Appeal No. UKEAT/0379/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 February 2014
Judgment handed down on 4 April 2014

Before

HIS HONOUR JUDGE PETER CLARK

MR M CLANCY

MR I EZEKIEL

THE GOVERNING BODY OF BEARDWOOD HUMANITIES COLLEGE APPELLANT

MS L HAM RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR EDWARD MORGAN (of Counsel) Instructed by: Messrs Forbes Solicitors Ribchester House Lancaster Road Preston PR1 2QL
For the Respondent	MS NATASHA NEWELL (of Counsel) Direct Public Access Scheme

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Employment Tribunal erred in its approach to the question of reasonableness of this conduct dismissal. Employer appeal allowed and that issue is remitted to the same ET for re-consideration.

HIS HONOUR JUDGE PETER CLARK

1. The parties before the Manchester Employment Tribunal in this case were Ms Ham, Claimant, and the Governing Body of Beardwood Humanities College, Respondent. This is an appeal by the Respondent against the reserved judgment of a full ET chaired by Employment Judge Sherratt, promulgated with Reasons on 29 October 2012, upholding the Claimant's claim of "ordinary" unfair dismissal (the liability judgment).

2. Following a subsequent remedy hearing held on 18 March 2013 the Claimant was awarded compensation totalling £68,400. By their remedy judgment dated 20 June 2013 the Employment Tribunal made no deduction for contribution, nor under the "**Polkey**" principle. There is no appeal against that remedy judgment.

3. The liability appeal was initially rejected on the paper sift by Mitting J for the reasons given in the EAT letter dated 1 March 2013. However, at a rule 3(10) hearing held before HHJ David Richardson on 22 July 2013, the Respondent's appeal was permitted to proceed to this full hearing.

4. The ET Reasons run to 56 pages. They are unnecessarily prolix, principally due to the lengthy recitation of evidence heard by the Tribunal. That is neither necessary nor helpful. What is required is an outline of the story; a chronological statement of the relevant findings of fact made by the ET. The material facts appear to be these.

5. The Claimant was employed at the College, formerly Beardwood High School, as Head of Science, later Director of Science, from September 1994 until her dismissal in May 2011.

6. From 1998 she was actively involved in the affairs of her trade union, NASUWT. The Employment Tribunal found that her dismissal and earlier alleged detrimental treatment was unrelated to her trade union activities. The reason for her dismissal related to her conduct.

7. The Respondent carried out a disciplinary investigation. As a result she was charged with four offences. A disciplinary hearing was held on 18-19 May 2011 in the Claimant's absence. That panel found all four charges made out, and the Claimant was dismissed with immediate effect on 23 May.

8. The Claimant appealed that decision. Her appeal was heard on 3 January 2013 by a panel chaired by Mr Osman. The Claimant attended with a trade union representative. Witnesses were called on both sides. Charges 1, 3 and 4 were upheld. The second, most important charge, relating to a child safeguarding incident, was only partly upheld. The appeal was dismissed.

The Employment Tribunal decision

9. Despite the unnecessarily complicated list of issues, the Tribunal found, in relation to ordinary unfair dismissal, as follows:

(1) The primary reason for dismissal related to the Claimant's behaviour: i.e conduct (paragraph 185).

(2) The original disciplinary panel had a genuine and reasonable belief that the Claimant was guilty of the misconduct alleged (paragraph 286).

(3) Nevertheless the original decision to dismiss was unfair because it was reached in the absence of the Claimant (paragraph 286).

(4) The appeal panel was properly constituted and conducted a full re-hearing rather than a review of the original dismissal decision (paragraph 292).

(5) As to the question of fairness under section 98(4) of the **Employment Rights Act** the Employment Tribunal expressed their conclusions at paragraphs 295-6 as follows:

> **"295. The allegations against the claimant, four in number, do not tally with the examples of gross misconduct taken from the disciplinary policy that are set out in this judgment at paragraph 283. The allegations do not themselves individually constitute gross misconduct. It is not right for a reasonable employer to 'gross up' individual allegations of misconduct to make them together constitute gross misconduct. The safeguarding issue which led to the claimant's suspension and to Mr Kennedy's investigation was the allegation considered the least serious by the appeal panel.**
>
> **296. Considering these matters in relation to this employee, who had 17 years of service as a teacher without any adverse disciplinary findings against her and who would to the knowledge of all concerned [have] had her employment terminated by reason of redundancy on 21 August 2012 on the closure of the school, and considering them against the findings of the appeal panel that relationships had broken down significantly with a substantial loss of trust and confidence rather than relationships having broken down absolutely with a complete loss of trust and confidence, then the decision to dismiss the claimant summarily for gross misconduct did not fall within the band of reasonable responses of the hypothetical reasonable employer and as such was unfair.**

The appeal

10. The appeal inevitably focuses on the ET's reasoning at paragraphs 295-296. But for the finding that dismissal fell outside the range of reasonable responses, it would have been fair.

