Appeal No. UKEAT/0259/18/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 3 September 2019

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MRS S WHEELEY — APPELLANT

UNIVERSITY HOSPITALS BIRMINGHAM NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR S BRITTENDEN (of Counsel) Instructed by: Thompsons Solicitors LLP 88 - 94 Church Street Liverpool Merseyside L1 3AY
For the Respondent	MS H BARNEY (of Counsel) Instructed by: Mills & Reeve LLP 78-84 Colmore Row Birmingham B3 2AB

SUMMARY

UNFAIR DISMISSAL – Contributory fault

An ET erred in law in its approach to assessing contributory fault following a finding of unfair dismissal arising from conduct which, but for mental health issues, would have amounted to gross misconduct. The ET had failed to follow the approach advocated by the EAT (Langstaff J) in **Steen v ASP Packaging Ltd** [2014] ICR 56. A cross-appeal was dismissed.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is the hearing of an appeal and cross-appeal from the decision of an Employment Tribunal ("the ET") held at Birmingham, Employment Judge Broughton sitting with Members Mr S Campbell and Mr NJ Howard. Written reasons were sent to the parties on 22 March 2018. I shall refer to the parties as they were below.

2. The ET held that the Claimant was unfairly dismissed, the dismissal also amounting to disability discrimination under Section 15 of the **Equality Act 2010** ("EqA"). It went on to hold that she had contributed 25% to her dismissal. From these findings the Claimant appeals and the Respondent cross appeals.

3. Before me the parties were represented by the same counsel as appeared below, Ms Barney for the Respondent and Mr Brittenden for the Claimant. Each has submitted helpful skeleton arguments augmented by oral submissions, which took the best part of the day. I am grateful to each of them. I shall not rehearse all of the arguments advanced nor the authorities referred to either in the skeleton arguments or in oral argument in the interests of giving an *ex tempore* judgment. I have, however, taken all of the submissions into account.

4. The Tribunal's reasons run to 168 paragraphs over 25 pages. Before turning to the grounds of appeal I will summarise the relevant facts of the case briefly: The Claimant had been employed by the Respondent since 1997, rising to the position of Head of Informatics. In May 2016 the Medical Director proposed what the Tribunal described as a minor restructure of the department. The Claimant had for the two years prior to this been in a personal relationship with her line manager. The proposed changes resulted in an email sent at the end of May 2016,

which was described as being out of character, and which the Tribunal held marked the commencement of a period of a "hypomanic phase".

5. The restructure was announced in July and the Claimant was unhappy at what had been decided. On 20 July she sent two emails to the Medical Director, each inappropriate in its tone, and despite being expressly directed not to, emailed members of her team following the circulation of the changes, saying that she had not been aware that the email would be sent and that she was considering her position.

6. She was suspended and told not to contact colleagues without express consent. However, on 27 July she went to the Medical Director's home in an attempt to discuss these issues.

7. An investigation took place and the panel held that the Claimant was guilty of gross misconduct. The Tribunal agreed with this, see Reasons paragraph 64 and 65, holding that this was:

> **"65. … gross insubordination on a grand scale and, notwithstanding the claimant's long service and clean disciplinary record, dismissal would, ordinarily, have been well within the band of reasonable responses available to a reasonable employer."**

8. However, in the course of the investigation into the misconduct it transpired that the Claimant was suffering from bipolar disorder. The Claimant was referred to Professor Oyebode by occupational health. The Professor reported on 3 February 2016. The Tribunal recorded events thereafter as follows:

> **"53. Professor Oyebode reported on 3 February 2016. His view was that the claimant presented with the cardinal features of bipolar disorder. There was, in his view, clear evidence of periods of depression and mania.**
>
> **54. He reported that it "is well recognised in manic phases that people can exhibit behaviours that are out of character and which demonstrate irritability, hostility, recklessness and may be prone to poor judgments." He referenced the claimant's threatening and insubordinate emails and said that the claimant regretted these behaviours, recognised them as wrong and, further, considered them to be out of character.**

> **55. Professor Oyebode's opinion was that, on balance of probabilities, the claimant was in a manic phase in the period in question and that her behaviour, which formed the basis of the disciplinary allegations against her, was compromised by severe mental illness.**
>
> **56. The disciplinary hearing continued on 11 February 2016 and again on 8 March 2016. In light of Professor Oyebode's report the claimant's representative sought to shift the focus away from misconduct to the claimant's mental health. The disciplinary panel, however, considered that it remained a conduct issue albeit they were prepared to consider the claimant's mental health in the context of mitigation."**

9. The issue before the ET was, therefore, what difference a recent diagnosis of bipolar disorder should have made. It found that the disciplinary panel ("the panel") unfairly criticised the Claimant for failing to report her mental health issues and seeking additional support sooner.

