Appeal No. UKEAT/0324/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 February 2014
Judgment handed down on 15 April 2014

Before

HIS HONOUR JUDGE PETER CLARK

MR H SINGH

MR B M WARMAN

MS K V BLEASDALE — APPELLANT

(1) HEALTHCARE LOCUMS PLC
(2) MR A LIDDELL (DECEASED)
(3) MR P SULLIVAN
(4) MR D HENDERSON
(5) MR D MOFFATT — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM KIRK (of Counsel) Direct Public Access Scheme
For the Respondents	MS EMMA SMITH (of Counsel) Instructed by: Penningtons Manches LLP Solicitors Aldwych House 81 Aldwych London WC2B 4RP

SUMMARY

UNFAIR DISMISSAL

Automatically unfair reasons

Reasonableness of dismissal

Employment Tribunal entitled to conclude, following a 15 day hearing, that the Appellant's dismissal was by reason of her conduct; not disclosures, whether protected or not, which she had made (the ET found, save for two, in bad faith). That dismissal for that reason was fair applying the **Burchell** test. It was a reasonable sanction.

HIS HONOUR JUDGE PETER CLARK

1. After a 15-day hearing in the London (Central) Employment Tribunal, followed by deliberations in private, an Employment Tribunal chaired by Employment Judge Dr Simon Auerbach delivered themselves of a reserved judgment with reasons extending to 84 typed pages containing 370 paragraphs. It was promulgated on 21 June 2012 and dismissed the Claimant, Ms Bleasdale's, various complaints of unfair dismissal, either for an automatically unfair reason under ERA s.103A or as being "ordinarily" unfair under s.98; detrimental treatment under s.47B short of dismissal and unlawful sex discrimination and/or victimisation brought against her former employer, the Respondent, Healthcare Locums plc (HCL), and various named officers of the company.

2. Against that judgment the Claimant has appealed. Initially the appeal was rejected on the paper sift by HHJ McMullen QC under EAT rule 3(7) for the reasons given in a letter dated 25 October 2012. However, following two oral hearings under rule 3(10) before HHJ Serota QC, that Judge permitted the appeal, as then formulated, to proceed to this full appeal hearing. The appeal challenges only the findings as to unfair dismissal under both s.103A and s.98 ERA.

Background

3. It is invidious to attempt to summarize so lengthy a judgment by the Employment Tribunal. It repays careful reading, as we have done. However, the essential facts for our purposes appear to be these.

4. The Claimant graduated as a nurse in 1983. Throughout her career she has shown considerable entrepreneurial flair. She built up a nursing agency, later

Sinclair Montrose Healthcare until her dismissal in January 2001. Following that dismissal she brought a claim of unlawful sex discrimination which was later settled on confidential terms which allowed her to set up a new enterprise in the recruitment sector, HCL. Her employment with HCL began in October 2005 in the role of Chief Executive. Her title was then changed to Executive Vice-Chairman. Other Board members included Mr Walker, non-executive Chairman and Mr Liddell, non-executive Vice-Chairman. The Chief Financial Officer was Ms Diane Jarvis. The Claimant and her husband owned 12 percent of the shares issued in HCL.

5. In January 2011 it emerged that Ms Jarvis had been "flattering" (i.e. falsifying) the accounting figures so as to present the company as being in a far healthier financial position than was in truth the case. Having owned up to her own shortcomings Ms Jarvis implicated the Claimant as being complicit in massaging the figures. Ms Jarvis later resigned without compensation.

6. Mr Moffatt, an accountant who joined HCL in January 2011, was assigned to investigate the allegations made by Ms Jarvis in relation to the Claimant's role in the false accounting methods employed by Ms Jarvis. He interviewed Ms Jarvis and examined an e-mail trail (see reasons, paragraph 343).

7. He tried to interview the Claimant but she was indisposed. He concluded that the Claimant had a case to answer in respect of three charges: in headline terms, permanent accruals, staff capitalisation and reorganisation costs. The overall figure by which, it was thought, the value of the company had been falsely inflated was some £9.9 million.

