Appeal No. UKEAT/0124/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 July 2016
Judgment handed down on 14 October 2016

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

MS V BRANNEY

MR B M WARMAN

MR M BROECKER — APPELLANT

METROLINE TRAVEL LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DESHPAL PANESAR (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
For the Respondent	MR ADAM SOLOMON (of Counsel) Instructed by: Metroline Travel Limited c/o HR Department ComfortDelGro House 329 Edgware Road Cricklewood London NW2 6JP

SUMMARY

UNFAIR DISMISSAL

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Reasonableness of dismissal

VICTIMISATION DISCRIMINATION - Whistleblowing

VICTIMISATION DISCRIMINATION - Protected disclosure

VICTIMISATION DISCRIMINATION - Dismissal

PRACTICE AND PROCEDURE - Disposal of appeal including remission

The Employment Tribunal ("the ET") held that the Appellant was dismissed for four instances of misconduct, two of which were protected disclosures and that the Appellant's dismissal was not unfair.

In deciding whether the reason for the Appellant's dismissal was that he had made protected disclosures, the ET asked, not what the reason or principal reason for the dismissal was, but whether the dismissal was "grossly" or "blatantly" unfair. The Employment Appeal Tribunal ("the EAT") held that the ET had misdirected itself.

In deciding whether or not the dismissal was unfair the ET decided that the Respondent would have been entitled to dismiss the Appellant for the two incidents of misconduct which were not protected disclosures. The EAT held that the ET had misdirected itself, as the Respondent had dismissed the Appellant not for two incidents of misconduct, but for four, two of which were protected disclosures, on the basis of the decision of the House of Lords in **Smith v Glasgow City District Council** [1987] ICR 796. The ET should therefore have held that the Appellant's dismissal was unfair.

The EAT would have remitted the case to the ET on this question, had it not also held that the ET misdirected itself on the question whether the dismissal was unfair.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

1. This is our decision on an appeal from a Decision of Employment Tribunal ("the ET") sitting at Watford. The Decision was sent to the parties on 2 November 2015. The ET consisted of Employment Judge Southam ("the EJ"). We will refer to the parties as they were below.

2. HHJ Richardson considered the Notice of Appeal on the paper sift and concluded that the grounds of appeal were arguable. He indicated that the nature of the challenge to the ET's decision made this a case in which the input of lay members would be useful; and so it has proved.

3. The Claimant was represented by Mr Panesar, and the Respondent by Mr Solomon, both of counsel. We thank both for their helpful written and oral submissions.

The ET's Decision

4. The ET dismissed the Claimant's claims. The EJ held that:

   i. the Claimant had made public interest disclosures to his employer on 8 May, 7, 16, 18, 29 June, and on 12 September 2014;

   ii. the fact he made those disclosures was not the reason or principal reason for his dismissal;

   iii. the Claimant was not dismissed because he drew to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful, or potentially harmful to health or safety;

   iv. the reason or principal reason for his dismissal was his conduct; and

v. his dismissal was not unfair.

5. The EJ described the pleadings and the procedural history. He listed the issues he had to decide at paragraph 13 of the Judgment. He directed himself correctly about the relevant law in section 14 of the Judgment.

6. The EJ set out his findings of fact in section 15 of the Judgment. We now summarise those. The Respondent is a bus company. It has a contract with Transport for London to provide bus services on routes in London. It has a garage in Holloway. The Claimant's employment began in 2010. He signed a document called "DriveSafe Check your Bus" ("DSCB"). It tells a driver that he must check his bus every day, how he must record the checks, and how, and when, defects should be reported. The Claimant said he understood the garage defect reporting procedure. He understood that it was a legal requirement for the Respondent, because of the terms of its operator's licence. He understood that a failure to comply with it could result in disciplinary proceedings and summary dismissal.

7. DSCB concerns the checks a driver must do before going out on the road. Those checks do not include checking windscreen wipers. Intermittent faults with wipers do not make a vehicle unsafe for the purposes of a PG9, that is, a defect which makes a public service vehicle unsafe to be driven on the road. If a bus has such a defect, then, unless it is raining or snowing, it may be driven to the depot (see the Respondent's Guide on vehicle defects). This document also tells drivers what to do if the power-assisted steering on a new Routemaster bus stops working (paragraph 15.5), and if the handbrake is slow to release (paragraph 15.6). There is also a document which explains how a dispute between a driver and an engineer about whether a bus is fit to drive should be resolved. In essence, the bus is sealed, and the driver has to wait

for an independent engineer to arrive. If no alternative vehicle is available and the driver refuses to drive after being given an instruction to, he is told that if the stop is unjustified, he will lose pay.

8. The driver's quality manual tells drivers they must not use mobile phones while they are on duty. If it is necessary to make a call in an emergency, they must secure the vehicle and leave the cab to make the call. At paragraph 15.12 the EJ made a finding, based on the evidence he heard, about the process for reporting a defect on a bus. In short, the driver reports the defect by pressing a button in the cab and speaking by radio to Ibus. An engineer is contacted and he decides what to do, and either tells Ibus, or the driver directly, what his instructions are. The driver must follow those instructions.

