Appeal No. UKEAT/0434/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 March 2015

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

MS JINADU APPELLANT

(1) DOCKLANDS BUSES LIMITED
(2) MR P RUSSELL
(3) MR D BUTTERFIELD
(4) MR T DALTON RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

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

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The Appellant was employed as a bus driver by the First Respondent. Her driving was considered to be below an acceptable standard and she was instructed to arrange to have a driving assessment at the First Respondent's in-house training centre. She repeatedly refused to comply with the instruction and was dismissed for gross misconduct. She appealed against her dismissal. The appeal hearing was adjourned in order for her to attend the training centre. Ultimately she did attend and was required to attend corrective training. Following the corrective training she took an assessment, which she failed. The appeal was reconvened. The only reason that appeared to have been given for the dismissal of the appeal was that she failed to display a satisfactory driving standard and that her dismissal was in the interest of public safety.

The Employment Tribunal dismissed her claim for unfair dismissal on the ground that she repeatedly refused to attend the training school and that the penalty of dismissal lay within the band of reasonable responses a reasonable employer might have adopted.

The Employment Appeal Tribunal allowed her appeal and remitted the case to the Employment Tribunal on the ground that the Employment Tribunal erred in failing to make proper findings as to: (1) the reason(s) for the dismissal of the appeal, and (2) the reason(s) for and reasonableness of the Appellant's dismissal by reference to that or those reasons.

THE HONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. The Appellant, Ms Jinadu, appeals against the Judgment of an Employment Tribunal (chaired by Employment Judge Goodrich), sent to the parties on 5 June 2014, following a hearing held at East London Hearing Centre on 11-13 March 2014, that she was not unfairly dismissed. In her claim form dated 28 August 2012, the Appellant brought numerous claims including sex discrimination, age discrimination, holiday pay, arrears of pay and other payments in addition to a claim for unfair dismissal. This appeal is concerned solely with the unfair dismissal claim.

The Facts

2. The Appellant was employed as a bus driver by the First Respondent (whom I shall refer to as "the Respondent") and previous employers from whom she transferred under TUPE from 9 July 2002 until she was dismissed on 9 July 2012. Her employment had transferred to the Respondent on or around 17 September 2011. The bus garage at which she was based was the Silvertown Garage.

3. On 17 May 2012 the Appellant was driving a D6 bus on its route towards the Crossharbour terminus. A complaint was made by a car driver about her driving to Mr Butterfield, one of the supervisors of the garage where she worked. Mr Butterfield and the Appellant submitted reports to Mr Dalton, the Operating Manager of the garage, who also requested and received a report from the Accident Prevention Supervisor, who had watched the CCTV footage in question. The Accident Prevention Supervisor's report refers to various failings in the Appellant's driving in the time period concerned. He referred, for example, to

the Appellant pulling out with cars still passing, one-hand driving, clipping kerbs, showing poor lane discipline, running a red light and pulling into the path of two cars.

4. In response to the report he received, Mr Dalton called the Appellant to a fact-finding meeting. She attended with Mr Morrison, her trade union representative. The outcome of the meeting was that Mr Dalton decided that, having viewed the CCTV recording, her driving was below an acceptable standard. He told the Appellant to arrange to have a driving assessment at the Camberwell training centre on 25 May 2012. The centre was an in-house training centre for the Respondent to train its bus drivers and, when required, to prepare them for external assessment. Mr Dalton confirmed this instruction in writing.

5. On 25 May the Appellant failed to attend the driving assessment at the centre and instead attended Mr Dalton's office with Mr Morrison. She told Mr Dalton, in response to him asking why she was there and not at the training centre, that she was not going because he was making her a scapegoat and using his position as a manager to bully her. There was some dispute as to the conversation that took place. However the Tribunal noted at paragraph 53 of the Decision that

> **"Whatever were the contents of the conversation it was abundantly clear … that the Claimant was adamantly opposed to attending any training assessment. …"**

Mr Dalton was incensed that the Appellant was refusing to comply with his instruction and he suspended her immediately without pay and required her to attend his office at 9am on 28 May. In suspending her without pay, Mr Dalton acted in breach of the Appellant's contract of employment, as he subsequently accepted.

