

Neutral Citation Number: [2023] EAT 122

Case No: EA-2022-SCO-000101-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 12 September 2023

Before :

THE HONOURABLE LORD FAIRLEY

between

GREATER GLASGOW HEALTH BOARD

Appellant

- and -

MR STEPHEN MULLEN

Respondent

Mr David James (instructed by NHS Central Legal Office) for the **Appellant**
Mr Stephen Mullen – no appearance

Hearing date: 31 May 2023

JUDGMENT

SUMMARY

TOPIC: Unfair Dismissal; range of reasonable responses

In a claim of unfair dismissal, the Employment Tribunal found that the employer's reason for dismissing the employee was a belief by it in the existence of misconduct consisting of aggressive and threatening behaviour by him to one of his line reports on 11 March 2021. The Tribunal further also concluded that the employer's belief in the existence of that misconduct was genuinely held and reached after reasonable investigation. Having made those findings, it was not then open to the Tribunal then to base its conclusion about the fairness of the dismissal in terms of section 98(4) of the **Employment Rights Act, 1996** on a factual hypothesis that the "real reason" for the dismissal was (or may have been) something different to the established reason. On the findings in fact made by it, the only conclusion to which the Tribunal could properly have come was that dismissal was within the range of reasonable responses open to the employer and was fair.

The Employment Tribunal's Judgment was set aside, and the claim of unfair dismissal was thereafter dismissed.

THE HONOURABLE LORD FAIRLEY:

Introduction and overview

1. The respondent to this appeal is Stephen Mullen. He did not appear at the full hearing of the appeal, nor was he represented. I have, however, taken full account of all of the papers that were submitted in advance of the appeal.
2. Between November 2001 and October 2021, Mr Mullen was employed by the appellant with the job title of “Supervisor”. From 2018, he performed that role in the appellant’s Endoscopy Decontamination Unit at Glasgow Royal Infirmary.
3. On 28 October 2021, Mr Mullen was summarily dismissed by the appellant for gross misconduct. He brought a claim for unfair dismissal and for arrears of pay. In his claim form (ET1), he did not identify notice pay as a separate head of claim.
4. Mr Mullen’s claim of unfair dismissal was upheld by the Employment Tribunal, and the appellant was ordered to pay him a basic award of £2,312.50, a compensatory award of £1,718.60 and notice pay of £4,925.16.
5. The Employment Tribunal did not identify any separate issue relating to notice pay in its list of issues for determination at the full hearing on merits and remedy (ET, para. 75). In particular, it did identify any claim for breach of contract under the **Employment Tribunals Extension of Jurisdiction (Scotland) Order, 1994**. Instead, the Tribunal seems to have treated notice pay simply as an aspect of the claim for compensation for unfair dismissal (ET, paras. 75 and 134*ff*). That was understandable and appropriate having regard to the way in which the ET1 was framed. It is, however, odd that the Tribunal then made a distinct award of notice pay separately from the compensatory award and also made a **Polkey** reduction from the latter but not from the former. For the purposes of this appeal, however,

it is sufficient to note that the part of the Tribunal's award which it referred to as "notice pay" was being entirely dependent upon its finding that the dismissal of Mr Mullen was unfair.

6. In this appeal, the appellant seeks to have set aside the Employment Tribunal's finding of unfair dismissal together with all orders for payment consequent upon that finding.

Summary of relevant findings in fact

7. In 2018, Mr Mullen was subject to disciplinary proceedings for behaving in an aggressive way towards his line manager. The outcome of that process was that a "supported improvement action plan" was recommended for him.
8. On 11 March 2021, one of the appellant's employees who was then supervised by Mr Mullen made a complaint that Mr Mullen had shouted at him and threatened him within the Endoscopy Decontamination Unit washroom. Over the course of the following days, that allegation was investigated by Mr Mullen's line manager, Ms Ward.
9. Following Ms Ward's initial investigation, a decision was taken by the appellant's EDU Service Manager, Mr McIvor, that there should be a more formal investigation. On 29 March 2021, Mr McIvor advised Mr Mullen of the allegation and of the decision to have it formally investigated.
10. Another of the appellant's managers, Ms Phyllis Watt, was appointed as the investigating officer. Ms Watt's investigation took place between April and July of 2021. As part of the investigation, Ms Watt took statements from eyewitnesses including *inter alia* from another of the appellant's employees, Mr Rankin. She

also took statements from the employee who had made the complaint and from Mr Mullen himself. Mr Rankin's statement corroborated the account of the employee who had made the complaint.

