Appeal No. UKEAT/0138/18/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11th October 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR G E YAGOMBA — APPELLANT

AXA SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR G E YAGOMBA (The Appellant in Person)
For the Respondent	MS CAROL DAVIS (of Counsel) Instructed by: Mayer Brown International LLP 201 Bishopsgate London EC2M 3AF

SUMMARY

PRACTICE AND PROCEDURE - Perversity

An Employment Tribunal's comment that an investigator had appeared overly keen to look for evidence which might have supported, rather than diluted his suspicions was not, on a careful examination of the reasons as a whole, cause for concern. The Tribunal found that the investigator had in fact found the relevant evidence. Its findings preferring that evidence to the evidence of the Appellant (as to whom it was critical) was not perverse.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal from a decision of an Employment Tribunal in Bristol, Employment Judge Livesey sitting with Mr J Howard and Mr C Williams, in a Judgment with Reasons which was sent to the parties on 27 October 2017. It was a complex case: the Tribunal heard evidence for 12 days, following three days of pre-reading, and it took four days to deliberate before reaching their decision which is contained in a 65-page Judgment.

2. I shall refer to the parties as they were below. The Claimant has appealed, his Notice of Appeal running to 19 closely typed pages complaining about many aspects of the Tribunal's Decision. At the Rule 3(10) Hearing of this Appeal, Her Honour Judge Eady QC permitted the matter to proceed to a Full Hearing on a very narrow issue which she formulated herself. It is instructive to set out the way in which she formulated the ground which alone is before me today and the brief written reasons she gave for that Decision.

> **"Reasons:**
>
> **Having been addressed by Mr Yagomba at length, for the reasons explained in my oral Judgment, I was not persuaded that his grounds of appeal disclosed any reasonably arguable error of law by the ET save on the following basis:**
>
> > **Given its finding that "Mr Bennett had appeared overly keen to look for evidence which might have supported, rather than diluted his suspicions" (see ET para 7.3.1 (iv) relating to the question whether the investigation was flawed), did the ET err (i) in failing to consider and/or find that this meant that the investigation had been carried out with a closed mind, and (ii) in failing to adopt the approach laid down in Salford Royal NHS Foundation Trust v Roldan [2010] 1RLR 721, CA, specifically see paras 13 and 57.**
>
> **This is a point that can be found in ground 6 and 7 of the original Notice of Appeal read together with the earlier general observations made regarding Roldan. I have, however, specifically set out the basis on which I have allowed the appeal to proceed (as above), so that there should be no confusion on this point at the Full Hearing in this matter. As indicated in my oral Judgment on this issue, it may be that the answer to the challenge on this basis lies in the ET's overall findings on the fairness of the investigation and the disciplinary process as a whole and Mr Yagomba should reflect on whether this is a point that ultimately has merit. At this stage, however, I am prepared to allow that a reasonably arguable question has been identified, in particular given that Mr Yagomba has told me that the Roldan point was one taken below, with specific reference to the potential significance of the disciplinary charges for a barrister working as a legal adviser in the insurance industry."**

3. I am told that no transcript of the oral Judgment of Judge Eady has been prepared in time for this Hearing which has come on relatively quickly. As I approach the matter afresh, that is not of concern to me.

4. The Claimant represented himself at the Hearing and Ms Carol Davis appeared for the Respondent as she had at the Hearing before the Tribunal. I am grateful to them both for their helpful skeleton arguments and concise submissions. Whilst in his written and oral submissions the Claimant did seek, to an extent, to stray beyond the narrow boundaries drawn by Judge Eady, he was at all times courteous and quick to move on when I suggested that he was seeking to broaden the scope of the Appeal.

5. Given the comments as to the significance of the Claimant's role in the final sentence of Judge Eady's comments I sought clarification from him of his professional status. Although called to the Bar in 2003 he did not undertake pupillage and has never practiced as a barrister, neither is he otherwise legally qualified in the conventional sense. That does not detract from the view which the Tribunal expressed, at paragraph 6.16 of the Reasons, namely that the Respondent regarding him as occupying a position of trust and responsibility. Ms Davis referred to him, more than once in the course of the Hearing, as a legal professional.

