Appeal No. UKEAT/0045/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2018

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

GRANGE (WHITEFIELD) CARE SERVICES LIMITED — APPELLANT

MR E JOSEPH (DEBARRED) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LESLIE MILLIN (of Counsel) Direct Public Access
For the Respondent	Respondent debarred from taking part in this appeal

SUMMARY

UNFAIR DISMISSAL – Contributory Fault

An Employment Tribunal reduced both the basic and compensatory awards to which the Claimant was entitled on his unfair dismissal by 15% to reflect contributory fault on the part of the Claimant. There was a background of very serious allegations being made against the Claimant by a vulnerable service user which the Tribunal did not take into account because they did not form part of the basis for the dismissal. The employer appealed and the appeal proceeded only in relation to the argument for a greater reduction in the basic award.

Held :

(i) A difference between the level of reduction of the basic and compensatory awards may be justified but only exceptionally so (**RSPCA v Cruden** [1986] IRLR 83)

(ii) The correct approach to the tests in sections 122(2) and 123(6) of the **Employment Rights Act 1996** had been set out by Langstaff J in **Steen v ASP Packaging Ltd** UKEAT/0023/13 and should be followed

(iii) While section 122(2) permitted consideration of any conduct (not just that related to the dismissal), the making of an allegation was not conduct on the part of the Claimant; it was simply that he was being accused of something. Identification of conduct that actually happened is a prerequisite to consideration of the reduction of any award

(iv) In the absence of any conclusion that the Claimant had acted in the way alleged, the Tribunal could not have taken the allegations into account as conduct for the purposes of section 122(2) of the **Act** and so had not erred

(v) It could not be said that a reduction of 15% for the basic award was manifestly less than should have been applied.

Appeal dismissed.

THE HONOURABLE LADY WISE

1. The Respondent appeals against a Decision of the Employment Tribunal ("the ET") sitting at Watford (Employment Judge Manley sitting alone) dated 2 May 2017. In a Judgment restricted to remedy, the Claimant was found entitled to both a basic award and a compensatory award, but both were reduced by 15% to reflect contributory fault on the part of the Claimant. Only a restricted appeal has been allowed to proceed to this Full Hearing, namely the level of contributory fault in relation to the basic award.

2. Before the Tribunal, the Claimant was represented by Ms Smeaton of counsel and the Respondent by Ms Millin of counsel. On 22 September 2018, the Employment Appeal Tribunal debarred the Claimant from taking further part in this appeal, due to failures to file an Answer and to respond to correspondence over a period of several months. Accordingly, only the Respondent has been involved in this hearing and has continued to be represented by Ms Millin.

The Proceedings before the Tribunal

3. The Claimant, having been dismissed for gross misconduct on 24 March 2016, issued a claim for unfair dismissal in the ET on 22 August 2016. As the Respondent did not enter an appearance, by lodging an ET3, on 22 November 2016 the Tribunal (Employment Judge Bedeau) issued a Default Judgment in terms of Rule 21 of the **ET Rules of Procedure**, in terms of which the claim for unfair dismissal was declared to be well-founded and a Remedy Hearing assigned. In a subsequent Judgment of 12 December 2016 Employment Judge Lang confirmed the Rule 21 Judgment; the Respondent having sought a reconsideration but having failed to prove that the proceedings were not served.

4. The Remedy Hearing then took place on 12 and 13 April 2017, after which a Judgment was sent to parties on 2 May 2017 awarding the Claimant a basic award of £6,056.25 (reduced by 15% from £7,125 to reflect contributory fault). A compensatory award of £14,195.34 (after the 15% reduction) was also made and is no longer the subject of this appeal.

