Appeal No. UKEAT/0255/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 March 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

QUINTILES COMMERCIAL UK LIMITED — APPELLANT

MR A BARONGO — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS TALIA BARSAM (of Counsel) Instructed by: QuintilesIMS Alba Campus Rosebank Livingston EH54 7EG
For the Respondent	MR BEN NORMAN (of Counsel) Instructed by: Laveer Legal Ltd 11th Floor Regent House Heaton Lane Stockport SK4 1BS

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Unfair dismissal - reasonableness of the dismissal - section 98(4) ***Employment Rights Act 1996***

The Claimant was dismissed, on notice, for a reason relating to his conduct; initially this was found to amount to gross misconduct but, on his internal appeal, the Respondent accepted it was more properly to be categorised as serious misconduct. The ET found the Claimant's dismissal for this reason was unfair: it had been unreasonable to characterise his conduct as gross misconduct at the original dismissal decision and once it was recognised it was something less - serious misconduct - that meant a warning was the only reasonable response, dismissal was not. The Respondent appealed.

Held: *allowing the appeal*.

The ET had unduly restricted its assessment of the fairness of the dismissal for the purposes of section 98(4) **ERA** by assuming as a general rule that a finding of conduct short of gross misconduct meant dismissal for a first offence was necessarily unfair; section 98(4) made no such prescription and the ET had failed to demonstrate it had correctly approached the question of fairness, alternatively, it had impermissibly substituted its view as to the appropriate sanction for that of the reasonable employer in the particular circumstances of the case.

HER HONOUR JUDGE EADY QC

Introduction

1. The questions raised by this appeal are essentially twofold: (1) in finding that there had been an unfair dismissal, did the Employment Tribunal ("ET") err by apparently distinguishing serious misconduct from gross misconduct when the statutory question was simply whether the dismissal for a reason related to conduct? and/or, more generally, (2) did it make the mistake of substituting its view for that of the employer?

2. In this Judgment, 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 Reading ET (Employment Judge Smail, sitting alone, over two days in March 2017). The parties were both legally represented before the ET: Mr Norman of counsel appeared for the Claimant, as he does today, the Respondent then represented by its solicitor. By its Judgment, the ET upheld the Claimant's complaint that he had been unfairly dismissed by the Respondent, although it found he had contributed to his dismissal by one-third. The Respondent's appeal was permitted to proceed on the bases I have identified in the opening paragraph of this Judgment; the Claimant resists the appeal, essentially relying on the reasoning of the ET.

The Relevant Background and the ET's Decision and Reasoning

3. The Respondent supplies sales staff for pharmaceutical companies. It employed the Claimant as a Medical Sales Representative from 1 October 2012, latterly selling drugs for Astra Zeneca ("AZ"). On 5 January 2016, the Claimant was dismissed on notice (his employment actually terminated on 5 February 2016) for two acts of misconduct: first, failing

to complete AZ's compliance online training course by the deadline of 3 November 2015, and second, failing to attend AZ's compulsory pioneer training course on 19 November 2015.

4. The Claimant did not deny either of these matters, and further accepted that they amounted to misconduct on his part. In mitigation, he contended he had been dealing with other matters; he had not intentionally failed to engage with the training, but had prioritised other work commitments. As the ET noted, in October 2015, the Claimant had been placed on a Performance Improvement Plan; this was not a good time for him.

5. In any event, the Respondent proceeded to hold a disciplinary hearing in respect of the two misconduct matters identified above. This was chaired by the Claimant's line manager, Mr Dempster, and it took place by telephone. The Claimant had not objected to that, although with hindsight felt it may have been prejudicial. As the ET noted, that was not a course prohibited either by the Respondent's own policy or the **ACAS Code of Practice on Disciplinary and Grievance Procedures 2015** ("ACAS Code"). It might not have been best practice, but it was not of itself unfair. During the course of the disciplinary hearing, the Claimant had referred to certain mitigating factors but Mr Dempster did not consider these sufficient. He concluded trust and confidence had been destroyed and determined the Claimant should be dismissed on notice, for gross misconduct.

