Appeal No. UKEAT/0417/13/DA
UKEAT/0418/13/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 February 2014

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

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(1) ESSEX COUNTY COUNCIL
(2) THE GOVERNING BODY OF VANGE PRIMARY AND NURSERY SCHOOL — APPELLANTS

MS S PARDOE — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	MS HAYLEY McLORINAN (of Counsel) Instructed by: Essex Legal Services New Bridge House 60-68 New London Road Chelmsford Essex CM2 0PD
For the Respondent	MS KATIE LANGDON (of Counsel) Instructed by: National Association of Head Teachers Legal Services 1 Heath Square Boltro Road Haywards Heath West Sussex RH16 1BL

<u>SUMMARY</u>

UNFAIR DISMISSAL – Reason for dismissal including substantial other reason

PRACTICE AND PROCEDURE – Disposal of appeal including remission

The Employment Tribunal failed to direct itself correctly on the approach it was to adopt when determining a dismissal for misconduct and the ET misapplied the correct test in material respects. The EAT refused to take the decision itself following **<u>Morgan v Electrolux Ltd</u>** (1991) ICR 369. The EAT remitted the case to a differently constituted Tribunal for determination.

THE HONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. The Governing Body of Vange Primary and Nursery School and Essex County Council ("the Appellants") appeal from the Judgment of Employment Judge Warren, dated 17 December 2012, that Ms Pardoe (who I shall refer to as "the Claimant") was unfairly and wrongfully dismissed. The Appellants further appeal the Judgment of Employment Judge Warren, following the hearing on 12 February 2013, that they pay the Claimant the sum of £46,198.50 consisting of notice pay, basic award, loss of earnings, future and past loss of pension contributions, and loss of statutory rights.

2. In this Judgment all references to the Judgment of the Tribunal and to Employment Judge Warren are to the Judgment on liability.

The facts

3. The Claimant had been Deputy Headteacher of the First Appellant, a primary school, since 1 April 2008. She had begun her employment on 1 September 1991. The events which led to her dismissal occurred on or around 13 July 2011. At paragraphs 8 to 10 of the Judgment, Judge Warren summarised them as follows:

> **"8. ... In July 2011 the Claimant's personal circumstances were troubling. The Claimant had recently escaped from a violent and abusive relationship from her son T's father. The Claimant was still fearful of him. Whilst son T was encouraged to have a relationship with his father there were concerns about T's safety in the care of the father. Police and Social Services were involved.**
>
> **9. At this time in July 2011 the family were being moved to a secret address to be away from the perpetrator of the violence.**
>
> **10. The Claimant's son T was behaving badly at school and [had] been excluded from four schools in the previous four years and the Claimant would at that time receive several calls a week from her son's then school where she would have to attend to restrain her son or calm him down."**

4. Paragraphs 11-17 of the Judgment set out the facts found by the Tribunal in relation to what occurred on 13 July after the Claimant was called to her son's school. That evening the Claimant telephoned a friend, Kirsty Player, who was also a teaching assistant at the school and, following a conversation, Miss Player went round to the Claimant's house. Paragraph 17 reads:

> **"After Kirsty arrived there was an incident when the Claimant's son purposely smashed a light bulb on the floor stating that hopefully his mother would cut her feet and that she would bleed to death. At this point the Claimant on her own evidence lost control chased her son into the porch holding his left shoulder while smacking him twice around the side of the head the son fled the house. Kirsty who was there at the time ran after T and encouraged him back to the house and Kirsty offered to take T home with her, an offer the Claimant accepted. The Claimant's evidence is that at no time was she drunk that she had had one glass of wine when her friend Kirsty arrived and started another before she left. The Claimant accepted that she used inappropriate language but denied using the "F" or "C" words."**

5. The Appellants are critical of the limited findings made in this paragraph, but, for reasons that will become apparent shortly, it is not necessary for me to go into the matter in detail in this Judgment.

6. The next day, 14 July, Miss Player approached Mr Rogers, Headteacher at the school, and expressed concerns that she had witnessed the Claimant physically and verbally abusing T on the previous evening. She was asked to write a statement setting out her account of the events, which she did. On 15 July Mr Rogers suspended the Claimant. The suspension was to

> **"enable a full investigation to be carried out to consider allegations of gross misconduct against the Claimant, namely that she allegedly behaved in the way outside of school that has resulted in a social services investigation and that this has the potential to impact on the employment relationship at the school and irreparably breach the implied contractual term of trust and confidence in that relationship. Specifically, it was alleged that she engaged in inappropriate physical and verbal abuse towards her son in a domestic setting."**

7. The school was closed from 22 July to 5 September for the school summer holidays, and the Claimant was told that an investigation would resume in September 2011. On 20 September the Claimant attended an investigatory hearing, conducted by the Headteacher.

By letter of 4 October Mr Rogers informed the Claimant that the matter would proceed to a disciplinary hearing. The Claimant was invited to attend a disciplinary hearing meeting by letter dated 13 October, which also gave her notice of a further allegation relating to a Facebook entry that she made.

