Judicial Communications Office

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COURT OF APPEAL QUASHES DECISION OF INDUSTRIAL TRIBUNAL

Summary of Judgment

The Court of Appeal today upheld an appeal by a nurse against a finding by an Industrial Tribunal that her use of an inhaler from a medicine cupboard on a ward was misconduct and that she had not been unfairly dismissed.

Caroline Connolly ("the appellant") was a nurse in the Acute Medical Unit in Altnagelvin Hospital. On 7 October 2012, whilst at work, she felt the onset of an asthma attack and used a Ventolin inhaler that she took from a locked cupboard in the medicine room in the ward. She did not inform the Ward Sister that she had taken the inhaler but said the sister had given her a non-prescription cough linctus on a previous occasion. She told the Ward Sister what she had done when she was next on duty on 9 October and said she intended to replace it from her own prescription. The appellant was informed on 10 October that she was suspended from work with immediate effect pending further investigation. She was dismissed following a disciplinary hearing on 21 June 2013 by reason of gross misconduct.

The appellant appealed against the decision to an Appeal Panel of the Western Health and Social Services Board. It confirmed the decision to dismiss her. The decision has since then been upheld by the Industrial Tribunal ("the Tribunal"), set aside by the Court of Appeal and subsequently upheld again by the Tribunal in December 2016. It was that decision which was the subject of this appeal.

The Law

Article 130(1) of the Employment Rights (Northern Ireland) Order 1996 provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal. Where the employer has done this, the determination of whether the dismissal is fair or unfair will depend on whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined "in accordance with equity and the substantial merits of the case". Ascertaining what the reason is, where that is in dispute, is likely to be principally or wholly an assessment of facts. Reaching a conclusion as to whether the dismissal is fair or unfair involves a mixed question of law and fact. The question in each case is whether the Industrial Tribunal considers the employer's conduct to fall within the band of reasonable responses.

The role of the Court of Appeal is not to conduct a rehearing and, unless the factual findings made by the Tribunal are plainly wrong or could not have been reached by any reasonable

tribunal, they must be accepted. The Court's role is confined to considering whether the decision of the Tribunal was wrong in law or the conclusions on the facts were "plainly wrong" or with "no or no sufficient evidence to found them". The Tribunal in this case, having set out the history of the matter and the relevant law and some considerations, stated:

> "We accept the [Trust's] submissions that this case involved an admission of guilt and that although misconduct can take many forms there is no hierarchy in the range test."

Lord Justice Deeny's judgment

Lord Justice Deeny said this comment has to be viewed with caution: "It is clear that in one sense there is a hierarchy or graduation i.e. from minor misconduct which could not possibly justify dismissal ranging up to gross misconduct about which, again, if proved, there could be no argument." The tribunal must, in considering whether the employer's decision fell within the band of reasonable responses determine that "in accordance with equity and the substantial merits of the case" as required by Article 130(4)(b) of the 1996 Order.:

> "I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning."

Lord Justice Deeny stated that the employer in this case had delegated to a disciplinary panel the decision on what sanctions should be imposed on the appellant after her use of the inhaler. The Disciplinary Panel decided in favour of summary dismissal. The Court of Appeal, however, has previously concluded that the panel's decision and the investigation were flawed. Counsel for the Trust ("the Respondent") accepted that by the time of the second Industrial Tribunal it could not stand over the Disciplinary Panel and the investigation but argued that the Appeal Panel remedied any defects. The judge said it appeared indisputable that the appeal process was fatally flawed in the following respects:

- There had been complaints by and against the appellant and there were un-redacted matters in the papers arising from those exchanges which were prejudicial to her. The Tribunal heard evidence from one of the Appeal Panel members and accepted that the un-redacted material was not read or taken into consideration in its decision. Lord Justice Deeny said the other Appeal Panel member should also have given evidence before the Tribunal so it could assess whether she had been coloured

consciously or unconsciously by unfair and prejudicial material. He said this undermined the claim that the appeal process had remedied earlier defects.

- The Appeal Panel member who appeared before the Tribunal had drawn the conclusion that the appellant was going to replace the inhaler she had used without telling anyone and that that would be a serious matter involving the chain of supply. Lord Justice Deeny, however, said there was no evidence that that is what the appellant intended to do: "There is no finding of fact to that effect. It should not therefore have been taken into account against her."
- The appellant contended that the investigation, disciplinary and appeal processes failed to investigate and establish if there was a culture of staff using Trust drugs for personal use. This point was not advanced at the appeal hearing apart from the appellant's comment that the Ward Sister had previously offered her a cough medicine from ward stock. Lord Justice Deeny said the Tribunal had failed to consider whether an employer, through the Sister who gave medicine, albeit non-prescription medicine from hospital stocks to the appellant without, apparently, thinking there was anything improper about that, would be acting wholly unreasonably in summarily dismissing the same employee who at a slightly later time uses an inhaler for her chest condition:

> "Clearly there is a distinction between prescription and non-prescription drugs but it appears wholly disproportionate for one action to be lawful and permissible and the other action to be visited with summary dismissal, particularly in the case of a relatively inexperienced nurse with no previous disciplinary findings against her. I conclude that the Tribunal's findings in these three respects were based on "no or no sufficient evidence" and were "plainly wrong"."