9. On 8 May 2014 the Claimant was due to take a new Routemaster bus from Hampstead Heath. He was due to leave Holloway Garage at 6.46am. At 6.45 he reported a defect with the wipers, while he was still in the garage. He spoke to an engineer. The engineer told the Claimant how to correct the problem which the Claimant had reported, and sent him on his way. When the Claimant arrived at Millbank he was still concerned about the wipers. He spoke to a policeman who told him the vehicle should not have been sent out in that state. At 8.07 he reported the defect to Ibus and was told to drive to Hampstead Heath where the vehicle would be changed.

10. He was suspended after this for failing to follow the defect reporting procedure. He was invited to an investigatory meeting. He was only told he had failed to follow the procedure for reporting mechanical defects on "various dates". At a meeting on 12 May he and Ms May looked at CCTV footage of his driving on 8 May. This showed the Claimant using his mobile

phone at 8.03 in the cab. Though he later disputed this, he accepted that he should not be using a phone while in control of the vehicle. Ms May reported him for disciplinary proceedings for three matters (see paragraph 15.16 of the EJ's Judgment).

11. The Claimant was invited to a disciplinary hearing with Mr Seers. It started, but did not finish, on 28 May. He was represented by Mr Dias. There was no note taker. Mr Seers said that there were only two charges; using a mobile phone and failing to follow defect reporting procedures. The Claimant said that he did not know the policy about mobile phones, but did know that he should not use one in the cab. The engineer gave evidence. He said that there were no spare buses when the Claimant first reported the problem. The hearing was reconvened on 5 June. There was much discussion about whether the engine was running when the Claimant used his phone. The meeting got out of control at that point. The Routemaster bus was inspected. Mr Seers thought that if the lights were on in the bus that meant that the engine was running. His inspection seemed to him to confirm this view.

12. The notes of the meeting recorded Mr Dias and the Claimant getting up to leave the room and saying they that would submit forms about being victimised for whistleblowing. Mr Seers told Mr Dias to leave, and the Claimant to get another representative. If he did not, Mr Seers said that he would be marked absent and the meeting would carry on without him. Mr Dalby, the garage manager, and the most senior person at the garage, intervened and persuaded the Claimant and Mr Dias to go back to the meeting. Mr Seers apologised, but the Claimant and Mr Dias did not. The discussion of the CCTV footage continued. There was a further adjournment after Mr Seers asked the Claimant why he was not being honest with him. After that adjournment, the Claimant said that he would not continue with the meeting. He and Mr Dias got up to leave. The Claimant alleged that Mr Seers then assaulted him, among other

things by pushing him out of the room. There was a conflict of evidence about this allegation. The EJ did not resolve it.

13. Mr Seers finished the meeting on his own. He heard evidence from the conductor of the Claimant's bus on 8 May and from Mr Vassilou about whether pressure had been put on the Claimant to take the bus out. Mr Seers recorded his conclusions. He decided that the Claimant had used his mobile phone in the cab. Mr Seers was critical of his driving standards. He thought that the Claimant had been badly served by his representative. He criticised the Claimant for reporting the defect to a policeman. The Claimant knew how to rectify the fault, and had decided to drive the vehicle. The defect card for the journey was missing. Mr Seers thought that Mr Vassilou's evidence showed that the Claimant was not being honest about whether he was under pressure. Mr Seers was very concerned that the Claimant had spoken to the police. This could have led to an appearance by the Respondent before the Traffic Commissioner. That could lead to the loss of the Respondent's licence. Mr Seers felt that the Claimant was motivated by malice towards the Respondent, and towards the Ibus engineers. The Claimant had a poor attitude and accused all of misbehaviour except himself. Mr Seers considered dismissing the Claimant but decided not to because of the poor standard of his representation.

14. He decided, instead, to issue a final written warning "on two aspects of the Claimant's conduct". Those were using a mobile phone in the cab, and not following the procedure for reporting defects. The EJ said that was clear to him that the breach on which the Respondent relied was reporting the defect to a police officer (Judgment, paragraph 15.22). The EJ said that Mr Seers had completely left out of account the fact that Claimant had reported the defect to Ibus at 8.07.

15. The EJ summarised the warning letter (dated 5 June) in paragraph 15.23 of the Judgment. It was not in the bundle for the hearing, but we were given a copy, which we read. We are satisfied, having read it, that on its correct construction, the effect of the letter was that Mr Seers gave the Claimant two final written warnings, one for each of those two aspects of his conduct, rather than giving him one warning for both aspects cumulatively. His conclusion, expressed in the letter, was that each aspect of the Claimant's conduct on 8 May amounted to gross misconduct. The letter said the "warnings" would stay active on the Claimant's file for twelve months (see also paragraph 15.23 of the EJ's Decision). The Claimant was asked to "make every effort to ensure that there is no further misconduct on your part … a repeat of similar misconduct under the Company's rules within twelve months is likely to lead to your dismissal". The EJ's approach to the letter of 5 June is not clear. In some passages of the Decision, he appears to appreciate that two warnings were given, but in others, to suggest that one was given. If and to the extent that he adopted the latter analysis, we consider that he erred in law.

16. The letter of 5 June was accompanied by a copy of the notes from the meeting on that date.

17. There was an incident on 6 June about which we need say nothing except that it showed further hostility between the Claimant and Mr Seers.

18. The Claimant produced a vehicle defect report card on 7 June 2014 and an irregular occurrence report on 8 June (see paragraph 15.25 of the ET's Judgment). On 10 June the Claimant appealed against the final written warning. On 16 June he submitted a grievance against Mr Seers, accusing him of a campaign of harassment, fear-mongering, assault and

smear against him. He had regularly had to drive buses with serious mechanical defects. He described Mr Seers' conduct on 5 June including an assault. He suggested that Mr Seers was out of control.