6. On 28 May the Appellant attended Mr Dalton's office. He asked her if she had time to reflect on her refusal to attend the training centre and, if given the opportunity, whether she would now attend. She refused to attend. Mr Dalton informed her that he would refer the matter to the General Garage Manager and that cases referred in this way might result in dismissal. The Appellant was instructed to attend a disciplinary hearing on 30 May and notified that a disciplinary award could include dismissal.

7. For reasons that are not relevant, the disciplinary hearing did not take place on that day but ultimately on 9 July 2012. It was conducted by Mr Russell, an Acting General Manager. The main points referred to in the minutes to the disciplinary hearing, which the Tribunal accepted, are summarised at paragraph 70 of the Tribunal Decision. They include the following:

> **"70.6. Mr Russell asked the Claimant why she had not gone to training school when Mr Dalton had requested her to do so. Her response was "because I am not going. The Inspector who reported me is against me."**
>
> **70.7. The Claimant reiterated "No, I am just not going to go. You will have to sack me because I am not going. I will draw blood before going." She further explained that the reasons were that the man complaining against her was drunk and they were not allowed to watch CCTV of her (she was complaining, in other words, about showing the CCTV footage).**
>
> **70.8. Mr Russell asked her once again whether she was prepared to go and the Claimant confirmed "No, but even if you sack me I am not going to training school." "**

8. The outcome of this disciplinary hearing was that, following an adjournment, Mr Russell reconvened the meeting, I understand on the same day, and notified the Appellant that she had refused to comply with a clear instruction to attend training school without good reason, which was deemed gross misconduct. She was dismissed for gross misconduct and notified that she would be dismissed with notice pay. She would be paid weekly until her appeal was heard. She was notified of her right of appeal. She did appeal against her dismissal.

9. The appeal hearing took place on 9 October 2012. The CCTV was watched by everyone present. Discussions took place as to the Appellant's Grounds of Appeal and her allegations of unlawful discrimination. In the course of the discussion Mr Mahon, who conducted the appeal, stated that:

> **"85. … there had been a clear instruction to attend the training school for assessment which was refused and because of that she was dismissed, and out of that she was now making allegations of discrimination. He asked whether these were now set aside and the Claimant was now happy to follow the instructions of Mr Dalton to attend training school. The Claimant withdrew her allegations of discrimination."**

Then the Tribunal said this, at paragraph 86:

> **"The outcome of the appeal was that Mr Mahon informed the Claimant that the hearing was adjourned in order for her to attend the training school. He informed her that, fail or pass the training school, she would return to the appeal before being reinstated to the garage, and he would deal with the remainder of the driving standards issues and all other matters should she wish to continue with them and give her the opportunity to set out in a proper and concise way the evidence she wished to [rely] on."**

10. The Tribunal noted that the Appellant expressed scepticism about attending the training school. The minutes show that her final comment was that, if she failed, it would be because they had asked them to fail her. She did not in fact attend training school on the date first scheduled. By letter dated 10 October 2012 she told Mr Mahon that she felt she was being bullied and intimidated into going to training school. Mr Mahon responded and urged her to reconsider. She replied by letter dated 17 October. She gave no indication that she was willing to attend driving school. Later that month the Claimant wrote again to Mr Mahon by letter dated 29 October, stating that she had made an arrangement to start driver training but had injured her knee. She requested lighter work.

11. Mr Mahon responded. He asked her to make a further appointment with the Training Manager when she was fully recovered. The Claimant continued to be unfit to attend work. She then wrote to Mr Mahon on 6 March 2013. She informed him that she was now fit to work

and requested a starting date and time. She made no reference to attending training school. Mr Mahon reminded the Claimant by letter dated 13 March 2013 that he had adjourned her appeal against dismissal to enable her to attend the driving school for assessment and corrective training following an examination by the driving test examiner. He reminded her that the instruction remained in place.