6. The Claimant appealed and his appeal was heard by one of the Respondent's Directors, Mr Athey, who took the view that the Claimant had been guilty of serious rather than gross misconduct, but also thought that trust and confidence had broken down and upheld the decision to dismiss.

7. The ET considered that the ultimate characterisation of the Claimant's misconduct as serious rather than gross had significant implications in this case, holding as follows:

> **"14. … Once the misconduct is characterised as serious and not gross, it means that warnings are to apply. This Claimant had no previous live warnings on his file. That meant he came as someone with a clean record into this disciplinary hearing. If the Respondent had believed and reasonably so that his misconduct had been gross, then that could furnish a reason for not applying warnings. However, the characterisation of the misconduct as serious on appeal means that the failure to issue a warning renders the dismissal unfair. Serious misconduct would have entitled any sort of warning including a final written warning but the express rejection of gross misconduct renders this dismissal unfair. …"**

8. The ET further considered that Mr Dempster's characterisation of the two training issues as gross misconduct did not accord with the Respondent's disciplinary policy and demonstrated he had taken into account matters other than the actual charges before him; as the Claimant's line manager, he had been involved in issues relating to the Claimant's performance more generally. While it was not wrong for Mr Dempster to have chaired the disciplinary hearing, it was all the more important that he was careful to limit what he took into account to the matters actually before him and he had failed to do that. The ET concluded that the Claimant's dismissal had been unfair as:

> **"21. … the misconduct was not reasonably characterised as gross rather than serious; and indeed, the Respondent on appeal characterising it as serious rather than gross means that a warning was the only reasonable response, and dismissal was outside it, within the terms of the Respondent's policy and general unfair dismissal law, the Claimant having a clean record."**

9. The approach adopted was further underlined when rejecting any suggestion that there should be a **Polkey** reduction (**Polkey v A E Dayton Services Ltd** [1988] 1 AC 344 HL):

> **"22. … I am not persuaded that a *Polkey* reduction is the correct concept because the characterisation of the misconduct as serious not gross means the Respondent should not have been in dismissal territory. …"**

10. The ET further summarised its conclusion in that regard, as follows:

> **"31. The particular issue in the case is whether dismissal was a sanction open to a reasonable employer. As soon as the appeal officer, rightly in my judgment, characterised the matter as serious misconduct and expressly not as gross misconduct, the Respondent could only reasonably be in warnings territory given that the Claimant had a clean disciplinary record. This was so under its own policy and under the general law of unfair dismissal."**

11. That said, the ET agreed that the Claimant had been unprofessional and guilty of serious misconduct; he had thereby contributed to his dismissal and it was fair to reduce his compensation by one-third to take account of this.

Submissions

The Respondent's Case

12. The Respondent observes that, by section 98(2)(b) of the **Employment Rights Act 1996** ("ERA"), a dismissal is capable of being fair if it is for a reason which "*relates to the conduct of the employee*". The reference to conduct is in general terms; there is no requirement that it amount to gross misconduct. Section 98(4) **ERA** required the ET to focus on the particular circumstances of the case. That meant it should avoid applying a standard approach to a case without first considering whether the case properly justified such an approach, see **Jefferson (Commercial) LLP v Westgate** UKEAT/0128/12 (19 July 2012, unreported) and **Airbus UK Ltd v Webb** [2008] IRLR 309 CA.

13. In this case, the ET's principal error was to move automatically from the Respondent's conclusion that the Claimant was guilty of conduct falling short of gross misconduct to a finding that dismissal for a first offence was necessarily unfair. That error either resulted from a failure to apply section 98(4) correctly (that is, by asking whether the Respondent acted reasonably in all the circumstances in dismissing the Claimant for the identified misconduct), or amounted to an impermissible substitution of the ET's own view for that of the Respondent.

