

Appeal No. UKEAT/0296/13/BA

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

At the Tribunal
On 10 February 2014

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MRS SARAH SMART

APPELLANT

WATERBEACH PARISH COUNCIL

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

The Employment Tribunal found that the Claimant had been wrongfully but fairly dismissed for misconduct.

The ET failed to give any real reasons for its finding that the Respondent's appeal panel had had reasonable grounds for its findings as to misconduct. Particularly in the light of the finding of wrongful dismissal, the ET ought to have given fuller reasons and addressed the points made by the Claimant as to the reasonableness of the panel's findings of misconduct.

Appeal allowed and the matter remitted to the ET to consider whether the appeal panel had reasonable grounds for its findings as to misconduct.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Claimant, Mrs Smart, against an Employment Tribunal judgment which was sent to her on 21 August 2012 following a five-day hearing in front of the Employment Tribunal in July 2012. The Claimant was the part-time parish clerk of Waterbeach Parish Council, the Respondents, for 20 years until she was dismissed summarily on 28 July 2011. Her husband, as it happens, was a councillor on the parish council.

2. The Employment Tribunal, sitting in Bury St Edmunds, found that the Claimant had been wrongfully dismissed but nevertheless her dismissal was fair. This is a finding that may seem odd to the layman, but is perfectly possible and well understood by lawyers. The finding of wrongful dismissal involves a consideration by the Employment Tribunal of whether, objectively, on the balance of probabilities and on the evidence presented to the Tribunal, the employer has proved that there were grounds for a summary dismissal, usually referred to as gross misconduct. On the other hand, a finding in relation to the fairness of a dismissal involves a consideration of the process and of the evidence before and the conclusions of the employer who makes the decision to dismiss.

3. The events which led to the Claimant's dismissal occurred mainly in November and December 2010, which is well over three years ago. They led to a grievance being taken out by Robert Pinion, who was a groundsman employed by the Council. That grievance in due course led to disciplinary action against the Claimant by a disciplinary panel. The Claimant was suspended on 3 April 2011. A specially appointed independent panel of councillors was appointed to investigate the disciplinary matters.

4. That panel found that a number of allegations of gross misconduct had been proven and they recommended the Claimant's summary dismissal. That recommendation was accepted by the Councillors and a letter of dismissal was sent to her in July 2011. The Claimant appealed against that decision, and another separate appeal panel was convened. It consisted of councillors from another council, and the Employment Tribunal found that it was an independent and unbiased panel. There was a full re-hearing. The appeal panel found in the Claimant's favour on a number of issues, but confirmed findings of gross misconduct on, according to the Employment Tribunal decision, seven allegations. The appeal panel recommended that the decision to dismiss should be upheld, and the Council in due course confirmed the dismissal.

5. The Employment Tribunal found that although there had been procedural problems with the original panel hearing, they were cured by the appeal. The Employment Tribunal rejected the Claimant's main case on unfair dismissal, namely that the reason for her dismissal was, in effect, manufactured and the Employment Judge found her evidence in this respect not credible. The Employment Judge found that following the report from the appeal panel the Respondent council had a reasonable belief that the Claimant was guilty of various heads of gross misconduct, that that belief was reasonable because the panel was reasonable in reaching the conclusion it did on the evidence before it, that dismissal was within the range of reasonable responses and accordingly that the dismissal was fair.

6. The appeal panel had confirmed three allegations or groups of allegations which the Employment Judge found to be sufficient to warrant dismissal. I will identify those allegations by reference to the wording as it is set out in the decision of the appeal panel, which I have been shown today, which itself runs from page 70 to page 102 in the bundle, with quite close typescript. The first of those is Allegation 8, which reads as follows:

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“Speaking to the groundsmen in a bullying and intimidating manner which resulted in Mr Pinion feeling that he had to lock himself in the shed during his lunch break in order to protect himself from further harassment. In addition by failing to intervene on their behalf, you were also complicit in your husband’s unreasonable behaviour towards these two employees, which resulted in Mr Pinion having to take time off from work, due to occupational stress related illness.”

