Appeal No. UKEAT/0166/16/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 31 October 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MS T E JINADU — APPELLANT

DOCKLANDS BUSES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR LEONARD OGILVY (Representative)
For the Respondent	MR IRVINE MACCABE (of Counsel) Instructed by: Moorhead James LLP Kildare House 3 Dorset Rise London EC4Y 8EN

SUMMARY

UNFAIR DISMISSAL - Contributory fault

Unfair dismissal - compensatory award - reduction for conduct/contributory fault - ***ERA 1996*** *sections 122(2) (basic award) and 123(6) (compensatory award)*

The ET had originally found that the Claimant (a bus driver who was asked to undertake remedial driving training and assessment) had been dismissed for a reason related to her conduct (her refusal to obey a reasonable instruction and insubordination). The EAT had set that decision aside and remitted for the case for consideration as to the reason for dismissal given the Respondent's approach on the internal appeal. At the remitted hearing, the ET concluded that the fact that the Claimant was given a further opportunity to attend the training and assessment meant her conduct was no longer the principal reason for dismissal on appeal; in confirming the decision to dismiss, the appeal panel principally had in mind the Claimant's inability to pass the driving assessment once she had attended the driving school; that was a reason related to capability, which had not been raised with the Claimant and this, together with the failure to allow a further attempt to pass the assessment (contrary to the Respondent's policy) rendered the decision to dismiss unfair. There was no appeal from that finding.

At the subsequent remedies hearing, the ET considered both the basic and compensatory awards should be reduced by 75 per cent, given the Claimant's earlier conduct in refusing to obey a reasonable instruction and insubordination. Allowing that any reduction in the compensatory award was dependent upon the Claimant's conduct having caused or contributed to her dismissal, the ET was satisfied it had: the decision on her internal appeal was only made given the fact she had earlier behaved in such a way as to warrant dismissal. The Claimant appealed.

Held: dismissing the appeal

The ET had correctly distinguished the tests required by sections 122(2) and 123(6) **Employment Rights Act 1996**. It was entitled to find the Claimant had behaved in a blameworthy or culpable way prior to her dismissal such as to mean it was just and equitable to make a reduction in the basic award pursuant to section 122(2). Given the particular facts of the case, the ET was also entitled to find a causative link between the Claimant's culpable conduct and the ultimate decision to dismiss (that being the decision on her internal appeal). The focus was on the Claimant's conduct, notwithstanding that the principal reason for the dismissal at that stage was one related to her capability. This was not a case where there was no link between the earlier conduct and that which informed the final decision to dismiss (**Nejjary v Aramark Ltd** UKEAT/0054/12 distinguished). The ET had been entitled to view the appeal decision in context, which included the Claimant's earlier misconduct.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Judgment of the East London Employment Tribunal (Employment Judge Goodrich sitting with members Mr Tomey and Mrs Saund on 17 December 2015; "the ET"), sent to the parties on 24 February 2016. That Judgment was concerned with the remedies to be awarded to the Claimant following from the ET's earlier finding in the Claimant's favour that she had been unfairly dismissed by the Respondent.

2. The ET made basic and compensatory awards on the unfair dismissal claim but found that those awards should be reduced by 75 per cent in respect of the Claimant's contributory conduct. The Claimant appeals against that reduction in both respects and was permitted to do so on a limited basis, restricted to two grounds of appeal, which essentially raised the question whether - having previously found that the Claimant had been dismissed on capability grounds and that having been the basis of an earlier EAT ruling in the Claimant's favour at the liability stage - the ET erred in revisiting conduct matters in reaching its conclusion on contributory fault. The Respondent resists the appeal, relying on the reasoning of the ET.

