Neutral Citation Number: [2024] EAT 150

Case No: EA-2022-000141-LA

EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 August 2024

Before :

HIS HONOUR JUDGE TAYLER
MR DESMOND SMITH
MR ANDREW MORRIS

- -

Between :

MS R THOMAS **Appellant**

- and –

BRANDPATH UK LTD **Respondent**
(Formally known as EXPANSYS UK LTD)

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Margaret Pennycook, Counsel (instructed through Advocate) for the **Appellant**
Oliver Isaacs, Counsel (instructed by William Lane of Worknest) for the **Respondent**

Hearing date: 22 August 2024

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The Employment Tribunal erred in law in its assessment of the reason for dismissal and in not considering whether a prior warning was manifestly unfair. By consent a determination of unfair dismissal was substituted.

HIS HONOUR JUDGE TAYLER:

Introduction

1. This is an appeal against a decision of the Employment Tribunal, sitting in Watford, on 21, 24 and 25 May, and 20 and 21 September 2021, Employment Judge Quill, sitting alone. The judgment was sent to the parties on 14 January 2022. The judgment dismissed a complaint of unfair dismissal.

The relevant law

2. Claims of unfair dismissal are governed by section 98 **Employment Rights Act 1996** ("**ERA**"):

> 98 General.
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) relates to the conduct of the employee,
> (c) is that the employee was redundant, or
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking)

the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

3. The fundamental test in a claim of unfair dismissal is that set out in section 98 **ERA**. The employer is required to establish the reason, or principal reason, for the dismissal. For convenience, I will refer to the reason, or principal reason, as "the reason" for dismissal. The employer must establish that the reason for dismissal is one of the potentially fair reasons. If the employer establishes that the employee was dismissed for a potentially fair reason, the Employment Tribunal will go on to determine whether the dismissal was fair or unfair on application of the provisions of section 98(4) **ERA**. Fairness is determined on a neutral burden of proof. If the employer does not establish the reason for dismissal the claim will succeed.

4. The first question for the Employment Tribunal is why the employer dismissed the employee.

5. In **Croydon Health Services NHS Trust v Beatt** [2017] ICR 124, Underhill LJ considered what is meant by the term "reason" for dismissal, at Paragraph 30:

> 30. What tends to be treated as the classic expression of the approach to identifying the "reason" for the dismissal of an employee for the purpose of section 98 and its various predecessors is the statement by Cairns LJ in *Abernethy v Mott Hay & Anderson* [1974] ICR 323, at p. 330 B-C, that:
>
> > "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."
>
> As I observed in *Hazel v Manchester College* [2014] EWCA Civ 72, [2014] ICR 989, (see para. 23, at p. 1000 F-H), Cairns LJ's precise wording was directed to the particular issue before the Court, and it may not be perfectly apt in every case; but the essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what "motivates" them to do so (see also *The Co-Operative Group Ltd v Baddeley* [2014] EWCA Civ 658, at para. 41).

6. The first stage is for the Employment Tribunal to consider whether the employer has established what, as a matter of fact, was the reason for dismissal. The second stage is for the Employment Tribunal to consider whether the reason established by the employer is a potentially

fair reason for dismissal.

7. In a misconduct dismissal, an Employment Tribunal is generally assisted by the guidance given in **British Home Stores Limited v Burchell** [1978] IRLR 379, paragraphs 2 and 20:

> 2. … What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion. …
>
> 20.What seems to have happened here, as we read the Decision, is that having, as we have already mentioned, started out by stating the function of the tribunal with accuracy, they then were in the course of their observations or considerations - perhaps very humanly with some degree of sympathy with, the young applicant, not professional!; represented, and an anxiety to see that she got a fair crack of the whip - departing from the task which they had set themselves; and that they embarked upon an independent evaluation of the evidence, not for the purpose of seeing whether management could reasonably have drawn the conclusion which management in fact drew, but whether that was by an objective standard a correct and justifiable conclusion. And moreover they were led into examining the matter from the point of the standard of proof which could be derived from the matters which had been stated, which were known to management, in. order to see whether the conclusion was justified. There are extensive citations from the well known case of *Hornal v. Neuberger Products Ltd.* (1956) 3 All ER 970 in which the Court of Appeal considered in great particularity different standards of proof - or, perhaps more accurately put, whether there was a different standard of proof - in a civil case on the one hand and in a criminal case on the other. That, as we think, had absolutely nothing whatever to do with the proper task of the tribunal, which had throughout to do that which this tribunal initially embarked on doing, which was to examine the reasonableness or otherwise of the conclusion reached by management.

