Appeal No. UKEAT/0147/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 October 2013

Before

THE HONOURABLE LADY STACEY

MRS A GALLICO

MR P M SMITH

J SAINSBURY PLC — APPELLANT

MS M BIBI-HUDSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW EDGE (of Counsel) Instructed by: Michael Simkins LLP Lynton House 7-12 Tavistock Square London WC1H 9LT
For the Respondent	MR ABOU KAMARA (of Counsel) (Appearing through the Free Representation Unit)

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Employment Tribunal found that the Claimant had been unfairly dismissed. The Respondent argued that the ET had substituted its own view of fairness for that of the Respondent. Held that the ET had substituted its own view; case remitted to a fresh Tribunal to hear again.

THE HONOURABLE LADY STACEY

1. In this case the Claimant is Ms M Bibi-Hudson and the Respondent is J Sainsbury PLC. The case is about unfair dismissal. This is the Judgment of the court to which all members have had an opportunity to contribute and follows discussion amongst the three of us. We shall refer to the parties as the Claimant and the Respondent.

2. It is an appeal by the Respondent against a Judgment of an Employment Tribunal chaired by Employment Judge van Gelder at Birmingham, which was sent to the parties with Reasons on 21 December 2011. The Claimant was represented at the Employment Tribunal by counsel and today is represented by Mr Kamara. The Respondent was represented at the Employment Tribunal by counsel and today is again represented by counsel, Mr Edge.

3. At the Employment Tribunal the Claimant claimed unfair dismissal and also other claims relating to discrimination and a claim in respect of equal pay. It is only the claim in respect of unfair dismissal that is before this Tribunal today. At the Employment Tribunal the Respondent contended against that claim of unfair dismissal that the Claimant had not been unfairly dismissed on the basis that she had been dismissed for gross misconduct.

4. The essential issues before the Employment Tribunal were defined by that Tribunal as follows: what was the reason for dismissal; was the reason for dismissal a potentially fair reason; if the reason was the conduct, or, perhaps more accurately, misconduct, of the Claimant, did the Respondent hold a genuine belief that the Claimant had committed the misconduct alleged; did the Respondent hold that belief on reasonable grounds; and did the Respondent undertake a reasonable investigation in forming that belief? Thereafter in setting out the issues

the Employment Tribunal asked if there was a failure to follow ACAS Codes, asked if an overall fair procedure followed, and finally asked: in all the circumstances was the decision to dismiss within the band of reasonable responses that a reasonable employer could make in that situation? In so doing, the terms of the **Employment Rights Act 1996** (ERA), section 98, are clearly discernible, that being the section with which unfair dismissal is nowadays concerned.

5. The Employment Tribunal decided by a majority, the legal chairman dissenting, that the reason for dismissal was:

> **"[…] that the Claimant had been dismissed for gross misconduct on the grounds stated in the original letter of suspension and confirmed to [sic] Mr Bainbridge's letter confirming dismissal."**

6. The reason in that letter was:

> **"Inappropriate management behaviour in relation to written communications which have subsequently been read by members of the transport team and deemed as offensive."**

7. The allegations against the Claimant were that she had produced a story, described as a thinly-veiled attack on other transport managers that was unrelated to key performance indicators in the context of a training course on which she had been sent by the Respondent, which was a course designed to train managers in clear communication connected to key performance indicators. In the training course there was a storytelling component in which the people on the course were encouraged to be creative and to set out matters in a story. They were provided with a guidance booklet on how they were to go about that, and that guidance booklet, amongst other things, stated that things could be positive in the story or negative and that it was the former – that is, the positive – that were sought.

