Appeal No. UKEAT/0324/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 March 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR M TOLLEY — APPELLANT

MRS S SCOFIELD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS KATHERINE REECE (Representative) Peninsula Business Services Ltd The Peninsula Victoria Place Manchester M4 4FB
For the Respondent	MR MARK ANDREW (Representative)

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Contributory fault

Unfair dismissal - unfairness - section 98(4) ***Employment Rights Act 1996*** *("ERA")*

Unfair dismissal - contributory fault - section 123(6) ***ERA***

The Claimant, who had worked in a team providing 24/7 care to the Respondent (a man in his mid-30s who has severe learning difficulties, physical disabilities and unpredictable epilepsy), was dismissed for some other substantial reason, namely an irretrievable breakdown in trust and confidence. The Respondent's mother - a Court of Protection appointed Deputy for the Respondent, who manages his care - had received statements from other members of the care team raising concerns about the Claimant. The Claimant, however, contended these were fabricated and questioned whether the staff in question had colluded in making the statements. The Respondent's mother obtained further, more detailed statements from two of the complainants but did not provide these to the Claimant. Considering the Claimant could no longer be trusted to work as part of the team providing the Respondent's personal care, it was decided she should be dismissed on notice. Her subsequent appeal was dismissed.

The Claimant complained this was an unfair dismissal, and the ET agreed to the extent that the Respondent had failed to follow a fair procedure in not providing the supplemental statements to the Claimant for her response. That said, the Respondent had reasonable grounds for believing that trust and confidence had broken down and, had the statements been provided to the Claimant, her response would have made no difference to the Respondent's view that she could not continue to work as part of the care team; addressing the unfairness of the procedure would have added an additional week to the process, and the Claimant's compensatory award would therefore be limited to one week's pay.

The Respondent appealed on two bases: (1) the ET should not have found the dismissal to have been unfair when the procedural failing it had identified would have made no difference to the decision, which was substantively fair; and (2) having found that the Claimant's conduct - specifically in contending that other team members had colluded to fabricate statements against her - was potentially relevant to her dismissal, the ET ought to have considered reducing the compensatory award under section 123(6) **ERA**.

Held: *allowing the appeal in part*

The ET had not erred in finding that the flawed procedure had rendered the dismissal unfair; its approach was consistent with the House of Lords guidance in **Polkey v A E Dayton Services Ltd** [1998] 1 AC 344 HL and was not susceptible to challenge on appeal.

Having, however, found that the decision to dismiss the Claimant was founded upon the Respondent's lack of trust in her - informed in part by her response to the statements from other members of staff - that potentially raised the question of contributory fault under section 123(6) **ERA**, and the ET was therefore obliged to consider this question, which it had failed to do (**Swallow Security Services Ltd v Millicent** UKEAT/0297/08 applied). This point would be remitted to the ET for reconsideration.

A **HER HONOUR JUDGE EADY QC**

Introduction

B 1. I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Judgment of the East London Employment Tribunal (Employment Judge Russell sitting alone on 4 July 2016; "the ET"), sent out to the parties on 5 July 2016. Mr Andrew, a friend of the Claimant who also happens to be a trade union C representative, appeared for the Claimant then as he does today; the Respondent was then represented by a consultant from Peninsula Business Services, although not Ms Reece.

D 2. By its Judgment, the ET upheld the Claimant's complaint of unfair dismissal, finding that her dismissal was for some other substantial reason, namely a breakdown in trust and confidence, but was rendered unfair as the Respondent failed to follow a fair procedure. E Finding that, following a fair procedure, the Claimant's employment would have been fairly terminated within a week, the ET awarded the Claimant a week's pay by way of compensatory award in addition to a full basic award and payment for loss of statutory protection. The Respondent appeals against the ET's finding that there was an unfair dismissal, and in any F event, against its apparent failure to consider any reduction in the compensatory award by reason of the Claimant's contributory conduct. It has been made clear before me today by Ms Reece that there is no challenge to the ET's failure to consider a reduction in the basic award. G The Claimant resists the appeal, essentially relying on the reasoning of the ET.

The Relevant Background and the ET's Conclusions

H 3. The Respondent is a man in his mid-30s who has severe learning disabilities, physical disabilities and unpredictable epilepsy; he is unable to speak but can communicate likes and

dislikes by facial and body movements. He lives in his own home with the assistance of 24/7 care, managed by his mother, Mrs Pat Tolley, on his behalf. Mrs Tolley is a Court of Protection appointed Deputy responsible for staffing matters and the general oversight of her son's care. Understandably, her aim is to aid his wellbeing and independence insofar as that is possible.

