Appeal No. UKEAT/0091/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 October 2018

Before

THE HONOURABLE MR JUSTICE SWIFT

MRS G SMITH

MISS S M WILSON CBE

MS S JURIC — APPELLANT

LOOK AHEAD CARE SUPPORT AND HOUSING — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SILVIJA JURIC (The Appellant in Person)
For the Respondent	MISS CHESCA LORD (of Counsel) Instructed by: Devonshires Solicitors 30 Finsbury Circus London EC2M 7DT

SUMMARY

CONTRACT OF EMPLOYMENT – Sick pay and holiday pay

CONTRACT OF EMPLOYMENT – Damages for breach of contract

UNFAIR DISMISSAL – Reasonableness of dismissal

UNFAIR DISMISSAL – Procedural fairness/automatically unfair dismissal

WORKING TIME REGULATIONS – Holiday pay

VICTIMISATION DISCRIMINATION - Dismissal

The Appeal Tribunal dismissed an appeal against conclusions that the Appellant had not been dismissed by reason of a protected disclosure, and had not been unfairly dismissed. The Appeal Tribunal also dismissed an appeal against the Tribunal's decision on the amount of holiday pay owing to the Appellant at the time of her dismissal.

On the protected disclosure dismissal claim, the Appeal Tribunal concluded that although the Employment Tribunal ("ET") had misdirected itself on the burden of proof, that misdirection had not been material. On the claim of unfair dismissal, the Employment Tribunal had taken account of all relevant matters, had provided sufficient reasons for its decision, and had reached a conclusion on the application of section 98(4) of the **Employment Rights Act 1996**which was reasonably open to it on a correct application of the law. The Employment Tribunal had correctly quantified the holiday pay claim.

THE HONOURABLE MR JUSTICE SWIFT

1. This is the Judgment of the Tribunal.

2. This is an appeal against the Decision of the Employment Tribunal following a hearing over four days in September 2017. In broad outline, the issues before the Employment Tribunal were: firstly, whether the Appellant had been dismissed by reason of protected disclosures contrary to section 103 of the **Employment Rights Act 1996**; secondly and alternatively, whether she had been unfairly dismissed contrary to section 98 of the **Employment Rights Act 1996**; and thirdly, whether she was entitled to any sums by way of outstanding holiday pay based on holiday entitlement that had accrued to her up to and including the date of dismissal.

3. The Appellant (the Claimant before the Employment Tribunal) was employed by the Respondent with effect from 10 September 2012. The Respondent provides a service to support vulnerable adults. From July 2015 the Appellant worked at Crown House, a specialist health service that is home to 20 residents and provides support to some 190 other people who live in the community.

4. The Appellant was, on the Respondent's case, dismissed for a reason relating to conduct. She was dismissed on 22 August 2016 and that decision was upheld on an appeal by letter dated 17 November 2016. The initial decision to dismiss was that the Appellant should be summarily dismissed. On appeal that decision was varied to dismissal on notice. The decision to dismiss followed failures by the Appellant on 6 May 2016 to follow instructions given to her by her manager, Ms Nugent. Those instructions were that the Appellant should not accompany a

A resident to a hospital appointment, the instruction being given because at that time the Appellant's DBS certificate had lapsed and had not yet been renewed by the Respondent.

B 5. In these proceedings the Appellant claimed to have made a number of protected disclosures; four in the period beginning from the end of September into October 2015, and a further four in or around May 2016, which was around the time of the events that ultimately led to her dismissal.

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6. The Employment Tribunal rejected the claim under section 103A. It accepted that four of the eight matters relied on as protected disclosures were qualifying disclosures but concluded D that those were not matters known to the manager who had taken the decision to dismiss, and therefore were not reasons for the Appellant's dismissal. The claim under section 98 was also dismissed, the Tribunal having considered the circumstances of the case and taken material matters into account. The claim in respect of holiday pay succeeded to the extent that the Tribunal E concluded that a further one and half day's pay should be provided to the Appellant.