8. The outcome of the course for the Claimant was that the story that she produced was found by her employers – that is, the Respondent – to be, as we have said, a thinly veiled attack on her colleagues, and it was found that she had taken an opportunity presented to her by the storytelling part of this training course to do that. It is clear from the Judgment of the Employment Tribunal that the Respondent led evidence concerning where it said the story had been left – that is, on the computer hard drive, which was shared by others – and that was not accepted at the internal appeal stage. However, it is plain from the Employment Tribunal Judgment that it was found that the Claimant's intention was that others would read the story. It had been alleged that she intended the story to be put on a storyboard within the foyer of the building to be seen by others. All of this happened in the context of an unhappy employment situation, where the Claimant had grievances that she had activated and that were in the course of determination.

9. At paragraph 6 of the Employment Tribunal Judgment the Employment Tribunal made various findings in fact. They started the question of unfair dismissal at paragraph 4 and set out the question, "What was the reason for the Claimant's dismissal?" and found that it was the story that she had written that had been found by others to be offensive. At paragraph 5 they stated as though it were a fact, though of course it is a matter of law, that gross misconduct is a potentially fair reason for dismissal, and at paragraph 6 they went on to discuss whether or not the Respondent held a genuine belief that the Claimant had committed the misconduct alleged. They found that the Respondent did have that genuine belief. They then went on to discuss whether or not that belief was held on reasonable grounds. In paragraph 6(b) the Tribunal state that the first belief that the story was a thinly veiled attack on other transport managers was held on reasonable grounds.

10. They then discussed where the matter had been left – that is, whether it had been on the computer hard drive – and they found at the foot of page 38, still within paragraph 6(b), that Mr Bainbridge had become intent on satisfying himself about the initial distribution of the story and had pursued the matter to a point where he was still not clear about who had obtained it but that he chose to conclude that the Claimant had been the person who had chosen to print off a copy and place it on a desk in a pile of papers. The Tribunal went on to find that that conclusion was not supported by any direct evidence.

11. They went on, however, still within paragraph 6(b), to find that the third element of Mr Bainbridge's belief was that the Claimant intended to see the story put onto the storyboard and they were satisfied that he had good grounds to accept that.

12. They then turned in paragraph 6(c) to discuss whether or not a reasonable investigation had been undertaken in forming that belief, and they found in that paragraph that it "was a reasonable investigation in the circumstances". Thus the Tribunal came to the view that there had been gross misconduct, that the employer genuinely believed that and that it had reasonable grounds so to believe. The Tribunal then looked at the question of any relevant failure to follow the ACAS Code and found that there was none. It then considered whether an overall fair procedure was followed in relation to the dismissal and found that it was.

13. It then turned at the foot of page 41 and in its paragraph 9 to ask itself the following question: "In all the circumstances, was the decision to dismiss within the band of reasonable responses?" There then follows in the Judgment four paragraphs – that is, 9.1-9.4 – in which the Tribunal purport to answer that question.

14. We have come to the view today that the submission made by Mr Edge on behalf of the Respondent to the effect that the Tribunal have not properly answered that question has to be upheld. We have come to that view because we have come to the view that those four paragraphs taken together do not set out a reasoning concerning itself with the band of reasonable decisions. It is trite law, and we were referred to it correctly by the parties, to the effect that in an employment situation one employer might decide to dismiss and another employer might decide not to dismiss. Each of those may be reasonable decisions within the band of decisions that a reasonable employer is entitled to come to. The question for any Employment Tribunal is not whether they themselves would have come to the same decision as the employer; rather, the question is whether the employer was entitled to come to the decision to which it did come. This is put in paragraph 9.2, where it is said:

> **"The issue is whether the error of judgment and the intent combined could be treated as an issue of gross misconduct which justified the decision to dismiss."**

15. While we are satisfied that that is the correct question, we are not satisfied that in the whole of paragraph 9 the question is properly answered. We are, in all the circumstances of the case, prepared to accept Mr Edge's submission that there has been substitution in this decision; that is, that the Tribunal has, in the way in which the decision has been written – and that is what we must go by – given us its own view on what it would have regarded as reasonable rather than asking itself whether the decision that the employer came to was one to which it was entitled to come.

