Appeal No. EA-2019-000110-JOJ (previously UKEAT/0140/19/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 July 2021
Judgment handed down on 17 August 2021

Before

THE HONOURABLE MR JUSTICE BOURNE

(SITTING ALONE)

MR E FALLAHI — APPELLANT

TWI LIMITED — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR JEREMY LEWIS (of Counsel) Instructed by: Cambridge Legal Practice Limited 9 Hills Road Cambridge CB2 1GE
For the Respondent	MS AKUA REINDORF (of Counsel) Instructed by: Cambridge Employment Law LLP Stratford House Ousden Suffolk CB8 8TN

SUMMARY

UNFAIR DISMISSAL

The Appellant was employed as Senior Project Leader – Technology. The Respondent raised issues about his performance. On 26 January 2016 an informal performance management process commenced and objectives were set, with targets to be measured in June 2016, October 2016 and January 2017. Before those deadlines arrived, his manager was concerned about a lack of progress and he was invited to a capability hearing on 26 May 2016, at which he was given a final written warning. A three month review period was set but after two months his manager considered that insufficient progress had been made. On 29 July 2016 the Appellant left work, and thereafter was on sick leave. On 8 November 2016 he was given notice of dismissal on capability grounds. He claimed unfair dismissal. The Employment Tribunal dismissed his claim. When considering whether dismissal was reasonable in all the circumstances, under section 98(4) of the Employment Rights Act 1996, it held that it could not look behind the final written warning which was not "manifestly inappropriate", applying the test in *Davies v Sandwell MBC* [2013] IRLR 374 and *Wincanton Group v Stone* [2013] IRLR 178. It also contended that the final written warning was within the range of reasonable responses. The Appellant contended that the former test was not applicable to a dismissal for capability and/or that neither test was satisfied in view of procedural flaws in the disciplinary process.

Held (dismissing the appeal) that the "manifestly inappropriate" test applies generally when an Employment Tribunal considers whether it can look behind a final written warning in its application of section 98(4). On the facts of this case the Tribunal was entitled to find that the Respondent acted fairly in applying its internal procedures, that a final written warning was not manifestly inappropriate and that dismissal overall was fair.

THE HONOURABLE MR JUSTICE BOURNE

Introduction and factual background

1. This is an appeal from a decision of the Employment Tribunal ("ET"), sent to the parties on 15 January 2019, dismissing the Appellant's claims for unfair dismissal and protected disclosure detriment.

2. The Appellant worked for the Respondent from 30 June 2014 as Senior Project Leader – Technology. Issues about his performance were raised at appraisals in February 2015, August 2015 and January 2016 and during that period he had two-weekly review meetings with his manager, Dr Blackburn. On 26 January 2016 an informal performance management process commenced and the frequency of the meetings increased to weekly. Objectives were set, with six targets to be measured, one in June 2016, one in October 2016 and the rest in January 2017.

3. Before any of those deadlines arrived, Dr Blackburn became concerned about a lack of progress and produced a review report. On 23 May 2016 this was sent to the Appellant with a letter inviting him to attend a capability hearing on 26 May 2016. The letter said:

> "I write further to your recent informal review meetings held with your line manager Jon Blackburn. The reviews held over the last few months have concluded that this period of informal monitoring has been unsuccessful in improving your level of performance.
>
> You are therefore required to attend a Capability hearing under the Disciplinary Procedure at 08:30 on 26th May 2016, in G6. Rob Scudamore, Associate Director will conduct the hearing with myself and Jon Blackburn present. You have the right to be accompanied by a fellow employee of TWI or a Staff Consultative Committee representative or a trade union official. There will also be an independent note taker present.
>
> The purpose of the hearing is to consider whether your work performance is at the required standard of a Senior Project Leader, Technology. You will have the opportunity to state your case. I enclose

> a copy of the Capability Report upon which the hearing will be based, for your information and to help you prepare.
>
> I must advise you that a potential outcome of the hearing could be a first or final written warning."

4. After the hearing on 26 May 2016, the Appellant was given a letter dated 3 June 2016. The letter referred to a conclusion that there had been "consistent underperformance over a considerable period of time", and recorded that Associate Director Rob Scudamore had issued him with a final written warning. By email dated 1 June he was sent a set of objectives for the performance management period up to 26 August 2016.

