

Appeal No. UKEAT/0326/05/ZT

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 3 November 2005

Judgment delivered on 23 November 2005

Before

HIS HONOUR JUDGE PETER CLARK

MRS A GALLICO

MR B R GIBBS

SURREY COUNTY COUNCIL

APPELLANT

MR DOUG HENDERSON

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

Contract of Employment and Unfair Dismissal

Confidentiality of Complainants – need to inform employee of case against him. Application of **HSBC v Madden**; **Sainsbury v Hill**. Range of reasonable responses. Appeal allowed. Whether Wrongful Dismissal finding should also be set aside.

HIS HONOUR JUDGE PETER CLARK

1. This is an appeal by Surrey County Council, the Respondent before the London (South) Employment Tribunal, against that Tribunal's reserved Judgment promulgated with Reasons on 25 February 2005 (the First Judgment) upholding the Claimant, Mr Henderson's claims of both unfair and wrongful dismissal, without deduction, either under the **Polkey** principle, or on the basis of his contributory conduct. We shall describe the parties as they appeared below.

Background

2. The Claimant's employment with the Respondent commenced on 10 August 1998. In 2003 he was appointed Technical Officer in the contract performance team. His functions included policing outside contractors. In about April 2003 Carillion plc was awarded the contract for road maintenance and construction in East Surrey.

3. Between May 2003 and January 2004 the Claimant raised some forty reports expressing his concern as to Carillion's performance of that contract. A further issue concerned an audit investigation carried out by the Respondent into work given to a company, formerly operated by the Claimant and now by his wife. Problems also arose over the Claimant's mental health, which he attributed to that investigation and its possible outcome.

4. Against that background, on 13 February 2004, the Claimant was called to a meeting by Callum Findlay, Head of Transportation, fixed for 16 February. It was said that serious allegations had been made against him. No details were then given.

5. The Claimant did not attend that meeting; he became exceedingly distressed, was admitted briefly to hospital and then referred as an outpatient to a Consultant Psychiatrist.

6. On 16 February Mr Findlay wrote to the Claimant, suspending him pending a disciplinary investigation. The letter spoke of reports from various sources alleging that he had made threats of violence towards various parties. On 1 March the Claimant's Trade Union representative raised a formal grievance about the way in which the Claimant had been informed of the allegations made against him and the effect this had had on his mental health. Mr Findlay rejected that complaint.

7. An appointment was made for the Claimant to attend an Occupational Health adviser on 16 March. He was unable to attend and a fresh appointment was made for 6 April. On 15 March the Trade Union asked for the grievance to be taken to the next stage and on 16 March the Union made further detailed criticisms of the disciplinary process.

8. On 19 March Mr Findlay wrote to the Claimant again. He said that he had contacted the "individuals concerned", reviewed the evidence and taken professional advice. Having done so he had reasonable cause to believe both the severity and validity of the allegations made and considered the threats of violence to amount to gross misconduct. He summarized his findings as follows:

"During the course of employment you have:

- (i) threatened violence against a number of people;**
- (ii) put a number of individuals in fear of their physical safety;**
- (iii) conducted yourself in an aggressive manner causing various parties to feel at risk of potential violence."**

9. Pausing there, at that stage Mr Findlay had received five statements from different individuals alleging that the Claimant had threatened serious violence against each of them and members of their families. The matter had been referred to the local police, who were not prepared to take action unless the individuals concerned were prepared to come forward and make personal complaints against the Claimant. It is an important feature of this case that the UKEAT/0326/05/ZT

individuals concerned did not wish to be identified for fear of reprisals by the Claimant. They would not attend an internal disciplinary hearing. In these circumstances no further details were given to the Claimant; he was not provided with copies of those statements, even in redacted form.

10. In his letter of 19 March Mr Findlay told the Claimant that he was minded to dismiss him; however, before making a final decision he gave the Claimant until 5.00 pm on Friday, 26 March to respond to the allegations. He would take a final decision on Monday, 29 March.

11. The Claimant's Trade Union responded on 24 March, first, by asking for a second stage grievance meeting; secondly, to Mr Findlay, pointing out:

- (a) that the Claimant had not been shown the evidence on which the allegations against him were based, and
- (b) that he was medically unfit to attend any meeting before 25 March.

12. In the absence of any further representations by or on behalf of the Claimant Mr Findlay proceeded to dismiss him summarily by letter of 29 March.

