Appeal No. UKEAT/0282/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 May 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MS I ELSTON — APPELLANT

(1) ROBBIE'S PHOTOGRAPHIC LTD
(2) MR W MCROBBIE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GUS BAKER (of Counsel) Instructed by: Workwise Legal LLP 40 Sudlow Road London SW18 1HP
For the Respondents	MR BARNABY LARGE (of Counsel) Instructed by: RBS & Natwest Mentor 2nd Floor Kirkstane House 139 St Vincent Street Depot Code 019 Glasgow G2 5JF

SUMMARY

UNFAIR DISMISSAL – Polkey deduction

UNFAIR DISMISSAL – Contributory fault

VICTIMISATION DISCRIMINATION – Other forms of victimisation

The Claimant had taken photographs of invoices she had seen during her work, which she considered established that she had not been told the truth by her employer about her pay and working hours. She provided copies of these photographs to her solicitor, who was assisting with her grievance, but was subsequently dismissed for breach of confidentiality. The ET accepted that the act of sending the photographed copies of the invoices to her solicitor was a protected act but found the Claimant's dismissal was in no way related to that act; to the extent the Respondent had been aggrieved about her conduct in that regard, it was because she failed to demonstrate support in a time of financial hardship. When considering the Claimant's complaint of unfair dismissal, however, the ET found that the reason for her dismissal *was* her conduct in photographing the invoices and then sending those images to her solicitor. Given the context, the ET did not find this was an act of gross misconduct but it held that the decision to dismiss did not fall outside the band of reasonable response given the Respondents' sense of grievance about what was seen as a lack of trust and the Claimant's perceived failure to demonstrate support in a time of financial hardship. The ET went on to find the dismissal had been unfair for procedural reasons but concluded that, if a fair procedure had been followed, there was still an 80% likelihood that the Claimant would have been dismissed. The ET further held that the Claimant's conduct was such that there should be a further 80% reduction. The Claimant appealed.

Held: *allowing the appeal*

In considering the complaint of unfair dismissal, the ET's findings as to the reason for the dismissal were such that it was inconsistent for it to hold that the protected act (the Claimant's

act of sending copies of the invoices to her solicitor) had not materially influenced the decision: that was an unavoidable consequence of its finding as to the reason for the dismissal and it was perverse of the ET to find otherwise. The ET's decisions relevant to the **Polkey** reduction and on contributory conduct were also unsafe. The ET had failed to grapple with the question of seriousness in relation to the Claimant's conduct, failing to demonstrate that it had any regard to the context in which the Claimant had passed on the photographs (for a specific purpose related to getting advice and assistance in her grievance, and sent to a solicitor, who was bound by their own duty of confidence). As for its finding on contributory fault, that was inadequately reasoned given that - in the particular context the ET had itself identified - there was no explanation as to why the Claimant's actions had been blameworthy.

In relation to the victimisation claim, given the ET's findings of fact, there was only one possible outcome and the Judgment in that regard would be set aside and substituted by a finding that the victimisation claim relating to the Claimant's dismissal was upheld. The questions of any reduction under **Polkey** and/or for contributory fault would be remitted for reconsideration to a differently constituted ET.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter gives rise to questions as to the approach to what is often described as a finding of substantive fairness for the purposes of section 98(4) of the **Employment Rights Act 1996** ("ERA"), as well as to the assessment of contributory fault, for the purposes of sections 122 and 123 of the **ERA**. Separately, a question arises in respect of the rejection of a claim of unlawful victimisation, contrary to section 27 of the **Equality Act 2010** ("the EqA") which, in this case, overlaps with the conclusion reached as to the reason for dismissal for the purposes of the unfair dismissal claim.

2. In giving this Judgment, I refer to the parties as the Claimant and the First and Second Respondents, as below. This is a Full Hearing of the Claimant's appeal from a Judgment of the London South Employment Tribunal (Employment Judge Andrews, sitting with Lay Members, Ms Dengate and Mrs Saunders, on 25 and 27 June 2018; "the ET"), sent out on 15 August 2018, by which the ET upheld the Claimant's claim of wrongful and unfair dismissal, but reduced her damages in respect of the unfair dismissal claim by 80%, both under **Polkey** (**Polkey v AE Dayton Services Limited** [1988] ICR 142 HL) and by way of contributory fault.

3. The ET also rejected a claim of unlawful victimisation brought by the Claimant, both in relation to her dismissal and also as regards other acts of alleged detriment. It was accepted that she had performed protected acts for the purposes of section 27 **EqA (**albeit not one that amounted to a relevant pay disclosure for the purposes of section 77 of the **EqA**) but the ET found that this had not been the reason for the Claimant's dismissal.

4. The Claimant appeals against the ET's finding that her dismissal was not an act of victimisation for the purpose of section 27 **EqA**, and also against the findings that resulted in the **Polkey** and contributory fault reductions. The Respondents resist the appeal, relying on the reasoning provided by the ET.