5. The letter of 3 June added:

> "Rob requested that there be a three month review period where he is expecting to see a significant increase in your standard and levels of performance. He asked your Manager to work closely with you and set objectives that could be measured and assessed over the next couple of months.
>
> It is important that you work closely with your Line Manager to ensure that you fully understand their concerns regarding your capability and that you focus on making the required improvements during the review period. If there is no or little improvement then we will have no option but to reconvene formal processes.
>
> You have the right of appeal against this warning – if you wish to appeal please confirm it in writing stating your full reasons to Sarah Smith, HR Manager within 5 working days of the date of this letter."

6. The Appellant did not appeal. He attended six review meetings from then until 18 July 2016, entering no comments on the review forms.

7. On 25 July 2016 Dr Blackburn again raised concerns about his meeting his objectives. After two thirds of the three month review period he was nowhere near meeting two thirds of

them. Dr Blackburn gave him the option of continuing with the review plan, or leaving with one month's pay as compensation.

8. There were then some negotiations which did not lead to any agreement, but on 28 July 2016, the Appellant said that he would leave the next day on the basis of the Respondent's previous offer of one month's compensation.

9. On 29 July 2016 the Appellant collected his belongings and left the premises, intending not to return. However, his employment did not end at that point. There was no concluded settlement agreement.

10. On 12 August 2016 he was therefore asked to return. Instead, on 15 August 2016 he submitted a sick note. He was invited to a performance management meeting on 30 September 2016 and a capability hearing on 28 October 2016 but did not attend because of sickness (although an occupational health assessment on 13 October 2016, carried out by telephone, indicated that he was well enough to attend the latter meeting). He continued to be signed off sick.

11. On 8 November 2016 the Appellant was given notice of dismissal, which stated:

> "Following receipt of the final written warning on 3 June 2016 (which I note you did not appeal), and given your continued under performance and the apparent lack of understanding on your part as to what is required of you and how to achieve the level of performance that is expected as a project leader, despite clear achievable targets having been set as part of the performance process, I feel now we have no choice but to move to dismissal on notice on the grounds of performance."

12. The Appellant's employment ended on 8 December 2016. An appeal against dismissal failed.

13. By his claim to the ET, the Appellant contended that his dismissal was unfair and that the rejection of his appeal was affected by an allegation he had made that his manager had committed fraud.

14. The ET found that the reason for dismissal was capability, that the dismissal decision was reasonable and that even if it had been procedurally unfair, it was inevitable that a fair process would have led to dismissal.

15. It also found that the fraud allegation was not a protected disclosure because the Appellant did not reasonably believe it to be true, and in any event that the appeal outcome was unaffected by it. That part of the outcome is no longer under challenge in this appeal.

16. The grounds of appeal which have been permitted to proceed are:

i. The ET erred in concluding that it could not go behind the final written warning given to the Appellant, and thereby failed to engage with his case, in particular as to the process being unfair and contrary to the Respondent's written procedures. It was perverse to find that the final written warning was within the range of reasonable responses and other than manifestly inappropriate.

ii. The ET erred by considering whether the final written warning was manifestly inappropriate, rather than considering whether procedural flaws in the warning process tainted the ultimate decision to dismiss.

iii. The ET made a perverse finding that the Appellant's grievance was intended to delay matters.

iv. The errors identified at i and ii above also undermined the ET's decision that a fair procedure would have led to dismissal in any event.

17. However, the core of this appeal is grounds 1 and 2 which are inter-related. Mr Lewis, for the Appellant/Appellant, told me that ground 3 is not being pursued as a free-standing ground of appeal but is relevant to disposal if the appeal succeeds. Meanwhile ground 4 relies on the same errors as are alleged under grounds 1 and 2.

Grounds 1 and 2

The law

18. As in every unfair dismissal case, if the reason for dismissal was a potentially fair reason within section 98(1) of the Employment Rights Act 1996, section 98(4) requires the ET to decide whether "in the circumstances … the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee".