The Relevant Background

3. The Claimant was a bus driver. She had continuous service going back to July 2002 but was dismissed by the Respondent on 9 July 2012. At the original ET Hearing of her complaint of unfair dismissal (she had also brought various other claims, but this appeal is only concerned with the unfair dismissal case) the ET rejected her claim, holding she had been fairly dismissed for a reason related to her conduct, specifically her refusal to attend driver training school, after

her driving was found to be below the required standard, and her manner in so doing, which was found to amount to insubordination. That Judgment was, however, set aside by the EAT (Supperstone J) on the basis that the ET had failed to make proper findings as to the Respondent's reason for dismissing the Claimant's internal appeal against dismissal and as to the reasonableness of the dismissal by reference to those reasons.

4. At the remitted hearing, the ET addressed the issues identified by Supperstone J. Doing so, it found that the reason or principal reason for the Claimant's dismissal was in fact capability, namely poor driving standards. Although the ET still relied on its earlier findings - that the Claimant had initially been dismissed due to her refusal to attend driver training school without good reason and for insubordination - it allowed that by the time of the appeal panel's decision the Claimant had attended the driving school, having been given further opportunity to do so, but had then failed her assessment. The Respondent's appeal panel had concluded that the Claimant could not be allowed to return to service "*given the concerns about her standard of driving*". As the Claimant would not have been given that further opportunity to attend driving school if conduct had remained the principal reason for her dismissal, this demonstrated that the appeal panel's concern was whether the Claimant could demonstrate the driving standards the Respondent expected of her, a reason related to capability.

5. Addressing the fairness of the Claimant's dismissal for that reason, the ET noted that it was a different reason from that which had held sway at the time of the original decision to dismiss (a conduct reason) and the Claimant had not been notified that the appeal panel was considering dismissing her in respect of her poor standard of driving rather than for a reason related to her conduct, as had been the original case. The Respondent had, further, not had regard to its own capability procedures, although the ET allowed the particular circumstances

and history of the Claimant's case might have meant it was not obliged to go through all stages of those procedures. That said, a reasonable employer would have at least offered the Claimant one further opportunity to pass the driving assessment having undertaken corrective training. Those failures, the ET concluded, rendered the Claimant's dismissal unfair.

6. The ET did not consider that it was certain that the Claimant would either have undertaken the further training or passed the assessment at another attempt. Applying **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 HL, any compensatory award might be limited to six, nine or twelve months. The ET also gave a preliminary indication on contributory fault, expressing the view that the Claimant "*was largely to blame for her dismissal by getting herself to the position where she was dismissed*" and considered that might result in a substantial reduction of around 75 per cent.

7. When returning to the question of the basic and compensatory awards at the remedies hearing - which led to the Judgment with which I am concerned - the ET noted the Claimant's disagreement with the suggestion of a 75 per cent reduction, contending, rather, that there should be no such reduction or a reduction of 33 per cent at most. The Respondent, on the other hand, was contending that the reduction should be of 100 per cent. Determining that, applying **Polkey**, the Claimant's losses should be allowed for nine months (paragraphs 63 and 64 ET's Reasons), the ET turned to the question of any reduction for contributory fault, finding it would be appropriate to make such a reduction as:

> **"70.1. There was conduct on the part of the employee in connection with their unfair dismissal which was culpable or blameworthy. The dismissal of an employee is a continuum, as described in the case of *West Midlands Co-Operative Society Ltd v Tipton* [1986] 536 HL, referred to by Mr Maccabe on behalf of the Respondent. The Claimant engaged in behaviour that was culpable or blameworthy by being dismissed for gross misconduct by Mr Russell. This dismissal was held by the Employment Tribunal to have been fair and this aspect of the Tribunal's decision was upheld by the Employment Appeal Tribunal. If she had not committed gross misconduct she would not have been dismissed by Mr Russell.**
>
> **70.2. The Claimant caused or contributed to her dismissal, therefore, by having been dismissed for gross misconduct and needing to appeal against her dismissal.**

> **70.3. Thereafter, at the resumed appeal hearing the Claimant was unfairly dismissed, as further described by the Tribunal at the remitted hearing.**
>
> **70.4. As referred to by the EAT, it may be thought that Mr Mahon, on the appeal acted very fairly to the Claimant in the circumstances in adjourning the hearing and allowing her a further opportunity to attend the training centre and thereafter in giving her repeated opportunities to do so (paragraph 25 of the EAT's judgment)."**

It concluded it was just and equitable to make a reduction in this regard of 75 per cent in respect of both the basic and compensatory awards.