6. Paragraph 13 of **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721 reads as follows:

> **"13. Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In *A v B* [2003] IRLR 405 the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. In *A v B* the EAT said this:**
>
> > **'Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the**

safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.'

7. I was taken to other authorities, but they essentially make the same point and add nothing to **Salford Royal NHS Foundation Trust v Roldan**.

8. The factual background is, as may be imagined from the length of the Reasons, complex. In the very briefest of terms, the Claimant was alleged to have diverted funds payable to a partnership, DSP, with which he was financially involved, to an account controlled by himself. The partnership was carrying out work for the Respondent which had acquired a business, initially founded by the Claimant, through a series of transactions identified in the Reasons and the Claimant had failed to disclose the full extent of his relationship with DSP.

9. Mr Bennett was charged with the investigation into concerns which had been raised. He worked for the Respondent's fraud group. His investigation was to lead to a disciplinary hearing, heard by Mr Goss, then an appeal heard by Mr Fretter, who had, on the Tribunal's findings, become disenchanted with his role with the Respondent and had been asked to be made redundant.

10. The Tribunal identified the five allegations which the Claimant faced at paragraph 6.44. This reads as follows:

"6.44. The Claimant ultimately faced 5 allegations of misconduct at a disciplinary hearing. It is worth identifying the allegations before considering their genesis and the manner in which they were investigated, although the following list does not necessarily reflect how each allegation was framed by the Respondent;

Allegation 1; that he fraudulently redirected sums paid by AXA to DSP into a bank account that he was the signatory to but the DSP partners (Mr Andaro and Mr Dhaudi) were not;

Allegation 2; that he deceived DSP by fraudulently producing a list of false invoices to cover up the redirection of sums;

Allegation 3; a compromise agreement was entered into between the Claimant and DSP to conceal evidence from the Respondent relating to Allegations 1 and 2;

Allegation 4; he sanctioned litigation work to be carried out by KLS for private individuals within the business;

Allegation 5; he affected payments from AXA to the same account referred to in 1 above, purportedly owned/operated by DSP, in respect of work which he completed whilst working for KLS but which was purported to have been undertaken by DSP."

11. The comment made by the Tribunal which is cited in the ground of appeal must be examined in its context. The comment appears in a section of the Reasons headed Conclusions, which begins at page 36. The section contains important self-directions. Those relevant to this Appeal are to be found at paragraphs 7.2.1 and 7.2.2:

"7.2.1. In cases involving dismissals for reasons relating to an employee's conduct such as this, we had to consider the three stage test in *BHS -v- Burchell* [1980] ICR 303 (see paragraphs 6 (a)-(c) of the List of issues);

(i) Had the Respondent genuinely believed that the Claimant was guilty of the misconduct alleged?

(ii) Was that belief based upon reasonable grounds?;

(iii) Was there a reasonable investigation prior to the Respondent reaching that view?

Crucially, it was not for the tribunal to decide whether the employee had actually committed the acts complained of.

7.2.2. Situations in which employees faced serious allegations of quasi-criminal misconduct which were in dispute, warranted particularly diligent investigations, but an employer did not need to demonstrate that its investigation mirrored what might have been expected prior to a criminal prosecution (*A-v B* [2003] IRLR 405). There should have been regard to the nature and consequences of the allegations and to the employee's future in the event that they were proven (*Tuner-v-East Midlands Trains* [2013] ICR 525)."

12. Taken together with the reference I have already cited as to the Claimant's position being one of occupying a position of trust and responsibility, it is clear that the Tribunal was fully aware of the **Salford Royal NHS Foundation Trust v Roldan** point.

