

Appeal No. UKEAT/0187/06/MAA

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 8 September 2006 and
21 December 2006
Judgment handed down on 14 March 2007

Before

HIS HONOUR JUDGE PUGSLEY

DR K MOHANTY JP

MR T MOTTURE

LONDON BOROUGH OF SUTTON

APPELLANT

MR J W KESTER

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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For the Respondent

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SUMMARY

Unfair Dismissal - Reasonableness of dismissal

Practice and Procedure – Perversity

Substitution by Employment Tribunal of its own view. This case concerned the dismissal of a quite senior management employee by Council. The issue was whether the Employment Tribunal had substituted its own view.

HIS HONOUR JUDGE PUGSLEY

1. This case came before us on 8 September 2006. We were unable to finish hearing the case and it was necessary for more documentation to be put before us. That documentation was put before us on 21 December. We heard argument and we adjourned the case until 18 January so we could consider the case in chambers.
2. In para 7 of its decision, the Tribunal found that the Claimant had commenced work with the Respondent on 3 August 1998 as manager of an independent unit within the Respondent Local Authority. In or about October 2003, the human resources department became aware that there were a number of issues emanating from the Claimant's department. Certain of these centred upon the erratic behaviour of one female employee and there were concerns at the high level of stress within the department. The human resources department sought the advice of a Ms Farragher and a formal investigation took place. As a result of that investigation the Claimant was suspended and there were disciplinary charges relating to him. These related to recruitment and failing to manage office problems. There was then a further disciplinary investigation of financial mismanagement of his department. The Tribunal set out its findings of fact in relation to dismissal and why it found that dismissal unfair in paras 13 onwards in its decision:

"13. The unauthorised recruitment allegation comprised two separate incidents.

In relation to Judith Lock's appointment, the Claimant was not on the panel which interviewed her and was not part of the decision making process. He had been in the room during the interview because he had been asked to be present as an observer by his own line manager Mr. Pote-Hunt. Ms Lock did not in fact succeed in her application for the post – this decision being taken by Mr Pote-Hunt.

Ms Lock was given another post some months later. This latter occurred without interview but in accordance with the Respondent's procedures which allowed a 'suitable' applicant (Ms Lock had been graded suitable after her interview) who had reached the required standard at a recent interview to be posted to a vacancy.

13.1 Fiona Ledden investigated the 'stress levels' in the Claimant's department and in so doing uncovered a number of matters which were on the face of it irregular. It is clear from that investigation (384) (which we do not criticise for its thoroughness) that most of the problems within the department involved one female employee who was difficult to manage. No attempt was made to deal with this reluctant employee or to resolve her difficulties. The report recommends that the Claimant should be disciplined for the

appointment of Judith Lock despite the fact that the decision to appoint the latter was not even made by the Claimant.

13.2 Other reported issues e.g. in relation to recruitment suggested that there might be a prima facie case for the Claimant to answer in relation to irregularities but Ms Ledden recognised that there were mitigating circumstances. However Ms Farragher seemed not prepared to give the Claimant any concessions and instigated disciplinary proceedings against the Claimant and commenced a management investigation into his department's finances.

13.3 The Claimant was criticised for not having declared his relationship with Joy Pugh. The relationship was platonic and did not start until after Ms Pugh's recruitment. There is nothing contained within the Respondent's manuals, as presented to the Tribunal, to say that an employee must declare the existence of a relationship to his/her line manager.

13.4 In relation to Joy Pugh's appointment she had been working for the Respondent on a temporary contract at the time when a vacancy occurred. The Claimant interviewed Ms Pugh and asked her to continue to work for Eco-Actif for two days a week. He asked Personnel to issue her with a temporary three month contract. Personnel did not advise the Claimant to advertise the position nor did they arrange for the post to be advertised internally. A further temporary contract was later issued to Ms Pugh on the authority of Janet Worth. Subsequently Eco-Actif was awarded Beacon status which necessitated the employment of a co-ordinator. The vacancy was for a job for which Ms Pugh was well suited since she was already familiar with the work. No-one else on the staff at that time had the necessary experience. The appointment of Ms Pugh would assist the Respondent financially since it meant that part of her salary would be funded by the Beacon project rather than by the Respondent. Again this appointment was ratified by Ms Worth. Ms Farragher was also aware of the appointment and made no comment on it at the time. At the time of this appointment the Claimant was not in a relationship with Ms Pugh although a platonic relationship later developed between them. Other temporary appointments had been dealt with in a similar manner (339) and it is entirely unreasonable to discipline the Claimant over appointments which were in line with Council policy and practice and which had been approved by his own line manager.