5. During the hearing before the Tribunal there was argument about the extent to which the Respondent was entitled to participate and, ultimately, Employment Judge Manley allowed evidence from the Respondent's witnesses and permitted cross-examination of the Claimant, together with submissions from both sides. Thereafter, and insofar as relevant to this appeal, the Tribunal made the following material findings of fact and in relation to what occurred at the hearing:

> **"14. I heard evidence over the course of the hearing from Mr Rai, who is a manager and from Ms Fernando, who is a senior manager. Neither of them dismissed the claimant. I also heard from the claimant. The bundle of documents runs to over 170 pages but it is true to say that I did not need to look at all of those. I will quote from some of them as I go through my findings of fact.**
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> **15. The respondent's representative asked questions of the claimant which related to a document which was in the joint bundle but I understood had not been put to the claimant when the investigation and disciplinary hearings took place. After we discussed it, I allowed those questions to be asked. The claimant denied what was said in that document.**
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> **…**
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> **19. The claimant worked at another care home, which was in another company name but which is in the same group, or was at the time in the same group, as a care worker from 2005. After some sort of complaint or allegation he was moved to the respondent's care home in 2013. The respondent is one of a number of connected companies, listed together at page 41 where a staff handbook is referred to. That appears to be under the name of Scorpion Group.**
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> **…**
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> **26. In February 2016 there was a complaint from a female service user's mother and Mr Rai visited them and took a note of what was said. He also saw a phone which indicated a message or a call either to or from the claimant from or to the service user which appears to say a misspelling of "call me". I do not accept that Mr Rai saw 15 such messages and there is certainly no other evidence of that.**
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> **27. There were also some allegations made then and later which were of a more serious nature. The respondent agrees that these were never put to the claimant. They were passed to the police and to Hertfordshire Social Services who apparently investigated although I understand no charges are pursued against the claimant with respect to those matters. The claimant was suspended. He was given no details except that it arose from a complaint by a service user. He was called to an investigation meeting which he attended on 18 March. That investigation meeting was said to cover the following matters of concern:**
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> > **• "It is alleged that you have been contacting clients of the supported living project by mobile phone**

• The giving of gifts to clients without consent

• Failure to maintain professional boundaries with a client when off duty."

28. The claimant attended that meeting with Ms Fernando. A summary of what happened there is that the claimant accepted that there had been calls between himself and the service user, that he had brought her a gift from Pakistan which she had asked for and, at some point, he had given her a birthday card. He said that this was common practice and that others had done this too. The record there indicates that the claimant also said that he knew it was against policies and procedures. He now denies that he said this but it seems likely to me, even though I accept that the claimant's knowledge of English is fairly limited, that he did accept that there was some wrongdoing in these actions.

29. The claimant was invited on 22 March to a disciplinary meeting to be held on 24 March. This involved the same charges as above. The claimant was told at that point that he could be accompanied by a friend or work colleague. The notes record that the claimant appeared to understand what the disciplinary hearing was about saying that it was about "*calling the client personally and buying gifts for her*". He said he understood the policies and by this time, as I have indicated, copies of those policies had been sent to the claimant and I assume, as I have heard nothing to the contrary, that that included the Code of Conduct quoted above.

30. It is recorded in that note that the claimant said he knew he had breached the policy but it is not clear to me whether he was saying that he knew this having seen the policy after the events in question. He said that others used their mobile phones and he bought the service user a birthday card because others had. There was no discussion about the content of his communication with the service user and no reference whatsoever to the more serious matters the respondent now allege.

31. The claimant was dismissed by a letter of the same date, it being said there that he had committed acts of gross misconduct. That letter informed the claimant of his right to appeal. The claimant did not appeal. He told me that he did not understand or did not notice the reference to the appeal. The claimant's first language is Urdu. He had an interpreter here. I accept his knowledge of English is limited but that he is able to use it sufficiently to deal with some matters."

6. In a section headed "*Law and submissions*", the Tribunal sets out the provisions of the **Employment Rights Act 1996** ("ERA") insofar as relevant to the various arguments presented. The conclusions are then given at paragraphs 41 to 51, but only paragraph 41 and part of paragraph 43 are germane to this appeal and those are in the following terms:

"41. I deal first with the question of contribution. I do find an element of blameworthy conduct here. This is because the claimant accepted that there was some blame on his part and that is consistent in the notes of the two interviews that he attended. Even with his limited English, I believe that the claimant did know that there was something perhaps wrong with the level of communication that he engaged in with the service user. Assessing the level of blameworthiness is not easy in this case. I entirely accept that I cannot take into account the other more serious matters which were not put to the claimant, nor do I know at what level they were investigated by anybody else. I accept he had no clear instruction before this matter came to light about the use of mobile phones with clients and the giving of gifts, nor did he believe that it could amount to gross misconduct. I do believe, however, that he did appear to accept that it was misconduct on some level. I have therefore decided that an appropriate reduction to both the basic and the compensatory awards is to reduce them both by 15%.