13. When making the comment to be found in the ground of appeal, the Tribunal was dealing with two specific points which had been raised by the Claimant in his written closing submissions in connection with allegation five:

"*The Respondent's investigators were biased in their investigations and closed-minded and when the Claimant complained of their bias in May 2012 he was ignored;*

> ***the Respondent's investigators focused their energies on obtaining incriminating evidence and not rebuttal evidence that would assist the Claimant, for example, another explanation or motivation for the DSP complaint and another explanation for the lack of electronic trail of DSP's involvement;***
>
> **These allegations were aimed at Mr Bennett in the main since the Claimant took no issue with Mr Crowther's involvement in the 2011 investigation.**
>
> **In broad times, we did not accept the general allegation of bias. We had acknowledged that Mr Bennett had appeared overly keen to look for evidence which might have supported, rather than diluted, his suspicions, but he then found it. The Claimant repeatedly said that exculpatory evidence would have been produced, but it never was, and his allegations of deliberate manipulation and/or concealment were rejected by the Respondent on reasonable grounds.**
>
> **Although the Claimant had complained about Mr Bennett's involvement during the investigation, it was never in such forceful terms as he did within the proceedings. He certainly asked Mr Bennett to step aside [C294-5]. Mr Bennett considered the request and took the view that the Claimant was attempting to divert attention from own his wrongdoing and remove the person who knew most about the evidence from the investigation. He regarded it as an attempt to impede the process but he nevertheless raised the issue with HR to check his view, which was confirmed.**
>
> **In hindsight and having seen the internal emails from the start of 2012, we can see why the Claimant was suspicious of Mr Bennett's motives, but we were ultimately satisfied of his objectivity and, more importantly, the independence of the disciplinary and appeal managers."**

14. The Claimant says that the finding in relation to Mr Bennett was, in essence, fatal to the Respondent's case and is something which should result in a finding of unfair dismissal. He pointed to other facts found by the Tribunal, including the fact that Mr Bennett was to seek further information following the initial Appeal hearing looking for exculpatory material which the Claimant had told Mr Fretter he was, "almost 100% sure" would be found in certain premises in Gloucester. That complaint seems to me irrelevant to the point being made in the central ground. What is relevant is that nothing of an exculpatory nature was in fact found. As the Tribunal said at page 45 of its Decision:

> **"As to the allegation that documents had been taken and/or concealed by Mr Bennett, we noted that the Claimant shied away from putting that case to him directly. Nevertheless, there had been four visits to the Gloucester offices during the course of the disciplinary process; on 21 September 2012 (when Mr Bennett was accompanied by Mr Springham), 4 October (Mr Goss met Ms Halinen), 13 December (Mr Bennett in the company of Mr Springham and/or Ms Halinen) and 20 December (the Claimant, Mr Bennett, and Mr Springham). Having heard the evidence, we were satisfied that there were reasonable grounds for the Respondent having rejected the assertion that Mr Bennett had deliberately concealed evidence. They concluded that the alternative explanation was more reasonable; that the evidence was missing because it did not exist."**

15. In his skeleton argument the Claimant suggested that the position is analogous to the police focusing only on evidence which supports their suspicions and discarding evidence that

supported those under investigation. He says that the underlying principle is exactly the same in the present case.

16. The problem with the analogy, as I see it, is that it was not said by the Tribunal that Mr Bennett had discarded, or otherwise manipulated evidence. It also fails to have regard to the vital words which are, "*But he then found it*" which follow the words quoted in the ground. To adapt the Claimant's analogy, if a police investigation found evidence which proved beyond doubt that a person was guilty of an offence, it might be possible to argue that there were procedural failings in the approach that the investigation took but that would not render unfair a conviction based on that evidence. Moreover, as Ms Davis points out, the nature of allegation five was such that the Claimant was the only person who was able to provide the exculpatory material. An investigator cannot investigate material not in his employer's possession, of which he is unaware, or which he is told does not exist or is told might exist but is not given access to it.