The Facts

5. The First Respondent is a small, high street photography printing and framing business, owned by the Second Respondent, who is its sole director. At the time of the events in question, the First Respondent had a workforce of seven, including a mixture of employees and self-employed contractors, and operated over two sites (numbers 2 and 8 Riverton Road).

6. The Claimant is an experienced picture framer who commenced employment with the First Respondent in May 2006, albeit having a wider remit than simply framing pictures. By the time of the events with which the ET was concerned, the Claimant was being paid £10.50 an hour. Her working hours had varied during her employment but, in April 2016, had been reduced to four days a week and, in August 2016, further reduced to three days a week. On neither occasion, had the Claimant been given proper notification of this and this was an issue that had rankled with her.

7. In or about 2015/2016, the First Respondent had experienced a downturn in business and profitability, which had prompted a focus on the performance of staff. In September and October 2016, some performance issues had been raised with the Claimant and she had, in turn, made it clear that she was unhappy about working only three days a week, although she could not commit to working Saturdays which was the only option then offered to her. She also asked to be made Head of Framing.

8. It was against this background that, in early November 2016, the Claimant happened to see a general invoices file - something to which she had access as part of her role - which included an invoice from a Mr Kelman for framing services provided to the Respondents at a rate of £12.50 per hour.

9. On 10 November 2016, the Second Respondent responded to the Claimant, explaining why he was not willing to make her Head of Framing. A few days later, on 14 November 2016, the Claimant was passing number 8 Riverton Road, and saw Mr Kelman inside, apparently working. That was on a Monday, when the shop would normally be closed, and she went in to ask him if it was open and whether he was doing framing. He told her that the shop was closed but she should speak with the Second Respondent. On 22 November 2016, the Claimant sent a grievance to the Second Respondent raising concerns as to the reduction in her working week, about pay rises given to others, and about the apparent employment of a freelance picture framer to work on Mondays without returning the Claimant to her full hours. The Respondents accepted this grievance amounted to a protected act for section 27 **EqA** purposes. A grievance meeting was arranged and to ensure impartiality, this was to be conducted by a Mr Leslie, a self-employed financial adviser to the Second Respondent and the husband of an employee of the First Respondent. Before this took place, however, Mrs Leslie met with the Claimant, on 20 December 2016, and a discussion took place about the companion the Claimant intended to bring to the grievance meeting. When the Claimant explained this was a solicitor (albeit someone who specialised in probate rather than employment law), Mrs Leslie responded in a way that the Claimant perceived to be aggressive. The Second Respondent subsequently wrote to the Claimant confirming she could attend the grievance meeting with either a work colleague or a trade union representative but not the solicitor.

10. On 23 December 2016, solicitors instructed by the Claimant wrote to the Second Respondent alleging that their client had been aggressively questioned by Mrs Leslie. They also confirmed the complaints raised by the Claimant's grievance which included her concern about younger colleagues being paid at a higher rate, indicating age, and sex discrimination. Again, the Respondents accepted this amounted to a protected act for the purposes of section 27 **EqA**.

11. In the meantime, the Claimant had taken photographs of Mr Kelman's invoices, which she subsequently passed to her solicitors.

12. The hearing into the Claimant's grievance took place on 17 January 2017 and Mr Leslie subsequently responded to the Claimant by a lengthy letter of 31 January 2017. The majority of her grievances were rejected but Mr Leslie accepted she had not been given the correct notice of the changes to her working week and confirmed that if the First Respondent was unable to offer her five days' work every week, she could work for other framing companies. As for Mr Kelman, Mr Leslie confirmed that the Second Respondent had told him that he had contracted a self-employed picture framer for one day's work during the Claimant's holiday period and that framer had then approached the Second Respondent asking to use the machinery for personal work, which had been agreed.

13. On 21 February 2017, the Claimant's solicitors wrote to the Second Respondent enclosing her grounds of appeal for Mr Leslie's decision and referring to the invoices relating to Mr Kelman that seemed to contradict what the Claimant had been told. The invoices showed Mr Kelman charging the First Respondent, on 6 December 2016, 39 hours of framing services at £12.50 per hour and on 31 *[sic]* November 2016, for 21 hours at the same rate.

14. The Second Respondent heard the Claimant's grievance appeal on 1 March 2017, acknowledging this was not ideal given that some of her complaints related to him. On 10 March 2017, he wrote to the Claimant saying he was in the final stages of preparing his response to her appeal, but, in the meantime, needed to make arrangements for an investigation meeting as it had been brought to his attention the Claimant had taken confidential information – i.e. the invoices relating to Mr Kelman.

15. On 13 March, the Claimant responded, explaining how and where the invoices were kept and raising other issues that she had with lack of privacy and data collection. On 17 March, the Second Respondent wrote to the Claimant with the outcome of the grievance appeal. He rejected all her grounds of appeal, upholding the decision of Mr Leslie.