…

43. … I have had no evidence at all from the decision maker at the time. Those witnesses for the respondent before me were clearly influenced by other information of more serious allegations which they chose, for whatever reason, not to discuss with the claimant. He had no opportunity to deny those more serious allegations and when he was given the opportunity in

this hearing, he denied them. The police, as we know, have taken no further steps. The dismissal was for the reasons stated; that is for contacting clients by mobile phone and the giving of gifts. I cannot go behind that and find that there were any other reasons for dismissal. The investigation did not investigate the claimant's arguments that other employees gave gifts and used mobile phones or, if Ms Fernando did carry out those investigations, she certainly brought no evidence here to that effect. …"

The Respondent's Arguments on Appeal

7. Ms Millin contends that the Tribunal made an error of law by disregarding allegations of a serious sexual nature when assessing compensation under the basic award because the allegations, although known to the employer, could not be put to the Claimant having been referred to the police. She submits that the allegations must fall under the "*any conduct*" requirement in section 122(2) of the **Employments Rights Act 1996** when it states that "*any conduct of the complainant before the dismissal*" should be taken into account when assessing compensation under the basic award. In contrast, section 123(6) requires consideration of whether the "*dismissal was to any extent caused or contributed to by any action*" of the Claimant. The Tribunal had failed to acknowledge that difference and had approached the contribution arguments as if both are the same.

8. Reference was made to the decision of Langstaff J in the case of **Steen v ASP Packaging Ltd** UKEAT/0023/13. In that case it was confirmed that there is a four-stage approach to determining whether a reduction in the basic and compensatory awards should be made, namely:

(1) What conduct gave rise to contributory fault?

(2) Was that conduct blameworthy?

(3) Did that conduct cause, on contribute, to the dismissal to any extent?

(4) To what extent should the award be reduced and to what extent is it just and equitable to do so?

A Of course, no finding of causation is required for a reduction of the basic award, and so for that the approach includes only (1), (2) and (4) above.

B 9. In short, Ms Millin's submission is that the allegations of a serious sexual nature ought to have been considered in the context of contributory fault for the basic award. The Tribunal had made no mention of the fact that the Claimant's work involved dealing with service users who were vulnerable with mild, moderate, or severe learning difficulties; that was a relevant factor in C assessing the level of the Claimant's contributory fault and had been ignored.

10. On the conduct that was taken into account by the Tribunal, Ms Millin argued that the D Tribunal should have taken into account also that the Liability Judgment was a Default Judgment, there had been more evidence led from which a conclusion of unfair dismissal had been reached. She submitted that it was an error to award a claim of a large sum where he has been dismissed E for gross misconduct concerning a vulnerable adult. Her position was that the misconduct that was proved was sufficient to justify a far greater reduction than 15%, and that in all the circumstances the reduction should be 100%; although that would create a substantial differential between the basic award and the now unchallenged compensatory award such an outcome would F be fair standing that it was a just and equitable test.

Discussion

G 11. As already indicated, this appeal is now concerned only with the Tribunal's approach to the level of reduction to the basic award. The far greater sum for the compensatory award stands intact, whatever the outcome. Section 122(2) of the **ERA** provides:

H > **"(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."**

12. There is no rule or requirement that, where blameworthy conduct is established, the level of reduction of the basic and compensatory awards will be the same. The test for reduction of a compensatory award differs in that it requires a causative link between the conduct and the dismissal. Section 123(6) of the **ERA** provides:

> **"(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by an 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."**

13. It is generally accepted that a difference in the level, if any, of reductions in the basic and compensatory awards may be justified, but only exceptionally so (**RSPCA v Cruden** [1986] IRLR 83). In the present case, the distinction is said to be that for the basic award, conduct that did not cause or contribute to the dismissal, but was separate, blameworthy conduct could and should have been considered by the Tribunal, such that a higher level of reduction for the basic award than the compensatory award would be seen to be just and equitable. I accept that in principle any conduct on the part of the Claimant was capable of being taken into account in considering the application of section 122(2), such that a higher reduction could have been contemplated than for the compensatory award. The central question, however, is whether the Tribunal erred in not achieving such an outcome, which requires an analysis of the facts as established before the Tribunal against the correct legal approach.