14. The ET had appeared to state as a proposition of law that any dismissal for conduct short of gross misconduct in the absence of prior warnings would be unfair but there was no authority for such a proposition and no such requirement under section 98(4). By focusing only

on the Claimant's clean disciplinary record, the ET had failed to consider other relevant matters, including the impact that his poor work record had on the Respondent's decision making and, more generally, the loss of trust and confidence in his ability to undertake his role to the required standards. The ET had unduly fixated on the precise label given to the Claimant's misconduct, losing sight of the statutory test. In the **ACAS Code**, gross misconduct was defined as conduct so serious in itself, or having such serious consequences, as to justify summary dismissal for a first offence. Whilst the nature of the conduct was of utmost significance when assessing whether an employee was reasonably dismissed without notice (see **Burdett v Aviva Employment Services Ltd** UKEAT/0439/13), that was not the case when assessing the fairness of a decision that the employee was guilty of conduct falling short of gross misconduct and should be dismissed but on notice. In this regard, the Respondent's policy on conduct might be relevant to the question of reasonableness, but it could not be determinative. It was unclear whether, and to what extent, the ET had regard to the disciplinary policy, but, in any event, the policy did not define serious misconduct or state what would be the potential outcome of such a finding, although it did suggest that in exceptional circumstances misconduct short of gross misconduct might warrant dismissal for a first offence.

15. The ET could also be seen as having adopted a substitution mindset: it had wrongly focused on what it considered was a reasonable sanction rather than whether the sanction applied fell outside the range of reasonable responses (suggesting it had placed itself in the position of the employer to determine what was the appropriate sanction rather than considering whether the decision taken by the Respondent was within the reasonable band). The ET had also concluded that the examples of gross misconduct identified in the Respondent's disciplinary policy "*point to misconduct of a worst character than the two examples in this*

case" (paragraph 18); that suggested it had substituted its view of the severity of the offence, akin to the error made by the ET in **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387 CA.

The Claimant's Case

16. For the Claimant it is contended that the ET had demonstrably asked itself the correct question: that is, whether the misconduct identified was reasonably treated as a sufficient reason for dismissing the Claimant. In asking this question, the Respondent's own characterisation of the Claimant's misconduct under its policy was relevant, both as to the seriousness with which the conduct was to be viewed and to the fairness of the sanction. Here, the distinction drawn on appeal between gross misconduct and serious misconduct meant this was to be seen as a case falling within the general category of misconduct under that policy. It was common ground that the ET had been right to have regard to the decision reached at the appeal stage - that this was a case of serious rather than gross misconduct - the appeal being part of the dismissal process (**Taylor v OCS Group Ltd** [2006] IRLR 613). That, however, meant it was relevant that the Respondent's own policy provided that misconduct falling short of gross misconduct:

> **"… generally … does not warrant dismissal on the first occasion, other than in exceptional circumstances. Repeated instances of general misconduct, in conjunction with a valid warning, can, however, result in dismissal." (Page 2 of the policy)**

17. The Respondent had not sought to rely on any exceptional circumstances and the ET could be taken to have had in mind the effect of the Respondent's own disciplinary policy when it observed that "*Once the misconduct is characterised as serious and not gross, it means that warnings are to apply*" (paragraph 14). The ET had further itself determined that the dismissing manager's characterisation of the Claimant's conduct as gross misconduct had fallen outside the band of reasonable responses, hence, the reference to the Respondent's disciplinary policy and the examples given there of acts of gross misconduct (which pointed to conduct of worse character than that in issue in this case). The ET had not, however, solely had regard to

A the Respondent's policy but had also viewed the decision reached through the prism of general unfair dismissal law, and the ET's references to what was "reasonable", at various stages of its reasoning, could be taken as the application of the band of reasonable responses test; on that basis, it had permissibly concluded that the misconduct in issue was not reasonably treated as sufficient reason for dismissing the Claimant.