13. Against that decision the Claimant appealed to a panel of three councillors chaired by Mr Chris Frost. An appeal hearing took place on 18 June. The individual complainants consented to release of their statements to the panel in confidence. The Claimant and his representatives were not shown those statements in any form. The Claimant denied that he had threatened anyone with violence. By a majority the panel dismissed the appeal. The minority member concluded that the Claimant was guilty of the misconduct alleged, but it was explained by his psychiatric condition. He was for the Claimant's reinstatement, followed by a recommendation for early retirement.

The Issues

14. The Claimant put his complaint of unfair dismissal on two bases; first that he had been dismissed by reason of his having made protected disclosures. That claim was withdrawn. Alternatively, he complained of ordinary unfair dismissal under section 98 of the **Employment Rights Act 1996** (“ERA”). His complaint of wrongful dismissal related to his summary dismissal without, he contended, good cause.

15. The Respondent’s case was that he had been fairly dismissed by reason of his conduct; that he had repudiated the contract of employment by that conduct, entitling them to dismiss him without notice. Alternatively it was said that if his dismissal was procedurally unfair the result would have been the same had a fair procedure been followed, applying the **Polkey** principle; further, he had contributed to his dismissal by his conduct.

The Tribunal Decision

16. Based on the facts as found and their understanding of the law the Tribunal reached the following conclusions:

- (1) The Respondent’s reason for dismissal, namely their belief that the Claimant had subjected the five complainants to threats of serious violence, amounted to a potentially fair reason for dismissal relating to his conduct.
- (2) Dismissal for that reason was unfair, applying section 98(4) **ERA** because:
 - (a) the Respondent had denied the Claimant details of the charges made against him. Their reason for so doing, confidentiality of the complainants, was patently invalid since if the complaints had substance, the Claimant would know their identity. He was not given an opportunity to present an effective defence,

(b) there was a rush to judgment by Mr Findlay, giving the Claimant and his representative no opportunity to put forward any defence in the window 19-25 March.

(3) There would be no deduction under the Polkey principle since the Tribunal were not provided with the information which was before Mr Findlay and the appeal panel. The Tribunal was not prepared to speculate as to the possible outcome of a fair procedure in these circumstances.

(4) Similarly, there was no evidence led to support the conduct alleged against the Claimant, either for the purposes of a finding of contributory conduct or to establish cause in answer to the claim of Wrongful Dismissal.

Further Conduct of the Proceedings

17. The question of remedy was adjourned to 7 March 2005. On that day the remedy issue was further adjourned to 13 June. Shortly before that hearing the Respondent applied for a review of the Tribunal's First Judgment, having already entered this appeal to the EAT.

18. A review hearing took place on 13 June. The basis of the application centred on a report from a Consultant Psychiatrist, Dr Hallstrom, dated 27 May 2005, which had been commissioned at the instigation of the Tribunal at 7 March hearing. It was contended that material contained within that report relating to the Claimant's medical history would have had a significant effect on the Tribunal's earlier decision. Having considered the application, which was opposed, the Tribunal affirmed their first judgment.

The Appeal

19. Arising out of the Review hearing and the Tribunal Judgment the Respondent served an Amended Notice of Appeal adding two further grounds. No objection was taken procedurally
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to that proposed amendment on behalf of the Claimant, notwithstanding that no formal Notice of Appeal was lodged separately against the Tribunal's Review Judgment and accordingly we granted the Respondent permission to amend. Thus the appeal now before us raised eight separate grounds of appeal.

Having pre-read the papers and the helpful skeleton arguments lodged by both counsel the argument before us focused first on the question as to whether, in relation to the Tribunal's finding of Unfair Dismissal, the Tribunal had properly applied the law in asking itself and answering the fairness question under section 98(4) **ERA**.

20. At paragraph 6 of their reasons for the First Judgment the Tribunal, having earlier set out section 98 **ERA** in full, directed themselves that their function was to apply the clear language of the legislation, "for which case-law is no substitute". They then went on to say that they bore in mind the guidance contained in cases such as **British Home Stores v Burchell** [1978] IRLR 379; **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439 and **Post Office v Foley**; **HSBC Bank v Madden** [2000] IRLR 827 and **Sainsbury v Hitt** [2003] IRLR 23, particularly (per Mummery LJ, para 30), the proposition that the objective standard of the reasonable employer applies equally to the question of investigation by the employer as it does to the reasonableness of the decision to dismiss in a conduct case. Reference was also made to the Court of Appeal decision in **Hussain v Elonex PLC** [1999] IRLR 420 and the EAT decision in **Asda Stores Limited v Thompson (No.2)** [2004] IRLR 598. Finally, on the law, they added that they were unaware (as are we) of any case in which a tribunal or the higher courts have had to consider the fairness of a disciplinary process in which the employers have denied the Claimant the basic details of allegations on the ground that it was necessary to do so in order to keep secret the identities of the complainants. In that sense the case before this Tribunal raised a new point.

