Appeal No. UKEAT/0559/11/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 May 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR D BLEIMAN

DR B V FITZGERALD MBE LLD FRSA

MR A EBUZOEME — APPELLANT

THE CROWN PROSECUTION SERVICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ALTHEA BROWN (of Counsel) Direct Access Scheme
For the Respondent	MR JONATHAN COHEN (of Counsel) Instructed by: Simons Muirhead and Burton 8-9 Frith Street London W1D 3JB

SUMMARY

RACE DISCRIMINATION – Direct

Dismissal of Senior Crown Prosecutor by Crown Prosecution Service for gross misconduct – making malicious and vexatious allegations.

It was argued that the Tribunal failed to give properly reasons in respect of two arguments raised by the Claimant - (1) the dismissal took place on a false assumption that definitive findings of malicious and vexatious conduct had already been made during the investigation of a grievance and (2) the sanction of dismissal was not appropriate given the classification of offences within the Respondent's disciplinary policy. It was also argued that the Tribunal's conclusions in respect of (2) were perverse.

Held: the Tribunal's reasons were sufficient and were not perverse.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Mr Aniere Ebuzoeme ("the Claimant") against a judgment of the Employment Tribunal sitting in London (South), Employment Judge Freer presiding, dated 14 June 2011. The Claimant alleged that his former employers, the Crown Prosecution Service ("the Respondent") had discriminated against him on the grounds of race, subjected him to detriment and dismissed him for whistleblowing and dismissed him unfairly. His allegations were wide ranging. The hearing took 15 days. The Tribunal's reasons run to 69 pages. His claims were all dismissed.

2. The Claimant's appeal to the Employment Appeal Tribunal was also wide-ranging. However following a preliminary hearing most of the grounds of appeal were dismissed by an order dated 18 October 2012. Two grounds were considered to be arguable and sent through to this full hearing. They were paragraph 16.12 of Ground 2 within the Notice of Appeal and Ground 4 within the Notice of Appeal, insofar as they relate to the claim of unfair dismissal (see paragraphs 103, 107 and 109 of the Judgment of Slade J).

3. The first ground asserts essentially that the dismissal took place on a false assumption that definitive findings of malicious and vexatious conduct had already been made during the investigation of the grievance. It is said that the Tribunal's reasons do not properly address this point. The second ground asserts that the sanction of dismissal was not appropriate given the classification of offences within the Respondent's disciplinary policy. It is said that the Tribunal's reasons do not properly address this point or that the Tribunal's conclusions are perverse.

The background facts

4. The Claimant qualified as a solicitor in 2001. He is black, born in Nigeria, a UK citizen. He was employed by the Respondent with effect from 1 November 2001. In 2004 he was promoted to the role of Senior Crown Prosecutor. In 2006 he began to work in the Lambeth unit. The Claimant first raised a grievance in July 2007 which was rejected in January 2008. He raised a further grievance in October 2008. This made wide-ranging allegations of discrimination, victimisation, harassment and bullying. His complaints specified four individuals. It is not necessary to set the complaints out in full; suffice it to say that they are serious allegations to make, especially since the individuals concerned were senior lawyers.

5. The Respondent made arrangements for this further grievance to be investigated by Ms Sandra Hebblethwaite, a Senior Crown Prosecutor. She was appointed in December 2008 to deal both with the Claimant's grievance and with another grievance by a different employee. She produced her report in June 2009. The length of time was justified, the Tribunal found, because of the extensive nature of the grievances and the number of people implicated, most of whom were lawyers with full case loads.

6. Ms Hebblethwaite's report was described by the Tribunal as detailed and methodical. It had clearly taken a great deal of time and involved a substantial amount of investigation. All the Claimant's complaints were dismissed. In the course of her investigation Ms Hebblethwaite inevitably had to reach a view as to where the truth lay concerning some of the complaints made. She made findings. The following came to be of particular significance:

> **"Finding 17:**
>
> **Aniere Ebuzoeme has embellished the content of what he was told by Tyica Riley in relation to the events on the 27th November 2007.**
>
> **Finding 18:**

The allegation made by Aniere Ebuzoeme that Jonathan Foy has 'actively campaigned' against him and is biased against him because he is black is false.

Finding 21:

The allegation by Aniere Ebuzoeme that Shazia Ahmed gave evidence to a previous investigation which discredited him and his abilities is false.

Finding 24:

Aniere Ebuzoeme has acted in bad faith by referring in his grievance to a meeting held with Keri Ashworth-Beaumont on 17th June 2008 which was held, at his request under 'Chatham House Rules'.