19. That remains the test in cases where, before being dismissed, the employee has been given a final warning. In *Davies v Sandwell MBC* [2013] IRLR 374, the Court of Appeal decided that in such a case (per Mummery LJ at [23-24]):

> "… in answering that question, it is not the function of the ET to reopen the final warning and rule on an issue raised by the Appellant as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a 'nullity'. The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the Appellant for subsequent misconduct."

and:

> "… it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, inter alia, the circumstance of the final warning."

20. In *Wincanton Group v Stone* [2013] IRLR 178 EAT, Langstaff P said at [37]:

> "We can summarise our view of the law as it stands, for the benefit of tribunals who may later have to consider the relevance of an earlier warning. A tribunal must always begin by remembering that it is considering a question of dismissal to which s 98, and in particular s 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently.
>
> Where the earlier warning is valid, then:
>
> (1) The tribunal should take into account the fact of that warning.
>
> (2) A tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a tribunal is entitled to give that such weight as it sees appropriate.
>
> (3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the tribunal is satisfied as to the invalidity of the warning.
>
> (4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may

contextualise the earlier warning. An employer, and therefore tribunal should be alert to give proper value to all those matters.

(5) Nor is it wrong for a tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

(6) A tribunal must always remember that it is the employer's act that is to be considered in the light of s 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur."

21. In *Bandara v BBC* (EAT, 9 June 2016), HH Judge David Richardson said:

i. A final warning may be found manifestly inappropriate "if there was something about its imposition that once pointed out shows that it plainly ought not to have been imposed". [30]

ii. The latter test was satisfied in the case of a warning for gross misconduct where the conduct "plainly did not amount to gross misconduct either on a reading of the Respondent's own disciplinary procedure or by generally accepted standards". [32]

iii. A final warning will never be manifestly inappropriate if it was within the range of reasonable responses, although the two tests are not the same. [33]

iv. If a final warning was manifestly inappropriate, and if the employer attached significant weight to it when deciding to dismiss (as opposed to treating it as mere background or as indicative of the standard to be expected while in reality dismissing for the post-warning misconduct), it would be difficult to see how the employer's decision could have been reasonable. [41]

The parties' submissions

22. Mr Lewis, representing the Appellant, accepts that he must overturn the ET's findings that the final warning was (1) within the range of reasonable responses and (2) not manifestly inappropriate. That follows from *Bandara* (above).

23. He relies on alleged procedural failings by the Respondent which led to the final warning being given, namely:

i. not informing the Appellant that a final warning might be the outcome of the informal capability process at a time when he could still improve his performance before the warning was given;

ii. not providing him with a copy of the Capability Procedure;

iii. contrary to the requirements of the Capability Procedure, not setting a review period at the start of the process;

iv. giving a final warning before any of the dates by which objectives were to be achieved had arrived;

v. contrary to the requirements of the Capability Procedure, cutting short the informal stage and proceeding to a final warning without going through a review period (or at least indicating at the outset that this was a possibility);

vi. not giving the Appellant a Development Review Plan until after the final warning was issued;

vii. not keeping notes of review meetings to evidence any areas for improvement.

24. Mr Lewis also criticises the reasoning of the ET, which concluded that (1) the Respondent in fact applied its Disciplinary Procedure (under which the final warning was permissible) and was entitled to do so, and (2) a final warning could in any event be issued at the final stage of the procedure under the Capability Procedure.

25. The first conclusion, Mr Lewis submits, was an error by the ET because (1) the Respondent did not advance that case and so the Appellant had no opportunity to meet it, (2) the Disciplinary Procedure applied to capability cases only where there was also unsatisfactory behaviour or conduct, (3) the Disciplinary Procedure referred to a final warning for a sufficiently serious "first offence", thereby indicating that it was concerned only with conduct, (4) the Disciplinary Procedure did not make provision for capability cases and (5) the reference by the Respondent to the Disciplinary Procedure in the letter of 23 May 2016 came too late to cure the earlier failures to follow the Capability Procedure.

26. Mr Lewis also criticises the second conclusion because (1) the Respondent did not suggest that there could have been a final stage meeting under the Capability Procedure in May 2016, (2) the ET did not consider why the performance issues were serious enough to warrant a final warning before the informal process had been followed and before a performance review, (3) the Appellant was not told that the Respondent was proceeding as if at the final stage and had no opportunity to comment and (4) procedural safeguards were not followed.

