge, having indicated that there was a procedural flaw, then went on to pose for himself the question in the following terms:

> **"I need to decide whether any such flaws were so fundamental as to render the dismissal potentially unfair or at least provide the Claimant some reasonable prospect of success."**

22. There is not, nor can there be, any criticism of the Employment Judge in identifying his task in those terms. There is a clear distinction identified in the authorities between, on the one hand, a procedural defect and, on the other, a procedure adopted which was unfair and it is well

established that the two are not necessarily coterminous. Merely because there is a procedural flaw does not necessarily mean that, looking at in the round, the procedure which was adopted in a particular case was an unfair one. If authority were needed for that proposition, the decision of this Tribunal in **Fuller v Lloyds Bank plc** [1991] IRLR 336 provides it.

23. However, criticism is made of the way in which the Employment Judge went on to address that question and the process of reasoning which it is said underpinned his answer to that question.

24. The remainder of paragraph 43 reads as follows:

> **"The Respondent argued that even had the Claimant attended the hearing, in the face of her admission of guilt and the Respondent being unwilling to accept her excuses as to misinterpretation of the instructions that she was under during the period of exclusion, it seems highly unlikely that the outcome would have been any different. In essence, the Claimant admitted working for two other Trusts while suspended/on sick leave and that the only defence to this action was to place a strained and implausible interpretation on the instructions she had been given at the time, but, at the same time admitting that she would, in 'normal circumstances' have disclosed such employment to the Respondent, but on this occasion chose not to. She provided this explanation at the disciplinary hearing and it was rejected and reiterated it in her ET1, providing no other justification for consideration by this Tribunal."**

25. The Employment Judge, having dealt with another aspect of the case in paragraph 44, says in paragraph 45:

> **"I do not consider, therefore, that any such flaws as there were in the Respondent's procedure would provide the Claimant with any reasonable prospects of succeeding in the claim for unfair dismissal at any full hearing of this matter."**

The Respondent's case

26. Mr Cramsie seeks to construe paragraph 43 so as to separate the way in which the Employment Judge posed the question from the way in which the Respondent set out its

argument. He does so for good reason. In the speech of Lord Bridge in **Polkey v AE Dayton Services** [1987] ICR 142 he said as follows:

> **"Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [ERA 1996 section 98(2)]. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural,' which are necessary in the circumstances of the case to justify that course of action. ... in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; ... If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [section 98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied."**

27. As is well recognised, and as **Polkey** makes clear, the question of how the employee would have been treated had a fair procedure been adopted is not wholly irrelevant in unfair dismissal claims. Whilst it may be immaterial to the issue whether the dismissal was fair or not, it may be highly relevant on the question of appropriate remedy and, in particular, what, if any, compensation should be awarded. It is clear from the way in which the Employment Judge expressed himself at paragraph 43 that what he records as the Respondent's argument was an invitation to pose the one question which Lord Bridge had identified in **Polkey** as a question which should not be posed: namely, whether, as he records the Respondent asserting, assuming that there was a procedural flaw, it was highly unlikely that the outcome would have been any different. This is not a case where it is apparent, from the terms in which the disciplinary body advised itself, that they had concluded that a hearing, at which Dr Nabili would have the opportunity to address them, whether by way of explanation or mitigation, would have been futile. Nor did the Employment Judge address the issue, which he might have addressed, of whether, in light of the fact that there had been a very full investigation in which the Claimant's

full explanation had been taken and recorded, the Respondent had concluded that it was open to it, and so procedurally fair, to proceed without giving her an opportunity to address the body taking the decision because a hearing with her present, or represented, would have been futile.

Conclusion

28. In my judgment, despite the very sophisticated argument put forward by Mr Cramsie on behalf of the Respondent, paragraph 43, from the start of the sentence that begins "The Respondent argued" really amounts to the Employment Judge adopting as relevant the assertion of the Respondent that the important matter is whether it is highly unlikely that the outcome would have been any different had the procedural flaw of proceeding in her absence not occurred. There is nothing in the remainder of that paragraph which, in my judgment, reflects anything other than the Employment Judge addressing, and agreeing with, that assertion.

29. In my judgement, therefore, the Employment Judge, in concluding that there was no reasonable prospect of success, did so as a result of misdirecting himself as to the appropriate approach to answering the question which he had correctly posed for himself.

30. In my judgment, therefore, the decision to strike out resulted from an erroneous approach in law taken by the Employment Judge. It is common ground that, such being my conclusion, I should dispose of this appeal by quashing the strike-out decision. The matter therefore will proceed, in the normal way, to a full merits hearing. In so doing, I am not passing any judgment on the ultimate likelihood, or unlikelihood, of the Claimant succeeding in her claim and, if so, to what extent. All that I have done is to have identified the fact that the Employment Judge, in answering the question posed on the strike-out application, misdirected himself as a matter of law and therefore necessarily came to a conclusion which cannot be sustained as a matter of law.