13.5 The Claimant was also charged and found guilty of failing to deal with management issues. This loosely worded charge appears to relate solely to the disruption being caused in the office by the instability of one female member of staff. We heard evidence from a number of the Respondent's employees or ex-employees and the impression we gained from their corroborative evidence was that the vast majority of the problems in the office related back to the disruption caused by this one staff member (JL) who was experiencing personal and family problems. The Claimant was not the immediate line manager of the offending member of staff and supported Amanda Palmer Roye whose responsibility it was to line manage this particular employee. The employee was disciplined by Ms Palmer Roye. A number of staff in the department had made formal complaints about this member of staff (and notably not about the Claimant) and the stress levels were undoubtedly high which led to an investigation being instigated by Ms Farragher. Ms Pugh was transferred forthwith (no reasoned explanation for this was ever given) causing extra work on an already pressurised department. The Claimant was aware of the problems within the department which were being caused by JL and had been in discussions with Personnel relating to the resolution of the problems. He had also authorised counselling for JL to be paid for out of his own department's budget.

13.6 Once again we found this to be unreasonable behaviour on the part of the Respondent. The charge was worded as "Dereliction of duty" (615) which is a gross exaggeration of the facts (467). It is evident that the Claimant was aware of and doing his best to deal with the problems caused by the difficult employee in the department. There was no evidence of deliberate abandonment of duty or malfeasance and a charge of dereliction of duty is in the circumstances absurd. We were also impressed by the loyalty shown to the Claimant by his former staff who gave evidence on his behalf. Their demonstrated attitude belies the Respondent's suggestions that the Claimant was negligent (or worse in his attitude to his responsibilities).

13.7 A further charge relating to JL and her son was found not proven on appeal but was taken into account at the appeal hearing as contributing to the overall finding of gross misconduct. It is totally unreasonable to weigh this unproven charge in the balance when considering penalty.

13.8 Charges relating to failure to attend meetings and financial mismanagement were added to the charges before the disciplinary hearing took place but after the Claimant's suspension.

13.9 In relation to the charge of failure to attend meetings, the Claimant was referred to Occupational Health within less than a week after submitting his first sickness certificate. The Respondent did not even wait for that first certificate to expire before seeking a second opinion. The Claimant attended the appointment and his illness was confirmed by the Respondent's doctor. His absence from a meeting on 4 May 2004 was supported by a sickness certificate. A further meeting was scheduled for 9 September 2004 shortly before his disciplinary hearing and the Claimant was advised not to attend the 9 September meeting on the advice of his solicitor. This explanation seems not to have been accepted by the Respondent who added a charge of failing to attend meetings to the disciplinary hearing. In the view of the Tribunal the Claimant provided acceptable reasons for his absence and notified the Respondent of his absence and of the reasons therefore. We consider the charge of failure to attend (which was upheld at the disciplinary hearing and appeal) to be unwarranted and unjustified.

13.10 In relation to the financial mismanagement charges, it is a fact that for the greater part of the period when the Claimant was manager of Eco-Actif, budgets were prepared by his line manager(s). On the departure of Brian Pote-Hunt the Claimant was required to prepare them himself. This was a job of which he lacked experience and the budgets prepared by the Claimant were flimsy and speculative and undoubtedly would not have satisfied the rigours of local government accountancy practice. His budgets had however been accepted without question by his superiors and were not criticised until Ms Farragher began her investigation. No help or assistance, or training was offered to the Claimant in this area. Instead he was faced at the disciplinary hearing with an additional charge of financial mismanagement. We consider this charge to be unfair. The budgets prepared by Claimant were inadequate and factually the department was losing money. The charge of mismanagement however implies a deliberate attempt to defraud or deceive and we do not believe this to have been the case. There was no tangible evidence either at the disciplinary or appeals hearings or before the Tribunal or deliberate financial mismanagement of funds but rather the impression of optimistic incompetence in financial affairs. This charge would be better have been dealt with on capability grounds rather than gross misconduct disciplinary action short of summary dismissal seems not to have been considered and should have been.

