Appeal No. EA-2020-000314-JOJ (previously UKEAT/0146/20/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 March 2021

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR C DALEY — APPELLANT

VODAFONE AUTOMOTIVE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR C DALEY (The Appellant in person)
For the Respondent	MRS M PECKHAM (Representative) Citation Ltd Kings Court Water Lane Wilmslow Cheshire SK9 5AR

SUMMARY

UNFAIR DISMISSAL

The EAT allowed the appeal against the ET's refusal of the Appellant's unfair dismissal claim on the grounds that the ET had failed to consider the adequacy of the employer's investigation in relation to whether his misconduct (offensive, threatening and intimidating behaviour towards a colleague) may have been caused by his depression and/or the side effects of the medication he was on for it.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the claimant in the Employment Tribunal, Mr Daley, against a judgment which was sent out on 31 January 2020 by the Tribunal sitting in Manchester, consisting of Employment Judge Tom Ryan, Mr Wilson and Mr Gill. Elisabeth Laing J allowed the appeal to proceed on two specific grounds, which are grounds 3 and 4.

2. The factual background is as follows. Mr Daley worked as a warehouse supervisor for Vodafone in Burnley from 6 November 2014. On 4 October 2018 there was an argument between Mr Daley and another employee, a Mr Ainsworth. Mr Ainsworth complained that Mr Daley had been offensive, threatening and intimidating and that he had sworn at him in the course of the argument. Mr Daley denied that he had behaved in this way. Vodafone management investigated the matter and decided that he had behaved as alleged, that he was guilty of gross misconduct and he was therefore dismissed summarily.

3. Mr Daley appealed to the next level of management and he said for the first time in the course of the proceedings that he had been suffering with severe depression since April 2017, that he was on strong doses of sertraline to help manage the condition, that some of the side effects of the depression were anger, frustration, irritability and anxiety and that the medication also has similar side effects. He said, "if at any point the company asked me about my condition I would have openly discussed this." But he went on to say:

> **"I do not accept I behaved in an inappropriate way and that what happened that day should not have resulted in dismissal. I would like to highlight with this medication it can make you react differently to situations which I may not be aware of."**

I have taken that quotation from paragraph 32 in the employment tribunal's decision.

4. The appeal was heard by a Mrs Harvey. Mrs Harvey rejected the appeal in a letter dated 10 December 2018. In that letter she referred to an "off the record" conversation that Mr Daley had had with HR during which he had apparently said, "if I had known it would have come to this I would have hit him". Mr Daley, I should say, denies saying that to HR. She acknowledged to the employment tribunal that this was a relevant piece of evidence but that Mr Daley had not been told at any stage that this off the record remark had been passed to management and that he had not been given any opportunity to answer it during the appeal hearing. As to his medical condition, Mrs Harvey dealt with that in her decision letter, which is set out at paragraph 38 of the employment tribunal's decision as follows. Mrs Harvey said:

> **"On further investigation this was not an issue raised by you during the investigation or the disciplinary hearing. We discussed this during your appeal and again on the balance of probabilities I felt there has been no trigger points during the past 18 months that have raised concerns to the company that would have required a medical assessment to be undertaken. The company has been extremely supportive towards you, particularly around the issue of arthritis.**
>
> **What I find difficult is that on the one hand you are denying that your behaviour was inappropriate at any stage during this incident, yet are seeking to explain the alleged behaviour that you did display was because of a medical condition. You did provide the documentation that amongst arrange [sic] of possible side effects, the behaviour was one of those side effects. You did raise the question of investigations with other members of staff as to your behaviour and there is consensus that they had not seen any significant change in your behaviour during the last 18 months, which confirms the point that there is no evidence of trigger points that would have warranted further investigation."**

5. The employment tribunal found that the initial decision to dismiss had been fair but that the way the off the record conversation was dealt with rendered the appeal process unfair. Having decided that, the employment tribunal went on to decide that the additional piece of evidence (the off the record conversation) would have made no difference to the outcome, so that applying **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 there would be no compensation in any event. Furthermore, they found at paragraphs 74 and 75 of the decision that Mr Daley's "conduct was the cause of his downfall" and that accordingly any compensation for unfair dismissal should in any event be reduced to zero.