8. Mr Liddell was then asked to carry out disciplinary proceedings against the Claimant. He added a fourth charge, relating to sale of a database, which had been referred to in Mr Moffatt's

report but not formulated as a charge by him. The Employment Tribunal found that the Claimant had a proper opportunity to deal with that further charge.

9. Having interviewed the Claimant, Mr Liddell concluded that she was guilty of gross misconduct and dismissed her. An appeal to Mr Henderson, appointed a non-executive director on 18 February 2011, was dismissed.

The Employment Tribunal decision

10. The Employment Tribunal set out the Claimant's case on unfair (and discriminatory) dismissal at paragraph 328. In answer to the Respondent's case that she was dismissed for gross misconduct, the Claimant contended that the dismissal process was a sham: her dismissal was pre-ordained regardless of the process undergone by Messrs Moffatt, Liddell and Henderson; it was prompted by considerations of her sex, protected acts (victimisation) and protected disclosures.

11. In short, the Employment Tribunal accepted the Respondent's case and rejected that of the Claimant in its entirety. They found that Mr Liddell's conclusion set out in his dismissal letter reflected his genuine beliefs and were not influenced by the Claimant's sex, protected acts, nor claimed or actual disclosures (paragraph 317; repeated in relation to both Messrs Liddell and Henderson at paragraph 346). Applying the **Burchell** test the Respondent had shown that the Claimant's dismissal was caused by the genuine belief by both officers in the Claimant's misconduct and for no other reason. Dismissal for that reason was based on reasonable grounds following a reasonable investigation and fair process, and the sanction of dismissal was justified, i.e. fell within the band of reasonable responses (paragraph 367).

12. Although the Claimant lost on the causation issue the Employment Tribunal considered the alleged protected disclosures relied on by the Claimant. Mr Kirk has helpfully tabulated their findings at paragraph 23 of his skeleton argument. The Employment Tribunal held that the Claimant's disclosures in March and July 2010 were protected disclosures: those on 13/14, 16, 17 and 19 January 2011 were qualifying disclosures but were not protected since they were not made in good faith and those on 22 and 24 January were neither qualifying disclosures nor, if they were, had they been made in good faith.

The appeal

13. We have been recently provided with a note of the second rule 3(10) hearing before HHJ Serota, held on 18 June 2013, under cover of a letter dated 31 January 2014, setting out the Respondent's potential costs application in the event that this appeal fails. I shall return to that application later on in this judgment.

14. In accordance with the usual practice, although the Respondent is notified of a rule 3(10) hearing and may attend (as members of the Respondent's legal team did on that occasion), it is an appellant only hearing. At that hearing the Claimant, who had represented herself before the Employment Tribunal, was represented by Mr Jonathan Crystal of counsel. According to the note taken by a representative of the Respondent, which is not agreed, Mr Crystal told the Judge, on instructions from the Claimant, that it had never been put to her (below) that she was not acting in good faith. That forms a significant plank in the appeal.

15. As constituted following that hearing, the appeal did not spell out a challenge to the Employment Tribunal's finding on causation. That omission was filled by a further application to amend the grounds of appeal, raised by Mr Kirk after he was instructed by the Claimant in succession to Mr Crystal. I permitted that amendment following a directions hearing held on

3 December 2013, despite strenuous opposition by Ms Smith, who has represented the Respondents throughout, since it seemed to me that Judge Serota cannot have intended the appeal to proceed on a wholly moot basis, given the Employment Tribunal's finding that the dismissal was not in any way prompted by the disclosures relied on by the Claimant.