7. In this appeal some six grounds of appeal are pursued. I will deal with each of them in F turn.

8. Ground 1 concerns the approach taken by the Tribunal to the burden of proof in the G context of the claim under section 103A of the **1996 Act**. The material paragraph is paragraph 51 of the Decision of the Employment Tribunal and that paragraph states as follows:

> **"51. When considering whether there has been a 'disclosure' within the meaning of s43(B)(1) I must consider whether the employee disclosed 'information'. It is not sufficient that the employee has made an 'allegation' - (*Cavendish Professional Risks Management Ltd v Mr M Geduld* [2010] IRLR 38). The claimant must show that she reasonably believed the disclosure H was in the public interest. To succeed in a claim that the dismissal was automatically unfair, she must show that the disclosures (if any are made out) were the sole or principal reason for her dismissal. The burden of proof rests on the claimant to show the elements of public interest disclosure and that that was the reason for dismissal."**

9. By comparison is the judgment of the Court of Appeal in **Kuzel v Roche Products Ltd** [2008] ICR 799 in which that Court set out the correct approach to the burden of proof in a case where a protected disclosure was asserted to have been the primary reason for dismissal. The material part of Mummery LJ's Judgment is at paragraphs 57 to 61. I set out those paragraphs as follows:

> **"57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
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> **58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
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> **59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
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> **60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.**
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> **61. I emphatically reject Roche's contention that the legal burden was on Dr Kuzel to prove that protected disclosure was the reason for her dismissal. The general language of section 98(1) is applicable to all of the kinds of unfair dismissal in the 1996 Act ("for the purposes of this Part"), including the subsequently inserted provisions. Section 98(1) is inconsistent with Mr Bowers's submission, as is the specific provision placing the burden of proof on the employer in case of detriment to the employee by reason of a protected disclosure. It is probable that no similar provision was made in the case of dismissal because it was considered, correctly in my view, that the situation in the case of dismissal was already covered by the general terms of section 98(1) and was blindingly obvious as a matter of general principle. An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was."**

10. We accept that if the statement of the Employment Tribunal at paragraph 51 is compared with the guidance given by the Court of Appeal in **Kuzel v Roche Products Ltd** between paragraphs 57 to 61 of the Judgment in that case, what the Employment Tribunal said here was unsatisfactory. Paragraph 51 of the Tribunal's Judgment is to the effect that a burden of proof

lay on the Appellant to demonstrate that the reason, or principal reason, for her dismissal was a protected disclosure. That was in error. But the key question in this appeal is: did that error actually effect the way the Tribunal approached its task on the section 103A claim?

11. We do not think that the misstatement at paragraph 51 had that effect. Two matters are important. The first is that at paragraph 56, albeit in the context of the unfair dismissal claim, the Tribunal clearly reached a conclusion that the Respondent had demonstrated the reason for dismissal being a reason related to conduct. On that basis, so far as concerned the reason for dismissal, the Tribunal did not reverse the burden of proof. The second point we rely on is paragraph 64 of the Tribunal Decision:

> **"64. I have found that the first four disclosures did amount to qualifying disclosures. With respect to them, I therefore move to the next question (at issue 6), which is whether the reason or principal reason for the dismissal was because she had made public interest disclosures. The claimant cannot hope to show that the sole or principal reason for her dismissal was those first four disclosures, as she acknowledged, the decision maker, Ms Pisarri, had no knowledge of them."**

12. Having regard to paragraph 64, it is clear that the point being made by the Tribunal at that paragraph was not so much a point by reference to the burden of proof, but simply a point to the effect that on the state of the evidence Ms Pisarri - who had taken the decision to dismiss - was not aware of the four disclosures that the Tribunal concluded were the qualifying disclosures. That being the state of the evidence, no question could arise that those matters were the reason, or principal reason, for the Appellant's dismissal. In the premises, we do not think that the statement in error at paragraph 51 of the Employment Tribunal's Decision had any operative effect in this case.