14. In the case of **Steen v ASP Packaging Ltd** Langstaff J, having set out the statutory provisions, articulated the correct approach to the slightly different tests enunciated in sections 122(2) and 123(6) respectively in the following way:

> **"10. The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve a consideration of what it is just and equitable to do.**
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> **11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct**

which is said to give rise to possible contributory fault, (2) having identified that it must ask whether that conduct is blameworthy.

12. It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is upon what the employee did. It is not upon the employer's assessment of how wrongful that act was; the answer depends what the employee actually did or failed to do, which is a matter of fact for the Employment Tribunal to establish and which, once established, it is for the Employment Tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer's view of wrongfulness of the conduct. It is the tribunal's view alone which matters.

13. (3) The Tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent then the tribunal moves to the next question, (4).

14. This, (4) is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."

15. The case of **Steen v ASP Packaging Ltd** involved a failure of the part of the Tribunal to set out, clearly, what the conduct on the part of the Claimant was that justified the reduction (in that case of 100%) other than impliedly and in terms that it was blameworthy. In addition to setting out the correct approach, Langstaff J stated the following:

"24. It is therefore all too often an error of law that a tribunal simply states its conclusion as to contributory fault and the appropriate deduction for it without dealing with the four matters which we have set earlier in this decision. We add for the comfort of tribunals that there is no need to address these matters at any greater length than is necessary to convey the essential reasoning. Of its nature a particular percentage by which to reduce compensation, if that is how the tribunal seeks to address the word "proportion" in section 123(6), or by a particular fraction, if that is how the tribunal wishes to address it, is not susceptible to precise calculation, but the factors which help to establish a particular percentage should be, even if briefly, identified. As the cases we have cited show this is all the more so where compensation is entirely extinguished by that which the tribunal concludes a Claimant actually did which was blameworthy and which made it in its view just and equitable to reduce both the basic award under section 122(2) and separately the compensatory award under section 123(6)."

16. Both of the passages I have set out from the decision in the case of **Steen v ASP Packaging Ltd** emphasise that the Tribunal must identify what the employee actually did, and then decide whether or not it was blameworthy. Applying that to the Decision in this case, the conduct that the Tribunal identified, and took into account because it was blameworthy, was the

A *level* of communication that this Claimant was engaged in with the service user. Although there were significant mitigatory factors, as set out in paragraph 41, the Claimant seems to have gone beyond what would have been an acceptable level of contact, notwithstanding that no clear instruction about it had been given to him. The Tribunal did not take into account the serious sexual allegations that were not investigated by the Respondent. As those were not part of the decision to dismiss, the necessary causal connection required by section 123(6) was not present in relation to the compensatory award.

17. The Respondent's argument is predicated upon the broader language of section 122(2), permitting consideration of *any conduct* on the part of the Claimant before dismissal and whether or not it had anything to do with the dismissal. What the argument appears to overlook is that information about an untested unproven allegation, which was denied by the Claimant, cannot properly be characterised as "*conduct of the complainant*" at all. The making of the allegation is not conduct by the Claimant; it is simply a fact that someone accused him of something. A finding that serious sexual misconduct was alleged but denied by the Claimant tells us nothing about the veracity of the allegations made. The police investigation resulted in no charges being brought against the Claimant and it would be wholly improper to speculate on the reasons for that. More importantly, the Tribunal *did not conclude* that the Claimant had acted in the way alleged. It is apparent, from paragraph 43, that the serious sexual allegations were put to the Claimant at the Tribunal hearing and that he denied them. No credibility findings, adverse or otherwise, were made by the Tribunal in relation to the Claimant. The Respondent's witnesses, however, are the subject of some criticism for being clearly influenced by the information about the more serious allegations that they chose "*for whatever reason*" not to discuss with the Claimant.