21. By way of amplification, we have been referred to the original case dealing with protecting the identity of informants, that is **Linfood Cash and Carry Ltd v Thompson** [1989] IRLR 235 (EAT) in which Wood P set out some guidance to employers faced with balancing the need to protect informants who are genuinely in fear of reprisals and, on the other hand, giving the employee accused of misconduct a fair hearing, which involves knowing the nature of the case against him. At this stage we simply note that what was to be protected was the identity of informants, not complainants. A similar issue arose in **Ramsey v Walkers Snack Foods Ltd** [2004] IRLR 754. **Asda Stores v Thompson (No.2)** was concerned with disclosure of witness statements made by informants, who had been promised confidentiality, during an investigation by the employer into allegations involving the supply of illegal drugs at company-organized events. **Hussain v Elonex** raised a question as to the reasonableness of the employer's investigation into an alleged assault where the accused employee was not provided with written statements from employees who had allegedly witnessed the incident.

22. Mr Greatorrex' first point in the appeal is that the tribunal's self-direction themselves that case law was no substitute for the words of the statute and merely guidance amounted to an error of law. This Tribunal was bound by the higher Courts' interpretation of section 98(4) **ERA** and was obliged to apply that interpretation to the facts and circumstances of the particular case.

23. We should not, without more, be inclined to accept that submission standing alone. The law is now well-settled, it was referred to in a judgment prepared on behalf of the Tribunal by its very experienced Chairman; the real question, we think, is whether the law was properly applied in this case. It is at this point that we consider Mr Greatorrex is on stronger ground.

24. The material reasoning of the Tribunal, having found that the Respondent established a potentially fair reason for dismissal (conduct) is wholly contained within paragraph 9.2 of the First Judgment Reasons. We should set it out in full.

“9.2 The Respondent’s did not, however, act reasonably in treating the reason as sufficient to justify dismissal. There was no sustainable ground on which to deny the Claimant details of the charges against him. The ground relied upon, namely the need to protect confidentiality, was patently invalid since, if there was any substance in the allegations, the Claimant must know the identities of those raising complaints against him. Natural justice required that he be made aware of when, how and against whom the threats were said to have been made. Had details of the charges been given, he would have been able to mount a proper defence. As it was, he was left with bare denial, reliance upon his record to date and some character evidence. The failure to inform the Claimant of the case against him was, in our view, grossly unfair. Moreover, the Respondents (by Mr Findlay) compounded the unfairness of the disciplinary process by ignoring the observations in the letter of 24 March concerning the Claimant’s medical state and rushing to judgment on 29 March without giving him any opportunity at all to be heard. There was no need to decide his fate so soon, and every reason to believe (given the series of recent events summarised above) that the Claimant was, as his representative had said in terms, not fit to attend a meeting in the limited period which Mr Findlay had proposed in his letter of 19 March, or to take any other effective step to defend his interests.”

25. Does that approach accord with the principles emerging from the cases to which the Tribunal referred in applying section 98(4) **ERA**, summarized in the first sentence of paragraph 9.2 of their Reasons? In our judgment it does not.

26. First, the Tribunal does not address expressly stages 2 and 3 of the **Burchell** test, approved in **Madden**; did the employer have reasonable grounds for his belief that the employee was guilty of the misconduct alleged following a reasonable investigation?

27. That omission would not of itself render the Tribunal Judgment unsound in law, provided that the basis on which their finding of unfairness was made is itself sustainable. In our judgment it is not.

28. We return to the approach of the Court of Appeal in **Sainsbury v Hitt**. At paragraphs 23-24 Mummery LJ referred to the earlier Court of Appeal decision in **Whitbread v Hall** [2001] IRLR 275, in which Hale LJ said (paragraph 16) of section 98(4):

“...there are both substantive and procedural elements to the decision to both of which the “band of reasonable responses” test should be applied.”