8. The disciplinary hearing took place on 17 January 2012. Mr Rogers had prepared a disciplinary hearing report. The disciplinary panel consisted of Mr Morgan-Jones, the Chair of Governors of the school, and two other Governors. The panel considered three allegations. The third arose from evidence that the Claimant had goaded her son in front of staff at the school on 13 July.

9. By letter dated 18 January 2012 the Claimant was informed of the decision of the panel. The letter stated, insofar as is material:

> **"We believe Ms Pardoe did physically and verbally abuse her son at home on the evening of 13 July 2011 whilst under the influence of alcohol. We believe this was gross misconduct."**

They also found the other two matters proved and that they amounted to serious misconduct.

10. The decision of the panel was that the Claimant should be dismissed without notice on the grounds of gross misconduct with effect from 17 January 2012. The Claimant did not appeal this decision. On 5 April 2012 she presented a claim complaining that her dismissal was both unfair and wrongful. Following a hearing before Employment Judge Warren on 21 and 22 November, the Tribunal decided that she was unfairly and wrongfully dismissed.

<u>The Appellants' case</u>

11. The principal ground of appeal advanced by Ms McLorinan for the Appellants is that the Tribunal did not correctly direct itself on the approach it was to adopt when determining this case and misdirected itself in significant respects. Ms Langdon for the Claimant submitted that the Judge clearly understood the relevant law and applied the facts he found directly to it.

<u>The law</u>

12. The legal framework in a case of dismissal for misconduct is, or should be, well-known. The relevant statutory provisions are in section 98(1), (2) and (4) of the **Employment Rights Act 1996**, which provide guidance as to the procedure for determining whether the dismissal of an employee is fair or unfair. Section 98(1) imposes upon the employer the burden of showing the reason or, if more than one, the principal reason for dismissal, and that it is either a reason falling with subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Subsection (2) then defines the kind of reasons which will fall within subsection (1) and includes such matters as misconduct (relied on in this case) lack of capability, retirement and redundancy. Subsection (4) is the key provision:

> **"In any case where the Employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

13. As Mummery LJ observed in **<u>Fuller v LB Brent</u>** [2011] IRLR 414 at paragraph 3:

> **"There is plenty of authority on the operation of s.98(4) (and of the similar section in the Employment Protection (Consolidation) Act 1978 which it replaced) in cases of dismissal for misconduct."**

14. In the recent decision of **Turner v East Midlands Trains Limited** [2013] IRLR 107, Elias LJ at paragraph 16 referred to what he described as the most recent valuable summary of the relevant principles contained in the judgment of Aikens LJ in **Orr v Milton Keynes Council** [2011] IRLR 317. As regards the fairness test in section 98(4), Aikens LJ summarised the position at paragraph 78:

> **"… (5) In applying that sub-section, the ET must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief. If the answer to each of those questions is 'yes', the ET must then decide on the reasonableness of the response of the employer. (6) In doing the exercise set out at (5), the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. (7) The ET must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted. (8) A particular application of (6) and (7) is that an ET may not substitute its own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances. (9) An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."**

The Employment Tribunal decision

15. In the present case, Employment Judge Warren set out the facts found by the Tribunal at paragraph 6 of 40 of the Judgment. Under the heading "Submissions", at paragraphs 41-43, he set out the arguments of the Respondent and the Claimant. At paragraph 44 he stated:

> **"As I am reminded in the decision of *Moore v C&A Modes* [1981] IRLR 71 what the Tribunal has to evaluate is the behaviour of the employer and the behaviour of the employer at the time the decision was taken and affirmed; and what has to be considered is the material that was before the employer, what message the employer got from that material and whether it was reasonable for him to act on it."**

16. At paragraphs 45-60 Employment Judge Warren considered the evidence. Paragraph 54 states, "There was no proper investigation in this matter." Paragraphs 58-60 read:

"58. It is clear that the decision to dismiss was based solely on the belief that the Claimant was guilty of an assault on her son.

59. It was in the Tribunal's view outside the band of reasonable responses to treat that reason as a ground for dismissal.

60. Had the Respondents taken into account all of the events, particularly the background which was undisputed, namely a physically violent relationship, stress of moving to a secret address, stress of the son disclosing that secret address to his father, a day of stressful conduct by the Claimant's son requiring his mother, the Claimant, to attend his school to remove a rolling pin and then requiring the police to do it, although the disciplinary panel alluded to taking these matters into account by way of mitigation, in the Tribunal's view they did not put sufficient weight on those matters which combined with an inadequate investigation, led to a decision which was outside the band of reasonable responses."