4. From May 2008, the Claimant had been employed as a personal assistant to the Respondent, one of a team of seven, which included her daughter and the Respondent's sister, Ms Edwards, who was another Court appointed Deputy for him. In October 2015, Mrs Tolley received statements from three of the other members of the team charged with providing care for the Respondent, including Ms Edwards, in which concerns were raised about the Claimant and the way in which she carried out her duties. Mrs Tolley arranged a meeting with the Claimant, who was accompanied and represented by Mr Andrew, having first sent her copies of the statements she had received. On the Claimant's behalf Mr Andrew challenged the statements, questioning whether there had been any collusion and disputing their accuracy. For her part, the Claimant made clear that she would never hurt the Respondent or let anyone else hurt him; she thought the world of him and loved him to pieces.

5. After that meeting Mrs Tolley took further statements from the two complainants other than Ms Edwards. Those additional statements provided substantially more information than had originally been given. Mrs Tolley did not forward the additional statements to the Claimant but took them into account when considering the effect upon the Respondent if the staff were at loggerheads and might leave. Mrs Tolley was concerned that the Claimant was ignoring the management plan for the Respondent and failing to follow proper process, which was affecting the staff's ability to work together. Although taking into account the Claimant's length of

service, she had noted an apparent change in attitude in the preceding few months and was satisfied that the content of the statements from other staff members was true.

6. On 20 October 2015, Mrs Tolley informed the Claimant that her employment was being terminated on seven weeks' notice as the relationship had broken down and she no longer wanted the Respondent to receive personal care from the Claimant. Mrs Tolley referenced the Claimant's rejection of the statements that had been disclosed to her but stated her conclusion that the relationship between the team had broken down and said she had lost confidence in the Claimant's ability to care for her son. The two supplementary statements were still not brought to the Claimant's attention.

7. The Claimant appealed, and a hearing took place in November 2015 chaired by the Respondent's uncle, Mr Ray Smith. Mr Smith saw all the statements, including those provided after the October meeting with the Claimant, albeit they were still not provided to her. Again, the Claimant denied the concerns raised against her. After the appeal meeting Mr Smith spoke with the employees who had made the statements and, on all the evidence available to him, concluded the appeal should be dismissed; he could find no evidence of collusion and considered that in the difficult situation of providing close personal care the relationship had irretrievably broken down.

8. By the conclusion of the ET hearing it was common ground that the Claimant had been dismissed for some other substantial reason, namely Mrs Tolley's belief that she could no longer have trust and confidence in the Claimant's ability to look after the Respondent. Although to some extent sharing the Claimant's concern about the chronology and timing of the three statements from the other members of the care team, the ET was satisfied the evidence

before Mrs Tolley was sufficient to found a genuine belief that she could no longer have trust and confidence in the Claimant's continued employment and ability to work as a team with her colleagues. That was a substantial concern and justified Mrs Tolley's conclusion that the working relationship had irretrievably broken down and warranted dismissal. Allowing that the Respondent as employer in this case was a severely disabled person acting through the agency of his mother, the ET reminded itself that it should not expect too high a degree of sophistication in terms of the process followed. Mrs Tolley had sought to follow a fair procedure, had made the Claimant aware of the concerns against her, provided her with copies of the original statements, and called her to a hearing at which she was able to set out her case and answer the concerns. That said, the ET went on:

> **"32. However, having decided to undertake further investigation after the hearing on 14 October 2015 and to obtain substantial additional evidence upon which she subsequently relied, it was incumbent upon Mrs Tolley both to provide that additional information to the Claimant and also to give her a proper opportunity to comment upon its contents. It was fundamentally unfair of Mrs Tolley to proceed to make a decision based upon considerable additional relevant evidence which the Claimant had never seen and did not have the opportunity to refute. This failure persisted throughout the appeal process and was not remedied by Mr Smith."**

9. Applying the range of reasonable responses test, the ET concluded the failure to provide the Claimant with the additional statements was not a minor matter; it deprived her of the ability to know the bulk of the detailed case against her, whilst the additional information was relied on by Mrs Tolley and Mr Smith. That, the ET concluded, took the overall procedure outside the range and rendered the dismissal procedurally unfair.