13. The remaining grounds of appeal all relate to the Tribunal's decision as to the contention that the dismissal was unfair contrary to section 98 of the **Employment Rights Act 1996**. There are four grounds of appeal relating to that decision. It has been slightly confusing for this Tribunal

to identify the precise content of each of those grounds of appeal because the way in which those grounds are presented in the Amended Notice of Appeal is not always reflected in the way in which they are set out in the Skeleton Argument. I should say at this stage the Skeleton Argument was not prepared by Ms Juric, but by Nabila Mallick of Counsel who, until Friday of last week, was acting on behalf of Ms Juric pro bono. Ms Juric has represented herself today and, so far as the Tribunal are concerned, has very clearly explained to us the reasons why she says the Tribunal Decision should be set aside.

14. Returning to the four grounds that relate to the section 98 decision, we will address all matters collectively referred to in the Notice of Appeal and the Skeleton Argument.

15. Ground 2 is that the Tribunal failed to consider two matters going to the fairness of the decision to dismiss. The first was whether the instruction given to the Appellant on 6 May was a reasonable instruction. As we see it, there is no substance to this ground. The question of whether the instruction was a reasonable instruction was considered directly by the Tribunal at paragraph 27 of the Judgment:

> **"27. The first and most substantial issue occurred on 6 May. On this day, the claimant accompanied the customer SD to the specialist hospital appointment that she had made towards the end of April. She had been told by Ms Nugent that she was not allowed to go. The claimant's evidence was that this was the third occasion that it had been mentioned, but she did not put that clearly to Ms Nugent. I accept that it might well have been mentioned before, but the claimant's evidence was that she was told about 10 minutes before she was due to leave that she could not go because she had no DBS. There was some concern about whether the appointment could be kept because of the need for adequate staff cover. In any event, I find as a fact that the instruction that the claimant should not go was clear and unequivocal and in line with policies that the claimant was well aware of."**

16. In addition to paragraph 27, Ms Lord (who appears for the Respondent today and appeared for the Respondent before the Employment Tribunal) has drawn our attention to three further passages in paragraphs 11, 14 and 71. Each of those passages identifying the reasons for the policies that lay behind the instructions that were giving to the Appellant on 6 May. Again, each

of those matters identifies, in our view entirely sufficiently, why it is that the instruction given on 6 May was a reasonable instruction. The Appellant criticises the timing of the instruction - it came only very shortly before the Appellant was due to leave for the hospital appointment – and also makes the point that the only reason why, as at 6 May, she had no DBS clearance was because the Respondent had delayed in applying to renew her clearance. However, neither of these points detracts from the Tribunal's conclusion that the instruction given was in accordance with the Respondent's policies and the plain inference from that being that the instruction was a reasonable instruction.

17. The second under Ground 2 is whether the Employment Tribunal gave appropriate weight to the fact that it was the Respondent's fault that as at 6 May the Appellant did not have an extant DBS clearance. However, that point does not logically go to any matter effecting the fairness of the decision to dismiss in this case; that decision was focused entirely on the Appellant's reaction to the instruction given to her on 6 May.

18. The third ground of appeal is that the Employment Tribunal did address in its Reasons, either sufficiently or at all, the fact that when the decision to dismiss was taken, the dismissing officer took account of a final written warning given to the Appellant in July 2015, which as at the time of the decision to dismiss had expired. The officer hearing the appeal recognised that the July 2015 final written warning had expired and ignored it. The Appellant says the Tribunal simply did not explore the reasons for that or the significance of that.

19. In our view this was beside the point for the purposes of the Tribunal's consideration of this case. Although account was taken of the final written warning in the decision to dismiss, it was disregarded for the purposes of the appeal decision. That being so, there was no error for the

A Tribunal not to address this point. The existence of the final written warning had fallen out of the picture for section 98(4) purposes by the time of the appeal hearing.

B 20. There was a further point that was taken under Ground 3. This was not in the Skeleton Argument but was contained in the Notice of Appeal and was directed to paragraph 72 of the Employment Tribunal Decision:

> **"72. Given the seriousness of the events particularly on 6 May and the times that the claimant had shown that she had difficulty abiding by instructions given by the respondent, this dismissal cannot be said to be outside the range of reasonable responses and I cannot therefore say that it was unfair. The unfair dismissal claims are therefore dismissed."**

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21. The gist of the point is that paragraph 72 suggests that events in addition to those on 6 May were material when it came to deciding whether or not the decision to dismiss fell inside or outside the range of reasonable responses. On a fair reading of paragraph 72, we do not think that is right. The instructions referred to in paragraph 72, in our view, referred to the sequence of instructions each of which was given to the Appellant on 6 May. We think that is a fair reading of the Tribunal's Decision; we do not consider that, at paragraph 72, the Tribunal was referring to matters outside the scope of the decision letters relating to the decision to dismiss and the decision to uphold that decision on appeal.