29. In the present case the Tribunal, having failed to make a finding as to whether this employer’s decision to dismiss was made on reasonable grounds following a reasonable investigation, instead concluded that failure to provide the Claimant with details of the serious allegations made against him and a “rush to judgment” led to a “profoundly unfair dismissal”. What is missing from that analysis is an assessment of whether the procedure adopted by the employer in the particular circumstances of this case fell within or outside the band of reasonable responses. That band may include some reasonable employers who would have disclosed the witness statements taken from the five complainants, either in full or in redacted form, or in some other summary form and others who would not, given the promises of confidentiality made by the Respondents to those complainants based on their fears and concerns for themselves and their families.

30. What this Tribunal did, impermissibly in our view, was to substitute their view for that of a reasonable employer. They simply found that if the complaints were true then the Claimant would know who those complainants were. In that way they rejected the Respondent’s reason for not disclosing the material in their possession.

31. The correct approach, based on binding authority, in our view, required the Tribunal to make clear findings as to the extent of the Respondent’s investigation into the reasons why the complainants insisted on anonymity and then to carry out the balancing act between the

Respondent's perceived need to protect the identity of the complainants and the natural justice requirement that the Claimant should know sufficiently the nature of the case against him, applying the band of reasonable responses test.

32. Mrs Winstone raises a powerful argument for the proposition that, applying the correct test, the result would be the same, whilst acknowledging that the Tribunal has not expressly addressed the questions which necessarily arise in this case. She submits that, applying the principle in **Dobie v Burns** [1984] ICR 812, the result was plainly and unarguably correct. Here, the Respondent gave the Claimant no opportunity to properly defend himself; first, because he was not made aware of the detail of the charges against him and secondly because, in the event, the Respondent proceeded to dismissal, without a hearing, at a time when the Claimant was unwell. In these circumstances, she submits, dismissal plainly fell outside the range of reasonable responses. We see the force of those submissions; however we are not persuaded that such an outcome is so plain and obvious that we can affirm the decision below notwithstanding the Tribunal's flawed approach. Equally, we reject Mr Greatorex' contention that the result was plainly and unarguably wrong. In short, we have concluded that the proper course is to set aside the finding of unfair dismissal and to remit that question for rehearing by a fresh Tribunal. We do so because this Tribunal has expressed trenchant views as to the merits of the claim such that it would not right to remit the case to the same Tribunal.

33. It necessarily follows that the Tribunal's further findings in relation to the **Polkey** principle and contribution must also be set aside, as must the Tribunal's findings on remedy (yet to be promulgated).

34. That leaves one final matter. Mrs Winstone submits that the Tribunal's finding that the Claimant was wrongfully dismissed raises separate issues from the Unfair Dismissal question and that there is no basis in law for setting aside that finding made in the Claimant's favour.

35. True it is that the question here is not one of reasonableness, but of fact; has the Respondent established the misconduct alleged so as to found the contention that the Claimant was in repudiatory breach of the contract of employment? As to that, the Tribunal found (First Judgment Reasons, paragraph 10) that the Respondent had not established any act on the part of the Claimant worthy of censure; indeed, at paragraph 9 they "unhesitatingly and emphatically acquit him of any wrong doing".

36. That finding was a subject of the review hearing. At that hearing evidence was adduced, following Dr Hallstrom's report, of the Claimant's medical history. It included, for example, a letter from his GP dated 24 June 2002, referring the Claimant to a Consultant Psychiatrist, in which the doctor said of the Claimant:

"He is constantly getting aggressive with members of his family, his work mates and more significantly he is exhibiting severe examples of road rage."

37. At the review hearing the Claimant was cross-examined on his medical history. The Tribunal deal with this aspect at paragraph 14 of their Review Judgment reasons. They accepted that some of the new evidence raised questions about the accuracy of some parts of the Claimant's evidence and disclosed a "minor psychiatric history" but, taken in the round it did not cause them to alter their original finding that the Claimant was not guilty of the serious criminal offences of threats of extreme violence of which he was accused.

38. It is not for us to re-try the evidence. However it seems to us that the Tribunal's conclusion at the review hearing was to some extent informed by their conclusion that there was no warrant for the Respondent to maintain the anonymity of the complainants. A different Tribunal may not take that view. It will then be in position to assess the hearsay evidence, admissible before Tribunals, of Mr Findlay as to the complaints which he received, taken with the medical evidence and history, in determining whether or not the Respondent has satisfied the burden of establishing repudiatory conduct.

39. We further accept Mr Greator's submission that it would be undesirable for the next Tribunal hearing the Unfair Dismissal claim afresh to be bound by the first Tribunal's finding of Wrongful Dismissal and questions of issue estoppel which that may raise.

40. In these circumstances we shall allow this appeal and remit all outstanding issues to the fresh Tribunal for rehearing.