16. On 21 March 2017, a further meeting took place between the Claimant and Mr and Mrs Leslie. This was arranged to discuss her letter of 13 March, which was treated as a second grievance but during the course of the meeting Mr Leslie informed the Claimant that she was to be suspended with immediate effect as she had not denied or apologised for taking the invoices. Letters were later sent out to the Claimant the same day inviting her to a meeting in respect of her second grievance and to a disciplinary hearing in relation to the allegation that she had taken confidential information without permission. Those meetings took place on 23 March with Mr Leslie, first dealing with the Claimant's grievance and then with the disciplinary allegation. As to the latter, the Claimant explained she had permission from Mrs Leslie and the Second Respondent to search files for product invoices and thus had permission to look at the files. She agreed, however, that she did not have permission to pass those documents on to a third party - her solicitor. Although she confirmed that she had since deleted the photographs

from her phone, she believed she had had good cause for acting as she had. When she was asked whether she was sorry to have done this, she replied that she was and it was out of character for her. Although Mr Leslie did not ask the Claimant whether she would do the same thing again, he inferred that she would have given the same response as she had at the earlier meeting on 21 March.

17. After meeting with the Claimant, Mr Leslie then met with the Second Respondent. It was not considered that anything more could be done in respect of the Claimant's grievance: she had no evidence that anyone had her national insurance number or payslip details. As for the disciplinary hearing, Mr Leslie expressed his view that the Claimant had deliberately disclosed the invoices to her solicitors and no apology had been proffered. He considered any change in behaviour was unlikely and concluded that she was guilty of gross misconduct and should be dismissed.

18. The Second Respondent considered the position over the weekend and reviewed all the documents. Having done so, he authorised Mr Leslie to write to the Claimant dismissing her.

19. In his evidence to the ET, the Second Respondent confirmed that had he disagreed with Mr Leslie, he would have overruled him.

20. Mr Leslie wrote to the Claimant on 27 March 2017, informing her that her actions in making and distributing copies of confidential information without permission amounted to gross misconduct and her employment was terminated with immediate effect. He explained that she had offered no apology, shown no remorse and offered no mitigation, concluding:

> **"It is my belief … that you stole the confidential documents to help with an outstanding grievance issue thinking that perhaps the confidential documents would help your case. That being the case, you did this knowing entirely what the consequences of your actions would be,**

> **had you been caught, and knowing it was the wrong thing to do. As a result of your actions, there is now a complete lack of trust and confidence in the employment relationship…"**

21. The Claimant, acting through her solicitor, appealed against that decision. On 7 April, the Second Respondent wrote to her asking her to confirm whether she wished to attend the appeal hearing in person. As the Claimant did not respond, he went ahead and determined the appeal on the papers, upholding Mr Leslie's decision.

The ET's Decision and Reasoning

22. The ET first considered the Claimant's complaint of victimisation. The Respondents had accepted that her first grievance and solicitors' letters of 23 December were protected acts but denied that her actions in photographing the invoices and sending them to her solicitor were protected acts for the purposes of section 27 **EqA**, or protected pay disclosures for the purposes of section 77 of the **EqA**. The ET agreed that section 77 was not engaged in this case but found that sending the invoices to her solicitor was a protected act for section 27 purposes (see paragraphs 85 and 86 of the ET's reasoning).

23. The ET then asked itself what had been the First Respondent's reason for commencing disciplinary proceedings and eventually dismissing the Claimant? In considering this question, the ET noted that its answer would inform its conclusions both in respect of the victimisation claim and the complaint of unfair dismissal. It reasoned as follows:

> **"88. In considering this we have regard to the chronology of events between the claimant's first indication of a possible legal claim (her grievance dated 22 November 2016) and the first indication by the respondent that they regarded her copying the invoices to her solicitor as a serious cause for concern (their letter dated 10 March 2017) - having received the copy invoices in the meantime on or just after 7 March. This includes the outcome of the claimant's first grievance which was partially in her favour and other conciliatory statements made in that outcome letter (e.g. agreeing to release from the anti-compete clause in her contract).**
>
> **89. In those circumstances we conclude that the reason for commencing the disciplinary process, the eventual dismissal and conduct of the appeal was not the fact that the claimant had done any of the protected acts or even that they had a significant influence on those outcomes. Although we recognise that Mr McRobbie was very disappointed by her decision to - as he put it – "go legal", we view this more in the context of the previous close friendship**

that they had and her failure, as he saw it, to cooperate with him to tackle the financial situation that he was facing."

24. Turning then to the Claimant's complaint of unfair dismissal, the ET found that the reason for the Claimant's dismissal was:

"93. …as the respondent submits, her conduct in copying and then sending to her solicitor copies of the invoices. Further we find that both Mr Leslie and Mr Mc Robbie genuinely felt that belief."