10. Going on to consider matters relevant to remedy, the ET observed that the procedural failing it had found in this case was not a matter expressly addressed in the **ACAS Code of Practice** and it did not consider that there was any basis for imposing an uplift in that regard. Considering the effect of the procedural breach, the ET, having regard to what the Claimant had said both in the internal hearings but also before the ET itself (by which time she had seen the

additional statements), the ET concluded that had she been provided with the two supplemental statements before her dismissal the Claimant would have maintained her position, in particular that the concerns raised against her were matters of fabrication or exaggeration. In those circumstances, the ET concluded that Mrs Tolley would clearly still have taken the view that the Claimant's employment should be terminated given the importance of teamwork and trust and confidence in when providing intimate personal care. If the additional statements had been provided to the Claimant, the disciplinary process would have been delayed by only a further week; thereafter, Mrs Tolley would - and could - have fairly dismissed the Claimant. The Claimant's compensatory award would thus be limited to one week's net pay.

The Relevant Legal Principles

11. The first question raised by this appeal concerns the ET's approach to the finding of fairness for the purposes of section 98(4) of the **Employment Rights Act 1996** ("ERA"). Determining fairness requires consideration both of substance and process. The fact that a fair procedure would ultimately have made no difference does not mean that the dismissal should be considered fair, **Polkey v A E Dayton Services Ltd** [1988] 1 AC 344 HL: the test is whether the employer's decision in the light of the circumstances known at the time, not the actual consequences of any failure in process, fell within the band of reasonable responses open to a reasonable employer. As Lord Mackay of Clashfern said at pages 354H to 355C:

> **"… the subject matter for the tribunal's consideration is the employer's action in treating the reason as a sufficient reason for dismissing the employee. It is that action and that action only that the tribunal is required to characterise as reasonable or unreasonable. That leaves no scope for the tribunal considering whether, if the employer had acted differently, he might have dismissed the employee. It is what the employee did that is to be judged, not what he might have done. On the other hand, in judging whether what the employer did was reasonable it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss as the consequence of not consulting or not warning.**
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> **If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee."**

A And see the speech of Lord Bridge at page 364E-G (referring to section 57(3) of the **Employment Protection (Consolidation) Act 1978**, the predecessor provision to section 98(4)):

> **"… If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is *not* permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 57(3), this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied."**

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12. Parliament has expressly stated that fairness is a matter to be assessed by the ET, and I remind myself that it will not be open to the EAT to interfere with that assessment unless it is founded upon an error of law, failed to address that which was relevant, took account of that which was irrelevant or can properly be described as perverse.

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E 13. The second basis of challenge in this appeal relates to the ET's failure to make any reduction in the compensatory award in respect of the Claimant's conduct. The relevant statutory provision in this regard is found at section 123 **ERA**:

> **"(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.**
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> **…**
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> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

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14. Section 123(6) requires the finding of a causative relationship between the conduct and the dismissal (see **Steen v ASP Packaging Ltd** [2014] ICR 56 EAT), although the use of the word "contributed" makes plain that the employee's conduct need only be a factor in the dismissal; it need not be the direct and sole cause. The focus required by section 123(6) must

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be on what the employee did: the employer's decision and conduct is relevant to the ET's assessment of fairness, but the issue of contributory fault requires an assessment by the ET of the employee's conduct. Moreover, the question of causation or contribution relates to the dismissal, not the unfairness of the dismissal.

15. More generally, it is open to an ET to find that a Claimant's conduct has contributed to her dismissal notwithstanding that it is for a reason other than conduct (see for example **Moncur v International Paint Co Ltd** [1978] IRLR 223 EAT (Phillips J presiding); and **Finnie v Top Hat Frozen Foods** [1985] ICR 433 EATS (per Lord McDonald), albeit that was a case where the reason for the dismissal had included the conduct of the employee). The requirement remains, however, that the employee's conduct be culpable or blameworthy in some way (see **Nelson v BBC (No. 2)** [1980] ICR 110 CA and **Slaughter v C Brewer & Sons Ltd** [1990] ICR 730 EAT, which allowed that a deduction for contributory fault might still be permissible where the dismissal was by reason of capability due to ill-health).