13.11 Given the above our overall conclusion is that the Respondent pursued disciplinary charges against the Claimant based on a flawed conclusion to an investigation. They attributed problems in the office to the Claimant instead of recognising that the greatest part of those problems lay with a disruptive employee whose direct line manager was being advised and assisted by the Claimant in an attempt to resolve the problems. The Claimant was also blamed for two recruitment decisions which were made not by him but by his line manager. He was also condemned (although not overtly) for having (or having had) two (perhaps in retrospect unwise) friendships with female staff in his own office. The only part of the disciplinary charges which appear to have had any sustainable foundation relates to the financial issues (added as an afterthought to the charges) where a charge of incompetence rather than of gross misconduct would have been more appropriate. The latter charges were added to the disciplinary agenda while the Claimant was genuinely off sick and were dealt with at the hearing before the Claimant had had an opportunity to explain his position. The charges of failing to attend meetings are unsustainable since on each occasion when the Claimant was alleged to have failed to attend meetings are unsustainable since on each occasion when the Claimant was alleged to have failed to attend, he had provided either a sickness certificate or a reasonable explanation for his absence.

13.12 In the light of the above we find that the Respondent's decision to dismiss is beyond the band of reasonable responses which it is open to an employer to take. We have weighed the evidence carefully and are conscious that we must not and have not substituted our own opinions for that of the evidence. The evidence in this case clearly demonstrates that no reasonable employer would have taken the decision to dismiss in similar circumstances.

13.13 We are conscious that in this judgment we have not recited every factual piece of evidence which we heard or which was presented to us. The purpose of our decision is however accurately to record the reasons upon which we have based our decision, that in turn being based upon the relevant law, and this we believe we have done."

3. Mrs Winstone has attacked the decision of the Tribunal on the basis that the Tribunal has misdirected itself as to law and proceeded to substitute its own opinion of the facts before it, effectively rehearing the Claimant's appeal and arriving at its own conclusions. In doing so, it is argued, the Tribunal ignored the employer's case as set out in a comprehensive letter of dismissal and failed to examine the reasonableness of the Respondent's actions.
4. It is further contended that the Tribunal ignored fundamental evidence which was highly relevant to the issues before it and that the Tribunal in effect reached a decision which was perverse, and did not give proper weight to the mass of documentation that there is in the case and the Tribunal did not do justice to the Respondent's own investigation into the issues.
5. We do not consider it is helpful to become bogged down with semantic issues as to the appropriate use of words in a decision. However, reading this decision, it is very clear that this Tribunal thought the Claimant had not been dealt with fairly by the Respondent Local Authority. That sense of outrage on his behalf seems to permeate the whole decision. The Tribunal refer in para 7 onwards to the Claimant being charged and being found guilty by the Local Authority. Reading the decision one cannot avoid the impression that the Tribunal saw the disciplinary process by the Local Authority as a sort of conviction by a magistrate's court and they, as a crown court, were re-hearing all the evidence and free to substitute their view for that of the lower court. The decision is peppered with occasions when the Tribunal makes judgments about their view of the matter and, although at para 13.12 the Tribunal specifically states that they have not substituted their own opinions for that of the evidence, we are bound to say that that direction is more honoured in the breach than the observance.
6. The approach of the Tribunal is illustrated by their reasoning at para 13.3 of the decision. There they note the Claimant was criticised for not having declared his relationship with Joy Pugh. The Tribunal go on to say the relationship was platonic and did not start until

after Ms Pugh's recruitment; they then go on to point out that there is nothing contained within the Respondent's manuals to say an employee must declare the existence of a relationship to his/her line manager.