25. The ET further found that there had been reasonable grounds for this belief, given that the Claimant accepted she had copied the invoices and then sent these to her solicitor. Although this amounted to misconduct - it was in breach of the confidentiality provisions within her contract - it had, however, been done in a very specific context: the Claimant had raised a grievance which had been rejected for reasons that she believed were contradicted by the invoices. The ET concluded that, although the Claimant should not have copied and sent the invoices to her solicitor, she had done so with a specific issue in mind and had sent them to a professional who had their own duty of confidence; it was an act of misconduct but not gross misconduct and the dismissal of the Claimant without notice thus amounted to a breach of contract (see the ET's findings on the wrongful dismissal claim at paragraphs 103 to 105). That said, for the purposes of the unfair dismissal claim, the ET did not feel able to say that the dismissal had fallen outside the band of reasonable responses given what it found to have been the conclusion of both Mr Leslie and the Second Respondent, that there was a loss of trust and a failure to pull together with the rest of the staff in respect of the First Respondent's financial difficulties.

26. The ET then considered whether the procedure adopted by the First Respondent had been fair, but concluded it had not. Although, it was a very small employer, the Second Respondent had recognised the need to ensure impartiality within the process but had gone on

to make the decision to dismiss himself and then also to determine the Claimant's appeal against that decision; that rendered the decision unfair. That said, the ET considered what would have been the outcome had the Claimant been provided with a fair appeal procedure and concluded that there was only a 20% chance that there would have been a different outcome and it thus reduced her compensation by 80% on a **Polkey** basis. It equally concluded that the Claimant was guilty of misconduct in disclosing invoices when she should not have done so and again assessed that contribution as warranting a reduction of 80%, explaining:

> **"100. …On the facts we find that the claimant was guilty of misconduct in that she disclosed invoices when strictly speaking, she should not have done. There was therefore blameworthy conduct which contributed to her dismissal but conclude that the extent of that blameworthiness is tempered to a limited extent, by the overall context (described below, under wrongful dismissal) and her motives in making the disclosure (seeking legal advice). We assess that contribution as 80%."**

The Relevant Legal Principles

27. The ET was concerned with claims of victimisation, unfair and wrongful dismissal.

28. Victimisation is defined by section 27 **EqA** as follows:

> **"27 Victimisation**
> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act."**

29. When considering issues of causation for section 27 purposes, it is common ground that this does not import a "*but for*" test but requires the ET to determine whether the protected act was a relevant reason for the treatment in question: accepting that there may be more than one motivation playing on the mind of the relevant decision-taker at the time, did the protected act

materially influence (whether consciously or unconsciously), that treatment (here, the decision that the Claimant should be dismissed)?

30. In **Martin v Devonshires Solicitors** [2011] ICR 352 EAT, it was allowed that, for the purposes of establishing the true reason for the treatment in issue, there may be cases where the way in which the employee carried out the protected act would properly be treated as separate from the act itself:

> **"22. … The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the *manner* of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the Managing Director at home at 3 o'clock in the morning. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint…Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had say, used intemperate language, or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately advanced made in some cases does not mean that it is wrong in principle."**

31. In determining the Claimant's victimisation claim, the ET was bound to apply the shifting burden of proof as laid down by section 136 **EqA**, which relevantly provides:

> **"136 Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

In the present case, it is agreed that the ET appears to have proceeded on the basis that the burden had shifted to the respondent to show that the protected act had not been causally relevant to the decision to dismiss: the decision reached was not because of that – that is, it was not materially or significantly influenced by any protected act.

32. The ET then went on to consider the Claimant's claim of unfair dismissal, finding that the reason for her dismissal was properly be characterised as relating to her conduct - a reason that is capable of being fair for the purposes of section 98 of **ERA** (see sub-sections 98(1) and (2)). In determining the question of fairness, sub-section 98 (4) **ERA** then provides:

> **"(4)…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."**

33. In the present case, the Respondents had labelled the Claimant's conduct as amounting to "misconduct" such as would justify her summary dismissal. In determining the wrongful dismissal case, the ET was required to determine whether, objectively speaking, the Claimant had acted in repudiatory breach of the contract of employment. Specifically, was required to decide as a fact whether the Claimant had been guilty of gross misconduct. For the purposes of an unfair dismissal claim, the question for the ET was different. To be capable of being fair, section 98(2) **ERA** only requires that the reason relates to the employee's conduct, it does not have to amount to gross misconduct. In any event, a finding of gross misconduct will not automatically render a dismissal fair, see **Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854 EAT and **Quintiles Commercial UK Ltd v Barongo** UK/EAT 0255/17. That said, the characterisation of an act as gross misconduct is not simply a matter of choice for an

A employer and, in this regard, the Claimant relies on my previous summary of the relevant case law in **Burdett v Aviva Employment Services Ltd** UKEAT/0439/13, as follows:

> **"30. The characterisation of an act as "gross misconduct" is thus not simply a matter of choice for the employer. Without falling into the substitution mind-set warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see Eastland Homes Partnership Ltd v Cunningham UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily."**

B

34. Whether characterised as gross misconduct or not, the employer cannot, in any event, be the final arbiter of its own conduct in dismissing an employee; as Longmore LJ observed in the case of **Bowater v Northwest London Hospital NHS Trust** [2011] IRLR 331 at paragraph 18:

C

> **"It is for the ET to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer."**

D

35. That ability to make that assessment is, however, vested in the ET and not the EAT (see Longmore LJ at paragraph 19 in **Bowater**) and it would be wrong to subject the ET's reasoning to an overly critical analysis scrutinising passages of the reasoning word by word (see **RSBP v Croucher** [1984] ICR 604 EAT).

E

36. Where an ET has found the dismissal to be unfair, it will proceed to consider the question of remedy. In doing so, the amount of any compensatory award shall be:

F

> **"123 Compensatory award**
>
> **(1)…such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

G

37. In determining what is just and equitable for these purposes, an ET is entitled to reduce the compensation by a percentage, representing the chance that the employee would still have lost their employment had the dismissal been fairly carried out (see **Sillifant v Powell Duffryn Timber Limited** [1983] IRLR 91 per Browne-Wilkinson J (as he then was at page 96), cited

H

with approval by Lord Bridge of Harwich at page 163 **Polkey v A E Dayton Services Limited** [1988] ICR 142 ("the **Polkey** reduction").

38. Additionally, both the basic and compensatory awards in an unfair dismissal case can be reduced to reflect the employee's contributory conduct, see sections 122(2) and 123(6) **ERA**. At that stage, the focus is not on the employer's conduct but on that of the employee. As Langstaff J, observed at paragraph 12 **Steen v ASP Packaging Limited** [2014] ICR 56 EAT:

> **"…It is not on the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Employment Tribunal to establish and which, once established, it is for the employment tribunal to establish and which once established, it is for the employment tribunal to evaluate. The Tribunal is not constrained in the least when doing so by the employer's view of wrongfulness of the conduct. It is the Tribunal's view alone which matters."**

39. Determining whether a Claimant's conduct should lead to a reduction in compensation for these purposes, it is first necessary for the ET to find that the Claimant was in some way culpable or blameworthy, see **Nelson v BBC (No. 2)** [1980] ICR 110 CA, p 121, where Brandon LJ provided the following guidance as to what might constitute blameworthy conduct for these purposes:

> **"The concept does not, in my view, certainly involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct, which while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go so far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."**

40. As the EAT made clear in **Steen**, the assessment of contributory fault, both as to the finding of contributory conduct and as to the determination of the amount of any reduction, is for the ET (see **Hollier v Plysu** [1983] IRLR 260, CA) and its reasoning in that regard is to be read in the round, avoiding any pernickety criticism (see per Richardson J in **Feltham Management Ltd v Feltham** UKEAT/0201/16 at paragraphs 55 to 59).

41. Lastly, but importantly, where an appeal against the decision of the ET is pursued on the basis of a perversity challenge, there is a high threshold. There must be an overwhelming case that no reasonable Tribunal, on a proper appreciation of the evidence could have reached the decision in question (see **Yeboah v Crofton** [2002] IRLR 634).

The Appeal and the Claimant's Submissions in Support

42. The Claimant's appeal has been pursued on five grounds, albeit that, for the purposes of this hearing, she has taken grounds one and two together - both relating to the ET's finding that the dismissal was substantively fair, the finding that forms the basis for the ET's **Polkey** reduction. Similarly, grounds three and four have been taken together - both relate to the ET's Decision to make a further 80% contributory fault reduction. Ground five concerns the Claimant's complaint relating to the ET's finding on victimisation.

43. On the first and second grounds, it is the Claimant's case that, save for its finding on the wrongful dismissal claim, the ET failed to reach any determination as to the seriousness of her conduct. By ground one, she complains that in determining that her dismissal was not substantively unfair, the ET erred by taking into account an irrelevant factor, namely her failure to pull together with the rest of the staff in respect of the financial difficulties, (paragraph 95). That was not the reason given in the dismissal letter, or relied on by the First Respondent in the ET3 or in argument before the ET, and it had not been identified in the list of issues, meaning there was an error for the ET to consider it (see per Langstaff J at paragraph 51 **Land Rover v Short** UKEAT/0496/10 and at paragraph 70 in **Chandhok v Tirkey** [2015] IRLR 195); it was not for the ET to conduct a broad assessment of the Claimant's conduct outside the Respondents' pleaded case. In any event, any failure of a Claimant's part to pull together in respect of the financial difficulties could not amount to misconduct and the focus of section 98

had to be on the reason for dismissal (here, the alleged gross misconduct). By ground two, the Claimant contends that the ET also erred by failing to reach its own decision as to the fairness of the dismissal: the test was not whether the First Respondent reasonably considered the conduct to be gross misconduct - it was not for the employer to be the final arbiter of its own conduct in dismissing the employee (see **Bowater** at paragraph 18) - it was ultimately for the ET decide (see **Burdett v Aviva** at paragraphs 29 to 30). The ET ought properly to have first determined whether the conduct in issue was sufficient reason for the Claimant's summary dismissal and then considered whether the First Respondent acted reasonably, in accordance with the substantial merits and equity of the case; it being a rare case where conduct that was insufficiently serious to amount to gross misconduct would warrant dismissal, see per Bean LJ at paragraph 61 **Newfound v Thames Water Utilities Ltd** [2015] IRLR 734.