11. Mr Mullen was absent from work on leave from 29 March until mid-April 2021 and was thereafter absent on sick leave between mid-April and early October 2021.
12. Ms Watt's final investigation report was submitted to Mr Mclvor on 11 August 2021. Ms Watt recommended a formal conduct hearing. Mr Mclvor accepted that recommendation.
13. On 26 August 2021, and whilst Mr Mullen was still absent from work, he was invited to attend a disciplinary meeting. With that letter, he was provided with a full copy of the investigation report and its various appendices, including the witness statements provided during the investigation.
14. Due to issues with witness availability, the disciplinary meeting did not ultimately take place until 16 October 2021. Mr Mullen attended with his union representative. The disciplinary panel was made up of three members. It was chaired by a Mr William Hunter. One of the two other panel members was Mr Mclvor.
15. The panel found that the allegation that Mr Mullen had shouted at and threatened another employee was established. It concluded that the conduct of Mr Mullen on that date amounted to gross misconduct. He was accordingly dismissed with effect from 28 October 2021. The letter of dismissal was issued by Mr Hunter. Whilst the letter recorded that the decision to dismiss had been taken by Mr Hunter, all three of the panel members contributed to that decision. The reason

given for the dismissal was Mr Mullen's conduct on 11 March 2021. The letter also referred, however, to the previous disciplinary procedure which had prompted the recommendation of the supported improvement action plan.

16. Mr Mullen appealed against the decision to dismiss him. His appeal did not succeed.

The ET's findings as to the reason for and fairness of the dismissal

17. The Tribunal began by considering what was the reason for the dismissal. It found that this was a genuinely held belief by the appellant that Mr Mullen was guilty of the particular misconduct alleged, namely that on 11 March 2021 he had shouted at and threatened a technician within the Endoscopy Decontamination Unit washroom (ET paras 78 and 79).
18. The Tribunal considered that the appellant had reasonable grounds for concluding that the misconduct had occurred (ET, para 86) having carried out such investigation as was reasonable in the circumstances (ET, para 94). In particular, the Tribunal found that:

"...the claimant and all witnesses to the incident on 11 March 2021 were interviewed at their respective investigatory meetings, the witness evidence was tested at both the conduct and the appeal hearings, and the claimant and his representative asked questions of the witnesses."

19. The Tribunal then went on to consider, in terms of section 98(4) of the **Employment Rights Act, 1996 (ERA)** whether or not the decision to dismiss fell within the band of reasonable responses. In so doing, it noted and accepted some of Mr Mullen's submissions that there were deficiencies in the process that had led to his dismissal.

20. First, the Tribunal accepted Mr Mullen's submission that between 11 and 29 March 2021 there was a delay in informing him of the allegation against him. It also concluded that, prior to that date, there was "a lack of transparency by [the appellant] in terms of the policy they were following" and in their communications with Mr Mullen about that. This, the Tribunal concluded, amounted to a "breach by [the appellant] of their bullying and harassment policies which both oblige [the appellant] to discuss the concerns raised with the employee at the earliest opportunity." It further concluded that it was a "breach of natural justice" for Mr Mullen not to have been informed of the allegation until 29 March 2021 (ET para 104).
21. Secondly, the Tribunal accepted a submission that the investigation of the allegation had taken an unreasonable length of time and that this was a breach of the appellant's conduct policy which stated that investigations into allegations of misconduct "should be undertaken in a timely manner" (ET, para 110).
22. Thirdly, the Tribunal accepted a submission that Mr McIvor should not have been part of the conduct panel and that this was a breach of the appellant's conduct policy which stated that panel members "must have had no prior involvement in the case" (ET, paras 113 and 114). It noted that:

"Mr McIvor did have prior involvement in the case and control over the direction it would take, in that it was he who decided to commission the formal investigation and endorsed Ms Watt's recommendations made in the investigation report that the case should proceed to a formal conduct hearing. "

The Tribunal noted that Mr McIvor had played an equal part with the other panel members in the decision to dismiss.

23. Finally, whilst the Tribunal accepted the evidence that the conduct panel had fully considered mitigating circumstances, length of service and re-deployment, it also

“...found that there were inconsistencies in Mr Hunter’s evidence as to whether the pattern of the claimant’s behaviour...was a contributory factor in the decision to dismiss him which... raised doubts about the real reason for the dismissal and the sufficiency of that reason” (ET, para 127)

24. At paras 130-132 of its reasons, the Tribunal stated:

“130. I have carefully assessed all of the evidence in the round. In doing so, I have found that there were procedural defects in the process leading to the claimant’s dismissal...I considered that [the appellant’s] failure to inform the claimant of the allegations against him until he was told about the formal investigation on 29 March 2021, the lack of impartiality in the conduct process due to Mr McIvor being a member of the conduct panel and the lack of certainty surrounding the real reason for dismissal were material procedural deficiencies that fell out-with the band of reasonable responses which a reasonable employer might have adopted.