19. There was a dispute about whether the Claimant handed Mr Dalby a letter about bus defects on 17 June. The EJ resolved this dispute in the Claimant's favour. The Respondent did not call Mr Dalby to give evidence at the hearing.

20. On 18 June 2014, the Claimant reported three faults while the bus was en route. He reported only one of those (about the wipers) to engineer. The engineer produced a written report. He told the Claimant to carry on driving, as it was not raining. It was then reported that the Claimant was refusing to continue with his journey. A controller then said that the Claimant was already running out of service and was due in the garage at any moment. Mr Seers asked to see CCTV footage of the run from Holloway Garage to Hampstead Heath.

21. On 23 June Mr Seers arranged an informal meeting to discuss mechanical problems with the engineers. The EJ said that it seems that the Claimant went to this meeting.

22. On 29 June, Mr Ali, an engineer, reported that the Claimant was due to take a bus out of Holloway Garage at 7.07. He reported a defect to Ibus at 7.03 about the wipers and the handbrake light. He drove to the entrance of the garage at 7.04. Mr Ali thought as the Claimant's bus was not operational but was blocking the exit of the garage, he should take the bus round the block and return to the garage. The Claimant did that, was given a replacement bus, and left the garage 16 minutes late. The EJ inferred that part of the delay was because the replacement bus also had a defect.

23. Because of the incidents of 18 and 29 June, Ms May decided to have an investigation meeting with the Claimant. He went. Notes were taken. He was asked at the meeting about his pre-service check. CCTV footage showed the Claimant driving the bus in the garage with a defect report card in his hand. The Claimant disputed whether it was necessary for Mr Ali to send him round the block with the bus. He had tried to reverse into the garage. Ms May decided to refer him to a disciplinary hearing on three matters: his failure to report a mechanical defect at earliest opportunity on 18 June, his failure to drive to the required standards on the same day, and his failure to follow reporting procedures on 29 June, leading to a loss of mileage.

24. Mr Parry held a disciplinary hearing on 23 July. The Claimant was there. Notes were taken. Mr Cica represented the Claimant. The EJ summarised the notes of that hearing at paragraph 15.36 of the Judgment. The hearing was adjourned. At that stage the Claimant's appeal against the final written warning had not yet been decided. Ms Dawson, a garage manager, was asked to investigate the Claimant's grievance against Mr Seers. She dismissed it in a letter dated 10 September.

25. Three reports alerted the Respondent to a further incident on 12 September. The Claimant made an irregularity report. Mr Stroud and Mr Louis-Fernand both made information reports. The Claimant reported a problem with the brakes or "retarder". He said he had called Ibus. Mr Louis-Fernand reported a call from the Claimant. Mr Louis-Fernand decided, with the engineers, that the bus should be changed at Camden town on the Claimant's return journey, because the Claimant thought that it was safe to carry on. The Claimant tried to speak to Mr Antoniazzi, the safety standards manager, about this, but only managed to speak to Mr Dalby. Mr Dalby said a bus would be substituted; and the Claimant's bus sealed in the Claimant's

presence and tested. That was done. Visual and physical checks showed no fault with the vehicle, but, as the EJ found, its electronics were not tested.

26. A further investigation meeting with Ms May was arranged for 22 September. The meeting was postponed to 1 October, when the Claimant attended. She decided there should be a disciplinary hearing in relation to a report showing a loss of mileage. Ms May wrote to the Claimant inviting him to a disciplinary hearing about this on 10 October with Ms Olowa-Jerome.

27. The Claimant told the Respondent that, in relation to the incident on 12 September, four other drivers had had a similar problem with the Routemaster retarder. He gave their names. He wanted to question the engineer, Mr Streather, who drove the bus on the road test on 12 September.

28. On 8 October, having learnt that the Claimant's appeal against the imposition of the final written warning had not been successful, Mr Dalby wrote an important email to Ms May, Ms Olowa-Jerome, Mr Parry and Mr Seers. He said, among other things, "… I will be speaking to HR tomorrow asking them: would they want John to conclude his case on the 15 October which would result in dismissal …". The EJ held, in paragraph 37 of the Judgment, that this email suggested that Mr Parry had said to Mr Dalby that on the basis of what he had heard so far, the case against the Claimant was likely to be proved in respect of the incidents on 18 and 29 June. The EJ said that "Mr Dalby and possibly others thought that dismissal was a likely outcome". Once Mr Parry had received the email, "he would have been in no doubt that Mr Dalby was looking for the claimant's dismissal". Nonetheless, the EJ considered that this email only showed that Mr Dalby considered that there was enough evidence of misconduct to justify

A the Claimant's dismissal. In paragraph 53, the EJ said that this "interference with the disciplinary process" was "potentially damaging to the fairness of the dismissal". It had the potential to influence Mr Parry. But in the end, he held, it made no difference. Mr Parry was "entitled" to dismiss the Claimant on the basis of his driving in the garage, bearing in mind the provisions of the final written warning. Nonetheless, Mr Dalby's intervention was "unwarranted and extremely risky from the point of view of the integrity of the dismissal procedure …".