44. By grounds three and four, the Claimant turns to the ET's finding on contributory fault, contending that it failed to provide adequate reasons in this regard. In general terms, employment litigation would be impossible if employees were not entitled to relay information that would otherwise be confidential to their solicitors; given that solicitors were bound by duties of confidentiality, there could not properly be said to amount to a breach of confidence. Given its findings in the context of the wrongful dismissal claim (that the Claimant had copied the invoices in a very specific context and had then disclosed them to a professional with their own duty of confidence), the ET needed to explain why this was found to be blameworthy conduct (see **Nelson v BBC (No.2)**). Additionally, the ET needed to further explain why it determined that any reduction should be assessed at 80%. In the alternative, the ET's finding of contributory fault and/or finding that the reduction should be as much as 80% was perverse.

45. By ground 5, in relation to the claim of victimisation, the Claimant complained that, having found (i) that her actions in copying the invoices to her solicitor amounted to a protected act, and (ii) that she had been dismissed for doing so, it was perverse of the ET to dismiss the Claimant's victimisation claim.

The Respondents' Submissions in Response

46. In general terms, the Respondents contend that the Claimant is taking an overly pernickety view of the ET's reasoning, contrary to the guidance laid down in **RSPB v Crouch**.

47. Turning to the first ground of appeal - the objection that the ET took into account an irrelevant consideration - the Respondents say the Claimant is misreading the ET's finding in this regard: it was not finding that this was the principal reason for the dismissal, or even an act of misconduct in itself, it was, however, part of the context, as was the loss of trust in the Claimant. The Respondents' pleadings and evidence before the ET provided a sufficient basis for such a finding. The principal reason for the dismissal was as set out at paragraph 95 of the ET's Judgment, but the ET did not err in also assessing context (and see **Bowater** at paragraphs 11 to 12). In any event, even if this was an inappropriate finding, it did not vitiate the conclusion reached (**Jones v Mid Glamorgan CC** [1977] ICR 815 at 826 (c) to (e)).

48. As for ground two – relating to what was said to have been the ET's failure to reach its own decision regarding fairness – it was apparent that the ET had correctly directed itself as to the correct test and the need to question if the conduct was reasonably capable of amounting to gross misconduct (per **Burdett v Aviva**); degrees of misconduct were not a feature of section 98 (see **Quintiles v Barongo**) and even if the Claimant succeeded on this ground it was hard to

see how the ET's finding that she might, in any event, have been fairly dismissed could be challenged as a result – the assessment of that question was for the ET.

49. Turning to grounds three and four, and the argument that the ET's finding on contributory fault were inadequately reasoned, it was wrong to consider paragraph 100 of the ET's Judgment in isolation. The ET had itself cross-referred to paragraphs 103 to 104 and its finding that the Claimant should not have copied and sent invoices to her solicitor; it was entitled to find that conduct was blameworthy and there was adequate explanation for that finding. Moreover, contrary to ground four, there was nothing perverse in the ET's finding the Claimant's challenge did not meet the high test required (see **Yeboah v Crofton**). The ET had paid careful regard to the Claimant's conduct and had been entitled to find that this was blameworthy, given that she had disclosed invoices when she should not have done.

50. As to ground five – relating to the victimisation claim - this was also put as a perversity challenge but, in truth, the Claimant was seeking to re-argue the distinction between act and manner of act (see **Martin v Devonshires**). The ET had permissibly concluded the dismissal was not in response to the doing of a protected act but some feature of it that was entirely separable. The issue was whether the **EqA** element was an operative cause and the answer was that it was not: it was not the protected acts but the Claimant's conduct in copying and sending the invoices that was the reason for the dismissal. In this regard, it was significant that, at paragraph 93, the ET had found the reason for dismissal was the Claimant's conduct in copying, and then sending to her solicitor, copies of the invoices. The Respondents' submission as follows:

> **"… Rather than go through appropriate channels and, following same, the Claimant chose to take matters into her own hands. She clandestinely took photographs of confidential invoices from a self-employer contractor. She had no legitimate business reason to be looking at these. She admitted to this conduct. Based on the facts, information, and evidence obtained during its investigation, the company was accordingly entitled to summarily dismiss her. Its actions were within the band of**

reasonable responses available to an employer in the circumstances and taking into account the size and administrative resources available to the Respondents."