16. In those circumstances, it is incumbent on us to allow the appeal. The question for us thereafter is disposal. We have been urged by Mr Edge to regard all the important findings in fact as having been made, and his submission to us is that we should therefore go ahead and

decide that this was not an unfair dismissal, and I hesitate to use the word "substitute" but he wishes us to make the decision. Mr Kamara in contrast has submitted that while his primary position is that we should refuse the appeal, if we do not do that, then Mr Kamara says that the matter should be sent back to another Tribunal to decide.

17. In response to that, Mr Edge has given us another suggestion, which is that if we are not with him in his primary position, which is that we should decide it ourselves, then we should send it back to a Tribunal but on a restricted basis, and if we understand him correctly, the suggestion he makes is that a Tribunal should be instructed to read the Judgment, to find the primary facts already proved and simply to answer the question of whether in all the circumstances the conduct was such as to render the decision to dismiss a decision that could be made within the band of reasonable decisions.

18. As we indicated to Mr Edge when he made that submission, it is one with which we have considerable difficulty. We cannot see how another Tribunal could properly consider that restricted question, as it is essentially a question that requires a view to be taken about reasonableness in all of the circumstances and is a question that depends on facts being found and legal inferences being drawn from them. So, while we are grateful to Mr Edge for his ingenuity in suggesting it, we do not regard it as a suggestion that would be of assistance in the disposal of this case. We have instead come to the view that the proper disposal is to send this case back to a new Tribunal in order that they may decide the question of unfair dismissal, and we emphasise that of course all the other matters that were raised in the first Tribunal have been decided. We are only concerned with unfair dismissal. But we have come to the view that we must send this back for a new Tribunal to consider the question of unfair dismissal; and, lest there be any doubt about it, we should make it plain that we expect the new Tribunal to

consider all of the law on unfair dismissal and to take as their starting point of course the terms of section 98 of the **ERA 1996**, which currently sets out the law on unfair dismissal.

19. Therefore, it will be for a new Tribunal to consider all of the parts of that section and to decide if the employer has shown what the principal reason was for dismissal and then to decide in terms of that section whether the determination of the dismissal is fair or unfair in all of the circumstances of the case. We take the view that it is not proper to send this back to the same Tribunal, because they have expressed their views, no doubt after hearing a good deal of evidence. Therefore, we send this back to a new Tribunal.

20. We do so, however, with concern. We note that this case started a long time ago. The events with which we are primarily concerned were in 2009, and there have been, we think, seven Tribunal appearances or applications between 2009 and now. We are very conscious of the overriding principles on which the Employment Appeal Tribunal acts, which, put broadly, are to afford justice in a reasonable time and at a reasonable cost to all of the parties and indeed to the state. Therefore, we take the view that it is very unfortunate that this matter should require to go back to a new Tribunal at this late stage and with all the consequences that that has for the cost to both parties and indeed to the state in providing a Tribunal to hear these matters. We are conscious that parties have no doubt done a good deal of work in considering their position in this matter already, but we feel that we should express the hope that, given the length of time that this whole business has gone on, if parties were able to discuss matters and to consider whether or not mediation might be of some use to them at this stage, then we would certainly commend that course of action to the parties, but it is of course a matter for the parties to consider.

21. To summarise, then, we are concerned that due to the way in which this matter was dealt with at the original Tribunal we have not had the benefit of an Employment Tribunal with all the skill and expertise that it brings to it considering fully the terms of the law on unfair dismissal. We are not prepared as an Employment Appeal Tribunal to substitute our view; we require to have that determined properly by an Employment Tribunal, and therefore it is necessary for us, while allowing Mr Edge's appeal on the basis that we do find that the first Tribunal has substituted its own view, we find it necessary to send it back to a freshly constituted Tribunal in order that the matter may be properly determined. We should say that we are grateful to both parties for the help that they have given us this morning.