16. As the Court of Appeal has routinely stated over the years (see the cases collected in *Harvey on Industrial Relations and Employment Law* Vol PI/1759) the question on further appeal is not whether the EAT decision is correct but whether the ET decision is reached without error of law. In the present case we have no hesitation in saying that, in our collective judgment, no error of approach is present in this ET's long judgment. It stands without embellishment by us. In these circumstances the appeal fails, as we indicated at the end of our hearing. However, in deference to the careful and sustained argument presented, both orally and in writing by Mr Kirk and the valuable and detailed written submissions of Ms Smith, running to some 47 pages, which required little further elaboration orally, we should set out our conclusions on the heads of appeal advanced by Mr Kirk, which may conveniently be summarised as good faith; reason for dismissal (causation); **Burchell** and ordinary unfair dismissal and perversity.

Good faith

17. The principal argument, as indicated above, is that the challenge to the Claimant's good faith in making the disclosures on 13-19 January 2011 was not made clear to her during the ET process, as required in accordance with the EAT guidance in **Lucas v Chichester Housing** (UKEAT/713/04/DA, 7 February 2005: Judge McMullen QC and members), paragraph 39, and **Meares v Medway PCT** (UKEAT/0065/10/JOJ, Langstaff J and members, 7 December 2010), paragraphs 36 and 52. The question for the Employment Tribunal is whether it is satisfied that the relevant disclosures were made for some ulterior motive, such as personal gain. Where the

motives are mixed the Employment Tribunal must look for the Claimant's dominant purpose in making the relevant disclosures: see **Street v Derbyshire Unemployed Workers' Centre** [2005] ICR 97, paragraphs 54 and 57 per Auld LJ, an authority to which the Employment Tribunal directed themselves (paragraph 254).

18. Was the Respondent's case on bad faith sufficiently put to the Claimant, then appearing in person (unlike the circumstances in **Meares**, as Mr Kirk points out)? Plainly it was. We refer to the following events.

19. Arising out of the parties' pleadings, good faith was identified as an issue at a case management discussion held before Regional Employment Judge Potter on 30 August 2011 and in the list of issues prepared by Ms Smith dated April 2012. The case was sufficiently put in cross-examination by Ms Smith at the Employment Tribunal hearing on 16 April 2012, in respect of which we have been shown an agreed note of evidence, and both the Claimant and Ms Smith dealt with good faith in their respective closing written submissions below. As the Employment Judge said in his decision letter dated 15 August 2012, rejecting the Claimant's review application:

> **"The Judge considers that there is no reasonable prospect of the Tribunal concluding that the lack of good faith issue was not fairly put to the Claimant in the course of cross-examination."**

20. He heard the evidence in this case. He is ideally placed to make that judgment. Everything we have seen, summarised above, confirms that assessment.

21. As to whether the Employment Tribunal was entitled to conclude that the 13-19 January disclosures were not made in good faith, we are entirely satisfied that they were. On the Claimant's case she learned of Ms Jarvis' wrongdoing from her on 9 January 2011; yet she

waited until 13 January to make the first of that tranche of disclosures. Having heard the evidence, albeit not from Ms Jarvis herself, the Employment Tribunal concluded that the Claimant's primary purpose was to further her own cause (see paragraph 254). That was a finding open to them. It is not for this Appeal Tribunal to substitute its own views for that of the fact-finding Tribunal even if we were inclined to do so. And we are not.

22. Finally, under this head, Mr Kirk takes a point on the statutory duties of a company director and the fact that the Claimant was not an accountant. She may not have been a qualified accountant but, on the evidence accepted by the Employment Tribunal, she knew what she wanted from the accounts; the mechanics she left to Ms Jarvis. As to her duties as director, that begs the question: did she comply with those duties or flout them? The Respondent concluded that it was the latter. The ET found that they were entitled to reach that view.

Reason for dismissal (causation)

23. Whether or not the later disclosures in January 2011 were made in good faith, and we have accepted that the Employment Tribunal was entitled to conclude that they were not, the critical question for the Employment Tribunal was what was the Respondent's reason for dismissal. That is, the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee as Cairns LJ formulated the question in **Abernethy v Mott Hay and Anderson** [1974] ICR 323 at 330B.