27. Further, Mr Lewis submits that the ET was wrong to regard the fact that the Claimant did not have two years' service as relevant to the question of whether it was appropriate to give a final warning.

28. For these reasons, Mr Lewis submits that it was not open to the Respondent to rely on the final warning and that the ET should not have placed weight on it.

29. Mr Lewis contends that in a case where a final warning was part of a single process culminating in dismissal (as opposed to cases like *Sandwell* and *Wincanton* where a warning was given for one instance of misconduct and the employee was then dismissed for further misconduct), the *Sandwell/Wincanton* approach does not apply, and the ET can and should consider flaws in the warning process without a Claimant having to surmount a "manifestly inappropriate" threshold before questioning the warning. That approach, he says, would unduly restrict the ET in assessing all of the circumstances under section 98(4).

30. In the alternative, and if "manifestly inappropriate" is the right test, Mr Lewis submits that it was manifestly inappropriate for the Respondent to issue the warning, having regard to the procedural failings outlined above. That test, he says, is satisfied where the warning plainly ought not to have been imposed, having regard to the employer's procedures: see *Bandara* (above), and the same point was made by Slade J *Simmons v Milford Club* (EAT, 6 December 2012) at [16].

31. By way of further alternative, Mr Lewis contends that even where the *Sandwell/Wincanton* approach applies, it remains permissible to have regard to the factual circumstances giving rise to the warning, and that the ET failed to direct itself of this. It should have had regard to the procedural objections set out above, and the fact that dismissal was being considered after only two months of a three month formal review period.

32. Ms Reindorf, for the Respondent, emphasizes the ET's findings of fact. The ET found that the Appellant had been given clear targets and sufficient time to meet them, and that the final

warning was within the range of reasonable responses and therefore not manifestly inappropriate so as to enable the ET to go behind it. To the extent that the *Wincanton* approach applies, Ms Reindorf submits that it is applicable to capability cases and was applied correctly. Essentially, says Ms Reindorf, this is a perversity challenge to the ET's factual findings, and it cannot surmount that high hurdle.

Discussion

33. The surviving grounds of appeal are focused on the final warning. For that reason the final warning has assumed particular prominence in the argument. However, it must be remembered that what the ET was required to judge was the reasonableness (in all the circumstances) of the dismissal, not the reasonableness (or appropriateness) of the final warning. The latter was a relevant factor, but was only one factor.

34. At paragraph 115 of the judgment, the ET described the final warning as "the starting point for what followed". It then considered, in some detail, what followed.

35. What followed was a review period which was intended to last three months but which ended after two months. The ET found as a fact that, at the point where settlement was explored, the Appellant was given the option of continuing with the third month instead. It also found, at paragraphs 118-119, that the Respondent was reasonable in proceeding on the basis of the two months which had elapsed, because of the lack of progress which the Appellant had made. It found as a fact that the Appellant could not have retrieved his situation in the third month, and that he had been given a reasonable opportunity to improve.

36. Then at paragraph 120 the ET found that the position had been made entirely clear to the Appellant after the final warning, and that he was given specific tasks by which to demonstrate the necessary improvement. In particular the ET said:

> "The decision to place him in the formal process was not taken out of the blue but against the backdrop of underperformance at any time."

37. The ET went on to reject the contentions that there had been a lack of training or support, and that the Appellant's targets had been unrealistic. At paragraph 129 it concluded:

> "In light of the above we do not find dismissal against the factual background and the final written warning to be outside the range of reasonable responses."

38. I cannot conclude from the words "and the final written warning" that a fair dismissal would not have occurred if there had not previously been a final warning. Those words mean that the warning was one of the factors taken into account. However, it seems to me that for any reasonable employer, far more significant factors would have been that the Appellant had not been performing satisfactorily since at least February 2015, and that neither the informal performance process which began in January 2016 nor the formal process which began in May/June 2016 had brought about a significant improvement. What mattered was not the warning per se, but the poor performance and lack of improvement.

39. For those reasons, it seems to me that Mr Lewis's objections to the procedure followed by the Respondent do not undermine either the Respondent's decision to dismiss, or the ET's decision that dismissal overall was reasonable.