12. The Claimant attended training school on 26 March. She was required to attend corrective training. Following the corrective training she took an assessment on 5 April, which she failed. The disciplinary appeal was reconvened on 30 April 2013.

13. At paragraph 99 the Tribunal stated:

> **"At the reconvened meeting the Claimant set out her complaints about Mr Dalton and Mr Butterfield and various complaints of discrimination. The outcome of the appeal was to reject the allegations, and to reject the Claimant's appeal against dismissal so that she remained dismissed. Even at this final hour, the gist of the Claimant's point at the reconvened appeal hearing seemed to be complaining about the treatment she had received from, particularly, the driver of the car that originally complained about her, Mr Butterfield and Mr Dalton; rather than seeking to persuade the panel to allow her to have further training and retake her assessment, so as to be able to pass it."**

The Employment Tribunal Decision

14. The Tribunal's conclusions in relation to the unfair dismissal claim are set out at paragraphs 159 to 161 of the Tribunal's Decision. There was no issue as to whether the Appellant was dismissed for a potentially fair reason. That being so, the Tribunal had to determine whether the Respondent had acted reasonably in treating that reason as sufficient reason to dismiss the Appellant. The nub of the Tribunal's Decision on that issue is at paragraph 159.4 and paragraph 161 of the Decision:

> **"159.4. The Claimant was given numerous opportunities to change her mind, back down and attend training school. She had an opportunity when she attended for work rather than the training school. She could have changed her mind at any point between 25 May, when she refused, and 9 July, when her disciplinary hearing took place. Even the appeal was adjourned to enable her to attend and the opportunity remained even after the Claimant failed to comply with her agreement to attend the training school."**

At paragraph 161:

> **"We have little or no hesitation in concluding that the sanction or penalty of dismissal lay within the band of reasonable responses a reasonable employer might have adopted, even allowing for the Claimant's length of service. Insubordination is listed as an item of gross misconduct. The Claimant repeatedly refused to attend the driving school. This was a reasonable instruction, having in mind the need to secure the safety of passengers and the public generally and ensure that London's bus drivers drive safely. Not only did the Claimant refuse to attend on numerous occasions when instructed to do so, but she actively appeared to be provoking Mr Russell to dismiss her by stating on several occasions that she would not go even if she were to be dismissed. She was, therefore, well aware of the consequences of her continued refusal."**

15. When I said that there was no issue as to whether the Appellant was dismissed for a potentially fair reason, that was, it seems to me, the way that the Tribunal proceeded when I consider those paragraphs, paragraph 159 to 161.

The Appellant's Case

16. Mr Ogilvy for the Appellant makes a number of points in his written and oral submissions on her behalf. First, he submits that the Tribunal was wrong to treat her refusal to attend the driving assessment which was arranged for 25 May 2012, which was a singular failing, as gross misconduct. In support of this submission, he refers to the decision of this Tribunal in **Brito-Babapulle v Ealing NHS Trust** [2013] IRLR 854, over which the President presided, and, in particular, paragraph 40 of the Judgment in which it was said that it is the whole of the circumstances that the Tribunal must consider when assessing whether the employer's behaviour is reasonable or unreasonable, having regard to the reason for dismissal.

17. Further, Mr Ogilvy submits that the Tribunal erred in certain specific respects:

   (1) In accord with the Respondent's grievance procedure, consideration should have been given to suspending the disciplinary procedure for a short period while the Appellant's grievances were dealt with.

(2) The Respondent did not consider bringing in another manager to deal with the disciplinary process, having regard to her complaints about Mr Butterfield and Mr Dalton.

(3) The reason for her dismissal has been overtaken by events in that before the conclusion of the appeal she had attended the training centre.

(4) Her failure to pass the test amounts to a capability rather than a conduct issue.