Lord Justice Deeny recognised that the appellant had been before two of the Respondent's appeal panels and two Industrial Tribunals and failed to find favour with any of them. The facts are that she took five puffs of the inhaler when undergoing an asthmatic attack without permission and that this was aggravated by her failure to report the matter until two days later. The judge considered this could not constitute "deliberate and wilful mis-conduct" justifying summary dismissal. He stated that the appellant's Terms of Employment did not seem to have expressly prohibited such a use and the Code of Conduct was ambiguous at best on the topic. He commented that if she had asked the Ward Sister for permission before she used the inhaler, the Sister had refused her permission and she had nevertheless gone ahead and used it, it could be contemplated as an act of disobedience as it would have been "a deliberate flouting of essential contractual conditions i.e. following the instructions of her clinical superiors". He further commented that dismissals for a single first offence must require the offence to be particularly serious:

> "Given the whole list of matters which the employer included under the heading of Gross Misconduct it is impossible, in my view, to regard the nurse's actions as "particularly serious". Any dismissed

> employee opting to go into a court of law and claim damages for breach of contract at common law against an employer who had summarily dismissed them for using a Ventolin inhaler while suffering from an asthmatic attack and delaying two days in reporting that, particularly when it was their 'first offence' could be tolerably confident of success before a judge, in my view. It seems to me therefore that this is one of those cases where the conclusion reached by the Tribunal was "plainly wrong" and one that no reasonable Tribunal ought to have arrived at."

Lord Justice Deeny said the interpretation of Article 130(4)(a) of the 1996 Order has been fixed by a series of appellate courts over the years. Whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer. He said that tribunals need to read this alongside Article 130(4)(b) which states that that decision "shall be determined in accordance with equity and the substantial merits of the case". Those words provide a protection to both employees and employers. They are a protection to the employee where the employer, usually acting through other employees with delegated power, acts with a genuine belief in what they are doing but in a way that is inequitable and contrary to the substantial merits of the case. Article 130(4)(b) is also a protection to the employer as it conveys that even if an employer is guilty of one or more errors in procedure that should not be equated with unfair dismissal unless those errors have led to unfairness to the dismissed employee which would render it inequitable or contrary to the substantial merits of the case to dismiss them.

Lord Justice Deeny said the Tribunal acknowledged that it must consider whether the decision to dismiss was proportionate in all the circumstances of the case but it was difficult to see how it did this, particularly as the Tribunal acknowledged that the penalty imposed was "at the extreme end". He concluded that the Tribunal erred in law and in its appreciation of the facts and quashed the Tribunal's decision that the appellant was fairly dismissed. He said that remitting the matter to another tribunal would be clearly inappropriate. The parties will be given time to consider the issue of remedy.

Lord Justice Weir agreed with Lord Justice Deeny's decision.

Lord Justice Gillen delivered a dissenting judgment. The appellant raised the following matters:

- The Tribunal erred in its findings in relation to the gravity of the misconduct. Lord Justice Gillen felt there was no basis upon which the Court of Appeal could consider the Tribunal's conclusion was plainly wrong. He said that taking a prescription drug from a locked ward for the appellant's own use was "clearly an extremely serious matter which no hospital could or should tolerate". He said the appellant was well aware that this was prohibited behaviour. Further it was perfectly reasonable for the Appeal Panel to take the view that intent to personally replace the inhaler infringed the pharmacy supply chain. The judge further considered that it was appropriate for

the Tribunal to have assessed that the appellant failed to think that there was much wrong with her behaviour. He said it was not unreasonable to conclude that it was sufficiently egregious to justify summary dismissal by the employer and dismissed this ground of appeal;

- The failings in the investigation. The appellant's case was that the Tribunal misdirected itself in law in failing to sufficiently investigate the matter in order to form a view about the seriousness of the conduct or the mitigating circumstances surrounding it. Lord Justice Gillen found no substance to this ground of appeal. He was satisfied that the Tribunal was entitled to conclude that a reasonable investigation had been carried out and that the appropriate legal authorities had been complied with;
- The findings that the Tribunal made relating to the appellant's intention to replace the inhaler with one of her own prescription and the inferences drawn from this were perverse. Lord Justice Gillen said the Tribunal's decision made it clear that the issue was not an attempt to conceal by the appellant but rather her conviction that it would be appropriate to replace the inhaler with one of her own. He said it was this that pointed the Appeal Panel towards a conclusion that she did not appreciate sufficiently that what she had done was wrong. Lord Justice Gillen considered this was not an unreasonable approach to adopt and said the Appeal Panel had given the appellant a sufficient opportunity to make her response in as detailed a manner as she wished concerning the concept of a supply chain. He said it did not amount to procedural unfairness or perversity and rejected this ground of appeal.

Lord Justice Gillen concluded that he would have affirmed the decision of the Tribunal.

Conclusion

The Court of Appeal, by a majority decision, quashed the Industrial Tribunal's decision that the appellant was fairly dismissed.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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