131. In reaching this view and applying the authority of *Cabaj*, I am satisfied that [the appellant] did not act reasonably in treating the reason shown as a sufficient reason for dismissing the claimant. This is because these material procedural deficiencies impeded the claimant in demonstrating that the real reason for his dismissal was not sufficient and that there was no reason given by [the appellant] for deciding to dismiss the claimant in spite of these procedural deficiencies that I could consider, as the evidence indicated they did not accept these were such deficiencies.

132. I have therefore concluded that these procedural deficiencies had such impact that they rendered the whole process unfair and that [the appellant] did not act reasonably in dismissing the claimant.”

The Grounds of Appeal

25. The appellant challenged the conclusion at para 132 on four grounds. First, it submitted that the Employment Tribunal had conflated the issue of the reason for the dismissal with the question of its fairness. Secondly, it had erred in law in concluding that, at the stage of considering the appropriate sanction for an established act of misconduct, it was not open to the employer to take account of previous similar conduct by the employee. Thirdly, it submitted that the Tribunal had substituted its view for that of the employer in relation to what amounted to a fair process. Fourthly, the Tribunal's reasons were not **Meek** compliant because its reasoning at paragraphs 127, 130 and 131 was at odds with its earlier finding in fact at para. 78 about the reason for the dismissal.

Analysis and decision

26. The first and fourth grounds of appeal relate to essentially the same issue, and are each well founded.
27. Having made clear findings in fact about the reason for the dismissal and the genuineness of the employer's belief in the existence of that reason (paragraphs 78 and 79), it was not then open to the Tribunal to base its conclusion about section 98(4) **ERA** fairness on a factual hypothesis that the "real reason" for the dismissal was something different.
28. The essence of the fourth ground of appeal is that the conclusions reached by the Tribunal at paras 130-132 were based on a premise that the appellant had a different (or "real") reason for the dismissal to the reason previously found at para 79. In my view, that submission is plainly correct. Having unequivocally established the facts as to the principal reason for the dismissal, and concluded

that the employer's belief in the existence of that reason was genuinely held, it was inconsistent with those findings for the Tribunal to base its decision on fairness (whether in whole or in part) upon a different factual hypothesis as to the reason for the dismissal.

29. In these circumstances, it is not necessary for the determination of this appeal for me to consider grounds 2 and 3. Had it been necessary to do so, however, I would have found them also to be well founded. The appellant was perfectly entitled, at the stage of considering sanction, to consider the previous analogous behaviour. That was so even though the panel's conclusion was that the conduct on 11 March 2021 amounted to gross misconduct.

30. The Tribunal also fell into error in failing to recognise that not every departure from an agreed disciplinary procedure will necessarily render a dismissal unfair. As can be seen from para 131 of its reasons, the Tribunal's inadmissible conclusion that there was a "real reason" for the dismissal was the sole basis for its conclusion that the dismissal was procedurally unfair. As was noted in **Westminster Council v. Cabaj** [1996] ICR 960, however, the question for the Tribunal in considering section 98(4) is not whether the employer acted reasonably in general, but whether it did so in treating the established reason as sufficient reason to dismiss. Once the issue of "real reason" is removed from the picture, the deficiencies in process identified by the Tribunal had no bearing at all on the issue of whether the reason for the dismissal established by the Tribunal at para 79 amounted to sufficient reason to dismiss.

Conclusion and disposal

31. Having regard to the findings made by the Tribunal at ET paragraphs 79, 86 and 94, the only conclusion to which it could properly have come was that the sanction of dismissal lay within the range of reasonable responses open to the appellant and that the dismissal was fair.

32. I will therefore set aside the finding of unfair dismissal and the consequent basic and compensatory awards. As I have already noted, the Employment Tribunal did not award notice pay as a separate claim for breach of contract. Instead, it did so simply as an aspect of the claim for compensation for unfair dismissal (see ET, paras 75 and 134ff). For the avoidance of doubt, therefore, the award of notice pay is also set aside.

33. I will thereafter substitute a Judgment that the dismissal of Mr Mullen on 28 October 2021 was fair. His claim of unfair dismissal accordingly fails.