(5) In the context of considering the discrimination claim Mr Ogilvy notes that the Tribunal stated at paragraph 133 of the Decision that:

> **"… If she had completed the training satisfactorily and passed her assessment she would have returned to work without further action against her; and would not have received a disciplinary sanction. …"**

(6) At paragraph 159.8 of the Decision the Tribunal stated:

> **"Overall, therefore, we are satisfied that the procedures, although there were failings in some respects, were within the band of reasonable responses a reasonable employer might have adopted."**

However the Tribunal failed to identify what those failings were and whether they rendered the dismissal unfair and, if not, why not.

(7) The Appellant had not been charged with insubordination. This allegation was never put to her, and it was not open to the Tribunal to rely on it, as it did at paragraph 161 of the Decision, as justification for her gross misconduct.

Conclusions

18. In my judgment the Tribunal was entitled to make the findings and reach the conclusions it did in relation to the Respondent's breaches of procedure. In particular, I reject Mr Ogilvy's submission that the Respondents were obliged to put the disciplinary investigation on hold until they had dealt with the Appellant's grievances. I also reject the submission that Mr Butterfield and Mr Dalton, in particular, should not have been involved in the disciplinary process, as the

Appellant had raised grievances against them. Mr Russell conducted the disciplinary hearing, and the Appellant had no extant grievance in relation to him.

19. Further, I reject Mr Ogilvy's submission in relation to the use of the term "insubordination" by the Tribunal at paragraph 161 of the Decision. It is clear, as the Tribunal noted, that the Respondents dismissed the Appellant for her repeated refusal to attend the driving school, which the Tribunal considered to be a reasonable instruction having regard to the need to secure the safety of passengers and the public generally and ensure that London's bus drivers drive safely. The Tribunal added:

> **"… Not only did the Claimant refuse to attend on numerous occasions when instructed to do so, but she actively appeared to be provoking Mr Russell to dismiss her …"**

The Tribunal was entitled, in my view, on the evidence, to reach the conclusion that it did in paragraph 161 of the Decision with regard to insubordination and the use of that term and what they state to be the true reason for the dismissal as recorded there.

20. However I do consider the Tribunal's Decision to be deficient in one very important respect. Mr MacCabe, who appears for the Respondents, accepts that, under the Respondent's procedures, the appeal amounts to a rehearing. The Tribunal's conclusions on the unfair dismissal claim are set out at paragraphs 159 to 161 of the Decision, to which I have referred, which led to the decision at paragraph 162 that the Claimant's unfair dismissal claim fails.

21. Paragraphs 159 and 160 deal in express terms exclusively with the Respondent's procedures during the disciplinary investigation including the disciplinary hearing and the appeal. The first sentence of paragraph 161, which I have read, but I repeat, reads as follows:

> **"We have little or no hesitation in concluding that the sanction or penalty of dismissal lay within the band of reasonable responses a reasonable employer might have adopted, even allowing for the Claimant's length of service. …"**

22. The only other point in the Decision where the Tribunal make a finding in relation to the dismissal of the appeal is at paragraph 99, where, insofar as it is material, the Tribunal states:

> **"At the reconvened meeting the Claimant set out her complaints about Mr Dalton and Mr Butterfield and various complaints of discrimination. The outcome of the appeal was to reject the allegations, and to reject the Claimant's appeal against dismissal so that she remained dismissed. …"**

23. At no point does the Tribunal set out, comment on or make any findings in relation to the reasons for the dismissal of the appeal. I am informed that there was no letter or anything in writing following the appeal setting out the reasons for dismissing the appeal. We do, however, have the notes of the reconvened appeal hearing, which run to some 11 pages. In section 8 of that document, at pages 10 and 11, there is the decision. The relevant passage reads as follows.