29. On 14 October 2014, Mr Harvey sent an email to Mr Parry listing the brake (or retarder) defects on the bus the Claimant had driven on 12 September, in response to a question about what faults with its brakes or retarder that bus had had in the previous three months. On 15 October Mr Bartosz submitted a report about a retarder failure on a LT bus. He described how, normally if he took his foot off the accelerator, the bus would automatically start a forced progressive deceleration; but that had not happened, so he had had to pump the brakes.

30. The same day, the Claimant's disciplinary hearing resumed. Notes were taken (see paragraph 15.45 of the ET's Decision). The Claimant gave evidence. Mr Parry decided that the case relation to the events in June was proved. He heard mitigation from Mr Cica. He found, on the basis of the CCTV footage, that on 18 June the Claimant had driven the vehicle when he was not fully in control of it. He found that mileage was lost as a result of the Claimant's actions. He decided that, on 29 June, the Claimant had a mechanical defect with the bus while still in the garage, and instead of approaching a supervisor or engineer, he had moved the bus from a parked position to the exit, blocking the path of other vehicles. He was not instructed to drive the bus to the exit. This was not the correct process for reporting and

resolving defects. The Claimant should have waited for engineer to meet him at the bus where it was parked.

31. Mr Parry decided that there were no defects on 12 September. The lost mileage should therefore be attributed to the driver, the Claimant. He found that the Claimant was not willing, or was unable, to follow the correct procedures. He referred to the final written warning in June. The incidents all concerned the reporting of defects in buses. Accordingly, he said, the Claimant's performance justified dismissal. The Claimant was told of his appeal rights and appealed. His appeal was dismissed by Mr Moran.

32. The EJ then considered whether the Claimant had made protected disclosures on the material dates. He held that the Claimant had made seven distinct protected disclosures. He explained those conclusions. We only say a little about those findings. The EJ rejected the Respondent's submission that reports through the Respondent's system for reporting defects could not be protected disclosures. He had some doubt whether the disclosures about the wipers could qualify as protected disclosures because he wondered whether the Claimant could reasonably think that the intermittent fault (the wipers parking in the wrong position when being used intermittently) could endanger anybody's health and safety. He concluded, however, that though the risk was small, the Claimant's belief in that risk was not unreasonable. The Claimant clearly made a protected disclosure on 7 June, as the Claimant correctly recorded on a defect card that the bus rolled back with no control after he had released the handbrake.

33. The EJ then considered the fairness of the dismissal. He acknowledged that he was required to find, first, the reason or principal reason for the dismissal. But he considered before deciding that, it was "appropriate" for him to consider the general fairness of the dismissal.

That was because, he said, if the dismissal was "blatantly unfair" that might shed light on the true reason for the dismissal, even though "ostensibly the reason for the dismissal might be unconnected with the making of any disclosures".

34. We make two initial comments about this approach. First, the suggestion that "ostensibly the reason for the dismissal might be unconnected with the making of any disclosures" is difficult to understand. Mr Parry explicitly linked his decision to dismiss the Claimant with defect reporting (see above), and two of the instances of misconduct for which the Claimant was dismissed amounted, on the EJ's own findings, to protected disclosures. Second, it is not logical to consider the "fairness" of a dismissal in an abstract way, in isolation from the reason for it. It is not the sequence of reasoning required by section 98 of the **Employment Rights Act 1996** ("the 1996 Act"), for the obvious reason that the statutory "fairness" of a dismissal is inextricably linked with what the employer has shown to be the reason, or principal reason, for the dismissal. As will become clear, we consider that this approach led the EJ into error.

35. The EJ then considered, first, the disciplinary case against the Claimant starting with the final written warning. The EJ held that the Claimant could have no complaint about being given a final written warning for using a mobile phone. We consider that when paragraphs 27 and 28 are read together, it is clear that the EJ had in mind that the Claimant had been given not just a warning, but a final written warning, for that conduct (see also paragraphs 15.22 and 38). The EJ noted two things in relation to the other conduct which was the subject of the final written warning. First, Mr Seers overlooked or ignored that the Claimant had reported the defect at 8.07. Second, Mr Seers' "whole concern in relation to the claimant's actions that day

were concerned with his discussing the matter with the police and the possible negative effect that this could have on the company's reputation" (paragraph 28).

36. He then considered the relevance of the final written warning and referred to the test in **Davies v Sandwell Metropolitan Borough Council** [2013] IRLR 374 CA. The EJ found that, in so far as the warning related to a failure to follow the procedure for reporting defects, there were no *prima facie* grounds for imposing the warning and it was manifestly inappropriate to impose it, because the Claimant had reported the defect to Ibus. Before us there was no cross-appeal against that finding.

37. We note that later in the Judgment, at paragraph 38, the EJ dealt with the Claimant's appeal against that element of the warning. The Claimant pointed out on appeal that he had reported the defect to Ibus. The warning was upheld, and, again, the decision maker, Ms Dawson, failed to note that the Claimant had reported the defect to Ibus, and, instead, focussed on the Claimant's action in discussing the defect with a policeman. Although the EJ does not say as much, it is an ineluctable inference from his reasoning about the warning that the decision on this appeal could not repair the invalidity of the warning.

38. We return to the EJ's narrative about the imposition of the warning. He said that that type of unfairness, that is, "Adopting a reason for a warning that might be regarded, objectively, as unreasonable falls well short of adopting a blatantly unfair position in relation to the giving of a warning". The employer might have a genuine but mistaken view about the employee's conduct. "That would not lead to a conclusion that a warning was blatantly unfair, so as to cast doubt on the genuineness of the employer's reasons for giving the warning. On the contrary, the genuineness of such a belief reinforces a conclusion that the expressed reason for the

warning was the true reason … That is the view I take in relation to this warning" (paragraph 31).