The Relevant Legal Principles

8. The statutory provisions permitting a reduction for contributory fault are differently worded in respect of the basic and compensatory awards as follows (**Employment Rights Act 1996**; "ERA"):

> **"122.** ***Basic award: reductions***
>
> **…**
>
> **(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.**
>
> **…**
>
> **123.** ***Compensatory award***
>
> **(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be 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.**
>
> **…**
>
> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

9. For the basic award, section 122(2) **ERA** does not require the finding of a causative relationship between the conduct and the dismissal, which can be contrasted to the requirement that the dismissal be "*to any extent caused or contributed to by any action of the complainant*" in section 123(6), which does require such a causal connection (see **Steen v ASP Packaging**

Ltd [2014] ICR 56 EAT). That said, use of the word "*contributed*" makes plain the employee's conduct need only be a factor in the dismissal, it need not be the direct and sole cause.

10. The approach to be adopted in respect of sections 122(2) and 123(6) **ERA** was usefully explained by Langstaff P in **Steen**, as follows:

> **"8. In a case in which contributory fault is asserted the tribunal's award is subject to sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2), dealing with the basic award, provides:**
>
> > **"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."**
>
> **9. Section 123(6) provides:**
>
> > **"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**
>
> **10. The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve a consideration of what it is just and equitable to do.**
>
> **11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy.**
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> **12. It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. 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 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.**
>
> **13. (3) The tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question, (4).**
>
> **14. This, question (4), is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."**

11. I note, in particular, the EAT's emphasis in **Steen** on the fact that the focus must be on what the employee did; the employer's decision and conduct is relevant to the ET's assessment as to the fairness of the dismissal, but the issue of contributory fault requires an assessment by the ET of the employee's conduct. Moreover, the question of causation or contribution relates to the dismissal, not the unfairness of that dismissal. It is, further, open to an ET to find that a Claimant's conduct has contributed to her dismissal notwithstanding that the reason for the dismissal relates to capability rather than conduct (see **Moncur v International Paint Co Ltd** [1978] IRLR 223 EAT, Phillips J presiding; and **Finnie v Top Hat Frozen Foods** [1985] ICR 433 EAT Scotland, per Lord McDonald, albeit that was a case where the reason for the dismissal had included the conduct of the employee). As is common ground before me, the requirement remains, however, that the employee's conduct be culpable or blameworthy in some way (see **Nelson v BBC (No. 2)** [1980] ICR 110 CA; and **Slaughter v C Brewer & Sons Ltd** [1990] ICR 730 EAT, which allowed that a deduction for contributory fault might still be permissible where the dismissal was by reason of capability due to ill-health).

12. Ultimately, it is for the ET to take a broad, commonsense view as to what part, if any, the employee's conduct played in the dismissal and then, in the light of that finding, to determine the level of any reduction, an assessment the ET is best placed to make and with which the EAT would only interfere if there were an error of law or the decision was perverse.

Submissions

The Claimant's Case

13. On behalf of the Claimant it is submitted that the ET erred by going behind the earlier ruling of the EAT and the ET's own finding as to the real reason for the dismissal (capability). Having found the reason for the dismissal was that pertaining at the time of the appeal, it was

not open to the ET to go back to the different reason as at the time of the original decision to dismiss. The ET had, further, specifically found that the Respondent had failed to comply with its own procedures. There had been, the Claimant submitted, a complete departure from the Respondent's policy, which led to the dismissal at the appeal stage (the relevant decision). Given the Claimant had been dismissed for failing a driving assessment on one occasion, when the Respondent's policy provided for more opportunities, what was the blameworthy conduct on her part? If the ET's answer was that her past blameworthy conduct had led to the ultimate decision - that is, at the appeal stage - that was bringing back into play the original decision founded on conduct, which the EAT had found not to be the operable decision. It would be to find that the dismissal was caused by both capability and conduct, which was not the ET's finding on the reason for dismissal. If the conduct had not caused or contributed to the decision to dismiss - rather than just being part of the background to/the context in which the decision was made - it should not have been taken into account as relevant conduct for the purposes of a reduction for contributory fault, see **Nejjary v Aramark Ltd** UKEAT/0054/12.