24. In setting out his valuable observations on the approach to be taken to Employment Tribunals, in the context of a s.103A ERA case, **Kuzel v Roche Products Ltd** [2008] ICR 799, Mummery LJ pointed out, at paragraphs 53-54:

> **"53... the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
>
> **54. ... the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge."**

25. Faced with the factual nature of this Employment Tribunal's finding that the reason for dismissal related to the Claimant's misconduct and no other (paragraph 346), Mr Kirk has attacked the finding on the basis that it is a conclusion inadequately reasoned: the ET's reasons, notwithstanding their length, are not "**Meek**-compliant". We disagree.

26. The Employment Tribunal had the Claimant's case well in mind: both generally (see again paragraph 328) and in various more particular respects considered in the course of their reasons. They heard from Messrs Moffatt, Liddell and Henderson and found them to be honest and reliable witnesses. We refer to paragraph 54 of **Kuzel**. The Employment Tribunal express their findings as to the reasons and motivation of Messrs Liddell and Henderson at paragraphs 317 and 346, but those conclusions must be viewed in the context of the whole of their reasons. We have done so and find that the Employment Tribunal's conclusions are more than adequately reasoned. In particular, we do not accept the submission that the Employment Tribunal have conflated their finding as to genuine belief on the part of the disciplinary officers with their reason for dismissal. The clear finding is that they genuinely believed that the Claimant was guilty of the misconduct alleged and that is why she was dismissed.

Burchell

27. Given that the Employment Tribunal's finding that the reason for dismissal related mainly to the Claimant's (mis)conduct, was dismissal for that reason fair?

28. In answering that question in the affirmative, the Employment Tribunal had regard to the **Burchell** test. They found that the Respondent carried out a reasonable investigation giving rise to reasonable grounds for their genuine belief that the Claimant had misconducted herself in relation to the, eventually, four charges against her. In discussion we put to Mr Kirk that, contrary to his submission, there was no requirement for the Employment Tribunal to hear from Ms Jarvis (whom the Claimant herself branded unreliable) since the question was whether the Respondent carried out a reasonable investigation leading to reasonable grounds for their belief in the Claimant's misconduct.

29. Mr Moffatt interviewed Ms Jarvis as part of his investigation. It was not for the Employment Tribunal to form its own view of her reliability. They considered the question of the Claimant's financial acumen, as opposed to the technical knowledge attributable to a qualified accountant; they considered the role of the lending banks and their influence on the outcome of the disciplinary process (paragraph 335) and the late database allegation and whether that worked unfairness on the Claimant's ability to defend herself (paragraphs 364-365); they found that the outcome of the disciplinary process was not pre-ordained (paragraphs 332-4) and held that Mr Liddell was an appropriate internal figure at the disciplinary stage (paragraph 352). These were all findings of fact open to them on the evidence.

Perversity

30. Mr Kirk recognised the high hurdle which he faces in making good this basis for appeal. We have considered the way in which this attack is framed by Mr Kirk and Ms Smith's detailed response to each particular of perversity pleaded by the Claimant following the hearings before Judge Serota. Without descending to the individual allegations, we have considered the rival submissions and have no hesitation in rejecting this way of putting the appeal. Far from

arriving at legally perverse conclusions, we are satisfied that the Employment Tribunal has demonstrated clear and logical reasons for its wholly permissible findings and conclusions.

Disposal

31. It follows, as we indicated at the end of our hearing, that for these reasons the appeal fails and is dismissed. Having announced our decision, Ms Smith applied for the Respondent's costs in the appeal, other than those which I ordered at the directions hearing held on 3 December 2013. Mr Kirk invited me to adjourn that application with appropriate directions in the absence of the Claimant, who has recently undergone surgery. I agreed with that course and gave directions for a costs hearing before me, sitting alone, in due course following publication of these reasons for our judgment.