Conclusions

17. Regrettably, the Judgment does not set out or even refer to section 98(4). No consideration appears to have been given to the terms of that subsection. Ms McLorinan, who appeared below for the Respondents, as did Ms Langdon for the Claimant, referred to the test in **BHS v Burchell** [1978] IRLR 379 in her submissions (see paragraph 41) but the Judge nowhere states that that is the test which he is applying nor does he refer to any of the authorities on the operation of section 98(4) in cases of dismissal for misconduct. The only direction the Tribunal gives itself is at paragraph 44 of the Judgment that I have read out. What is there set out is what Bristow J said at paragraph 13 in **Moore v C&A Modes** [1981] IRLR 71. This Tribunal held in that case that the Industrial Tribunal had not erred in law in finding that it was reasonable for the respondent employers to conclude that the appellant, a section leader in their store, had been caught shoplifting at another store and that it was not unfair for the employers to dismiss the appellant for that reason. The test in **BHS v Burchell** does not appear to have been referred to in that case. It may be, however, reading the facts of the case, that the point taken on appeal did not require any consideration of the three-stage approach. **Moore v C&A Modes** was in fact referred to by Ms McLorinan in her submissions in support of the submission that an employee can be guilty of misconduct even if it does not involve stealing from the employers themselves or, as in the present case, involves an assault on a child

outside the school environment. As for the finding of wrongful dismissal, no reasons are given for that finding.

18. No reasons are given for the finding of wrongful dismissal. It may be that, if the dismissal was unfair, then it must also have been wrongful. However, there is no statement by the Tribunal to that effect.

19. In my judgment, the Tribunal has failed to set out the law that it is purporting to apply, as it is required to do, and it has misdirected itself in significant respects. The direction that the Tribunal gave itself in paragraph 44 is not a correct, or at least is not a complete, statement of the approach to be adopted by an Employment Tribunal when determining the issue of fairness or otherwise of a dismissal on grounds of conduct. Moreover the Tribunal appears to have applied, in relation to the investigation carried out by the Appellants, the test as to whether the investigation was a proper investigation (see paragraph 54). That is not the correct test. Further, the use of this language suggests, as Ms McLorinan observes, that the Tribunal has adopted a subjective approach and, in relation to certain aspects of the investigation, formed its own view as to how the investigation should have proceeded. For example, at paragraph 55 the Tribunal state:

> **"The accounts of events as recalled by the Claimant and Ms Player were so different the Respondents should have re-interviewed Ms Player after getting the Claimant's statement to test her account and her recollection of events."**

Neither counsel could recall that specific point, which appears as the Tribunal's first reason for concluding that there was no proper investigation, being raised at the hearing.

20. It was the Tribunal's view that the decision to dismiss was outside the band of reasonable responses and that it was outside the band of reasonable responses to treat the Claimant's

misconduct as a ground for dismissal (see paragraph 59). However, that view was based on the finding at paragraph 58 that the decision to dismiss was based "solely" on the belief that the Claimant was guilty of an assault on her son. The Appellants challenge this finding. It is clear from the letter of dismissal that the reasons for dismissal were not so limited.

21. Nowhere in the decision does the Tribunal make an express finding of the misconduct the Appellants believed the Claimant was guilty of, or that the Appellants had reasonable grounds for that belief. Ms McLorinan submits that the misconduct was that set out in the whole of Miss Player's statement, which the letter of dismissal stated was believed by the Appellants as being accurate. It was not the limited misconduct referred to in paragraph 17 of the decision and summarized in even more limited terms in paragraph 58.

22. In my judgment, the Judgment of the Employment Tribunal contains a number of material errors. For the reasons I have given, this appeal succeeds. In the circumstances, it is not necessary and, as will become apparent in a moment, not appropriate for me to consider the various other challenges to the decision made on behalf of the Appellants, in particular in relation to findings of fact and conclusions that it is said no reasonable Tribunal could have made.

Disposal

23. That leaves the issue of disposal. Ms McLorinan urges me not to remit the case but to take the decision myself. Referring to the decision of the Court of Appeal in **Morgan v Electrolux Limited** [1991] ICR 369, she accepts that unless no Industrial Tribunal, here Employment Tribunal, properly directing itself could have come to the conclusion that the employee had not been unfairly dismissed, the Appeal Tribunal was not entitled to substitute its own decision for that of the Industrial Tribunal but should have remitted the case to the

Industrial Tribunal for reconsideration. She submits that this is a clear case, even on the Claimant's own admissions, of gross misconduct which, in all the circumstances, must result in summary dismissal and that being so there is no prospect that a Tribunal could take a contrary view.

24. I do not agree. By reason of the Tribunal's failure to apply the correct test, there are not the findings of fact that must be made before the correct test is applied. Particularly in issue in the present case is the reasonableness of the investigation that was carried out and whether the dismissal was fair in all the circumstances. Whether it was or not may turn on what misconduct the Appellants believed the Claimant was guilty of and whether the Appellants had reasonable grounds for that belief. All these matters are in dispute between the parties, and as I say the Tribunal has not made the findings that are necessary in this case for the case to be determined, applying the correct test.

25. Despite the well-argued submission of Ms McLorinan I am not satisfied that no Tribunal could take a view contrary to the Appellant's case that the Claimant was fairly dismissed. Accordingly this case will be remitted to a differently constituted Tribunal for determination.