16. Even when the issue of a contributory fault reduction is not raised before the ET, if it has found that there was conduct on the part of the employee that was or could be regarded as blameworthy the ET will be required, given the language of the statutory provision, to consider contributory fault; see **Swallow Security Services Ltd v Millicent** UKEAT/0297/08, a decision in which the obligation was described as follows:

> **"27. … there is, in section 123(6), an express obligation upon the Tribunal if it finds that the dismissal was to any extent caused or contributed to by any action of the Claimant (which conduct must be blameworthy …) to make a reduction in compensation to the extent that it considers it just and equitable to do so. In our judgment it follows that, if in the course of their deliberations, a Tribunal concluded that there had been such causative and blameworthy conduct, the Tribunal would be bound to apply section 123(6), whether the issue of contributory fault had been raised by the employer or not. The Tribunal [is] statutorily required so to do. Further, in our judgment, in any case before the Tribunal in which the facts are such that a finding of contributory fault may appropriately be made, the Tribunal are bound to consider the issue, raise it with the parties, and decide whether there has or has not been contributory fault and whether a deduction for contribution should be made. We do not accept Mr Masarella's argument [for the Respondent] that the trigger for the Tribunal's duty to consider the issue has to be a finding that here has been contributory fault; for if the Tribunal do not raise the issue, such a finding, however appropriate it might have been, may**

never be made. The trigger must arise at an earlier point, such as that which we have described."

17. If there is no such finding by the ET, however, an employer cannot suggest for the first time on appeal that it ought to have made such a finding (see the discussion in **Swallow** at paragraphs 36 to 41). Ultimately, it is for the ET to take a broad commonsense view as to what part if any the employee's conduct played in the dismissal and then in the light of that finding to determine the level of any reduction, an assessment that the ET is best placed to make and with which the EAT would only interfere if there was an error of law or the decision was perverse.

Submissions

The Respondent's Case

18. On the ET's findings the Respondent contended that the procedural defect it had identified could not have made any appreciable difference to the outcome for the Claimant; as such the ET should not have held there was any procedural unfairness. Moreover, a finding of procedural unfairness did not necessarily render an otherwise fair dismissal unfair, and the ET here erred in apparently assuming that it did. It had limited its consideration to simply the question of procedural unfairness rather than looking at whether that impacted upon the fairness of the dismissal. The question for the ET had been whether the procedural defect denied the Claimant an opportunity of showing that the employer's reason for dismissal was an insufficient reason for the purposes of section 98(4) (see **Westminster City Council v Cabaj** [1996] IRLR 399 CA, per Morritt LJ).

19. Further and in the alternative, an ET was obliged to consider of its own motion a reduction in respect of the compensatory award where it had found that the Claimant's conduct had caused or contributed to the dismissal (see **Swallow** above). Here, the conduct in question

was the Claimant's allegation that the three makers of the statements against her had been malicious and lying, which had caused Mrs Tolley to conclude that the relationship had broken down. Although the reason for the dismissal had been some other substantial reason, the ET had clearly considered that conduct led to the breakdown in the relationship (had it not been of that view, there would have been no need to refer to the **ACAS Code**). In any event, for the purposes of section 123(6) the conduct did not have to be misconduct as such.

The Claimant's Case

20. On behalf of the Claimant it was submitted that there was no basis for interfering with the ET's conclusion on fairness. As for the reduction of the compensatory award, it had been agreed that the Claimant's dismissal had been for some other substantial reason. It was not a conduct dismissal, and thus there was no basis for reducing the award. Moreover, this was a case where there was a breakdown in the working relationship but not a finding by the ET of blameworthy conduct by the Claimant: there was no finding that it was the Claimant's conduct that had caused the breakdown in working relationships, and the ET's decision did not therefore warrant a finding of contributory fault.

Discussion and Conclusions

21. The first challenge raised by the appeal is to the ET's finding that the Claimant's dismissal was unfair by reason of a procedural failing. As I have already said, that assessment was one for the ET to make under section 98(4) **ERA**, applying the range of reasonable responses test. It is by that standard that an employer's conduct and decisions are to be judged, not with hindsight but in the light of the circumstances facing the employer at the time. The assessment is concerned not with what might have happened but with what did happen, and I do not accept the Respondent's submission that a procedural unfairness cannot of itself render a

dismissal unfair. Whilst a procedural defect may not render the decision unfair - because the employer took the view that it would make no difference and the ET considers that decision fell within the range of reasonable responses - it will all depend on the circumstances.

