Appeal No. UKEAT/0489/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 November 2013

Before

THE HONOURABLE MR JUSTICE MITTING

MR C EDWARDS

MR D G SMITH

ROYAL BANK OF SCOTLAND PLC — APPELLANT

MR P O'DOHERTY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR P STARCEVIC (of Counsel) Instructed by: Messrs Brodies LLP 15 Atholl Crescent Edinburgh EH3 8HA
For the Respondent	MR P O'DOHERTY (The Respondent in Person) & MRS L O'DOHERTY (Representative)

SUMMARY

UNFAIR DISMISSAL – Procedural fairness/automatically unfair dismissal

Unfair dismissal. Unfair procedure, including pre-judgment of the outcome.

THE HONOURABLE MR JUSTICE MITTING

1. The Claimant is 41. He started employment as a branch manager with the employers on 5 January 2009. In late 2009 his marriage broke down. He was diagnosed with depression and was off work for two weeks. He returned in the first week of January 2010. He broke down in tears on 25 January 2010 and was signed off sick by his general practitioner until 1 February 2010 and then for a longer period. In the week commencing 8 February 2010 an investigation began into an allegation that he had divulged details of a customer's account to his sister-in-law and that there were anomalies in the account for which he might have been responsible. On 8 March 2010 the Claimant's line manager told him, by voicemail, that he was being investigated. On 23 March 2010 an investigation meeting was convened by Dave Pryce, the auditor who was inquiring into the allegations for the operational risk department. The topics were two-fold. First, that he had viewed the accounts of friends and a family member without authorisation contrary to the employer's rules. Secondly, that he had upgraded his sister-in-law's account by using a staff access code, thereby avoiding the monthly charge which she would have otherwise have paid of £12.95.

2. The Employment Tribunal found that the Claimant became distressed after about 15 minutes into the investigative meeting, that his thought processes were adversely affected by his medical condition and that he had not been given an adequate opportunity to deal with the topics of the investigation or to have someone attend the meeting with him.

3. On 8 April the Claimant was suspended. He was invited to a disciplinary meeting on 25 May but before then had been to occupational health. He attended a meeting with Dr Mawson on 30 April. She produced a two-page report, which was later summarised in a letter of 8 May. In her two-page report she noted in response to a box at the head of it, in

answer to the question, "Adjustments/restrictions recommended", "Yes". She discussed the impact of his condition on his ability to perform his work and the adjustments that might have to be made to permit him to do that, but importantly she also commented on the forthcoming disciplinary hearing:

> **"Mr O'Doherty is understandably concerned about his ability to effectively perform at any disciplinary hearing. However I believe he is capable of understanding the process and capable of taking part in the process and from this point of view I would regard him as fit to attend such a hearing. However he continues to experience a significant level of symptoms and at times suffers with episodes of distress. It is also notable that his memory and concentration is not yet improved. On this basis should a hearing take place I feel that Mr O'Doherty would take part in such a hearing with less difficulty should he further improve in his condition, perhaps after the start of his counselling. Should his employer decide that would not be appropriate in view of the disciplinary process then it is recommended that account be taken of his ongoing symptoms and that he is allowed generous timing to prepare and conduct a meeting and should he experience any undue difficulty that account is taken of this in the conduct of the meeting."**

Dr Mawson's opinion could not have been clearer.

4. The disciplinary meeting was postponed but only until 3 June. That was done in part to permit some documents to be supplied to the Claimant. He was advised of his right to be accompanied at the disciplinary meeting, but he attended alone. He told the Tribunal that he did so only to demonstrate that he was unfit to answer the allegations and to advance his case. The Employment Tribunal found that he had been extremely distressed at the disciplinary meeting and had made it clear to the senior bank manager conducting it, Mr Taylor, that he did not want it to go ahead. The Employment Tribunal found that it should have been adjourned, that his mental condition meant that he could not remember details of what had occurred some time ago, and that the employers knew that and that Mr Taylor should have known it. Further, Mr Taylor did not conduct the further inquiries which he thought necessary into matters which the Claimant had raised at the meeting and should have done so. He asked the auditor, Mr Pryce, for clarification about some matters, which Mr Pryce provided to him at 4.11pm on 4 June, the day after the disciplinary meeting. A disciplinary letter was sent to the Claimant

dated 4 June. He said in evidence to the Tribunal that he had received it on the same day. Its terms followed a template letter which the Tribunal had found had been downloaded by Mr Taylor two hours after the end of the disciplinary meeting. We have been told today in fact it was an hour and 13 minutes, but it does not matter.