Finding 29:

The allegation by Aniere Ebuzoeme that Keri Ashworth-Beaumont tried to obtain statements from witnesses to allege that Aniere had caused her to have a seizure is unsubstantiated and false."

7. Ms Hebblethwaite recommended disciplinary proceedings. She said:

"Taking these findings as a whole it is my view that action should be taken against Aniere for making false allegations.

During this report I have referred on a number of occasions to the possibility that the complaints made by Aniere [the Claimant] … may be malicious and/or vexatious. Such an instance is covered by the Grievance Policy at paragraph 8.4 … The investigation has disclosed behaviour on the part of … Aniere Ebuzoeme that could be considered to be misconduct. This can be investigated further during the disciplinary process with … Aniere … being given the opportunity to make representations on the matters."

8. The Respondent, indeed, decided to take disciplinary proceedings. The allegation was set out in a letter dated 11 February 2010. This stated:

"On or around 2nd October 2008, you raised formal grievances […] which following an investigation were found to be malicious and vexatious."

9. This, of course, is not what the investigation by Ms Hebblethwaite had found. She had used the words "inappropriate", "false", "false and unsubstantiated" and "in bad faith" at certain points in her report as we have seen. She had referred to the "possibility" that the allegations might be malicious and vexatious. She had recommended disciplinary proceedings but she had not said that she found the allegations to have been malicious and vexatious. The

charge, therefore, overstated the position. As the Tribunal found, there was other correspondence containing the same overstated position.

10. The disciplinary hearing was conducted by Ms Ononiwu, the Respondent's Legal Director. Meetings took place on 22 March and 24 March. There was no separate disciplinary investigation prior to those meetings, Ms Ononiwu taking the view that no such investigation was required. The Claimant attended the meetings. He put forward written submissions saying his complaints were made in good faith, but he did not address the content of the allegations against him. Ms Ononiwu set out her decision in a letter dated 1 April 2010. It is sufficient to quote a short passage from this very detailed letter:

> **"I have carefully considered all the information in my possession. Your written submissions do not address any of the conclusions of the Investigator's findings. In the absence of any explanation for the submission of false and embellished information to bolster your grievance I do not accept your grievance was made in good faith. I am satisfied on the balance of probabilities, that the charge is proven."**

An appeal was subsequently heard and dismissed.

Statutory provisions

11. Section 98(1) of the **Employment Rights Act 1996** provides that it is for the employer to establish the principle reason for dismissal and that it is of a kind specified in s.98(2) or some other substantial reason. Section 98(2) specifies conduct. Section 98(4) provides that where the employer has fulfilled the requirements of s.98(4)(1):

> **"The determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

The Appeal Tribunal's role

12. It is also important to keep in mind the role of the Employment Appeal Tribunal. This Tribunal hears appeals only on questions of law (see s.21(1) of the **Employment Tribunals Act 1996**). In a case such as this the Appeal Tribunal is concerned to see whether the Tribunal has applied correct legal principles, given reasons that comply with its legal duty and reached findings and conclusions that are supportable if the correct legal principles are applied. The Appeal Tribunal's role is limited. Parliament has made Employment Tribunals the arbiters of all questions of fact and evaluation.

The first ground: the supposed false assumption

13. On behalf of the Claimant, Ms Althea Brown draws attention to the mismatch between Ms Hebblethwaite's report, which speaks of the possibility that the allegations may have been malicious and/or vexatious, and a charge that says that the allegations had been found to be malicious or vexatious. She submits that Ms Ononiwu proceeded on a false assumption that the allegations had been found to be malicious or vexatious and that the Tribunal did not deal with this matter adequately.

14. She accepts that the Tribunal decided this issue against the Claimant. The Tribunal said the following in paragraph 387 of its Reasons:

> **"Ms Ononiwu did make the repeated error in her correspondence that the grievance investigation 'found' the Claimant's allegations to be malicious and vexatious. However, the Tribunal concludes on the evidence that Ms Ononiwu did not approach the disciplinary hearing on that basis, genuinely wished to explore the Claimant's input into the allegations and was fully prepared to consider the Claimant's input and any other consequential considerations that may have been required. The Tribunal concludes from the evidence that the finding of gross misconduct was not based on a false assumption that Ms Hebblethwaite had made a definitive finding of malicious and vexatious conduct."**

15. Ms Brown submits that the Tribunal has not sufficiently grappled with the issues that arose from the mistaken assumption in the charge. Ms Ononiwu did not hold a further

investigation of her own. How then could she reach conclusions adverse to the Claimant on this point? It can, she submits, only have been on a false assumption. The Tribunal, she argues, has not explained how the charges can have been found proved if there was no disciplinary investigation. The key issue for the purposes of s.98(4) is whether the employer entertained a reasonable belief that the employee was guilty of misconduct (see **British Home Stores v Burchell** [1980] ICR 303). The Tribunal's lack of reasoning on this point is insufficient (see rule 30, paragraph 6 of the **Employment Tribunal Rules 2004** and **Meek v City of Birmingham District Council** [1987] IRLR 250).

