Appeal No. UKEAT/0052/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 November 2012

Before

THE HONOURABLE MR JUSTICE WILKIE

MR M CLANCY

DR B V FITZGERALD MBE LLD FRSA

BARNET ENFIELD & HARINGEY MENTAL HEALTH TRUST APPELLANT

MS M MARS RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS EMMA SMITH (of Counsel) Instructed by: Bevan Brittan LLP Solicitors Fleet Place House 2 Fleet Street London EC4M 7RF
For the Respondent	MS MARIA MARS (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Employment Tribunal misunderstood or misapplied the evidence. A different tribunal must consider the case afresh.

THE HONOURABLE MR JUSTICE WILKIE

1. This is an appeal by the Barnet Enfield & Haringey Mental Health Trust against a decision of the Employment Tribunal held at the East London Hearing Centre on six days between 12 and 21 September 2011 in respect of one of the conclusions of that Tribunal, namely that the Appellant unfairly dismissed the Claimant, Maria Mars.

2. Ms Mars had made other claims alleging disability discrimination and dismissal and/or detriment for a reason connected with making a protective disclosure as well as for outstanding holiday pay and breach of contract. Each of those claims were dismissed by the Tribunal and there is no cross-appeal by Ms Mars in respect of those decisions.

3. We say at the outset that our decision is to allow the appeal. We are asked by the Appellant to remit the matter of unfair dismissal for a fresh hearing before a differently constituted Tribunal. That means that all of the issues canvassed below and here will be still in play. A lot of the points made by the Appellant have been made in such a way as to invite this Tribunal to express a view whether certain points that the Appellant relies on may or may not be well founded.

4. Inevitably in order to dispose of this appeal we have had to come to certain limited conclusions, but we wish to avoid saying anything in respect of any of the other matters which have been canvassed before us which would give either side any undue optimism or pessimism as to whether the claim ultimately will succeed or will be dismissed. That will be a task for the new Tribunal which hears this matter afresh, and nothing that we say should in any way inhibit their freedom to hear the evidence, consider the arguments and come to the conclusions to which they will conclude they are entitled to come applying the law to the facts.

5. The Appellant and Ms Mars, who have greatly assisted us by their oral and extensive written submissions should not feel, by reason of our approach, that we have not considered these issues of fact. We have considered them, but have decided to make no comment on a large number of them for the reasons that we have indicated.

The appeal

6. The Appellant appeals against the decision of the Employment Tribunal on two bases. The first is that it is said that there were a series of findings of fact which were demonstrably contrary to the evidence or which involved argument which was not sustainable on the evidence. Our judgment is that some of these points are well made and, as the issues to which those findings of fact related, were thought by the Tribunal to be important or central to their deliberations, in our judgment, the errors which they made in respect of the factual basis for their findings were so clear and obvious that they constituted errors of law which, in themselves would be sufficient to allow the appeal.

7. The first issue concerns their findings in relation to a memory stick. This was an issue upon which there was a very clear dispute. Putting it shortly the evidence on behalf of the Appellant was that at various meetings, one dated 15 February 2008, another dated 20 February 2008, and the disciplinary hearing dated 21 April 2008, the Respondent said that one of the explanations put forward by Ms Mars for what the Respondent believed was a substantial inadequacy in her record-keeping was that she kept files on a memory stick. There was some detailed evidence that she used a personal computer which belonged to her son.

8. By way of contrast the Respondent, Ms Mars', evidence to the Tribunal was that she had never mentioned having a memory stick; furthermore, she could not have said that, because she does not herself own a personal computer and in fact she does not have any children.

9. One of the central issues in the case was the Appellant's view, held by Ms Lithgow, that, to an extent, Ms Mars was not honest in the way in which she had dealt with explaining or justifying the apparent inefficiency in her record-keeping. One of the elements which informed Ms Lithgow apparently was that she said that Ms Mars had put forward the memory stick argument, but had failed to produce a memory stick which showed that she was keeping files in that way.

10. Given that this was an important element in the case, the Tribunal had to come to a view on the credibility of the witnesses including Ms Mars, and this was one of the issues which they considered to be important for that purpose. Their reasoning in support of their view that, on balance, they preferred the evidence of the Claimant, was the Tribunal's understanding that a witness called by the Appellant, Ms Gregoriou, had said that, at a meeting on 15 February 2008, the Claimant had produced a silver memory stick which was inserted into a computer and no relevant material was found.