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22. Before leaving that matter, however, I should point out that certainly at the time of the decision to dismiss three allegations were being considered in respect of the Appellant's conduct. Two related to 6 May in the same incident on 6 May, the third related to a further instance on 11 May. This third matter was the subject of a specific finding against the Appellant in the dismissal letter. It does not seem to us that that matter is being referred to by the Tribunal at paragraph 72 of its Judgment. Nevertheless, were the decision to be read in that way, that would nevertheless be entirely consistent with the way in which the dismissal decision was approached at the relevant

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time. Certainly, looking at the Tribunal's reasoning on section 98 as a whole, between paragraph 66 and paragraph 72 we see no error of law in the way in which the Tribunal approached the fairness of the dismissal in this case.

23. I now turn to Ground 4, which was again put in two ways; one more clearly in the Notice of Appeal, the other more clearly in the Skeleton Argument. The first way in which it was put was to the effect that there was a failure to give sufficient reasons in respect of the difference between the decision to dismiss – that the Appellant should be dismissed without notice – and the decision on appeal that the Appellant should be dismissed on notice. I have already addressed this point under Ground 2. Reliance on the earlier final written, which appears to have been the difference between the decision for summary dismissal and the decision for dismissal on notice, fell out the picture at the appeal stage (but had been part of the picture at the first instance decision). The Employment Tribunal's Judgment focuses on the actual reasons for the final decision to dismiss the Appellant. This was the correct approach for the Tribunal to take. The Tribunal did not fail to deal with any relevant matter.

24. The other way in which Ground 4 was put was in the Notice of Appeal as follows:

> **"12. The Tribunal failed to give any, or any adequate, reasons to explain why, having found that the appeal manager took the view that the Appellant's conduct did not amount to gross misconduct [paragraph 46], the Tribunal concluded that the Appellant's dismissal fell within the bands of reasonable responses."**

25. Having considered the contents of the Tribunal's Judgment, and specifically (a) the direction the Tribunal gave itself on section 98 at paragraph 53, and (b) the conclusion that it stated on the material part of that claim at paragraphs 71 to 72, it does not seem to us that the approach alleged in the skeleton argument was in fact the approach taken by the Employment

Tribunal. There is then no substance to this second and alternative way in which Ground 4 was put.

26. Ground 5. The point arising here was whether the decision to dismiss was unfair because of Ms Nugent's involvement at the investigation stage. The Appellant says it was unfair for Ms Nugent to be in charge of the investigation because she was too directly involved in the events of 6 May. Indeed, the Appellant says that because the Appellant refused to return to Crown House when she was requested, one consequence was that Ms Nugent was required to stay beyond her normal hours, the consequence for Ms Nugent being that she was late collecting her child from nursery and was fined by the nursery for the late collection of her child. All these matters, together with various other points made by the Appellant, it is said, demonstrate that Ms Nugent should not have conducted the investigation.

27. Accepting, for the sake of argument, that it is correct to say that Ms Nugent was directly involved with the events of 6 May we must consider Ms Nugent's actions, taking account of what the Tribunal said about them in its Judgment. There are two material passages. The first is at paragraphs 32 to 33:

> **"32. On 12 May, Ms Nugent was appointed to carry out an investigation into the claimant's conduct. The claimant raises issues now before me about Ms Nugent carrying out that role, but it is clear from the disciplinary policy that her appointment as investigating officer was in line with what that says as follows: -**
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> > **"*11.6 the investigation should be used solely to establish the facts of the case. It will usually be conducted by the employee's line manager (investigating manager) and where necessary with the assistance from Human Resources.***
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> > ***11.7 where it is not appropriate for the employer's line manager to investigate the allegation of misconduct, then another manager or team leader will conduct this investigation.*"**
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> **33. The claimant did not raise any concerns about this aspect at the time, although she did later. It appears to me that Ms Nugent was an appropriate person to deal with the investigation."**

The second passage is at paragraph 69 of the Judgment.