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18. These findings disclosed no error of substitution. The ET was applying the correct legal test as to whether the decision reached by the Respondent was in the reasonable band. It did not find that the only circumstance that the Respondent had been entitled to take into account was the existence or not of prior warnings, nor did the ET exclude the possibility that other factors might have been relevant. Rather the ET permissibly and correctly assessed the seriousness and reasonableness of sanction, considering the Respondent's own categorisation of seriousness, and the sanctions provided under its own policy, and also considering what was reasonable under unfair dismissal law more generally. In carrying out that assessment the ET properly had regard to the Respondent's reason for dismissal - the two acts of serious misconduct - the Respondent had not dismissed the Claimant for wider performance failings (specifically, Mr Dempster had said it was the particular failings relating to the two AZ training matters that had destroyed trust and confidence).

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Discussion and Conclusions

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19. The ET was concerned with the Claimant's complaint of having been unfairly dismissed; its touchstone was, therefore, section 98 of the **ERA**. By section 98(2) it is provided that a dismissal is capable of being fair if it is for a reason which "*relates to the conduct of the employee*". Although the correct categorisation of the conduct - whether gross misconduct or something less - will be crucial when determining a complaint of wrongful dismissal, where the

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employee has been dismissed without notice or with short notice, under section 98 a dismissal is not rendered automatically unfair if the conduct properly falls to be categorised as something less than gross misconduct: it is capable of being a fair dismissal provided simply it is for a reason relating to the employee's conduct.

20. Here, the ET having found that the reason for the Claimant's dismissal did relate to his conduct, the issue was whether the decision to dismiss was fair for the purposes of section 98(4) **ERA**. While the Respondent had the burden of proving its reason for dismissal and that it was a reason falling within section 98(1) or (2), when considering fairness for the purposes of section 98(4), the burden was neutral as between the parties.

21. Section 98(4) **ERA** provides:

> **"(4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
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> > **(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."**

22. In assessing the question of fairness for these purposes, it is common ground that it was relevant for the ET to have regard to the entirety of the dismissal process including the appeal stage (**Taylor v OCS Group Ltd**). The ET was, moreover, bound to assess the Respondent's actions and decisions against the standard of the band of reasonable responses of the reasonable employer in the particular circumstances of the case. It was, therefore, not for the ET to judge the Respondent's decision against what it - the ET - would have done; it had, rather, to assess what had occurred in terms of the range of reasonable responses of the reasonable employer in those circumstances: did the Respondent's conduct and decisions fall outside that range?

23. In carrying out that assessment, the ET was bound to keep in mind the language of section 98(4). That provision does not lay down any rule that, absent earlier disciplinary warnings, a conduct dismissal for something less than gross misconduct must be unfair. It may be that in most cases an ET will find that a dismissal in such circumstances falls outside the band of reasonable responses, but it should be careful not to simply assume this is so, as if it were a rule laid down by section 98(4); it is not.

24. Here, the Respondent had ultimately determined that the Claimant's conduct was properly to be characterised as 'serious' rather than 'gross' misconduct. It still, however, concluded he should be dismissed, although this was to be on notice rather than a summary dismissal. For its part, the ET had to assess the decision to dismiss in those circumstances against the band of reasonable responses.

25. Although the ET seems not to have referred to the **ACAS Code** for this purpose, it might have seen it as relevant that in the **ACAS Code** it is suggested that acts of gross misconduct will be those acts that are so serious in themselves, or have such serious consequences, that they may call for dismissal for a first offence (see paragraph 23 of the **ACAS Code**). If that weighed with the ET, however, it is not apparent from its reasoning.

26. It was also open to the ET to consider the Respondent's disciplinary policy as relevant to this assessment. In submissions on the appeal, both parties have placed reliance on that policy: the Respondent observes that it allows that conduct falling short of gross misconduct might still result in a dismissal; the Claimant counters that this is only envisaged where there are exceptional circumstances. Both arguments may have merit, but the short point is that the ET's reasoning does not reveal any particular reliance on the approach laid down in the

Respondent's policy. Indeed, having regard to the ET's explanation of its approach, it is hard to avoid the conclusion that it proceeded upon an assumption that, once the misconduct was characterised as serious and not gross, this was not a case where the Respondent could fairly dismiss (see, in particular, how the ET explained its approach at paragraphs 14, 21, 22 and 31).