22. In the present case, Mrs Tolley had considered it relevant to obtain further statements from two of the three staff members who had raised concerns. Those statements, as the ET relates, provided substantially more information than had been provided before but Mrs Tolley did not provide them to the Claimant for her response before deciding to dismiss. Equally, they were not provided to the Claimant at the appeal stage. The question for the ET was whether the decision not to provide the statements to the Claimant (even if one of omission) fell within the range of reasonable responses for the employer in the circumstances of this case at that time; at the liability stage it mattered not that, objectively speaking, it would have made no difference. In this case, the ET took the view that the omission to provide the additional statements in these circumstances fell outside the range:

> **"33. … on the facts of this case … the failure to provide the Claimant with the additional statements … was not minor but deprived her of the opportunity to know the bulk of the detailed case against her. This additional information was relied upon by Mrs Tolley and Mr Smith whilst withheld from the Claimant. In the circumstances, the failure was such as to render the overall procedure adopted outside of the range of objectively reasonable procedures. Dismissal was procedurally unfair."**

23. I do not know whether I would have reached the same conclusion on this point as the ET - not least as I did not hear the evidence from Mrs Tolley and Mr Smith and am not charged with making the relevant assessment - but I cannot say its conclusion was perverse. The statements were seen as relevant to the decisions being made; they bolstered the case against the Claimant and provided greater detail. The Respondent's objection is that in reality it would have made no difference: the Claimant would - as she did before the ET when she had been able to refer to the statements - have denied the content of the additional statements and suggested that the makers must have exaggerated or lied in making them. That might be so, but

A that was not the question for the ET. At the time of deciding not to provide the Claimant with the additional statements, how could Mrs Tolley or Mr Smith be certain that the greater detail would not permit the Claimant the opportunity to provide a more convincing account in response? It might well have been that the decision makers would still have concluded that, if nothing else, employee relations had broken down such that it was no longer tenable to continue to employ the Claimant, but neither Mrs Tolley nor Mr Smith saw the statements as irrelevant to their decisions. That being so, I am unable to see why the ET was not entitled to consider the failure to pass them to the Claimant was outside the range.

24. The second basis of challenge relates to the ET's failure to make any reduction in compensation in respect of the Claimant's conduct. It is not said that this was a matter raised below expressly, and Ms Reece accepts that this was a dismissal for some other substantial reason rather than by reason of the Claimant's conduct as such. Accepting, as I do, that the reduction need not be limited to conduct dismissals, however, the ET would still have needed to find that the Claimant's behaviour was in some way culpable or blameworthy.

25. As Mr Andrew observed, in the present case, the ET was careful not to cast the Claimant as the wrongdoer and made no finding as to whether the statements made against her were in fact valid or not:

> **"28. I share to some extent Mr Andrew's concern about the chronology and timing of the three letters. It is indicative of discussion between the three personal assistants that each decided to express their views to Mrs Tolley within such a very short time frame. Whether or not this was collusion, in the sense of an inappropriate desire to secure the Claimant's dismissal, or sharing of genuine and mutual concern about observed practices in the Claimant's care Mr Tolley [sic], it is not clear. What is clear, in my conclusion, is that the evidence before Mrs Tolley was sufficient to found a genuine belief that she could no longer have trust or confidence in the Claimant's continued employment and ability to work as one team with her colleagues. On the evidence available, this was a substantial concern and not one which could be described as capricious nor whimsical."**

26. That said, the ET did find that there was a reasonable basis for Mrs Tolley's concerns and that was in part informed by the Claimant's response to the disciplinary allegations:

> **"29. … Mrs Tolley was also entitled to take into account and attach significant weight to the Claimant's response to the concerns when raised, namely to say little herself but advance a case through Mr Andrew which accused the three personal assistants with whom she worked most closely of either fabrication or exaggeration and to suggest that they were not to be trusted. This was not conducive to a good ongoing working relationship.**
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> **30. On 3 August 2015 Mrs Tolley had given a very clear indication of the behaviour expected, namely respect, patience, understanding and ability to work as one team with one goal in the interests of Mr Tolley. On the evidence before me and indeed before Mrs Tolley at the time, I am satisfied that she was reasonably entitled to conclude that she no longer had confidence in the Claimant's ability to do that. Having regard to the small size of the employer, the importance of the work being done by the Claimant and the absence of suitable alternatives, Mrs Tolley was entitled to consider that the working relationship had broken down irretrievably and warranted dismissal."**

27. It is possible, although I would go so far as to say inevitable, to read those conclusions as findings of some form of culpable behaviour on the part of the Claimant. As the question of contribution had not been expressly raised before it, the ET understandably did not express itself in the language that would clearly answer that question for the purposes of section 123(6), but, adopting the approach laid down in **Swallow**, I can see that this was a case where the facts were such that a finding of contributory fault might appropriately have been made and therefore the ET was bound to consider the issue, raise it with the parties and then determine whether it did in fact find there was contributory fault and that a deduction from compensation was to be made and, if so, of how much. In those circumstances, I therefore allow this appeal on the second ground and inevitably must direct that the question of contributory fault should thus be remitted to the same ET.