It was apparent that the ET had this in mind; the language that it had used had also focussed on the Claimant's copying of the invoices, which was not part of the protected act found by the ET. If the Respondents had reached the decision in question for reason that was severable from the protected act that was not victimisation. That was what the ET had found here.

Discussion and Conclusions

51. In order to address the issues raised by this appeal, it is necessary to start by looking again at the ET's findings as to the reason for the Claimant's dismissal. In considering her complaint of victimisation, the ET stated its conclusion that this was not because she, "*...had done any of the protected acts or even that they had a significant influence on those outcomes*." To the extent that the protected acts had motivated the Second Respondent's reasoning at all, the ET apparently found that it was only her desire to "*go legal*" that had caused the Second Respondent disappointment, in the context of their previous friendship and, "*her failure, as he saw it, to co-operate with him to tackle the financial difficulties he was facing"* (see paragraph 89).

52. Although the ET did not expressly explain how it approached its task under section 136 **EqA**, it would seem that it assumed that the burden had shifted to the Respondents but found that they had established that the dismissal was by no means related to the Claimant's protected acts.

53. Turning to the Claimant's complaint of unfair dismissal, in contrast with its approach to the question of victimisation, on this claim the ET started not by looking at what had *not*

influenced the First Respondent's decision but focussed on what had been in the relevant decision-takers' minds at the time the decision was taken, concluding that was, "*her conduct in copying and then sending to her solicitor copies of the invoices*."

54. Placing that finding back into the framework of the ET's reasoning on victimisation, an obvious problem arises. The ET had defined the protected act as the Claimant's sending of the invoices to her solicitor (paragraph 86). In then finding that the same act was at least part of the reason, or the principal reason, for unfair dismissal purposes, an obvious question arises as to why the ET then concluded that in no way tainted that decision for the purposes of the victimisation claim.

55. The Respondents say the ET's findings as to the reason for unfair dismissal purposes must be read holistically: in considering the fairness of the dismissal, the ET went on to put this in context – it was part of the loss of trust and the Claimant's failure to pull together with the rest of the staff in respect of financial difficulties (paragraph 95). Where the detriment in question (here, the dismissal) related to the means by which a protected act is carried out, it may well be that it is not the protected act itself that is the issue (see **Martin v Devonshires**); in the present case, the ET had expressly accepted the Respondents' case, which demonstrated that the real issue was the Claimant's failure to follow internal procedures and to, instead, copy confidential information and send that to a third party and that was separable from the more limited protected act of simply sending copies of the invoices to her solicitor.

56. There are, however, numerous difficulties for the Respondents in this respect. First, the ET did not express its reasoning in **Martin v Devonshires** terms. I am told that it was referred to the earlier case law, consistent with **Martin v Devonshires**, but, as Mr Large has fairly

accepted, the ET's reasoning makes no reference to this. The Respondents say this is something that can be implied, but if the ET had found the manner in which the Claimant acted was properly separable from the protected act, it would have been reasonable to expect its decision to make that clear; it does not. Second, even if one looks at the further finding - made for the purpose of the unfair dismissal claim - or imports into the reasoning at paragraph 93 the wider objections raised by the Respondents (which would have included the copying of the invoices, not merely the sending of those invoices to the solicitor), that would not detract from the ET's finding that the reason for the dismissal was, at least in part, for the same conduct that the ET had found amounted to a protected act for section 27 **EqA** purposes (that is, the sending of the invoices to the Claimant's solicitor). Third, and more specifically, when considering the victimisation claim, the ET had not found that the view that the Claimant had failed to cooperate to tackle the Respondents' financial difficulties was untainted by her protected acts. On the contrary, the ET expressly found that the Second Respondent's disappointment in the Claimant in this regard related to her decision to "*go legal"*. Ultimately, whichever way one looks at the ET's findings on the reason for dismissal, it is thus impossible to escape from the link to the protected act.

57. It is right to observe that any Appellant before the EAT faces a high threshold in seeking to establish a perversity challenge. That will particularly be the case where the challenge relates to an assessment carried out by the ET - as the first instance Tribunal of fact - in determining what was the real reason for a particular decision taken by the employer. Here, however, the Claimant's challenge arises squarely from the ET's own finding on reason for the purposes of the unfair dismissal claim. The ET had the advantage of hearing from the relevant decision-takers (the Second Respondent and Mr Leslie) and it determined that the facts and beliefs in their minds, at the relevant time, included the sending of the copies of the invoices to

A the Claimant's solicitor and (albeit not the principal factor weighing on their minds) the Claimant's failure to demonstrate support in a time of real financial difficulty (a failure that was also found by the ET to be related to the protected act - the Claimant "*going legal*"). On its own findings, it was thus simply inconsistent for the ET to find that the Claimant's protected act played no part in the decision to dismiss; on those findings of fact, no reasonable ET, with a proper appreciation of the law, could have reached the conclusion that this had not been a material influence in the decision.