11. The first point taken by Mr Morgan concerns the ET finding (paragraph 295) that:

> **"...the allegations do not themselves individually constitute gross misconduct. It is not right for a reasonable employer to 'gross up' individual allegations of misconduct to make them together constitute gross misconduct."**

12. As Mr Morgan submits, the proper focus for the Tribunal ought to have been the nature and quality of the Claimant's conduct in totality and the impact of such conduct on the sustainability of the employment relationship. The "reason" for dismissal, for the purposes of s.98 of the Employment Rights Act, 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 famously observed in **Abernethy v Mott Hay and Anderson** [1974] ICR 323; later approved by the House of Lords in **Devis & Sons Ltd v Atkins** [1997] ICR 662. Thus the question for this ET was, first,

whether they accepted Mr Osman's evidence as to the findings of the appeal panel on the four charges levelled at the Claimant. If so, that is the conduct against which the section 98(4) question falls to be judged.

13. Section 98(4) provides:

> **"Where the employer has fulfilled the requirements of subsection (1),** [i.e has shown a potentially fair reason for dismissal; here, conduct under s.98(2)(b)] **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... the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee..."**

14. Thus, the focus is on the reasonableness of the employer's reason for dismissal, as explained by Cairns LJ.

15. We would add a further observation. The expression "gross misconduct" is steeped in industrial history. It pre-dates the introduction of the statutory concept of unfair dismissal, introduced by the **Industrial Relations Act 1971**. It is convenient shorthand for the old common law concept of wrongful dismissal: that is, where the employee is guilty of repudiatory conduct entitling the employer to summarily dismiss him without notice or pay in lieu thereof. The expression does not appear in s.98 of the Employment Rights Act. Employment Tribunals have a separate wrongful dismissal jurisdiction under the **Extension of Jurisdiction Order 1994**. However, unfair and wrongful dismissal are separate and distinct causes of action: see **Redbridge London Borough Council v Fishman** [1978] ICR 569; applied in **Farrant v Woodroffe School** [1978] ICR 184. A wrongful dismissal may be unfair; a fair dismissal may be wrongful.

16. The error of approach by this Employment Tribunal, as set out above, is not saved by Ms Newell's submission that the Employment Tribunal permissibly considered the entirety of the Claimant's conduct and how it did not amount to gross misconduct. That is not the correct approach. The question is not whether the individual acts of misconduct found by the appeal panel individually, or indeed cumulatively, amounted to gross misconduct. Rather, it is whether the conduct in its totality amounted to a sufficient reason for dismissal under section 98(4).

17. It follows that we accept Mr Morgan's principal submission.

18. Secondly, Mr Morgan argues that the Employment Tribunal were guilty of substituting their own view for that of the employer in finding the dismissal unfair. We note that the Employment Tribunal correctly directed themselves as to this well-established principle: see paragraph 258. Did they then depart from that self-direction?

19. We approach that question with some trepidation in light of recent Court of Appeal authority: for example, **Bowater v NW London Hospitals NHS Trust** [2011] IRLR 331 and **Graham v DWP** [2012] IRLR 759. As Longmore LJ pointed out in **Bowater**, paragraph 19, the EAT must not substitute its view for that of the ET on appeal.

20. In these circumstances we are not prepared to uphold Mr Morgan's submission on this aspect of the appeal.

21. He returns to stronger ground in submitting that the Employment Tribunal took into account a wholly irrelevant factor in its assessment of the s.98(4) question at paragraph 296: namely that the Claimant's employment was due to end by reason of redundancy on

31 August 2012 on the closure of the school. Ms Newell accepts that the impending redundancy was irrelevant to the conduct unfair dismissal question but argues that here the ET was simply recording a fact. We cannot accept that submission: the prospect of future dismissal by reason of redundancy was simply irrelevant, but the Employment Tribunal appear to have taken it into account in their overall assessment of the reasonableness of the dismissal by reason of conduct.

Disposal

22. Ms Newell mounted a forceful and sustained defence of the Employment Tribunal's conclusions on fairness by reference to what she characterised as the lack of seriousness of the four disciplinary charges against the Claimant. They were such that dismissal fell outside the range of reasonable responses. We cannot say that that conclusion is plainly and unarguably right or wrong. We therefore are unable to reverse or uphold the finding of unfair dismissal on appeal. Having fallen into error the Employment Tribunal decision on ordinary unfair dismissal cannot stand. The appeal is allowed.

23. The case will be remitted for re-hearing on the reasonableness of sanction issue. This was a lengthy hearing below. Although we have found errors in the original Employment Tribunal's approach, we accept Ms Newell's submission that the point should be remitted to the same Employment Tribunal, if practicable, for re-consideration in the light of our judgment. The matter may be determined on submissions; no further evidence is required.