17. The point is to me, made clear by the final comment in the section cited above that the Tribunal was ultimately satisfied with Mr Bennett's objectivity. That was a key finding and not one which could possibly be described as perverse. By contrast, the Tribunal's findings in relation to the Claimant were less positive. I have already mentioned the finding that far from Mr Bennett having concealed evidence, as the Claimant had alleged, it was missing because it did not exist. At paragraphs 6.5 and 6.6 the Tribunal said this:

> **"6.5. We found the Claimant to have been a poor witness. On some issues, he appeared certain of his ground, but was then undermined when confronted with a previous account or documents which suggested that he might have been wrong. On other issues about which we had expected him to have had a firm grasp, he was often rather vague.**
>
> **6.6. There were many several issues which served to undermine his credibility. The following were some examples;**
>
> > **- He appeared to give three conflicting accounts as to the establishment of the Swindon office of the Duncan Stanley Partnership ('DSP') (see paragraph 6.36 below);**
> >
> > **- One of those involved in DSP was said to have been a Mr Price (see the Claimant's written account [C91]). During his evidence, he said that he was mistaken and that 'Mr Price' was in fact a 'Mr Crips'. A day later, 'Mr Crips' became 'Mr Crisp'. We found**

the Claimant's mistakes difficult to understand given his level of involvement in DSP (see paragraph 6.30 below);

- He stated that he and the other DSP partners had been in a dispute during which they had been separately represented by solicitors. The dispute resulted in a compromise or buyout agreement which he initially thought had not been reduced to writing, despite it being worth £100,000 or £110,000 to him. We considered that to have been surprising. Later in his evidence, he stated that there probably *was* a written agreement somewhere. Disclosure of it was then sought by the Respondent but, the morning after that application was made, the Claimant stated that there was no agreement because, at the stage that a final agreement was reached, solicitors were no longer involved. His initial account had therefore changed twice;

- The partners of DSP informed Group Fraud that the Claimant had been a party to the compromise agreement [E481]. The Claimant agreed that that had been the case during his evidence on numerous occasions. He was then at a loss to explain how or why he had told Group Fraud in 2012 that he had had nothing to do with it, the notes of which he did not dispute [C546 and 553];

- He claimed that he had not been accused of having 'siphoned' money from the partners of DSP in 2011, but then accepted that a document of his own acknowledged that that allegation had been made [C92];

- He challenged the accuracy of the notes of several meetings which had been recorded in manuscript and then transcribed. When asked about the notes of the meeting of 15 June 2012, for example, he stated that he did not dispute them. He was then asked about some of the evidence in more detail and, at that point, he then took issue with one particular entry. Upon reviewing the notes in full, it was *only* that entry with which he took issue. From the Respondent's perspective it was arguably the most important one (see 6.82 paragraph below);

- He had to accept that an important concession that he made during his evidence concerning the provenance of a letter which was written to his line manager in October 2011 by Ms Tailby, was made for the first time during the hearing (see paragraph 6.64 below). It was a surprising revelation given the importance of the letter;

Several grievances upon which the Claimant relied had not been received by the Respondent. Despite having been an adept user of IT, he had not kept electronic copies, nor had he backed up the personal computer upon which they had been written which was subsequently lost without explanation. He also claimed to have sent them in an unusually cumbersome fashion; by scanning and emailing them from the scanner, rather than by simply attaching them to an email which appeared to have been his usual means of communication on most other occasions. The Claimant asserted that he had sent three grievances which he not retained electronic copies of, none of which the Respondent had received (those of 1 September 2011 and 18 June and 11 July 2012)."

18. Ms Davis reminds me of the stricture in the case of **Aslef v Brady** [2006] IRLR 576 that I must respect the factual findings of the Tribunal and should not subject the Reasons to unrealistically detailed scrutiny. The point is well made. The comment which is the subject of the ground of appeal could, in isolation, give rise to concern. However, in light of the findings of the Tribunal, taken as a whole, it is clear that the Tribunal's conclusions were not perverse and there was no error of law. I therefore dismiss this Appeal.