27. For the Claimant, it is said that I can infer the ET was intending to refer to what was allowed under the Respondent's policy and/or to what it had concluded followed from its application of the band of reasonable responses test. I am, however, not persuaded this is what the ET was saying. First, because the language used suggests the ET saw this approach - that, absent earlier warnings, it would be wrong to dismiss for conduct falling short of gross misconduct - as a rule, or proposition of law. Second, because the ET does not use the language of the band of reasonable responses test but seems to assert what it had concluded was the reasonable response, which would suggest an error of substitution. Third, because even if the ET did have in mind the Respondent's policy, it (i) failed to allow for the fact that this stated that dismissal in such cases might still be the appropriate sanction in exceptional circumstances and/or (ii) still needed to keep sight of the statutory test it was bound to apply - to ask whether, in these particular circumstances, the decision to dismiss the Claimant was fair.

28. The particular circumstances of this case apparently included the Respondent's concern that it could no longer trust the Claimant to meet the standards required of him for his work. Its case was that this informed the decision to dismiss - not just the two acts of serious misconduct, but those acts seen against the background of the performance issues relating to the Claimant. The ET alluded to these matters as informing Mr Dempster's decision to dismiss, but did not ask whether these might have been relevant when determining the fairness or otherwise of the sanction. I do not suggest that the ET would not have been entitled to find that dismissal still

fell outside the band of reasonable responses, but the Judgment implies that the ET simply failed to consider this as part of the relevant factual matrix. That seems to have been because the ET unduly restricted its view of what was relevant, by adopting an impermissibly rigid view that, where the conduct in issue fell short of gross misconduct, dismissal could only be the appropriate sanction if there are other warnings in place. The approach also seems, however, to have been informed by what the ET considered was the case, the substitution of its own view as to what was the correct course for that of the Respondent (as suggested by the ET's explanation as to how it construed the nature of the conduct in issue). In either event, there is nothing to suggest the ET considered the question of sanction by applying the band of reasonable responses test to the circumstances of this case, keeping in mind the language of section 98(4).

29. That being so, in my judgment the ET's approach in this case was flawed: it unduly limited the potential range of reasonable responses by applying a general rule as to when dismissal might be fair in cases of conduct falling short of gross misconduct, when no such rule is laid down by section 98(4). Further, or alternatively, it fell into the substitution trap, imposing its own view as to the appropriate sanction rather than conducting an assessment of the Respondent's decision against the band of reasonable responses test. In either event, the conclusion is rendered unsafe and the appeal must be allowed.

Disposal

30. It is common ground that this is not a matter where it would be appropriate for the EAT to reach its own view, in substitution for that of the ET. The assessment of fairness for section 98(4) purposes is for the ET and this matter must therefore be remitted. For the Respondent it is said that this should be to a different ET; the Claimant contends that it should return to the same ET.

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31. I have considered the factors in **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763. Whether this matter returns to the same or a different ET, the hearing required is relatively short, although I appreciate that even quite small differences in length of hearing can be significant in terms of costs. Another material consideration is that remitting this matter to a different ET (so, allowing that it can be heard by any other Employment Judge in the region), is likely to enable it to be listed sooner. What most weighs with me, however, is that I have reluctantly come to the conclusion that the ET in this case adopted a fundamentally flawed approach. Although I have no doubt as to the professionalism of the Employment Judge (and this is not a case where there is any suggestion of bias or partiality), I consider this is a case where it is better for all concerned for the matter to be heard afresh before a different ET. To save costs and to assist that ET, however, I would hope the parties are able to provide a statement of agreed facts, which might enable the re-hearing to be shortened to one day.

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