8. In **Boys and Girls Welfare Society v McDonald** [1997] ICR 693, His Honour Judge Peter

Clark emphasised that while **Burchell** provides useful guidance, the fundamental principles are to be found by reading the clear words of section 98 **ERA**. HHJ Clark also noted that **Burchell** was decided before a change in the burden of proof. Where an employer has established the reason for dismissal, and that it is a potentially fair reason, the fairness of the dismissal is determined on a neutral burden of proof. HHJ Clark emphasised the importance of an Employment Tribunal considering whether there has been an adequate investigation, in addition to considering whether there were reasonable grounds for the employer forming a belief that the employee was guilty of the alleged conduct.

9. Generally, when considering the fairness of a dismissal an Employment Tribunal will not go into the circumstances of any previous warnings. However, there are limited circumstances in which it may be appropriate to do so: **Davies v Sandwell Metropolitan Borough Council** [2013] IRLR 374, paragraphs 20 to 24:

> 20. As for the authorities cited on final warnings, Elias LJ observed, when granting permission to appeal, that the essential principle laid down in them is that it is legitimate for an employer to rely on a final warning, provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it must not have been manifestly inappropriate to issue it.
>
> 21. I agree with that statement and add some comments.
>
> 22. First, the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s. 98(4) to particular sets of facts. The broad test laid down in s.98(4) is whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.
>
> 23. Secondly, in answering that question, it is not the function of the ET to re-open the final warning and rule on an issue raised by the claimant 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 claimant for subsequent misconduct.
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> 24. Thirdly, 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.

10. The judgment in **Davies** again emphasises the fundamental importance of the application of section 98 **ERA**.

The outline facts

11. The claimant worked for the respondent from 2013. She worked in the Finance Department as a purchase ledger clerk.

12. On 31 May 2016, there was an altercation between the claimant and a colleague, Mr Halpin. After the altercation Mr Halpin said he wanted to raise a grievance. Attempts were made to fix an informal meeting with the claimant. She asked that the meetings be delayed, so that she could have a representative with her. In the end, she did not attend the final meeting that had been fixed, which resulted in a letter being sent to her, on 8 June 2016, inviting her to a disciplinary hearing. It was asserted that the claimant had been insubordinate in refusing to attend the meeting fixed for 8 June 2016. The claimant was informed that she was entitled to be represented, and that she should provide the name of any representative and/or explain if there was a difficulty in attending, by noon on 9 June 2016. She did not do so by the deadline. The claimant contacted the respondent on the day of the hearing and stated that her representative was not available. The claimant sought a postponement. She received no response. The meeting went ahead in the claimant’s absence and she was issued a first and final written warning.

13. The claimant’s absence continued. The claimant was invited to a disciplinary hearing by letter dated 21 September 2016 to consider two matters: firstly, complaints raised by Mr Halpin; secondly, the manner in which the claimant had been dealing with sickness absence and contact between the company and her GP and/or a reference to Occupational Health.

14. The claimant was signed-off sick for a significant period. In the end, the respondent conducted a disciplinary hearing in her absence. The claimant was dismissed by the respondent, in a letter dated 4 October 2016, which did not set out the grounds of the dismissal. A note of the disciplinary hearing and findings dated 27 September 2016 was attached to the dismissal letter. The

document referred to an incident, on 31 May 2016, when is was stated that the claimant had been rude and dismissive to Mr Halpin, and that there had been behaviour described as "passive aggressive" in "vocal and email communications". It was also suggested that the claimant had failed to properly cooperate in contact between the respondent and her GP and Occupational Health.

15. The Employment Tribunal directed itself, by reference to section 98 **ERA**. There was no specific reference to **Burchell**. In paragraph 69 the Employment Tribunal referred to the requirement for an analysis of whether there was a reasonable basis to believe the conduct had been committed by the employee and whether there was a reasonable process prior to making the decision to dismiss. The Employment Tribunal referred to **Sainsburys Supermarket Ltd v Hitt** [2002] EWCA Civ 1588, [2003] ICR 111 a case that emphasises the importance of considering the band of reasonable responses in respect to matters, including the investigation into a disciplinary allegation.

16. The Employment Tribunal considered Halpin incident from paragraphs 77 to 80 of the judgment:

> 77. **I am satisfied that Mr Capp did genuinely conclude that the Claimant had acted "inappropriately". He was not able to give specific information, but rather relied on Ms Burnett's comments that there had been an ongoing pattern of behaviour**.
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> 78. Taken in isolation, to the extent that he found that the situation would have escalated but for Ms Burnett's intervention, I do not think there are reasonable grounds for that specific conclusion. I think it is contrary to what Halpin said and Burnett said she did not know.
>
> 79. To the extent that he found that the Claimant was responsible for the situation, the question is not what I would have decided had I been the decision-maker; the question is whether there were reasonable grounds for him to reach the conclusion that the Claimant was responsible. He did note that Mr Halpin was the person who swore (as confirmed both by him and Ms Burnett). He did not have the same information that I have from the claimant– namely that she believes that Mr Halpin reacted to her refusing to do something which, in her opinion, was a refusal she was obliged to make. Rather he had the notes taken by Mr Hughes in which Halpin alleged that the Claimant was often obstructive and that 31 May 2016 was a further example, and in which Burnett alleged that Halpin's request had not been unreasonable and that the Claimant's response had been inappropriate. Burnett did not claim to have heard the exact response uttered by the Claimant, but the implication from her account is that she, the Finance Manager, knew what the Claimant had been asked to do and did not believe that the Claimant was being sufficiently co-operative. She also stated her opinion that other people (whom she named in the notes) found the Claimant difficult. There was, therefore, reasonable evidence for Mr Capp's conclusion that the Claimant had behaved