10. The ET discussed the panel's conclusions, notably that the diagnosis did not explain all the behaviours exhibited, and that it was difficult to identify which parts of the Claimant's behaviour were down to her bipolar disorder and which were not. The Tribunal noted, importantly in my judgment, that the evidence before it was that the Claimant had never before flouted a direct management instruction, visited a director at home uninvited, or inappropriately emailed the executive or members of her team. These were, of course, the behaviours which amounted to gross misconduct.

11. The ET had at an earlier stage adjourned the merits hearing and directed that a joint psychiatric report be prepared. The expert was a Professor Goodwin. His report, together with his reply to questions posed by the Respondent were before the ET, but he was not called.

12. It is important to set out the ET's conclusions in light of all the medical evidence.

> **"131. Professor Goodwin then considered the events of July 2015. He did not consider that the claimant's anger or resentment were caused by her mood disorder. Rather, it was his view that her condition was likely to have amplified her response. As a result he effectively concluded that the claimant's condition was a significant influence on her subsequent actions. He considered that the claimant's defence of her actions over the next 2 to 3 months further evidenced significant impairment to her judgment.**

132. Specifically, the medical expert appears to have formed the view that the claimant would not have expressly flouted management instructions but for her elated state.

133. The respondent was able to put their challenges to the claimant's presentation to Professor Goodwin and he considered them all. They did not alter his view and we have no good reason to challenge his experience, qualifications or conclusions.

134. The respondent's own evidence was that they accepted that the claimant was in a manic phase in the relevant period in July 2015. They sought to argue, however, that the claimant's mental state had no substantial impact on her behaviours and, in this regard, they relied principally on previous examples of inappropriate conduct.

135. That seems to us to be an untenable conclusion. It is unsustainable on the evidence before us to suggest that the impact of the claimant's mental health on her behaviours at the relevant time was no more than trivial. The medical evidence is clear. The claimant's judgment was impaired and her reactions were amplified as a result of her condition.

136. To put it another way, by virtue of the medical evidence, the claimant has established facts from which we could conclude that her behaviours were substantially affected by her bipolar disorder. The respondent accepted that her reactions were stronger and more exaggerated than she had exhibited previously. Their conclusion that she would have reacted as she did in any event amounts, at best, to an assumption. They have failed to produce cogent evidence that her mental health played no more than a trivial part in the events.

137. That said, we have accepted the respondent's evidence about previous examples of unprofessional conduct. None of those were as serious as the events in July 2015. It seems to us, therefore, likely that the claimant would still have been angry and would still have responded unprofessionally but her reactions would not have been as extreme as those she actually manifested.

138. In those circumstances her condition did have a significant impact on her actions which, therefore, arose because of something in consequence of her disability."

13. The ET went on to conclude that the Respondent's decision to dismiss was not a proportionate response, and was thus an act of disability discrimination as well as amounting to unfair dismissal.

14. Having made these findings, the ET went on to consider contributory conduct. Its findings were set out at paragraphs 157 to 159:

"157. However, the claimant was not blameless in this situation. Her previous inappropriate and unprofessional behaviour was a key factor in the disciplinary panel's deliberations and clearly contributed to her dismissal. Indeed, it was likely that she would have responded inappropriately in July 2015 even had she not suffered from bipolar disorder.

158. Whilst she apologised for attending Dr Rosser's home relatively quickly, the claimant clearly started to have insight into the rest of her actions by November 2015, yet she did not apologise until a diagnosis was confirmed and, indeed, until her failure to do so had been expressly raised by the disciplinary panel. It was not unreasonable for the disciplinary panel to draw adverse inferences from that.

159. We note that Professor Goodwin felt that she would not have sent the insubordinate email but for her condition and that her disorder contributed >50% to the rest of the

> **circumstances. That said, the respondent may not have dismissed but for the previous misconduct and the delay in apologising. It seems to us that the principal reason for the dismissal was the respondent's failure to appropriately discount the effects of the claimant's disability from their deliberations but the claimant's contribution was, nonetheless, substantial. As a result, we consider that the claimant's conduct contributed 25% to her dismissal."**

15. The Respondent's cross-appeal seeks the setting of the judgment and the remittal of the case to a differently constituted Tribunal. Were that to succeed the Claimant's appeal would be otiose, all matters falling to be considered again. I shall, therefore, turn first to the cross-appeal and to the sole ground permitted, at the sift, to proceed.