39. Our initial comment about this paragraph is that the EJ has avoided, at this stage of his analysis, expressing a finding about the reason for the unfair warning (for failure to follow the procedure for reporting defects). On his own findings, it was for reporting a defect on the bus to a policeman, and was given because of Mr Seers' concern for the Respondent's reputation. The EJ's focus on "blatant unfairness", a test which is not found in the relevant statutory provisions, has led him to overlook, at this point, his own findings that this warning was not based on *prima facie* grounds and was manifestly inappropriate (and so both unfair and invalid), but also, that it was given for the reason which we have just described. In our judgment, these factors, properly analysed, give pause for thought about the Respondent's approach, rather than allaying anxieties about it.

40. In paragraph 32, the EJ said that it was not necessary for him to make any findings about the allegation that Mr Seers had assaulted the Claimant. Even if Mr Seers had done so, that could only have been because the meeting got out of control. It was not a reason for thinking that the expressed reason for the warning was not the true reason. Again, it seems to us that the EJ has forgotten his earlier findings about Mr Seers' reason for giving the warning, a matter about which, on the EJ's own findings, there could be no room for doubt.

41. The EJ found, in paragraph 33, that the Claimant was dismissed "on account of four elements of misconduct":

i. not reporting problems with the wipers while he was still in the garage on 18 June,

ii. his driving of the bus while he was in the garage;

iii. causing a loss of mileage on 19 June by going to the garage exit; and

iv. causing a loss of mileage on 12 September by making a false report about the retarder.

Both (i) and (ii) were, on the EJ's findings, also protected disclosures.

42. The EJ made some comments about these elements in paragraph 34. (i) was not a breach of any requirement in DSCB. (ii) was shown on CCTV. A reasonable employer might see it as less serious than making a call on a mobile phone from the cab of a bus. (iii) showed a lack of common sense. As for (iv), DSCB does not provide that a driver will be disciplined for making a report which turns out to be false; the sanction for that is loss of earnings.

43. The EJ then asked himself what the reason for the dismissal was. He had considered the fairness of the dismissal "in very broad terms" in order to "assess whether or not the respondent's reasons for dismissing the claimant might be genuine and whether in fact the fairness of the dismissal sheds light on the principal reason for the dismissal". He expressly reminded himself that "the subject matter of the warning was ostensibly part of the reason for the dismissal because the dismissal was described as being progressive".

44. At this stage, we repeat that we do not understand how considering the "fairness" of the dismissal in the abstract can shed any light on the genuineness of the reasons for a dismissal if those reasons are left out of account. Finding what is the reason or principal reason for the dismissal is not a free-floating inquiry. The employer must show what the reason for the dismissal is. The logical way of approaching this is to consider the employer's case, and find what the reasons are. What the EJ did, instead, was to consider whether the dismissal was

"blatantly unfair" (whatever that means), and then as coda to that, to make findings in paragraph 33 about the reasons for the dismissal. He then revisited those in paragraphs 35 to 47.

45. The EJ noted in paragraph 36 Mr Johnson's "severe irritation" that on 18 June the Claimant was reporting "trivial defects". The Respondent took the view that, coupled with the incident of 29 June, the Claimant was "inclined to waste time". The EJ then referred to Mr Dalby's email of 8 October. We have summarised his findings about that, above. In the next paragraph, the EJ said that "That in turn begs the question whether the respondent could reasonably have dismissed the Claimant on the evidence available to them on 8 October".

46. He held that the Respondent "cannot be criticised", at the time of dismissal, for taking the view that the Claimant had an existing valid warning for a failure to follow a defect reporting procedure, especially as he had appealed unsuccessfully against that. We consider that the EJ was entitled to take that view about the Respondent's state of mind, with one important qualification. As we have noted, he had already found that the warning for failing to follow the defect reporting procedure was invalid, and, we consider, by necessary inference, that the decision on the appeal did not cure that invalidity. Thus, the EJ could not take that warning into account in considering the fairness of the dismissal. That qualification does not apply, however, to the final written warning which was independently given for driving while making a phone call. There is nothing to suggest that that was invalid, or to prevent the Respondent from relying on it in support of a decision to dismiss.

47. In paragraph 40, the EJ analysed the three disciplinary charges. Two were "very loosely related to" the procedure for reporting defects. The first charge not covered by DSCB and the

A third was not covered by the disciplinary procedure at all. They are not matters of misconduct which are "particularly similar" to discussing with a defect on a bus with a policeman. The Claimant "can have no complaint about" the second matter on 18 June (his driving in the garage), though there was a question about how seriously a reasonable employer would view it.

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48. The EJ drew some of the threads together in paragraph 41. He found that disciplinary proceedings were taken against the Claimant because "he was regarded as a trouble-maker for raising a trivial issue …". The Respondent was "particularly annoyed at the waste of time" on 18 and 29 June caused by his reporting of the defects. The Respondent was also "extremely irritated" by the report to the police on 8 May. The EJ made a clear, and important, finding that the principal reason for "taking" disciplinary action against the Claimant was that he had made protected disclosures.