58. I turn then to the Claimant's grounds of challenge to the ET's findings on the unfair dismissal claim.

59. The first relates to the decision that there should be a **Polkey** reduction of 80% on the basis that, had a fair appeal procedure been followed, there was only a 20% chance that there would have been an outcome other than dismissal. As the Claimant's grounds acknowledge, this conclusion arose from the ET's earlier finding that the decision to dismiss the Claimant, although she had not been guilty of gross misconduct, fell within the band of reasonable responses; that is, as it is sometimes described, that it was substantively fair. The ET explained its conclusion in this regard at paragraph 95 of its reasoning. It first rejected the Respondents' assessment of the Claimant's conduct as gross misconduct but, having found that it still amounted to misconduct, the ET did not consider it could find that the decision to dismiss fell outside of the range of reasonable responses. In reaching that conclusion, the ET specifically had regard to the context - from the Respondent's perspective - and what was described as the loss of trust and the Claimant's perceived failure to pull together with other staff given the First Respondent's financial difficulties. For completeness, I should say that I do not find that, in making these findings, the ET thereby went beyond the pleaded case it had to determine; its

reasoning in relation to those matters makes clear that it was permissibly having regard to the broader context.

60. The assessment of fairness is, of course, very much for the ET – indeed, it is tantamount to a finding of fact. The question of reasonableness, however, imports an element of objectivity; an ET does not simply defer to the employer in this regard. And it is apparent in this case that the ET considered the context of a Claimant's conduct - the sending of the invoices to a solicitor, who had their own obligation of confidentiality, and with a specific issue in mind - to be relevant to the assessment of the seriousness of that conduct for the purposes of determining whether it amounted to gross misconduct. There is, however, no indication that the ET then had regard to that context in determining the seriousness of the Claimant's conduct more generally for section 98(4) purposes. That was a relevant consideration and it was part of the circumstances that the ET was bound to consider. More particularly, the determination of reasonableness for section 98(4) purposes requires the ET to have regard to the reason shown by the employer. In this case, however, the reason had a context: the Claimant was seeking her solicitor's advice and assistance in her grievance and needed to show her adviser the documents she had seen. In that context, did the decision to dismiss still fall within the bound of reasonable responses? It is possible that an ET might find that it did, or, at least, that there was a percentage chance that it would have done (perhaps for the wider reasons set out in the Respondents' response) but I am unable to see that the ET had regard to this relevant context when making its assessment of reasonableness in this case. That being so, I agree with the Claimant that the ET's finding under **Polkey** is rendered unsafe.

61. Similarly, when turning to the ET's finding of contributory fault, while I can see that it might have been open to an ET to find that the Claimant had been blameworthy in copying the

invoices, that is not how the ET chose to express its finding of contributory conduct. Instead, the ET focussed on the Claimant's disclosure of the invoices to her solicitor. Given that, as the ET went on to find, this was for an entirely legitimate purpose and the Claimant's solicitor would be bound by their own duty of confidence, I am unable to see how this particular act can be said to be blameworthy. The Respondents say that the ET's reasoning needs to be read holistically, incorporating its findings under the heading of wrongful dismissal, which included the act of copying the invoices. That might be right, but the fact remains that the ET's decision was stated to have been informed by the provision of the invoices to the Claimant's solicitor, which begs the question as to why that aspect of her conduct was blameworthy? Allowing that the ET's wider reasoning might provide some basis for a finding of contributory conduct, I do not find that the Claimant's case has met the high threshold for perversity challenge under this head. I do, however, allow the appeal against this finding on the adequacy of reasons ground.

Disposal

62. For the reasons provided, the appeal is allowed on grounds 2, 3 and 5.

63. In relation to the victimisation claim, given the ET's findings of fact, I consider that only one outcome is possible and the ET's Judgment in that regard will be set aside and substituted by a finding that the victimisation claim relating to the Claimant's dismissal is upheld. The questions of any reduction under **Polkey** and/or for contributory fault will, however, need to be remitted for reconsideration. Having regard to the guidance provided in **Sinclair Roche & Temperley v Heard and anor** [2004] IRLR 763 EAT, I am satisfied that this should be to a differently constituted ET. The findings of fact made by the ET have not been disturbed, the issues on remission require an assessment to be carried out on the basis of those facts; that does not have to be carried out by the same ET. Sometime has now passed since the original hearing and the saving of time and the question of proportionality are

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therefore neutral considerations in this case. I have, however, found that the ET's approach in certain respects was fundamentally flawed and, although I do not doubt this ET's professionalism, there is bound to be a danger that, if this matter was remitted to the same ET, this would be seen as simply giving it a second bite at the cherry. On balance, therefore, I consider that the remaining issues to be determined should be remitted to a differently constituted ET.

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