Appeal No. UKEAT/0601/11/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 April 2013
Judgment handed down on 6 June 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR I EZEKIEL

MR D NORMAN

CROYDON HEALTH SERVICES NHS TRUST (FORMERLY MAYDAY HEALTHCARE NHS TRUST) APPELLANT

MR G BROWN RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DESHPAL PANESAR (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR
For the Respondent	MR JOSEPH SULLIVAN (of Counsel) Instructed by: Martin Searle Solicitors 9 Marlborough Place Brighton East Sussex BN1 1UB

SUMMARY

UNFAIR DISMISSAL

Reasonableness of dismissal

Contribution

PRACTICE AND PROCEDURE - Perversity

Employment Tribunal finding of unfair dismissal due to lack of reasonable investigation, applying **Burchell**, and procedural failings. Decision not perverse; not a case of substitution of view by ET. Perversity not made out.

However, ET failed to address issue of contribution raised before it. At request of parties EAT made its finding of 25 per cent contribution rather than remitting the point.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. The parties before the London South Employment Tribunal in this matter were Mr Gary Brown, Claimant and Croydon Health Services NHS Trust, Respondent, as we shall describe them. This is the full hearing of an appeal by the Respondent against the Judgment of an ET chaired by Employment Judge Silverman, sitting over 6 days, upholding the Claimant's complaint of unfair dismissal brought against the Respondent, his former employer and awarding him compensation totalling £43,300. That Judgment, with reasons, was promulgated on 22 July 2011.

Background

2. The Claimant was a long serving employee of the Respondent, his employment having commenced on 19 April 1982 and ended with his summary dismissal by Mr Ralph, Director of Estates and Facilities, on grounds of gross misconduct, on 2 March 2010. The Claimant was a Project Officer in the Respondent's Estates Department. Following an investigation by the civilian police and Mr Mark Howard, an NHS counter fraud specialist, known as Operation Kateri, an investigation was carried out by Helen Daniels leading to the Claimant facing three charges of misconduct arising out of his relationship with Trevor Randall, a contractor and his brother John Brown and his son (the Claimant's nephew) Paul Brown. First it was said that the Claimant coerced Mr Randall to employ John and Paul Brown on work for the Respondent. Next, that he, the Claimant, improperly authorised invoices submitted by his brother's firm, Indecs, without supporting documentation. Thirdly, that he acted inappropriately in assisting Indecs in the tendering process operated by the Respondent. Mr Ralph found all three charges made out. An appeal against dismissal was rejected by a panel chaired by Ms Smith. She did not give evidence before the ET but another panel member, Ms Alagaratnam, did.

The ET decision

3. The ET rejected the Claimant's case that he was dismissed for making a protected disclosure but upheld the complaint of 'ordinary' unfair dismissal under s.98(4) **Employment Rights Act 1996**. The ET found that the reason for dismissal related to the Claimant's conduct but held that it was unfair, principally because, in the view of the ET, the Respondent had not carried out a reasonable investigation into the charges against the Claimant and in addition on procedural grounds. They went on to find that no deduction should be made under the **Polkey** principle, but say nothing about the issue of contribution by the Claimant to his dismissal, an issue identified in the list of issues agreed between the parties and on which the ET was addressed in oral closing submissions by Mr Panesar representing the Respondent. The ET went on to assess compensation in the total sum of £43,300, including the basic award, compensatory award and a 10 per cent uplift under s.207A **Trade Union & Labour Relations (Consolidation) Act 1992**.

The appeal

4. It is now well established that in a case of unfair dismissal the ET must not substitute its view for that of the employer. The test is whether the employer acted within the range of reasonable responses. That test applies to procedural considerations, including the reasonableness of the employer's investigation, as well as substantive matters including the appropriateness of the sanction, here dismissal: see the cases cited in **Sainsbury v Hitt** [2003] ICR 111 (CA).

5. The EAT must approach with caution appeals based on the perversity ground, as explained by Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634. Just as it is wrong for the ET to substitute its view for that of the employer in a case such as this, equally it would be

wrong for the EAT to substitute its own judgment for that of the ET under the guise of perversity: see **Bowater v NW London Hospitals NHS Trust** [2011] IRLR 331, para. 19, per Longmore LJ. It would appear that I fell into error in that way in **Graham v DWP** [2012] IRLR 759 (CA). In considering the perversity ground(s) in the present appeal advanced by Mr Panesar we are reminded by Mr Sullivan of the formulation of Burton J in **Chambers-Mills v Allied Bakeries** (UKEAT/0165/08/LA, 18 November 2008) para. 9, where he said:

> **"It is of course not enough for a tribunal to be in factual error; far from it, it is required before this tribunal can interfere, that there be an error of law. There can in rare circumstances be such a concatenation of errors of fact, or so gigantic a howler, that such error might amount to perversity, but perversity, as has been made clear in so many recent authorities in the Court of Appeal, is a very narrow ground."**

Unfair dismissal

6. Mr Panesar submits that in finding the dismissal unfair the ET was guilty of substituting its view for that of the Respondent employer and further that that conclusion was legally perverse.