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49. In paragraph 42, the EJ said that once the Respondent had evidence of misconduct at the disciplinary hearing in July, "the position changed". He reminded himself that the tests for detriment related to protected disclosure and for dismissal are different. Liability for a detriment is established if the protected act has a more than trivial influence on the outcome. He would have held that the protected acts were a significant influence on the commencement of the disciplinary proceedings against the Claimant. But he did not consider that they were the principal reason for the dismissal (paragraph 43). If a dismissal is "merely unfair" that unfairness is unlikely "to call into question the reason for the dismissal", whereas if it was "blatantly unfair then it might be legitimate to question whether the dismissal is for the stated reason".

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50. We comment again that by focussing on degrees of unfairness the EJ was not asking himself the right question. He was also obscuring the right question, which was whether the reason or principal reason for the dismissal was that the Claimant had made protected disclosures. Further, he had already partly answered that question in paragraph 33, when he found that the Claimant was dismissed for four "elements of misconduct". We note that two of those amounted to the making of protected disclosures, and that, on the EJ's findings, the Claimant had received an invalid final written warning for disclosing a defect in his bus to a policeman, which the Respondent took into account in deciding to dismiss him.

51. The EJ said in paragraph 44 that there was no evidence from the Respondent about how it treated other drivers who breached the procedure for reporting defects. He was free to conclude that the dismissal was not for the stated reason if the dismissal was "so grossly unfair that it calls into question whether or not the stated reason for the dismissal was the true reason". He did not come to that conclusion. We make the same comment in relation to this paragraph as we have in the previous paragraph.

52. The EJ had identified unfair elements in the dismissal including the unfairness in part of the formal written warning given in June for failing to follow the procedure for reporting defects. He repeated that he could not criticise the Respondent for "following that warning", as there had been an unsuccessful appeal against it. He said that if that part of the warning could be impugned on the basis of **Davies v Sandwell**, "the relevant point is still that the dismissing officer was entitled to hold the view that the claimant was liable to the consequences of an existing written warning" (paragraph 45). We have already commented on that reasoning, above. The EJ said in paragraph 46 that if he concluded that the dismissal lay outside the reasonable range of responses, that would not necessarily lead him to the conclusion that the

reason relied upon by the Respondent "cannot be the reason". The taking of such a decision is not uncommon, but "does not lead inevitably to a conclusion that the reason for the dismissal was something quite different from the reason relied upon".

53. At paragraph 47 he concluded that the Claimant's acts in making disclosures prompted the disciplinary proceedings against the Claimant but that the reason for the dismissal was that it was perceived that the Claimant was guilty of misconduct in relation to the matters which were alleged against him and the existence of the final written warning played a part in the decision making. The reason for the dismissal was not making the protected disclosures. The principal reason was that the Respondent considered that the Claimant was guilty of misconduct "in relation to the matters that were alleged against him and the … written warning played a part in the decision-making". The reason for the dismissal was not that the Claimant had made protected disclosures. It was that the Respondent "considered that the claimant was guilty of various elements of misconduct".

54. The EJ has again asked the wrong question. He has failed to focus on his own findings which might cast light on the true reason of the dismissal, and, again, has, apparently, not seen that the label "misconduct" which the Respondent applied to the four elements "on account of" which the Claimant was dismissed, was, on the Respondent's own case, misconduct in the reporting of defects (and, on the own EJ's findings, the making of protected disclosures in two instances). We note that the specific findings which the ET made in paragraphs 33 and 34 have been replaced with generalised references to "misconduct", which obscure the overlap we have identified between the protected disclosures and the "misconduct" relied on by the Respondent for dismissal.

55. The EJ then considered the fairness of the dismissal (for the first time, in the light of the finding he had made about the reason for the dismissal). He held that some aspects of the dismissal were unfair (paragraph 48). Both Mr Parry and Mr Moran thought that the Claimant was guilty of all the misconduct alleged. But they did not have reasonable grounds for thinking so in relation to all the items of misconduct. The Claimant could not reasonably have been found guilty of misconduct for the first allegation on 18 June, or in relation to the incident on 12 September 2014. The EJ gave cogent reasons for those conclusions.

56. That left two driving matters: the Claimant's driving in the garage on 18 June, with one hand, and on 29 June, his blocking of the garage exit. If they had been the only matters against him at the disciplinary hearing, the EJ concluded that no reasonable employer could have dismissed the Claimant (paragraph 50). Those were not as serious as using a mobile phone in the cab, which is against the law. Whether dismissal for those two matters was within the reasonable range of responses "becomes more difficult" when the final written warning was taken into account. This related to driving standards, as did the use of the mobile phone. The warning was a "final" warning and the Claimant was told that any similar misconduct would be likely to lead to his dismissal. If the warning was taken into account, the EJ was "not prepared to hold that dismissal lies outside the range of reasonable responses". The Respondent was entitled to seek to uphold driving standards.

57. In paragraph 53, after considering Mr Dalby's interference, the EJ held that "Mr Parry was entitled to dismiss the claimant on the basis of his driving in the garage on 18 June bearing in mind the provisions of the prior warning" and that Mr Dalby's interference made no difference. We observe that it would have been more accurate if the ET had said that Mr Parry "*would have been* entitled to dismiss the claimant for the driving on 18 June". The point here is

A that, on the EJ's findings, Mr Parry did not dismiss the Claimant for the 18 June misconduct alone, but for other things as well, which, on the EJ's findings, he was not reasonably entitled to treat as misconduct.