11. The Tribunal, on the basis of their understanding then constructed an argument which cast doubt upon the reliability of Ms Gregoriou's evidence and, by implication, that of the other Appellant's witnesses. It is pointed out that the Tribunal, at paragraph 10 of their decision where they record that evidence of Ms Gregoriou, was wrong in recording her evidence because, in the Chairman's own notes of evidence at page 146, the evidence of Ms Gregoriou was that at that meeting the Claimant had told her about a memory stick but had not actually

produced it. In that respect, therefore, the Tribunal's reasoning on this important topic was demonstrably based on a fundamental error as to what the evidence had been.

12. The second, similar, issue concerns the extent to which, there had been running, in parallel, a grievance process whereby the Claimant had been making complaints about certain aspects of her working conditions, and the response of her managers to it, as well as the disciplinary proceedings arising from the discovery by the Appellant that there were some deficiencies in the Claimant's record-keeping.

13. The sequence of events appears to have been that: arising from discovery of evidence of some deficiency in record-keeping the Appellant suspended the Claimant. At about the same time the Claimant launched her grievance, informed by the terms in which a reference had been made to occupational health in order for them to advise the Appellant whether her underlying medical conditions may have contributed to those apparent record-keeping deficiencies.

14. The Appellant stayed the disciplinary proceedings pending the outcome of the grievance procedure, which went through a first stage, then to an appeal. After that had been completed it then resumed the disciplinary procedure to which we have referred.

15. Some of the same managers were involved in both the grievance procedure and the disciplinary procedure. Ms Lithgow was on the Appeal Panel dealing with the grievance procedure, as was a Mr Bohrer. Ms Lithgow at the same time, however, was the person who took the decision after a disciplinary hearing to dismiss the Claimant, and Mr Bohrer was the chair of the Panel which heard the Claimant's appeal against the dismissal.

16. The Tribunal came to a series of conclusions about the appropriateness of the same managers being involved in both parallel sets of proceedings. Their consideration of that issue was informed by their findings of fact, in particular the finding of fact at paragraph 13.32 which deals with the narrative in respect of the grievance procedure. In the course of that paragraph they said as follows:

> **"Ms Madaka reviewed the evidence and decided not to uphold the grievance. She said the evidence showed that the Claimant had office space, computer access and clinical space to see patients. She also referred to the fact that clinical notes should have been kept up to date which was a component part of the disciplinary process against the Claimant but was not part of the grievance raised by the Claimant against Dr McCarthy Woods. She also concluded that Dr McCarthy Woods had supported the Claimant. The issues of the grievance against Dr McCarthy Woods and the disciplinary process against the Claimant were conflated. In reaching a conclusion Ms Madaka discussed the record keeping with Ms Bucknor who worked with the Claimant. The conclusion was communicated to the Claimant by letter dated 1st October 2007."**

17. It is pointed out by the Appellant that the statement of fact that record-keeping was no part of the grievance raised by the Claimant is inaccurate because the letter in which the grievance is raised contains at the end under heading 4.0, "Impact On My Professional Practice And Development", the following statement:

> **"The ongoing excessive pressure plus the lack of support and poor management have affected my physical health and well being; which in turn has impacted on aspects of my performance. This has resulted in me not being able to keep my clinical records up to date and I have made managers formally aware of this."**

18. It is therefore clear that this issue was one which had been raised by the Claimant under the grievance procedure and that the Tribunal, in informing itself of the evidence on the basis of which it subsequently came to conclusions about the way in which the parallel procedures were operated by the Appellant, misdirected itself on the evidence and on the documentation. This issue was, to some extent, important for the Tribunal in its decision. In our judgment, this was a clear misunderstanding of or misdirection as to the facts.

19. The third point reverts to the memory stick issue and amounts to a simple, but clear-cut, misstatement of the evidence given by Ms Lithgow in the context of her decision to dismiss and, in particular, her view that the Claimant had not acted honestly in her dealings with the Appellant on the issue of any explanation that there might be for her apparent poor record-keeping. At paragraph 13.47, part of the findings of fact, the Tribunal says as follows:

> **"She [Ms Lithgow] also took into account the issue of the memory stick and disbelieved the Claimant's denial of having one, which added to the conclusion of dishonesty."**

20. That is demonstrably inaccurate as an account of the evidence given by Ms Lithgow. Ms Lithgow's evidence, recorded in a number of places in the Employment Judge's notes and given in response to questioning at various stages in her evidence, made it clear that what Ms Lithgow was saying was that the Claimant had referred to the fact that she had kept notes on a memory stick. It was the Claimant's position that this evidence was untrue and that she had denied having any such memory stick when asked about it in the course of the disciplinary proceedings. She had repeated that evidence before the Tribunal. But it is clear that the Tribunal has confused itself as to what Ms Lithgow was saying in her evidence as to what had been said at the time. Once again, unhappily, this is a clear misapplication of the evidence on an issue which, it is apparent, the Tribunal considered to be of significance.