14. Alternatively, a 75 per cent reduction was putting the matter too high, in particular having regard to the various mitigating factors (accepting the difficulty in asking the EAT to interfere with the amount of a reduction).

15. In making his oral submissions, Mr Ogilvy accepted that his case was more difficult in respect of the reduction for the basic award, given that the statutory test in that regard did not require that the employee's conduct caused or contributed to the dismissal; the ET was simply entitled to reduce that award if, having regard to the employee's prior conduct, it considered that was such that it would be just and equitable to do so.

The Respondent's Case

16. The appeal was limited to the question of contributory fault and really to the reduction of the compensatory award; there could be no proper challenge to the reduction of the basic award. The facts found by the ET plainly satisfied the requirements of section 122(2) **ERA**. This was, so far as the identification of the reason for the dismissal was concerned, an unusual case. Arguably, the reason was to be determined at the time of the original decision, which would have made this a conduct dismissal. Even accepting that the Respondent had not appealed against the ET's finding on the remitted liability hearing, that decision allowed that conduct still formed part of the background to the ultimate decision; this was not a case where the starting point was the same as what might normally be expected in a capability dismissal.

17. As the case law allowed, the fact that the reason or principal reason for the dismissal might be capability did not preclude an ET from finding contribution under either the basic or compensatory awards. As already stated, there was no requirement for any causal connection in respect of section 122(2), and the requirement under section 123(6) was merely that there was a link; it needed only to be a factor, not determinative of itself. The ET's reasoning in this case did not fall into the error identified in **Nejjary**. In that case, the ET had taken into account conduct of the employee, which had resulted in disciplinary warnings, when neither that conduct nor those warnings had any causal connection with the reason for the dismissal. In the present case, the earlier misconduct (refusing to obey a lawful and reasonable instruction to attend the driving school and the Claimant's insubordination) had led to the initial dismissal decision and thus to the appeal, it had been the reason why she was given one further chance at the appeal stage and why the Respondent had not embarked upon a capability process afresh. The ET had concluded that the Claimant was largely to blame because she got herself into the position of being dismissed at the outset. That was a dismissal in respect of her conduct - her

refusal to attend driver training school and insubordination - and permissibly led the ET to reduce both the basic and compensatory awards by 75 per cent.

Discussion and Conclusions

18. The ET in this case had regard to the separate statutory provisions, sections 122(2) and 123(6) **ERA**. It expressly reminded itself that, although the basic award might be reduced should it consider it just and equitable to do so given the Claimant's conduct, a reduction of the compensatory award would require that the ET find that her conduct had to some extent caused or contributed to the dismissal.

19. Taking first the ET's conclusion on the basic award, it is hard to see how a challenge can successfully be pursued on appeal, something Mr Ogilvy has fairly acknowledged in oral submissions. The ET reached a permissible view as to the Claimant's conduct up to the appeal hearing; she had behaved in a way that the Respondent had reasonably seen as insubordination, which had initially caused it to dismiss by reason of that misconduct. That was plainly a finding of blameworthy or culpable behaviour on the part of the Claimant prior to the decision to dismiss (taking that to be the final decision on the appeal), to which the ET was entitled to have regard when determining what was just and equitable in respect of the basic award.

20. When turning to the compensatory award, however, the ET had to do more (as it recognised, paragraph 50 of its Reasons). Specifically, it had to find that the dismissal was "*to any extent caused or contributed to by any culpable or blameworthy action of the Claimant*".