7. The substitution by a Tribunal of its view of the matter, as opposed to looking at whether the Respondent's actions were within the range of reasonable responses, is not an empty legalistic formula. It goes to the very heart of the function of a Tribunal. Tribunals have neither the experience or the expertise nor the information before them to assume the role of castigating employers, because the Tribunal would not necessarily have acted in that way. If Tribunals are to maintain their credibility with both employee and employer, they must show a suitable modesty about their own role.
8. It is hardly surprising that personal relationships arise out of common experience, be that school or university education, the workplace or a membership of a voluntary organisation whether it be religious or social or sporting. When relationships are formed between people of different areas of responsibility within an organisation, this can cause problems irrespective of any sexual component of that relationship. An employer has a perfectly proper interest in being concerned about relationships being seen to compromise the integrity of their own internal disciplinary and supervisory roles. An employer may legitimately be concerned where the person is a member of a Masonic lodge, a religious church, a political group, and/or a golf club, if that appears to give concern among fellow employees that a particular employee is being either favoured or discriminated against.
9. We do not consider that dealing with the matter as this Tribunal did was in accordance with the **British Home Stores v Burchell** [1978] IRLR 379 guidelines, nor do we consider that it does justice to the complexity of the issues raised in this case. A Tribunal might well come to the view that it did not consider a relationship – whether an explicitly sexual one or a platonic one or one based on a mutual social or religious grouping – was one about which it would make any judgment at all. However, a Tribunal is not required to answer that question but to ask whether an employer's response to the discovery of such a relationship

is a reasonable one. The experience of the Tribunal is that there are many cases where a Tribunal would not have made the judgment the employer made, but cannot for a moment stigmatise the judgment that the employer did make as being outside the ambit of responses of a reasonable employer.

10. We have been referred by Counsel for the Appellant to many areas where it is said the Employment Tribunal decision did not give justice to the aspects of evidence for it.
11. We are extremely grateful that Ms Rebecca Quayle (a city solicitor who is appearing under the Free Representation Unit) has assisted us with representing the Claimant. Both in oral and written argument, she has pointed out that there are parts of this appeal which are no more than a bare-faced attempt to re-litigate issues of fact which were determined to the employer's detriment by the Respondent.
12. If we may say so, we accept those contentions in that we do not consider (having spent considerable time going through the documentation that was before the Tribunal) that the general charge of perversity is made good; we do not consider it can be said that the findings reached by the Tribunal were perverse in the way alleged. There is copious authority - to which we neither need to refer, nor to which we consider we can add anything useful - to say that perversity is a difficult argument to sustain. The place and weight to be given to a particular piece of evidence is a matter for the Tribunal, which has all the benefit of seeing witnesses and making judgments of fact.
13. It may be that it was open to this Tribunal to find unfair dismissal; it may well be that a future differently composed Tribunal may find this Claimant was unfairly dismissed. However, we have to say that in this case, the substitution by the Tribunal of its own view was such that we have to allow this appeal.

14. This is not a decision we have reached lightly; it is not a decision which we have reached without being very well aware of the consequences, in terms of public money and the like, that our decision will cause.
15. However, this is not a case of a bit of careless drafting where it is palpably obvious that the Tribunal were carrying out the approach in the correct way. We cannot in this case say that, despite its protestations to the contrary, the Tribunal properly approached this by looking at consideration of the proper **Burchell** test of what was within the range of reasonable responses as opposed to substituting its own view.
16. We consider that in this case the appeal should be allowed and that it should be reconsidered by a differently constituted Tribunal. We are not persuaded that this Employment Tribunal decision would have been the same if the Tribunal had adopted the correct test of judging the case against the view of the reasonable employer rather than substituting their own view on crucial issues. Equally, as we have indicated, we are not seeking in any way to suggest that any new Tribunal considering this matter could not reach the same conclusion as this Tribunal did, namely that this was an unfair dismissal. This case should be approached on a completely open basis.
17. We would point out that we consider this is eminently a case where the parties should try to reach settlement between themselves, if this is at all possible. We are mindful of the cost, both in terms of emotions and money, of this type of litigation and we hope that a mediated compromise could be effected.
18. Our decision is that the appeal is allowed and the case is to be heard by a differently constituted Tribunal. After the lapse of time and the basis upon which we have allowed this appeal, we do not consider it appropriate to remit to the same Tribunal; that is not in any way a reflection on the integrity of the Tribunal but we doubt very much whether it is realistic in a case of this sort to return it to the same tribunal. We therefore direct it goes to a differently constituted Tribunal.