28. In both passages the Tribunal's conclusion was to the effect that no complaint was made about Ms Nugent at the time of the investigation and that in any event Ms Nugent's involvement as investigator did not take this case outside the range of reasonable responses. In our view, the Tribunal was right to reject the criticism based on Ms Nugent's role in this case. It is correct that at the time of the investigation no complaint was made about Ms Nugent's role. Yet the Appellant did raise this matter at the end of the disciplinary hearing, and by the time of the appeal the first ground of appeal related to Ms Nugent's involvement as the investigator in this case. The point was then put in issue prior to the effective decision to dismiss.

29. However, it does not seem to us that Ms. Nugent's involvement is a matter of any real substance in this case. There was no substantial dispute as to what had happened on 6 May, or to the extent it is relevant, there was no dispute as to what had happened on 11 May either. The question that was material to whether or not the Appellant should be dismissed, or subject to some other form of disciplinary action, concerned the evaluation of the significance of those events. There were no disputes of fact to be resolved as such. That being so and looking at the fairness of the process from beginning to end rather than simply looking at any one particular part of it, we are satisfied the Tribunal was entitled to conclude that in this case Ms Nugent's involvement as investigator did not amount to the adoption by the Respondent of an unfair process.

30. I now turn to Ground 6 of the appeal. This concerns the Tribunal's Decision on the holiday pay claim. In the course of argument, this was a ground that I found troubling. It seemed to me initially, that the Tribunal may not have made sufficient findings as to the extent of the Appellant's contractual entitlement to leave, or may have been in error in assuming that the leave entitlement, as at the beginning of the 2016-2017 holiday year as stated by the Appellant, in fact

included holiday entitlement that she was carrying over from the previous year rather than being exclusive of that carry over entitlement. However, we have been taken to two documents that were before the Tribunal, that in our view satisfy us that based on the evidence available the Tribunal addressed this matter correctly.

31. The first document is the leave record for 2015-2016. That identifies that the starting point for that year was a leave entitlement of 25 days and that by the end of that year the number of days remaining, untaken, was four days. The second document that was seen was the leave record for the next leave year, April 2016 to March 2017. Again, the starting point for that document is a leave entitlement of 29 days: based on the information before the Tribunal, that must have been a contractual entitlement of 25 days plus four days carried over from the previous financial year. In addition to these documents, the Employment Judge has provided a short note explaining in more detail the reasoning in her Judgment which led her to the conclusion that the Appellant was entitled to a further one and half day's holiday pay. According to that additional explanation, her starting point was in accordance with the document she saw that the Appellant's entitlement as at the beginning of the 2016-2017 holiday year was an entitlement to 29 days. That entitlement was then reduced pro rata to take account of the fact that the Appellant was dismissed in the course of that holiday year; that pro rating exercise leaving an entitlement of 11.44 days. The Employment Judge then accepted evidence before her to the effect that the Appellant had been paid 10 days in lieu of untaken holiday leaving a remaining balance of one and half days, hence the conclusion that she stated at paragraph 73.

32. Based on the information that was before the Employment Judge, we are entirely satisfied that that was the correct answer. In the course of argument today it appeared that the parties may have been at odds, rather than in agreement, as to the starting point when it came to holiday

entitlement for 2016-2017. It being the Appellant's case today that she had a contractual entitlement for that year of 29 days rather than 25 days, and that the four days to be carried over from the previous holiday year were, therefore, in addition to that 29 days starting point. So far as we can see there was no evidence in support of this contractual position before the Employment Tribunal. As I have explained, the evidence before the Tribunal was in the form of the two employee annual leave records. On that basis we consider the Tribunal reached the correct conclusion. What the position may have been had the Tribunal been provided with different evidence in relation to a different alleged contractual entitlement, is not a matter that is within the scope of this appeal.

33. For all those reasons this appeal is dismissed.