18. Against that background, I conclude that the Tribunal did not find any conduct on the part of the Claimant established, save that which it took into account in making the reduction of 15% to both the basic and compensatory awards. I do not consider that the Respondent has demonstrated that the Tribunal was told that the more serious allegations simply could not have been investigated once referred to the police, something that Her Honour Judge Eady QC at the sift stage of this appeal made clear that it was for the Respondent to establish.

19. Mrs D Fernando, who had not made the decision to dismissal but who gave evidence, made reference in her witness statement (at paragraphs 9 and 29) to Hertfordshire Social Services contacting the Respondent to advise that the Disclosure and Barring Services should be informed of the Claimant's conduct, but that does not address the issue of whether the Respondent had been unable to investigate the serious allegations because of the police investigation. Paragraph 9 of Mrs Fernando's statement does state that the police investigations were separate, but does not explain why or at whose instigation that occurred. In any event, nothing much turns on this as it is accepted now that the allegations were not proved.

20. As far as the police investigation was concerned, the Claimant was of course entitled to the presumption of innocence in relation to a serious sexual allegation of a criminal nature. In my view, as the Tribunal had been made aware that no charges were taken against the Claimant in respect of those allegations, and as they had not formed part of the basis for dismissal, the only basis on which they could have been considered as part of the determination under section 122(2) was if the Respondent had established that the conduct referred to in the sexual allegations had, on the balance of probabilities, which would have been the correct standard of proof before the Tribunal, actually taken place.

21. It is tolerably clear from paragraph 43 that the Tribunal did not find such conduct established, albeit that the discussion there relates to **Polkey**. More importantly, of the options available to the Tribunal on this point, it seems to me that the course adopted, namely, not to make direct findings on the allegations that did not form part of the Respondent's reason for dismissal, was the only prudent one. The Tribunal hearing was not, in those circumstances, the appropriate forum in which these allegations could properly be tested. The alleged victim did not give evidence and there was documentation which, insofar as I have seen it, included a letter from a Mr B containing hearsay evidence of what he claims the alleged victim told him; Mr B did not give evidence.

22. It is important to reiterate that the identification of conduct that actually took place is a prerequisite to consideration of reduction of any award (basic or compensatory) on a just and equitable basis. For the reasons given, it would have been inappropriate for the Tribunal to rely on conduct that had not been proved by the Respondent. An allegation of certain behaviour, however serious, is not tantamount to proof that it occurred.

23. Ms Millin contends, also, that even if the Tribunal could not take the sexual allegations into account in assessing contributory fault, the percentage reduction of 15% was far too low and it should be 100%. Her reasons included that this was a Default Judgment and that the Claimant had never had to establish that his dismissal was unfair and that the established conduct had, in any event, amounted to gross misconduct in light of the breach of duty of care towards service users who were vulnerable. She submitted that it could not be just and equitable to award somebody over £6,000 for what he had done. While accepting success in this appeal would lead to a significant differential between the two awards, Ms Millin submitted that such an outcome would still be fair and reasonable in all the circumstances.

24. I reject these submissions. The Tribunal took into account the relevant conduct of the Claimant and assessed blameworthiness, the level of which it found difficult to identify because of the findings it had made in relation to the Claimant having been given no clear instruction about the use of mobile phones with clients, and the giving of gifts, at any time before the complaint was made against him. Balancing the factors for and against the significant reduction in the award, as best as it could, the Tribunal opted for 15%. While of course a higher figure might also have been justifiable, I cannot conclude that 15% was manifestly less than should have been applied as a reduction. As I have decided that only conduct before dismissal and actually proved could be taken into account, it would have been inconsistent and arguably perverse for there to have been a different outcome for reduction of the basic and compensatory awards. Ms Millin suggested that any further reduction would be helpful and that awarding the Claimant anything at all was unacceptable; that appears to overlook that the Tribunal, having heard the evidence, decided that a relatively significant award was justified for the reasons that are given and adequately reasoned.

25. For all the reasons given, the appeal is dismissed.