16. That ground argues that the Tribunal erred in its approach to the assessment required of it under Section 98 of the **Employment Rights Act 1996** ("ERA") and Section 15 of the **EqA 2010**, specifically in requiring the Respondent to "discount" the impact or effect of the Claimant's disability in the decision-making process. Ms Barney argues that such an approach is wrong in law and, and if applied would result in a position where, no matter how severe his or her conduct, no employee whose disability significantly influenced his or her misconduct could be dismissed. The paragraphs relied upon in this ground are at paragraphs 143, 155, and 159. Paragraph 159 is set out above; the other two paragraphs read as follows:

> **"143. Had additional clarity been received the respondent would have had to consider discounting the impact of her condition from her actions. They did not do so.**
>
> **....**
>
> **155. However, no reasonable employer would have rejected the key finding of Professor Oyebode, that the claimant's actions were compromised by severe mental illness, without, at least, seeking further clarification or information. Had they sought the same and received findings similar to those of Professor Goodwin they would have had no reasonable alternative but to discount the effect of the condition."**

17. Ms Barney submitted that the RT's approach was to ignore any conduct attributable to disability in determining whether the sanction is appropriate. The word "discount", she says, necessarily means that the employer had to ignore acts which were causally related to the disability. That means that if an exceptionally serious and grave act was entirely attributable to

a disability, an employer would have to disregard the act in its entirety when considering sanction. In the course of argument I asked Ms Barney whether, had the words, "taken into account" been used in place of "discount" this argument could be sustained? She agreed that it could not.

18. Mr Brittenden in reply said that too much weight was being placed on the word, "discount." The use of the expression in the reasons did not suggest that the ET was saying that there was immunity from disciplinary sanction when there was a link between the manifestation of a disability and misconduct. Indeed, he pointed out that the ET at paragraph 162 of its Reasons found that the panel could reasonably have censured the claim, and even issued her with some form of disciplinary warning. This suggested their use of the word "discount" was not being used in the sense of "completely disregard".

19. I prefer Mr Brittenden's submissions. I do not consider that by its use of the word "discount" the ET was indicating that a panel would have had to disregard entirely the effects of the medical condition. On a fair reading of the judgment, I find that the ET did indeed mean that the word "discount" was being used in the sense of take into account and not completely disregard. I also bear in mind that the ET had directed itself correctly on the terms of Section 15 of the **EqA** and the need to consider the question of justification in Section 15(1)(b). The correct application of that test could never lead to the situation Ms Barney contends for. Consequently, I reject the cross-appeal.

20. I turn now to the Claimant's grounds of appeal. They centre on the findings of contribution, but also on certain comments made by the ET in relation to the **Polkey** issue with

which it had yet to resolve. The grounds were summarised succinctly as follows by Laing J when granting leave for the appeal to progress to a Full Hearing:

21. First, the Claimant was not given a proper opportunity to comment on the issue of contributory conduct before a discount was made. Second, the ET erred in law in finding that the Claimant was guilty of contributory conduct on the basis that she would not have responded inappropriately, even if she had not suffered from bipolar disorder, and/or otherwise failing to take into account all relevant factors in relation to past behaviour. Third, the ET erred in penalising the Claimant for the delay and apologising, and/or in treating matters as a relevant factor, and fourth, it erred in finding that the Claimant would not have accepted a sanction short of dismissal.

22. I can deal with the fourth ground shortly. It concerns the question of the remedy issue, which, see paragraph 161, the ET said that, it "would need to consider…" That suggests an exercise yet to be undertaken. In paragraph 163 the ET expressed the view that, "On the evidence we have seen it seems unlikely that she would have accepted such a sanction…." It went on to look at other matters which it had yet to determine.

23. It is argued for the Claimant that the ET went too far on issues which were yet to be determined and gave the appearance of drawing firm conclusions. For the Respondent it was accepted that the language was unfortunate but Ms Barney submitted that the ET was doing no more than giving the parties a steer, focusing their minds on the issues and evidence which might be required at a remedy hearing. I share the view that the ET's language was unfortunate and gives an appearance of predetermination. However, in light of the conclusions I have drawn on the remaining heads of appeal, I do not consider that the ET is thereby precluded from considering the issues which will be before it afresh.

24. The first to third grounds can be dealt with together. I am satisfied having regard to the papers in the appeal bundle and the submissions of counsel that the issue of contribution was plainly before the ET. From the contemporaneous handwritten note prepared by Ms Barney it appears that the ET raised the issue of contribution, which was always going to be a live issue, and expressed concern as to the difficulty of the exercise of deciding how to apportion how much of the conduct was because of the medical condition and how much, "pre-existing". It had sought confirmation that the Respondent had been arguing that the Claimant's previous challenging behaviour contributed to the dismissal. I therefore, reject the submission that the Claimant did not have an opportunity to address the ET on the issue of contribution, as to which there was limited scope for submission; the exercise being very much one for the ET itself, taking a wide view of the evidence it had heard and accepted.