Unfortunately the second employee, to whom that allegation relates, is not named but is common ground and clear that it is a Mr Rabbett, so the allegation of bullying and intimidation relates to two people, Mr Pinion and his colleague, Mr Rabbett. The second allegation is an amalgamation of two: numbers 5 and 10. Allegation 5 states that:

“...following the ‘protected disclosures’ made by Mr R Pinion in respect of the use of red diesel and the disposal of chemicals in compliance with the public interest disclosure provisions of the 1996 Act [the Employment Rights Act 1996] you subjected him to unfair treatment which left the Council vulnerable to claims of –

(a) constructive dismissal [and so on]”

Allegation 10 perhaps fleshes that out somewhat. It says:

“By failing to register your alleged concerns regarding Mr Pinion’s capability during the assessment procedure [and I am told that was in November 2010] and then seeking to raise a series of complaints just three weeks later it is believed that you abused your position in order to cause him a significant detriment as a result of his protected disclosure.”

Then there are allegations 3 and 4, which go together. Allegation 3 says:

“That when you were made aware of the regulations relating to the lawful disposal and storage of chemicals you chose to support the view of your husband Councillor D Smart that these substances could be ‘sprayed out’ in contravention of the regulations.

...

Allegation 4:

“This action put the Council and its employees at risk and placed the two groundsmen in an impossible and vulnerable position.”

7. Although the Employment Judge found that the Claimant had been fairly dismissed on the basis of those three allegations or groups of allegations, he nevertheless found that she had been wrongfully dismissed. His reasons in relation to that are at paragraph 5.4 in his judgment. He rightly directed himself that he had to decide whether in fact the Claimant was guilty of gross misconduct and, if she was not and she was dismissed without notice, she was entitled to her contractual three months' notice pay. He said this:

"I have studied carefully all of the relevant documents for the purpose of this hearing, and in particular the allegations made against the Claimant. It is my view that the most important and serious complaint against the Claimant was that made as a result of the allegations of bullying by Mr Pinion. The Tribunal decides that although these allegations were genuine ones made by Mr Pinion, they were mistaken. The Claimant did have some doubts about Mr Pinion's ability before he made any such complaint. Mr Pinion together with Mr Rabbett did ratchet up the level of their complaints as the disciplinary process went on, and Mr Pinion, a vulnerable individual according to the agreed evidence on both sides in this case, clearly felt increasingly insecure because of the probationary of his employment. It is my decision also that Mr Pinion found it difficult to distinguish in his own mind between actions carried out and comments made by Mr Smart and those by Mrs Smart. I considered that the issue relating to the disposal of chemicals was probably as explained by the Claimant rather than as suggested by Mr Pinion and therefore not gross misconduct."

Then he deals with various other allegations, which he says are not gross misconduct, and says:

"As a consequence I come to the conclusion that there was no gross misconduct. I conclude the Claimant is entitled to her notice pay."

Then he calculates that at as £4,238. It should be noted, before leaving paragraph 5.4, that neither Mr Pinion nor Mr Rabbett gave live evidence to the Employment Tribunal and indeed it is perfectly normal, in circumstances like this, for people in their position not to give such evidence, although it does make it difficult for the Employment Tribunal deciding on the wrongful dismissal side of the claim.

8. The nub of the appeal that I am now dealing with is that the Employment Judge failed to give adequate reasons for his conclusion that the appeal panel had reasonable grounds for coming to its own conclusion in relation to gross misconduct, which of course was different to

the one that he came to. What the Employment Judge said about this is at paragraph 6.6 in his decision. I will read that fully into the record, and I will also read in part of paragraph 6.5 and paragraph 6.7 and 6.8 to put it into context. Dealing with the conclusions of the appeal panel, the Judge noted that the appeal panel had reached different conclusions on various allegations to that of the original panel. Then he says:

“It was therefore the conclusion of the Tribunal that taken overall and in particular taking into account the nature of the appeal panel rehearing that there had been a satisfactory and thorough enough investigation of the allegations against the Claimant, not simply through the conclusions in Mr Pinion’s grievance but also in a thorough investigation carried out during the appeal panel hearing.”

I interpose here to say that I have been provided with both the very full Reasons of the appeal panel and also by the Respondent a very full set of notes relating to the grievance brought by Mr Pinion, which themselves run to 33 pages. I read on:

“6.6 For the reasons stated above it was clear to the Tribunal that the Respondent both at disciplinary hearing and appeal had a genuine belief in the Claimant’s guilt and that this was reasonable as it was perfectly reasonable for both panels to come to the conclusions they did on the evidence before them. There had been procedural error by the Respondent at the disciplinary panel but this was corrected by the conclusions and process of the appeal panel rehearing.