> inappropriately.
>
> 80. In terms of what response there should be, he had before him evidence that there had previously been mediation between the Claimant and Mr Halpin, and that had failed. Ms Wheeler had left the organisation by this stage, and he did not have her account of what the Claimant had said to her. He did not have it from Ms Wheeler and he did not have it from the Claimant. [emphasis added]

17. The Employment Tribunal returned to the Halpin matter in considering the dismissal decision, at paragraphs 92 to 93. The Employment Tribunal focused primarily on the Halpin incident in considering the fairness of the dismissal, referring to it as being a sufficient reason for dismissal, in the light of the final written warning.

18. The Employment Tribunal also considered sickness reporting, from paragraphs 81 to 85, stating that Mr Capp had reasonable grounds to decide that the claimant was not providing sufficient information and cooperating about her absence, although the Employment Tribunal did not return to that matter in the section of the judgment considering the dismissal decision.

19. In its submissions to the Employment Tribunal the respondent specifically raised the issue of whether the prior final warning might have been manifestly unfair. The respondent referred the Employment Tribunal to the relevant authorities. The Employment Tribunal considered the authorities at paragraphs 72 to 74, and clearly thought that it was an issue worthy of consideration, the respondent having properly raised the matter in its skeleton argument. The only reference to this issue in the analysis of the Employment Tribunal is at paragraph 92, which deals with the question of whether the written warning should have been disregarded because it was issued earlier in the same related series of events; or whether it should not have been taken into account because the warning postdated the Halpin incident:

> 92.I do not agree with the Claimant that Mr Capp was obliged to disregard the written warning because it was issued earlier in the same related series of events. The warning was specifically for failing to attend the meeting(s) on 8 June 2016, which was treated as failing to comply with an instruction. The warning was not for either the Halpin incident or the failure to follow appropriate procedures during absence. Furthermore, the fact that the warning post-dated the Halpin incident did not oblige the Respondent to ignore it.

20. The Employment Tribunal did not consider and decide whether the issue of the final warning

was manifestly unfair. That is the first Ground of Appeal.

21. We conclude that the Employment Tribunal erred in law, in failing to determine the question of whether the final warning was manifestly unfair, having identified that as one of the issues for determination.

22. The second Ground of Appeal contends that there was a failure to apply the **Burchell** guidelines. It was said, in submissions, primarily because a failure to properly consider whether there had been adequate investigation.

23. The third Ground suggests, in the alternative, that the decision was perverse.

24. The fourth Ground asserts that there was unfairness in proceeding with the disciplinary hearing, in the absence of the claimant, rather than delaying to allow for a possible improvement in her medical condition.

25. We conclude that the Employment Tribunal erred in law, in failing properly to consider the question of whether the respondent had conducted an investigation that fell within the band of reasonable responses. The respondent made only a very limited assessment of what the claimant had done that constituted misconduct. At paragraph 77, the Employment Tribunal recorded that Mr Capp concluded that the claimant had acted "inappropriately". There was a suggestion that when dealing with Mr Halpin she had been "unhelpful". However, there was no clear finding of what she had done or said that was "inappropriate". The only specific words the respondent decided had been said were said by Mr Halpin who had used the "F word" on two occasions. The Employment Tribunal found that the suggestion that the situation would have escalated, but for a manager's intervention, was not based on reasonable grounds.

26. There was an obvious possibility of further investigation that should be undertaken by a reasonable employer. The Employment Tribunal should have considered whether Mr Capp should have interviewed Mr Halpin to find out what the claimant had been asked to do and precisely what she had done or said in response to the request, and in what respect it was said to be inappropriate, if the respondent were to act within the band of reasonableness.

27. We consider that the Tribunal did not – having not specifically directed itself to the importance of considering whether investigation fell within the band of reasonable responses – consider that question and ask whether a reasonable employer would have been required to undertake more detailed investigations in these circumstances.

28. Accordingly, we uphold Grounds 1 and 2 of the Grounds of Appeal. It is not necessary for us to go on to consider Grounds 3 and 4.

29. The dismissal occurred in 2016. The proceedings have been extremely lengthy. The respondent adopted the pragmatic approach that, if the appeal succeeded, they would concede unfair dismissal. Accordingly, on the basis of that concession, we substitute a finding of unfair dismissal and remit the matter to the same Employment Tribunal to determine remedy, including any relevant matters of **Polkey** and/or contribution.

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