5. The disciplinary outcome letter followed the template letter with the addition only of the date upon which dismissal was to take effect. In all other respects we are told it was identical. Evidence was given to the Employment Tribunal that the person who had drafted the outcome template did not include in it any outcome other than dismissal.

6. The Tribunal found:

(1) The decision to dismiss was pre-judged, as it put it, "prior to any meeting taking place with the Claimant".

(2) The Claimant was not given a proper opportunity to defend himself.

The Tribunal went further in respect of its first conclusion. It found that the letter which was ultimately sent to the Claimant, apart perhaps from the date on which dismissal took effect, had been prepared before the disciplinary meeting on 3 June. The Claimant launched an internal appeal. On 7 June the regional director dismissed it. The Employment Tribunal found the dismissal to have been unfair for the following reasons.

(1) The Claimant should have been provided with details of the allegations before the investigation meeting because of his medical condition.

(2) The employers should not have proceeded with the disciplinary meeting until there had been time for the Claimant's condition to improve, after which a further medical report should have been obtained to ensure that he was fit.

(3) In any event, putting to one side consideration of the Claimant's medical condition, the employers should have carried out further enquiries of and about the customer whose account had been viewed.

(4) The employers should have sent requested documents to the Claimant prior to the disciplinary hearing. And

(5) The employers should not have pre-judged the outcome and made the decision to dismiss before he had a reasonable opportunity to put his case.

The Tribunal also found that there had been a failure to make reasonable adjustments to accommodate the difficulty created for the Claimant, his inability to present his case adequately caused by his disability, his medical condition. It set out its reasons in paragraph 4.4 of its reserved Judgment and Reasons.

> **"It was noted by Dr Mawson that the claimant's memory and concentration was impaired and that there was concern about the claimant's capability of understanding the process and taking part in it. The recommendation was that the hearing should take place when the claimant's condition had improved but if this was not possible then account should be taken of his symptoms and he be allowed generous time to prepare and conduct a meeting. The respondent's practice of conducting investigation meetings without the employee being told in advance of the specifics of the allegations and for employees not to be permitted to be accompanied at such meetings may well be reasonable in normal circumstances but this practice placed the claimant at a substantial disadvantage in comparison to persons who are not disabled and not suffering from the claimant's condition. The specifics of the allegations and questions to be asked could have been put to the claimant in advance of any meetings, the respondent could have allowed him to be accompanied at the investigation meeting and could have allowed him the extra time that he needed as recommended by Dr Mawson if they were intent on proceeding with the disciplinary process as they did. Such adjustments were clearly not made. The claimant was not provided with generous time to prepare for the investigation meeting or for the disciplinary hearing as he did not have the documentation and information requested well in advance of those meetings. Furthermore additional time was not given to the claimant during the course of those meetings and, in fact, Mr Taylor continued with the**

> **disciplinary hearing at a time when it was clear that the claimant was unable to cope. Accordingly the Tribunal found that the respondent was under a duty to make reasonable adjustments but they failed to do so during the disciplinary process and by virtue of this they discriminated against the claimant."**

7. Mr Starcevic, who did not appear for the Claimant below, and relies on grounds drafted by another counsel who also did not appear for the Claimant below, submits that the Tribunal's decision contains two basic errors of law. First, he submits that there was no or no adequate material upon which the Tribunal could found its conclusion that the outcome had been pre-judged. He draws attention to the wording of paragraph 2.17 of the Reasons, which states:"

> **"The Tribunal found as a matter of fact that the decision to dismiss the Claimant was pre-judged and was made following Mr Pryce's investigation and prior to any meeting taking place with the Claimant."**

He submits that a natural reading of that sentence means that the issue had been pre-judged even before the investigation meeting on 23 March 2010.

8. His second submission is that the Tribunal adopted a short-circuit in considering the issue of discrimination and the failure to make reasonable adjustments by failing to identify the provision criterion or practice which the employers ordinarily followed but which they should have adjusted to permit the Claimant to put his case adequately.