16. Particularly in her oral submissions today Ms Brown argued that it was impermissible for the Respondent to have moved straight from the findings of Ms Hebblethwaite and the disciplinary charge to a disciplinary hearing. She submitted that Ms Hebblethwaite had made no more than preliminary findings that the charge was false or embellished. That there ought to have been an investigation where these matters were put to the Claimant prior to any disciplinary hearing taking place. She submitted that the Tribunal had not dealt adequately with this point. We suggested to her that this argument did not appear to be one that had been taken forward to a full hearing. She argued that the ground allowed was sufficiently wide to encompass it.

17. An Employment Tribunal is obliged to give reasons for its Judgment (see rules 30(1) and (6) of the Employment Tribunal Rules of Procedure - Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**). In **Meek v City of Birmingham District Council** Bingham LJ stated that although Tribunals are not required to create "an elaborate formalistic product of refined legal draftsmanship" their reasons should:

> **"[…] contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."**

18. Applying these principles we are entirely satisfied that, taken as a whole, the Tribunal's reasons sufficiently state how it has reached its conclusion. The particular paragraph of the Tribunal's Reasons upon which the Claimant's ground of appeal is focused (paragraph 387) is embedded in the Tribunal's discussion of a complaint of victimisation. In order to see how the Tribunal dealt with the matter as regards unfair dismissal, it is necessary to look at its findings of fact and its specific reasoning concerning unfair dismissal.

19. As background to those findings it is also important to keep in mind the terms of the dismissal letter which we have already quoted. In this letter it is plain that Ms Ononiwu did not assume that Ms Hebblethwaite found the allegations to be malicious and vexatious. She started from the conclusion the Claimant had submitted false and embellished information. This was the finding of Ms Hebblethwaite. She reached her own conclusion that in the absence of any explanation for the submission of false and embellished information the charge was proved. In its findings of fact, the Tribunal quoted the letter of dismissal. It also said:

> **"234. The Tribunal finds that Ms Ononiwu considered all the information carefully before reaching a decision. The Tribunal also accepts Ms Ononiwu's evidence that she tried to be fair to the Claimant, she had no dislike of him and there was no reason for her to be unfair."**

20. It was Ms Ononiwu's position that she did not need, in the absence of any challenge by the Claimant, once again fully to investigate the disciplinary charges. She was entitled to start with the findings that the Claimant had submitted false and embellished information, but she reached her own conclusion that the allegations were malicious and vexatious, having been fully prepared to consider any input from the Claimant.

21. The Tribunal, as a matter of fact, accepted that this was the case (see, in addition to paragraph 234, which we have quoted, paragraphs 219 to 222, which it is not necessary to quote). In its conclusions on the question of unfair dismissal, which run from paragraphs 427 to 462, the Tribunal said the following:

> **"452. The Respondent held a reasonable belief in the Claimant's conduct. Ms Hebblethwaite had made findings of fact based upon her extensive investigation enquiries. It was reasonable for Ms Ononiwu in the absence of any material to challenge those facts from the Claimant to rely upon them to reach her conclusion.**
>
> **453. Having regard to the Tribunal's findings above with reference to the Claimant's victimisation claim, Ms Ononiwu's conclusion was one reasonably open to a reasonable employer on the facts. The Tribunal concludes that Ms Ononiwu did not consider that Ms Hebblethwaite's finding of the possibility of malicious and vexatious behaviour was a certain finding in respect of which she was bound."**

22. In our judgment the Tribunal's findings are plain. Ms Hebblethwaite had made findings of fact that the Claimant had submitted false and embellished information. In the absence of any material challenge from the Claimant, it was reasonable for Ms Ononiwu to rely on those findings. She, herself, went on to consider whether the finding of false and malicious behaviour was made out. She concluded that it was; and this was a reasonable conclusion.

23. We do not think that Ms Brown's point concerning disciplinary investigation was permitted in itself to go through to a full hearing on appeal. It was, however, plainly a point which the Employment Tribunal considered carefully (see within its findings of fact paragraphs 380 to 382 and for its reasoning paragraphs 442 to 448). In our judgment the Tribunal's reasoning fully complied with its legal duty on this point as well. If we had thought that this ground had gone through to a full hearing we would have decided it contrary to the submissions of Ms Brown.