21. A fourth issue under this heading concerns what was the evidence in respect of the condition of the patient files which had been reviewed by the Appellant and which Ms Madaka, one of the supervisors of the Claimant, said she discovered when she reviewed them.

22. The Tribunal, as part of its stated intention of applying the well-known **British Home Stores Ltd v Burchell** [1978] IRLR 379 test, at paragraph 45.5 said that it was not satisfied that at the time the Respondent reached its decision to dismiss there were reasonable grounds

upon which to reach such a conclusion. Those reasons included firstly a question about the security of the files which were investigated by Ms Madaka. They said this, at 45.5.1:

> **"There was no evidence of the condition of those files at the date of suspension. There was no evidence of secure keeping of the files during the 8 months prior to the dismissal hearing. It was clear from the evidence that other clinicians and staff had access to those files as some of the cases remained live."**

23. They had taken evidence which they recorded in their findings of fact at paragraph 13.40, recording Ms Lithgow's evidence that the files were paper files kept in sleeves which she believed had been kept in the office of Ms Madaka during the ten-month period between suspension and the disciplinary hearing. She did not know how the files were preserved in the intervening period.

24. The Employment Judge's notes of her evidence were to the effect that, in addition to what she was recorded as having said at paragraph 13.40, she said they were in boxes in a locked office at STA and being "live" files they were accessed to by other clinicians during the period between the suspension and the disciplinary hearing.

25. There are two further sources which have been placed before us as to the true state of the evidence on this issue. They are, respectively, the notes taken by Ms Smith, who appears for the Appellant, during the relevant cross-examination of Ms Lithgow, as well as the notes taken by the trainee solicitor who attended her. Each of their notes say that Ms Lithgow's evidence was that access was only on an authorised basis. Thus the state of the evidence on that issue was that the files were kept in a locked office and because they were "live" files clinicians had authorised access to them.

26. In the light of that, the statement by the Tribunal that there was no evidence of secure keeping of the file during the eight months prior to the dismissal hearing at paragraph 45.5.1

simply “flies in the face” of uncontested evidence by Ms Lithgow on these two elements, namely that the office was kept locked and, secondly, that rather than other clinicians and staff having access it was clinicians who had authorised access to such files as they were “live”. In our judgment, that paragraph “flies in the face” of the evidence and indeed “flies in the face” even of the evidence noted by the Tribunal in its own decision. In our judgment, that is another fundamental error in respect of the evidence which, both individually and cumulatively, causes us to conclude that the misunderstanding by the Tribunal of the evidence that it heard amounts to an error of law.

27. The second limb of the appeal is a submission that if one looks at the reasoning of the Tribunal as to why the dismissal was unfair set out at paragraph 45, in a series of 18 sub-paragraphs, within some of which there are a number sub sub-paragraphs, the overall effect is that the Tribunal, though directing itself carefully and correctly about its role and that it must not substitute its judgment for that of the Respondent both as to the ultimate outcome of the reasonableness of the decision to dismiss and the reasonableness of the investigation which was undertaken, has, nonetheless, fallen prey to the temptation to do so and appears to have taken the initiative, where there was no evidence at all, to speculate about certain matters which it considered to be of significance; one of them, for example, being the question whether the files, during the period between the suspension and the disciplinary hearing, may have been sabotaged so that the detailed examination conducted by Ms Madaka should be considered of less weight by reason of the fact that it may be that the files had, in the meantime, been tampered with or, at any rate, affected by access had to them by other people employed by the Appellant.

28. It is fair to say that this issue was addressed in the evidence by Ms McCall, the Director of Human Relations, who also sat on the body hearing the appeal against the dismissal, and the

Tribunal, at paragraph 13.5.9, recorded her as saying that they considered whether files might have been sabotaged and concluded that it was beyond the realms of possibility. In the face of that evidence, and by way of example only, the Tribunal, in our judgment, did stray into the forbidden territory of substituting its judgment for that of the Appellant.

29. We say no more about this particular limb of the appeal for two reasons. First, it is unnecessary for us to do so, because, in any event, we are satisfied that the manifest errors in relation to findings of fact were such that they constituted a sufficient error of law for the appeal to succeed; and secondly, as we indicated at the outset, we want to say nothing which will in any way inhibit or embarrass a new Tribunal from considering this matter on the evidence, arguments, and the law, as it appears right to them in due course.

Conclusion

30. For those reasons, therefore, this appeal is allowed and the decision of the Employment Tribunal to uphold Ms Mars' claim that she was unfairly dismissed by the Appellant is quashed. We direct that the case is remitted to a differently constituted tribunal for a wholly fresh hearing of that claim.