9. As far as the first ground of appeal is concerned, there is in our judgment nothing in it. It is an unreasonable interpretation of the Tribunal's words in paragraph 2.17 to say that the Tribunal found that the decision had been made before the investigation meeting. What the Tribunal found was that the decision had been made following Mr Pryce's investigation, a process which included the investigation meeting. The reference can only fairly be read as referring to the disciplinary meeting. As far as a decision having made before the disciplinary hearing goes, there was material upon which the Tribunal could have reached the conclusion

that it did. In particular, the insistence that the meeting was held when it was, notwithstanding the advice of Dr Mawson that it should be deferred to permit the Claimant to put his case adequately, the fact that the decision outcome letter followed the decision template letter, a document which did not provide for any other outcome, word for word save for the inclusion of the date on which dismissal was to take effect, and although this does not appear as part of the Tribunal's reasoning, if it accepted the Claimant's evidence on the question, the receipt by him of the dismissal letter on 4 June, the day on which it was sent. Finally, the Tribunal were entitled to find, indeed driven by the documents to find, that the material which Mr Taylor thought that he required from Mr Pryce was not in fact given to him until the dismissal outcome letter had been sent.

10. Accordingly we conclude that there is nothing in the first of the two principal grounds of appeal.

11. As to the second, we acknowledge that the Tribunal did not set out expressly what the provision criterion or practice was which should have been adjusted to accommodate the Claimant's mental difficulties. That ground of appeal was drafted, as we have indicated, by counsel who did not attend the hearing. It has been advanced by Mr Starcevic, who has done his best at short notice, who also did not attend the hearing. It seems to us to have been inevitable that the practice of the employers in conducting an investigation meeting without first notifying the person under investigation on the detail of the allegations or allowing him to be accompanied at the investigation meeting was assumed. It was common ground that that was the practice. Had it been seriously in issue, then one would have expected the employers to have raised it and said words to the effect that it was not their practice. It is a practice which, as the Tribunal observed, is one which is commonplace when investigations are conducted. Accordingly the fact that the Tribunal did not spell out what the practice was is not, in our

judgment, a ground for upsetting its plainly well-reasoned and justified decision on the failure to make an adjustment. Reduced to its simplest level, what the Tribunal found, and was plainly entitled to find, was that the application of normal disciplinary processes in the case of this Claimant, given his disability, was one that put him at a significant disadvantage. That disadvantage could and should be overcome. Thus explained, the decision of the Tribunal is plainly sustainable.

12. The hearing of this case took place over four days. The allegations against a branch manager were very serious. For a branch manager to gain access to the account of a relative for the purpose of providing information to his sister-in-law to permit her to make use of that in relation to her dealings with her husband would be a grave breach of contract by the branch manager, fully justifying dismissal and summary dismissal. Likewise, for a branch manager deliberately to arrange, with the use of his own access code, for a relative to enjoy the facilities of an account without paying the contractual charges for that account would be an act of gross misconduct. As we understand it, by the time that the Claimant came to conduct his case before the Employment Tribunal he was fully able to do so. He had recovered. One would therefore have hoped that the Tribunal would have resolved the underlying factual questions, namely whether or not the Claimant had done either or both of the things alleged against him. If he had not, then he was entitled to have the finding of a Tribunal that he had not committed those serious acts of misconduct. If he had, then it is difficult to see how any Tribunal could have concluded that it would be just that he should receive substantial compensation for future losses. In other words, the **Polkey** issue raised its head loud and clear. The Tribunal found that the Claimant did not contribute to its conduct. There is no appeal against that finding. But it expressed itself equivocally about the **Polkey** issue. It directed itself correctly at paragraph 4.3 of its decision in the light of Elias J's observations in **Alexander v Bridgen Enterprises** UKEAT 0107/2006 and expressed its conclusion shortly.

> **"In this case the Tribunal did not have sufficient evidence before it to speculate what would have happened if procedures had been properly complied with and found that this was one of the relatively rare cases when it could not decide what would have happened if a fair procedure had been followed."**

It has therefore not decided the **Polkey** issue. If the employers insist at the remedies hearing that the Claimant did do either or both of the two acts of alleged gross misconduct and so should receive no compensation for future loss, then it is an issue which the Tribunal will have to determine.

13. Accordingly, and for the reasons expressed, we dismiss this appeal and remit the matter to the original Tribunal if possible for it to determine what monetary awards should be made to the Claimant. We trust that the observations which we have made about the need to determine the basic underlying issues will not go unheeded.