40. To take one example, Mr Lewis pointed out that if the written Capability Procedure is followed to its final stage and if performance remains unsatisfactory, the employer's options are (1) dismissal, (2) a move to another role (e.g. demotion) or (3) a final written warning but that

the latter applies "only … if no Final Written Warning is currently active". So, argues Mr Lewis, the existence of the prior final warning deprived the employer and the employee of the option of a final warning at that final stage. But that is to ignore the ET's finding of fact that the attempt to improve the Appellant's performance had definitively failed by July 2016. On the ET's findings, a final warning at that point would have served no purpose.

41. I also remind myself that internal procedures are not laws, and a departure by an employer from an internal procedure does not render a dismissal automatically unfair. It is one of the circumstances to be taken into account.

42. In my judgment the ET did not make any error of law when it considered the procedural objection to the giving of a final warning.

43. The ET correctly noted that in the letter of 23 May 2016 inviting the Appellant to attend a capability hearing, the Respondent stated (1) that the hearing would take place under its Disciplinary Procedure and (2) that an outcome could be a final warning. It does not seem to me that at any stage, either in his employment or in the ET proceedings, the Appellant has been taken by surprise by reliance on that procedure.

44. The ET considered that the Respondent had a discretion to use that procedure, but it also noted that under the Capability Procedure the Respondent had a discretion to move directly to the final stage.

45. That last observation was correct, because the written Capability Procedure, under "Final Stage", states that the employee can be invited to a final capability meeting "if there is insufficient

improvement in performance at the end of the review period, or in cases of more serious unsatisfactory performance" (emphasis added).

46. The point removes the force from Mr Lewis's objection that, on the face of the written Procedures, the Disciplinary Procedure will be used in a performance case only where there are mingled performance and conduct issues. The bottom line is that sufficiently serious under-performance can lead directly to a final warning.

47. That point also meets Mr Lewis's assertion that the Appellant should have been warned at the start of the informal process that he faced a possible final warning. The fact is that the procedures enable the employer to proceed directly to a final warning if the facts warrant it. On the ET's findings of fact, they did.

48. Nor did the ET err in law when it mentioned, at paragraph 112, the fact that at the time when the final warning was given, the Appellant had not yet acquired statutory protection against unfair dismissal. That fact did not have any technical significance. It just demonstrated that a final warning was not the strictest sanction which the Respondent could have applied on 26 May 2016, and that the Respondent gave the Appellant a chance.

49. On the facts of this case, the ET found that the use of a final warning was appropriate, both procedurally and substantively. It was entitled so to find, and it made that finding having reviewed the objections to the Respondent's application of its internal procedures.

A

50. It follows that the ET was entitled to find that the warning was not manifestly inappropriate in the *Davies/Wincanton* sense, and that it was within the range of reasonable responses (if there is any practical difference between those two tests, which I doubt).

B

51. I also consider that the "manifestly inappropriate" test was applicable when the ET decided whether it could "go behind" the final warning. The authorities show that this approach is not confined to misconduct cases. Ground 2 therefore fails.

C

52. However, the test may be less important in a case such as this. There are misconduct cases where an earlier final warning leaves an employee hanging by a thread, so that dismissal may be based on some later and separate misconduct even where that later misconduct is less serious. In such a case the "validity" of the final warning is crucial. But I agree with Mr Lewis that this is not such a case. In reality the Respondent, and indeed the ET, considered the continuum of the Appellant's performance issues from February 2015 onwards. Therefore dismissal was not the result of some later isolated incident. It was the result of a continuous and prolonged failure to achieve performance of a sufficient standard. The true significance of the final warning was in informing the Appellant of an urgent need to improve. Comparing the case with what was said in *Bandara*, quoted at paragraph 21(iv) above, it seems clear that dismissal was in reality for the post-warning failure to improve performance. It was not directly triggered by the pre-warning events, because a sufficient post-warning improvement could have prevented it.

D

E

F

G

53. For all of the reasons set out above, ground 1 therefore also fails. The ET committed no error of law and its findings were not perverse.

H

Grounds 3 and 4

54. It follows that there is no merit in ground 3 or ground 4.

Conclusion

55. The appeal is dismissed.