6.7 The decision to dismiss the Claimant was within the range of reasonable responses of a reasonable employer. The appeal panel had come to the conclusion that the allegations relating to bullying, to protected disclosures and relating to disposal of chemicals were proved. It is the conclusion of the Tribunal that these were serious matters properly taken as such by the panels and consequently dismissal was within the range of responses of a reasonable employer taking into account the mitigation of the Claimant’s clean disciplinary record.

6.8. The Judge would like to make it clear that in coming to his conclusions he has had to consider over 1,000 documents, many of which he found to be either marginally relevant or irrelevant. Eight witnesses gave evidence at the hearing and two witnesses provided statements but there was no cross-examination. He trusts that the parties and their advisors are clear that there is no inconsistency in the Tribunal’s conclusion that the claim for unfair dismissal is unsuccessful on the basis that the allegation of bias was found unproven and that the Respondents had acted within the *Burchell* principles as to reasonableness within the terms of the Employment Rights Act 1996 and the Tribunal’s decision as to damages for breach of contract which depends on the individual conclusion of the Judge.”

9. Those reasons are, unfortunately, extremely slight and indeed can be categorised as simply stating a conclusion. That is the conclusion at paragraph 6.6 that it was perfectly reasonable for both panels to come to the conclusions they did on the evidence before them.

The question is: was that enough? Whether reasons are sufficient depends on all the circumstances, and sometimes it may be enough for a Tribunal to say simply that there were reasonable grounds for an employer's conclusion. However, in this case it is surprising that the Employment Judge did not give a more detail than he has, given that his own conclusions, which I have mentioned at length, were different to those of the appeal panel and given the Claimant's detailed written submissions on the issues, which I have in my bundle at pages 105 through to 109 (and those pages relate only to allegations 3, 5, and 8).

10. I therefore look at the most important allegation, as the Judge found it, which was the bullying one. The appeal panel's finding in relation to that are at page 99 in my bundle. I have already read out the allegation and made the point that Mr Rabbett is not named in it. It is also right to say that there are not many details of the bullying and intimidating manner given under the allegation heading. What the appeal panel said under the heading "Decision" was this:

"From the emotional condition and distress exhibited by both Mr Pinion and Mr Rabbett, the Panel had no difficulty in accepting that this allegation was correct. While the Panel accepted there might be a fine line between bullying and firmness on the part of the employer and much might depend upon the perception of the individual involved, there was no doubt in the minds of Panel members that both employees felt that they had been bullied by Mrs Smart which had had adverse effects on their personal lives and, in the case of Mr Pinion, in him being prescribed medication by his doctor for work related stress.

It could be argued that this continued even after Mrs Smart had been suspended...

Mrs Smart appeared at a loss to understand their emotions or to appreciate that she had been the cause of distress.

The Panel found the allegation to be proven and that this was gross misconduct."

11. On its face, I am afraid to say, that reasoning by the appeal panel is not the most satisfactory. As I have said, the charge was not clear. The particular findings of bullying are nowhere to be found, and the Tribunal bases its decision entirely on its assessment of the subjective feelings of Mr Pinion and Mr Rabbett. That may be good enough if the course of reasoning is fully explained. But one can see that the findings of the appeal panel may have

been open to legitimate criticism and so one would have expected the Employment Judge to explain how he came to the view that they were reasonable.

12. I am not going to go into the other allegations. It is not for this Tribunal to get bogged down in who said what and the details of the material before the Employment Tribunal. It seems to me that, regrettably, the Employment Tribunal has not supplied sufficient reasons in this case and that its conclusion cannot therefore be supported, and that the matter will have to be remitted for further consideration. When I say “the matter”, I mean the question of whether there were reasonable grounds for the conclusions reached by the appeal panel, and it will need to focus very clearly on that.

13. Such an outcome is always regrettable, but it seems to me particularly so in this case. The events in question go back to December 2010. The dispute itself, the underlying dispute, was described by the Employment Judge as “unfortunate and sensitive”, and I can see why he said that. What is most troubling for me is that there have already been four substantial hearings in relation to this matter: the grievance, the Claimant’s first disciplinary hearing in front of a panel of councillors, the second one at appeal, and then a five-day Employment Tribunal hearing. I note the Employment Judge’s comment that the Respondent is a small council with limited resources. I have all that in mind, and I would implore the parties please not to spend any more time valuable time and money on this rather pointless litigation if they can possibly avoid it. But Mrs Smart is entitled to justice and to see justice done and therefore she is entitled to proper reasons. So I must allow the appeal.