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Authorities

58. We were referred to various authorities. It is necessary for us to refer only to **Smith v Glasgow City District Council** [1987] ICR 796 HL, to **Davies v Sandwell Metropolitan Borough Council** [2013] IRLR 374 CA and to **Wincanton Group plc v Mr L M Stone** UKEAT/0011/12/LA.

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D 59. In the **Smith** case, to simplify somewhat, the employee was dismissed by a special committee of the Respondent, for three effective reasons. The Industrial Tribunal held that the employer had not established the second reason (1(b)). The Tribunal held that the Respondent was reasonably entitled to take one of the reasons into account in isolation, and that the penalty of dismissal was "one which was reasonably open" to it. Lord Mackay said this at page 803B-E:

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> **"It is important to notice that the resolution of the question what is the reason or, if there is more than one, the principal reason for the dismissal is important not only in relation to subsections (1) and (2) of section 57 but also in relation to subsection (3) for the question in subsection (3) is whether the employer acted reasonably or unreasonably in treating *it* as a sufficient reason for dismissing the employee and *it* must refer back to the reason or the principal reason determined under subsection (1). As Lord Simon of Glaisdale said in *W Devis & Sons Ltd v Atkins* [1977] ICR 662, 682-683, referring to the predecessor of the present legislation:**
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> > **"the employer must satisfy the tribunal that he acted reasonably in treating 'it' (i.e., the reason shown by the employer as the reason for the dismissal of the employee) as a sufficient reason for the dismissal. … The reference to 'equity and the substantial merits of the case' … merely shows that the word 'reasonably' is to be widely construed; but they in no way affect the proposition that what must be shown to be reasonable and sufficient is the employer's action in treating the reason shown by him (the employer) as the reason for dismissing the employee." "**
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H 60. Lord Mackay commented that the Tribunal had not found whether or not 1(b) was the principal reason and the Respondent must be taken to have failed to show what the principal

reason was; but in any event, the Respondent had not shown that 1(b) did not form, nor form part of, the principal reason for the dismissal. He went on to say (between pages 803H and 804A):

> **"… As a matter of law a reason could not reasonably be treated as sufficient reason for dismissing Mr Smith when it had not been established as true nor had it been established that there were reasonable grounds upon which the special committee could have concluded that it was true. Unless, therefore, the industrial tribunal had held that reason 1(b) was not treated by the council as the reason which the council treated as sufficient for dismissing Mr Smith or that it formed no important part of the reason which the council treated as sufficient for dismissing Mr Smith, I am of opinion that the tribunal erred in law"**

He went on to say that reason 1(b) must have formed an important part of the reason which the Respondent had treated as a sufficient reason for dismissal. "To accept as a reasonably sufficient reason for dismissal a reason which, at least, in respect of an important part was neither established in fact nor believed to be true on reasonable grounds is, in my opinion, an error of law".

61. We should explain that "section 57" is section 57 of the **Employment Protection (Consolidation) Act 1978**. It was the statutory predecessor of section 98 of the **1996 Act**.

62. In **Davies**, Mummery LJ said:

> **"20. As for the authorities cited on final warnings, Elias LJ observed, when granting permission to appeal, that the essential principle laid down in them is that it is legitimate for an employer to rely on a final warning, provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it must not have been manifestly inappropriate to issue it.**
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> **21. I agree with that statement and add some comments."**

63. Mummery LJ summarised the effect of the authorities about final written warnings in this way at paragraphs 22 to 24:

> **"22. First, the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s.98(4) to particular sets of facts. The broad test laid down in s.98(4) is whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.**

23. Secondly, in answering that question, it is not the function of the ET to reopen the final warning and rule on an issue raised by the claimant as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a 'nullity'. The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.

24. Thirdly, it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, inter alia, the circumstance of the final warning."

64. In **Wincanton**, at paragraph 37(6), Langstaff P (as he then was) said,

"(6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur."

Discussion

65. We have been much helped by the detailed written and oral submissions of counsel. We mean them no discourtesy, but we consider that, having summarised the decision at some length, and having commented on it, we can set out our views briefly. We have adopted, to some extent, the analysis of Mr Panesar. It seems to us that there are two main issues: whether the EJ erred in law in his approach to the questions whether:

i. the reason or principal reason for the Claimant's dismissal was that he had made protected disclosures; and

ii. the Claimant was unfairly dismissed (if he was not dismissed for making protected disclosures).

66. Logically, the first question is what the reason or principal reason for the Claimant's dismissal was, and whether it was that he had made protected disclosures. In our judgment the EJ erred in law in this case by repeatedly using a test of blatant or gross unfairness as a proxy for asking himself the right question. This led him to fail to focus on the evidence which was relevant to that question, and, instead, to focus on evidence which was either irrelevant, or of

limited relevance. In particular, the EJ apparently failed to notice that two aspects of the misconduct for which, on his findings, the Claimant was dismissed, were acts which, he had found, amounted to protected disclosures.

67. There were other aspects of the evidence and of his findings which, in our judgment, were relevant to this question, which were troubling, and which the EJ should have factored into his decision on this question. They include:

i. the finding that the disciplinary process which led to the Claimant's dismissal was "prompted" by the Claimant's protected disclosures, and, indeed, that they were the principal reason for taking that action;

ii. that the Claimant had been given two final written warnings on 8 May 2014, one of which was for reporting a defect to a police officer on 8 May 2014, and that the EJ had held that that final written warning (in short) should not have been given (or taken into account); the EJ also found that Mr Seers' sole concern on that day was the report which the Claimant made to the policeman;

iii. that Mr Parry dismissed the Claimant expressly for conduct relating to defect reporting;

iv. that Mr Dalby, to whom the Claimant had delivered a letter about defects, which the EJ found was a protected disclosure, was clear he wanted the Claimant to be dismissed (see the EJ's findings about this email and its "potential" effect on the integrity of the procedure; this had the potential to influence Mr Parry, who took the decision, among other things).