21. At the stage of determining contributory fault, the focus of the ET thus had to be on the conduct of the Claimant. It had already determined the Respondent's reason for the dismissal -

ultimately, capability - and had assessed the fairness of the decision to dismiss for that reason, focusing on the Respondent's decisions and asking at each stage whether these fell within the band of reasonable responses of the reasonable employer in all the circumstances. Turning to the issue of contribution, the ET had to ask whether there was any culpable conduct on the part of the Claimant that to any extent caused or contributed to the dismissal. There was no reason to read that provision as prohibiting a reduction where the dismissal is for a reason related to the employee's capability; that is not what it says and is not how it has been interpreted by the case law. Had Parliament wished to limit the reduction in compensation to conduct dismissal cases, it could have simply referred to the dismissal being *solely* caused by the employee's conduct. It did not. Rather, it chose to allow that the employee's actions might simply have *contributed* to the dismissal *to any extent*. The blameworthy or culpable conduct must be causally linked, but it does not have to be the sole or even the principal cause.

22. Here, the ET had found the Claimant was originally dismissed for a reason related to her conduct. It was that dismissal which led her to pursue an appeal; there would have been no decision by the appeal panel if not for the Claimant's earlier misconduct. It was, as the ET permissibly found, largely due to the very fair response of the appeal panel that the Claimant was given a further chance to attend the driving school. That provided the context for the Claimant's failure to pass the assessment, which then became the principal reason for the appeal panel's upholding the dismissal.

23. Mr Ogilvy submits that, having found that the appeal panel's decision to dismiss was by reason of capability (the Claimant's failure to pass the driving assessment), the ET could not go behind that to take into account the earlier misconduct and insubordination which had weighed

with the original decision maker; by doing so, he contends the ET fell into the same error identified in **Nejjary**.

24. That, however, is not a fair representation of the ET's approach in the present case. Whilst it found that the ultimate reason for the dismissal (assessing that at the appeal stage) was capability (the failing of the driving assessment), the ET was entitled to see that decision in context; the appeal panel's reaction to the Claimant's failing the driving assessment did not fall to be considered in a vacuum but was to be viewed against the background of the earlier history of her misconduct in refusing to attend the driving school and her insubordination in that respect. The Claimant had been given what was very much a last chance to make good, to attend the school and show she could pass the assessment. The appeal panel's decision to provide the Claimant with that last chance did not wipe away what had gone before. It did not sever any link between the appeal panel's decision and the Claimant's earlier conduct. The appeal panel's failure to give the Claimant further opportunity to address her failings meant, as the ET found, that the decision was unfair. It did not mean that the ET was unable to have regard to the obvious link between the decision to dismiss at that stage and the earlier decision; it might not have been such as to amount to the principal reason at that stage, but it remained a causative link. This was, therefore, not a case akin to **Nejjary**, where there was no causal link. In this case, the ET was plainly satisfied that the Claimant's earlier conduct, whilst not the reason for the ultimate decision to dismiss, had still informed or contributed to that decision, albeit that the actual reason was one of capability.

25. Mr Ogilvy says in the alternative that the reduction of 75 per cent was too high given the mitigating factors relied on by the Claimant. On that question, however, I remind myself that the level of the reduction is very much a matter for the ET, which, as the Tribunal of first

instance, will be best-placed to make that assessment, and it will generally not be for the EAT to interfere. Can I say that the ET erred in law in concluding that the Claimant's earlier conduct had contributed to her dismissal such that a 75 per cent reduction would not be just and equitable or reached a perverse conclusion in that regard? I do not consider that I can. I am not satisfied that the Claimant has met the burden upon her to demonstrate that the ET's decision was perverse, and I can see no error of law in that regard. Mr Ogilvy has forcefully pointed to the mitigating circumstances he relied upon before the ET, but those were matters for the ET to assess, and, having heard all the evidence, it reached the view that a high - albeit not as high as the Respondent contended - level of reduction was the just and equitable course in this case. Whether I would have reached the same conclusion I do not know, but I am satisfied that this was a permissible level of award with which I am unable to interfere.

26. For all those reasons, I dismiss this appeal.