The second ground: the sanction for dismissal

24. Ms Brown's second argument is that the sanction imposed on the Claimant was disproportionate and unreasonable having regard to the Respondent's own disciplinary policy. In Appendix 2 to this policy there is a statement of what might amount to gross misconduct, serious misconduct and minor misconduct. Examples are given. "Minor misconduct" includes the example "making a vexatious or malicious complaint", "gross misconduct" is defined as "conduct so serious that it destroys the employer/employee relationship and merits dismissal without notice or pay".

25. Ms Brown submits that the Tribunal has not dealt properly with this issue in its Reasons or has reached perverse and impermissible conclusions. Since "making a vexatious or malicious complaint" as an example of minor misconduct, the Tribunal has, she argues, failed to identify any features that would justify a reasonable employer in treating such a complaint as gross misconduct. She acknowledges that the Tribunal placed weight upon the nature of the work done by the Claimant and the colleagues against whom he made complaints. She argues that this does not really grapple with her point. It is, she submits, not appropriate to raise the bar in terms of sanction merely by virtue of the nature of the Claimant's work or the work of those against whom he complained. Consistent application of the disciplinary policy requires, she submits, that cases of vexatious and malicious complaints should receive like treatment.

26. The Tribunal quoted the policy accurately in paragraphs 243 to 244 of its Reasons. It placed emphasis on the following passage of the policy:

> **"The examples set out below are neither exclusive nor exhaustive and represent a guide only. Any decision to institute a particular sanction will be based on the judgement of the person hearing the disciplinary after considering the available evidence and representations made at the hearing. Something that may initially present as an act of minor misconduct could, following a disciplinary hearing, amount to serious misconduct or vice versa."**

27. The Tribunal set out its conclusions on this part of the case in paragraphs 454 to 458 of its Reasons and again in paragraph 460:

> **"454. With regard to sanction, Ms Ononiwu had enough information before her to consider that the Claimant's circumstances were not just an example of an employee making a grievance under the grievance process which was simply not upheld. It also was not an example of an employee using only intemperate language. It was within the range of reasonable responses for Ms Ononiwu to consider that, given the allegations and the evidence available in the Claimant's circumstances, elements of his grievance were made in bad faith.**
>
> **455. It was not unreasonable for Ms Ononiwu to conclude that the allegations made by the Claimant were so serious that if true, they were likely to have extremely serious consequences to those accused.**
>
> **456. Ms Ononiwu considered other sanctions, but the circumstances raised a trust and integrity issue, which was essential for the type of work carried out by the Claimant. The Tribunal accepts the Respondent's evidence that integrity is a core value expected from its legal team.**
>
> **457. It was within the range of reasonable responses for Ms Ononiwu to conclude that the relationship between the Claimant and the Department had been seriously damaged and trust and confidence compromised.**
>
> **458. It was, on balance, with the Respondent's disciplinary policy to consider the matter to be one of gross misconduct. The terms of the disciplinary policy make it clear that something may initially present as an act of minor misconduct could, after a disciplinary hearing amount to serious misconduct.**
>
> **[…]**
>
> **460. However, the Tribunal concludes that those considerations, in this case at least, should form part of a Tribunal's analysis of reasonable belief and/or whether the sanction falls within the range of reasonable responses. A dismissal for pursuing a grievance that was simply not upheld for example must, it is suggested, be a belief in misconduct and a sanction that no reasonable employer could adopt."**

28. In our judgment these paragraphs make it entirely clear why the Tribunal reached its conclusions on the question of the policy. It found correctly that the policy was not prescriptive of what might amount to gross misconduct. It found that the Respondent reasonably placed great weight on the seriousness of the allegations which the Claimant had made and the potential consequences for those who were accused. It found that the Respondent reasonably concluded that integrity was a core value expected of its legal team and that the circumstances which had been found raised an issue of trust and integrity. It found that it was reasonable for Ms Ononiwu to conclude that the Claimant's conduct seriously damaged the relationship with the Respondent and compromised trust and confidence between them. It was reasonable, therefore, to consider the matter to be one of gross misconduct.

29. These are, to our mind, sufficiently reasoned conclusion to comply with the Tribunal's legal duty. Nor do we consider that they can, in any way, be characterised as perverse or containing any error of law. The Tribunal was entitled to hold that it was reasonable for the Respondent to place weight on such matters as those set out in its Reasons. For these reasons the appeal will be dismissed.