68. We have no confidence that the EJ did take these aspects of the evidence into account when deciding whether the Claimant was not dismissed for making protected disclosures. This is because the relevant findings are scattered about in different parts of the decision, and there is no sign that the EJ appreciated that they were relevant to this issue. Rather, on this issue, he repeatedly asked himself the wrong question, which was whether the dismissal was blatantly or grossly unfair. We have asked ourselves whether the only answer which was open to the EJ on these findings was that reason or principal reason for the dismissal was that the Claimant had made protected disclosures. Very much on balance, we conclude that it might have been open to an ET, properly directing itself, to find that the Claimant was not dismissed for making protected disclosures. But such a conclusion, in the light of the findings of fact to which we have referred, would have required cogent explanation. There is none in the Decision.

69. We are not persuaded by Mr Solomon's submission that the EJ has made a finding of fact that the Claimant was not dismissed for making protected disclosures, and that finding is conclusive. The defective process of reasoning which we have described makes that finding unsound.

70. We turn to the fairness of the dismissal, an issue which only arises if the reason or principal reason for the dismissal is not the making of protected disclosures. We are troubled on this aspect of the case by the fact that the EJ has, in effect, held that the Respondent would have been entitled to dismiss the Claimant for two out of the four items of misconduct on which the Respondent relied, but was unreasonable in relying on the other two. The point is that the Respondent did not dismiss the Claimant for two "reasonable" examples of misconduct alone. The EJ did not find that the Respondent in fact dismissed the Claimant for four separate matters, and that the Respondent would have dismissed the Claimant for each of those on its

own, or for two on their own. The EJ instead found that the Respondent "was entitled" to dismiss for the driving matters, which is different. We consider that a finding that the Respondent did dismiss the Claimant for the two driving matters alone was not open to the EJ in this case. That is just not how the Respondent presented its case to the ET, and it is not how the EJ saw it, either (see for example, the way the EJ described Mr Parry's reasons for dismissing the Claimant in paragraph 15.46, paragraphs 33 and 47, and in paragraph 48, "The respondent has shown the reason for the dismissal. I consider that Mr Parry and subsequently Mr Moran both thought that the claimant was guilty of *all* the misconduct alleged" (emphasis added)).

71. On the basis of the **Smith**, it seems to us that there can only be one answer on this aspect of the case. The Respondent relied on four examples of misconduct which, in Mr Parry's view, were all incidents relating to reporting defects on vehicles (Judgment, paragraph 15.46). On the basis of the EJ's findings, there was no material on which he could have based a conclusion that the Claimant was dismissed for four single, equally important, pieces of misconduct. The findings of the ET show that the Respondent's reason for dismissal included all four. The EJ having found that the Respondent did not act reasonably in treating two of those as a sufficient reason for dismissing the Claimant, the finding that the dismissal was not unfair cannot stand. What the EJ did, instead, was to consider (as it were, in a parallel universe) whether the Respondent would have acted reasonably in dismissing for two aspects of misconduct only. That was not a legitimate line of inquiry in this case, because the Respondent did not dismiss the Claimant for two driving-related incidents, but for four incidents relating to the reporting of defects.

72. We are not convinced by Mr Solomon's attempts to distinguish **Smith** from the facts of this case. We accept that the reason for the dismissal was a composite of different conduct on different dates. But the important similarity between this case and **Smith** is that in each case the employee was dismissed for all the strands on which the employer relied, not for one or two. The point here is that there was no evidence that the employer did dismiss for some of the allegations of misconduct and not for the others. The EJ found that two of the strands were not based on reasonable grounds, and that the Respondent would not have acted reasonably in dismissing for the other two, absent the warning. What the Respondent would have been entitled to do if it had not acted unreasonably in relying on two examples of "misconduct" which it did in fact rely on, is nothing to the point.

73. This conclusion means that we do not need to consider Mr Panesar's argument based on the final written warning. We will, nonetheless, say a little about it. We note, first, that on our construction of the letter of 5 June, two separate warnings were given for different types of gross misconduct. The **Davies** argument only invalidates one of those warnings, not both. The **Davies** argument does not affect the warning for using the phone in the cab. It seems to us that had the Respondent in fact dismissed the Claimant only for two instances of poor driving, and relied on the final written warning given for making a phone call from the cab, such a dismissal might well have been not unfair. But those were not the facts with which the ET, on his own findings, was confronted. In the real world, the Claimant was dismissed for four instances of misconduct, not two.

Remedy

74. We heard submissions on remedy at the end of the hearing. On the first issue, whether the Claimant was dismissed for making a protected disclosure, we would have remitted this

A case to a different ET. On the question of "ordinary" unfair dismissal, we have come to the conclusion, for the reasons we have given, that on the basis of the EJ's own findings, and of the decision in **Smith**, the only conclusion which was open to this EJ was that the Claimant's dismissal was unfair. The case will therefore be remitted to the ET for a decision on the remedy to which the Claimant is entitled.

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