25. As to the second ground, I have been taken by Mr Brittenden to **Steen v ASP Packaging Ltd** [2014] ICR 56, a decision of the EAT presided over by Langstaff J. The EAT pointed out at paragraph 10 that in Section 123(6) the ET has to consider the question "did the action in question cause or contribute to the dismissal to any extent?". It went on to identify four questions which the Tribunal had to answer. First, identifying the conduct said to give rise to contributory fault, and second, asking whether that conduct is blameworthy, taking an objective view unfettered by the employer's view, see paragraph 12. The third question is whether the blameworthy conduct caused or contributed to the dismissal in any event? If it did not do so to any extent, then no matter how blameworthy the Tribunal considered the conduct there can be no reduction. The final question involves quantifying the extent to which it is just and equitable to reduce the award.

26. In paragraph 24 the EAT said as follows:

> **"24. It is therefore all too often an error of law that a tribunal simply states its conclusions as to contributory fault and the appropriate deduction for it without dealing with the four matters which we have set out 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)."**

27. Mr Brittenden points to the disparity between the ET's conclusion at paragraph 136, namely that the panel's findings that the Claimant would have reacted as she did amounted to no more than an assumption, and that the Respondent had failed to produce cogent evidence that her mental health played no more than a trivial part in the events, with its conclusions at paragraph 157 that the "previous inappropriate and unprofessional behaviour was a key factor in the disciplinary panel's deliberations." He also pointed to the absence of any meaningful analysis of the previous, "inappropriate and unprofessional behaviour" bearing in mind that the Claimant had been employed for 20 years without any concerns about her behaviour having been brought to her attention. Her relationship with her line manager over the previous two years may have had a bearing on this, but there is no reference in the reasons to the time span over which the behaviour concerned occurred.

28. Ms Barney submitted that Tribunals are permitted to take a broad view of the relevant circumstances when determining the issue of contributory fault to include all the circumstances and the history of events leading to dismissal. The conduct found to have contributed to dismissal is not limited to that identified in the disciplinary allegations. However, in none of the various authorities to which she took me is the conduct held to have contributed to the dismissal being at such a temporal remove.

29. The ET's comment that, "it was likely that she would have responded inappropriately in July even if she had not suffered from bipolar disorder" does seem, as Laing J observed, to sit oddly with its earlier criticism of the panel's similar finding. What, I ask rhetorically, does, "inappropriate behaviour" mean? It is possible to imagine an overreaction to receiving certain news, which would fall well short of the term blameworthy. Langstaff J's second question in **Steen** required an objective appraisal by the ET. Paragraph 157 seems on the face of it to have addressed the question solely from the employer's perspective, the previous (and unspecified by the ET) behaviour being held to have been "a key factor" in the decision to dismiss. I also take into account the finding mentioned above that there had never been any prior incidence of the Claimant behaving in the way she did over this short period. There is scant evidence to be gleaned from the reasons as to the previous behaviour. Paragraph 7 making reference to table banging and walking out of meetings at unspecified times. The dismissal letter, although going into a little more detail, is remarkably general in its description of the matters, which were of an entirely different nature from the conduct in July 2016. See paragraph 73.

30. In my judgment, the Tribunal erred in law in failing to identify the individual aspects of conduct said to have contributed to the dismissal, and thereafter objectively to assess blameworthiness as required by **Steen**. Its findings as to the likelihood of the Claimant having acted inappropriately with no identification of what such actions might have been, and whether they could objectively have been adjudged blameworthy was a further error of law.

31. I turn briefly to the issue of the failure to apologise. Paragraph 158 falls into the same trap of looking at the issue from the employer's point of view. I raised with Ms Barney why someone who was suffering from what was plainly a serious psychiatric illness should have to apologise for that. She rightly reminded me that it is not the role of this Appeal Tribunal to

substitute its own view, but said that the need to apologise was not for the illness but for the consequences which had flown from her behaviour. However, this seems to me to be a further issue which requires the objective analysis set out in **Steen**, which is hard to glean from the reasons, which focused, again, on the Respondent's view of the late apologies. If I am wrong in relation to these conclusions in respect of contributory conduct, I would add that the reasons are not **Meek**-compliant, failing as they do to explain the reasons for the Tribunal's findings in accordance with the correct legal test, and also for failing to give any indication as to how the conclusions resulted in the figure of 25%.

32. I have considered the issue of disposal. Having regard to a generally fair and balanced appraisal of the evidence with findings made against each of the parties, it seems to me that the appropriate course is to refer this matter back to the same ET. There is no reason whatsoever to doubt its professionalism and ability to be objective, and having regard to the overall nature of contributory conduct it would be a nigh-on-impossible exercise for a differently-constituted Tribunal to carry out.