7. On the charge of the Claimant coercing Mr Randall to employ his relatives, Mr Panesar submits that it was for the Respondent to form a view of the credibility of the wholly conflicting accounts given by the Claimant and Mr Randall, who gave evidence at the disciplinary hearing before Mr Ralph and was there cross-examined both by the Claimant and his trade union representative. It was not for the ET to reach its own conclusion as to the credibility of the disputed versions.

8. All this true, however we are not persuaded that this ET fell into the substitution trap. On the contrary, applying the **Burchell** test they held (paras. 41-44) that the Respondent had failed to carry out a reasonable investigation, specifically, into the Claimant's case that Mr Randall had an ulterior motive for accusing the Claimant of coercion, namely that the Claimant believed

that he, Randall, had been guilty of fraudulent activity and had as a result excluded his company from the tendering process. As Mr Sullivan points out, in his dismissal letter dated 5 March 2010 Mr Ralph acknowledges that the Claimant contended that he had raised the issue of Mr Randall's integrity with his line manager, Bob Woodham. However, Mr Ralph does not appear to have taken this up with Mr Woodham; nor did the appeal panel. Both the disciplinary and appeal hearings proceeded on the basis of Ms Daniels' investigation and the evidence and submissions which they received. There was no additional enquiry by either disciplinary authority.

9. In reality, the critical question for us is whether the ET's finding that the Respondent failed to carry out a reasonable investigation into the three charges levelled against the Claimant (it was the Respondent's case that any one or more of the charges amounted to gross misconduct entitling the Respondent to dismiss him) is sustainable on appeal, applying the strict test to which we have earlier referred. Whilst Mr Panesar succeeds in landing some blows in his challenge to the ET's findings; by way of example the finding at para. 47 that the Respondent ignored the evidence of three people that the Claimant was not involved in the tendering process appears to be contrary to the agreed position between the parties that he was, so that bells began to ring as we absorbed Mr Panesar's careful submissions, having then had the advantage of Mr Sullivan's detailed response we were not persuaded that this was a case giving rise to the full concatenation which causes us to interfere. The egg is sufficiently good, albeit in parts.

10. We are further satisfied that, in addition to further enquiries of witnesses, including Mr Woodham and a former Project Officer, James Brown (no relation), the ET was entitled to conclude that the Respondent ought to have disclosed to the Claimant the Operation Kateri file (para. 59) and to be concerned that the main players in the forthcoming disciplinary process all

met to review the outcome of the police and counter fraud investigation on 25 September 2009 (para. 58).

11. In short, we see no basis in law for interfering with the ET's finding of unfair dismissal.

Contribution

12. On this aspect of the appeal we are persuaded that the ET fell into error. We have earlier referred to the agreed list of issues and Mr Panesar's closing argument on this aspect of the case. Mr Sullivan submits that it is implicit in the ET's reasons that the contribution argument failed; we are unable to draw that inference, particularly in light of the ET's finding of fact (para. 50) that the Claimant authorised payment of invoices submitted by his brother/Indecs which were unsupported by any documentation. We have been taken to a comparison between Indecs invoices approved by the Claimant and a Randalls invoice with supporting documentation. The ET accepted that the Claimant should not have approved the Indecs invoices without supporting documents. Although there was no written instruction or policy to this effect there was extensive evidence from employees as to the practice.

13. At para. 63 the ET observe that a proper investigation might have resulted in a finding that the Claimant should have ensured that he was not involved in authorising payments to his brother/Indecs, however that is a different point from his authorising payment without the necessary documentation. Further, in that paragraph the ET expressly address the quite separate **Polkey** question only.

14. The question which then arises is what is to be done with the contribution issue? We proffered three options to the parties: remit the question to the same or a different tribunal or resolve the matter ourselves. Both parties expressed a preference for the third option. We are

content to take that course, which is proportionate in the interests of saving further time and expense and in line with the approach of Jacobs LJ in **Buckland v Bournemouth University** [2010] IRLR 445, paras. 57-58.

15. Loyal to the ET's finding at para. 50 we find that in approving Indecs invoices without supporting documentation the Claimant was guilty of culpable or blameworthy conduct which materially contributed to his dismissal. In our judgment the appropriate level of contribution is represented by a 25 per cent reduction in both the basic and the compensatory awards.

Uplift

16. Mr Panesar raised a faint argument that the ET failed to give adequate reasons for their finding (para. 83) of a 10 per cent uplift for breach of the ACAS Code. The range, under s.207A of the 1992 Act is 0-25 per cent. The ET settled on 10 per cent. Looking at their reasons as a whole that reflected the procedural failings which they had earlier identified. We see no force in this submission.

Disposal

17. It follows that the ET finding of unfair dismissal is affirmed. However, the compensation awarded is subject to a 25 per cent deduction in respect of the Claimant's contributing conduct as we have found it to be. Consequently, the overall award of compensation is reduced to £32,475.