Appeal No. UKEAT/0161/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 September 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MS I M YEUNG — APPELLANT

CAPSTONE CARE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

PRELIMINARY HEARING - APPELLANT ONLY

APPEARANCES

For the Appellant	MS NATASHA JOFFE (of Counsel) (Appearing under the Employment Law Appeal Advice Scheme)

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

It is reasonably arguable that a manager who conducted a disciplinary case, then pursued further investigations and interviews without reverting to the Claimant, acted unfairly.

Observed that the Employment Judge, as is dispiritingly common, wrongly placed the burden of proof on the Respondent, despite the change in **Employment Act 1980**.

HIS HONOUR JUDGE McMULLEN QC

1. This case is before me on a preliminary hearing as directed by HH Jeffrey Burke QC. I formed the provisional view that there was substance in most of the grounds, and will direct that Judge Burke's preliminary observations on this be forthcoming to the parties, since I substantially agree with them. Today the Claimant has had the distinct advantage to be represented by Ms Natasha Joffe, appearing for free under ELAAS, and I am grateful to her for her work, although I have said that the Claimant's Notice of Appeal and her skeleton argument are succinct and clear and have been strengthened by Ms Joffe's intervention.

2. This case will go to a full hearing on what are now agreed to be grounds 1-4 of the skeleton argument. Whether as a separate ground or as a part of those, I consider there is a question of law with a reasonable prospect of success in relation to what happened after 13 January 2012. The Judge records in paragraph 12 of his Reasons that after the appeal meeting there was a full investigation by the appeal officer, Mr Odell, who interviewed relevant staff, but none of that came back to the Claimant. That would seem to me to be unfair.

3. The Claimant, however, must bear in mind two points as she proceeds with my blessing to a full hearing. The first is that the Judge, I am dismayed to note, gets the burden of proof wrong in his conclusion at paragraph 12 – that is, the second paragraph 12 in this Judgment. Yet again, I am wearied by having to draw the attention of Employment Judges to a host of EAT judgments from 1990, including my own in **West London Mental Health NHS Trust v Sarkar** [2009] IRLR 512 undisturbed [2010] EWCA Civ 289, where I deal with the issue of the bland application of **British Home Stores Ltd v Burchell** [1978] IRLR 379 without a reflection on the change in the law by the **Employment Act 1980**. I bemoaned the fact that

Tribunals were still getting it wrong despite constant reminders of this court, the Court of Appeal and of the Court of Session, and yet again Employment Judge Vinecombe has got it wrong. I will say the same thing in the second case in my list today, where yet another Judge has got it wrong.

4. The point is, however, that the employer in this case succeeded notwithstanding that the burden of proof was placed upon it, and so the Claimant will have to bear in mind that there was a finding in favour of the Respondent with a more onerous obligation placed upon it.

5. The second caveat is that in his concluding remarks, Mummery LJ in his majority Judgment in **Fuller v London Borough of Brent** [2011] EWCA Civ 267, adopts what I said in that case, that the Claimant did not assist herself by failing to take part in the internal hearings. Ms Yeung must expect some criticism because she did not take part in the internal proceedings.

6. With those two caveats in mind, the case will go to a full hearing. This is a case where, as Ms Joffe points out in her skeleton, the stakes were high (see **A v B** [2003] IRLR 405 and **Salford Royal NHS Foundation Trust v Roldan** [2010] EWCA Civ 522). The Judge should have considered, in standing back and looking at the reasonableness of the decision to dismiss, matters that might be exculpatory of this Claimant in a regulated background where, the consequences of her actions would lead to the regulator intervening and conducting a safeguarding inquiry in which she was acquitted. I will not send forward ground 5 which relates to that, because it came after the relevant date.

7. Ground 6 relates to what might appear to be a difference between what the Judge said ex tempore and what he said in writing; the latter prevails. Otherwise, this case will go to a full hearing. It will be a Judge alone, two hours, category B.