6. Ground 3 of the notice of appeal suggests that the appeal process should have gone further into Mr Daley's mental health and medication and their possible impact on his behaviour and should have considered whether it amounted to a mitigating factor, and complains that the employment tribunal failed to deal with this point in the context of considering the quality of the investigation. Looking at the decision, it is plain that the employment tribunal did not consider this point in the context of the adequacy of the investigation: the only point they considered was whether Mrs Harvey should have taken into account the off the record conversation without Mr Daley having an opportunity to deal with it.

7. As I say, it is plain the employment tribunal did not address the point. Mrs Peckham, who has appeared today for Vodafone and made extremely helpful points, says three things in response. First, she says that Mr Daley did not really raise this issue before the employment tribunal. However, I think it is plain that he did or did sufficiently raise it. At page 54 of the EAT bundle is the ET1 claim form where he says:

> **"… I believe if they honestly thought that I was being aggressive and threatening that this would not be normal behaviour for me. Then they should have considered my depression and my medication. I have suffered from depression since leaving the Armed forces in 2013 but was only diagnosed 18 months ago and I am currently still on medication for this."**

Further, he put before the Tribunal as part of the evidence a letter from his GP dated 7 March 2019 (page 100 in the bundle) which makes clear that he suffered chronic depression, that he was on sertraline and that depression can cause unexpected symptoms, including cognitive impairment and anger issues. That letter, of course, was not before Mrs Harvey for the original disciplinary hearing, but it is plain that the whole point Mr Daley wanted to make was that the employer should have sought something like that and that they could then have taken that into account in deciding whether to dismiss. That answers Mrs Peckham's first point that Mr Daley did not raise the issue before the employment tribunal.

8. The second thing she says is that in fact this issue was engaged with by Mrs Harvey in the course of the appeal, and she refers me to paragraph 38 of the decision which I have read out. It is certainly right that Mrs Harvey did engage with this issue, but that does not necessarily mean she engaged with it appropriately or adequately. The claimant's point is that there should have been further investigation by Vodafone and that issue still remains on the table.

9. Her third point was to refer me to paragraph 49 of the decision where the tribunal is dealing with a separate claim, which was dismissed and has not been the subject of the appeal, which was a disability discrimination claim under section 15 of the **Equality Act 2010**. In the course of that paragraph they say there was no evidence before the employer at either stage when the decisions were taken that would enable them to form the conclusion that the depression and the medication was why the claimant acted as he did. In other words, the "because of" element (section 15 test) is not established. I am not clear, as I said during argument, why the tribunal put the point like that: it was for them (the employment tribunal) to decide the causation issue in the context of section 15. But anyway, as I say, there is no appeal against that. In any event, that sentence does not come close to resolving the issue of the extent of the investigation that Mrs Harvey ought to have carried out into the question of the claimant's mental health and medication.

10. I have considered Mrs Peckham's points and I reject them; we are therefore back to the plain point that the employment tribunal did not address its mind to the question of whether the investigation was adequate, in failing to make further enquiries about Mr Daley's mental health and medication and the effect that that might have on his behaviour. The appeal must therefore be allowed on ground 3.

11. If the employment tribunal were to consider that Mrs Harvey ought to have investigated the matter further, they will also need to consider the appropriate level of compensation, which

brings in again the possibility of a **Polkey** deduction. Mrs Peckham also conceded, quite properly, that their conclusions on contribution to which I have referred at paragraphs 74 and 75 really could not stand. Plainly, issues about the impact of Mr Daley's health on his behaviour must have been relevant to the question of any contributory fault. Ground 4 is therefore also valid.

12. The issues whether there was unfair dismissal because of the failure to investigate, whether there should be a **Polkey** deduction and whether there is any element of contributory fault will therefore have to be remitted to the employment tribunal. I was in two minds as to whether to remit to the same employment tribunal or a fresh one, but I was told by Mr Daley that Employment Judge Ryan had retired so my mind was made up easily that it should go to a fresh employment tribunal. That employment tribunal will be considering only the three issues I have identified, and it will be for them to decide how to resolve those issues, and in particular whether any further evidence is required and what form any hearing should take. In general, the factual findings made by the employment tribunal can stand, and certainly the findings in relation to the off the record conversation and in relation to **Polkey** on that particular failure in the appeal process will stand.

13. The appeal is allowed and those issues will be remitted to a fresh tribunal and I will make sure that the EAT order sets that out clearly.