> **"Having taken evidence here today we find no proof of harassment on the grounds of race, age or sex. We do however find strong evidence that links the public complaint to the CCTV and the poor driving displayed whilst at Camberwell. Ms Jinadu failed to display a satisfactory driving standard and this led to DMI Orr's decision.**
>
> **In view of this and in the interest of public safety we conclude that Ms Jinadu's appeal fails and she remains dismissed."**

24. On its face the reason for dismissing the appeal related to the Appellant's poor driving. That, Mr Ogilvy submits, is a reason related to capability and not conduct and in this connection Mr Ogilvy points to paragraph 41 of the Decision, which sets out the Respondent's procedures for training school, which indicate that only if a driver failed an assessment twice after corrective training would the driver be at risk of dismissal. Mr MacCabe submits that the reason for dismissal remained, as it had been at the time of dismissal, one of misconduct and that the Tribunal was entitled to take into account all matters including her failure to pass the test when considering whether or not to allow the appeal.

25. It may be thought that Mr Mahon, on the appeal, acted very fairly to the Appellant 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. However the fact is

that he did, and on 13 March 2013 at paragraph 96 of the Decision, he reminded her that he had adjourned the appeal against dismissal to enable her to attend the driving school for assessment and corrective training following an examination by the driving test examiner. He reminded her that the instruction remained in place. The Decision continues at paragraph 97:

> **"The Claimant attended training school on 26 March 2013. She was required to attend corrective training. Following the corrective training she took an assessment on 5 April 2013, which she failed."**

The disciplinary appeal, as paragraph 98 notes, was reconvened on 30 April 2013.

26. In my judgment the Tribunal erred in failing to make proper findings as to (1) the reason(s) for the dismissal of the appeal, and (2) the reason(s) for and reasonableness of the Appellant's dismissal by reference to that or those reasons. Accordingly this appeal succeeds, and I direct that the case be remitted to the Employment Tribunal for those matters to be considered.

Evidence at the Remitted Hearing

27. My present view is that there is no need for further evidence. The points that I have identified are matters of law that can be dealt with on the basis of the evidence that was before the Tribunal and has been before this Tribunal. However, if the Tribunal hearing the case on the remission, having heard from the parties, is of the view that there should be further evidence on any matter relating specifically to the matters that are being remitted to them, then of course it is open to them in their discretion to hear further evidence.

Costs

28. Mr Ogilvy has made an application for costs following the Judgment that I have delivered in relation to, or arising out of, the £1,600 that the Appellant has paid in court fees. The regime

in relation to court fees and costs is explained by the President in a recent decision of **Look Ahead Housing and Care Ltd v Chetty and Anr** UKEAT/0037/14.

29. Rule 34A(2A) of the **Employment Appeal Tribunal Rules 1993** provides:

> **"If the Appeal Tribunal allows an appeal, in full or in part, it may make a costs order against the respondent specifying that the respondent pay to the appellant an amount no greater than any fee paid by the appellant under a notice issued by the Lord Chancellor."**

30. At paragraph 50 the President explains that underlying the principles that he has set out is the fact that fees are paid whatever the result. They are not refundable except perhaps in the most exceptional of circumstances, which very rarely if ever exist. Accordingly what has to be achieved by application of Rule 34A(2A) is justice between the parties as to which party should effectively incur the payment of fees, which viewed as between them is a common expense incurred simply because there was an appeal.

31. The nub of my decision is that the Tribunal failed to give reasons for dismissing the appeal, which was a re-hearing, as a result of which this Tribunal does not know what the Employment Tribunal found to be the reason for the dismissal and is not able to assess whether the Tribunal erred or not in finding the dismissal was fair in all the circumstances. Mr MacCabe submits that analysis was one that I made during the course of argument, not one that figured in the Appellant's Notice of Appeal or Skeleton Argument. That being so, there is no basis for effectively penalising the Respondent. If the point had been put in the terms that I so found, then the Respondents could have referred the matter to the Tribunal in the ordinary way for the Tribunal to respond. That, he submits, is what the Appellant should have done and then the costs of this hearing would have been avoided.

32. Mr Ogilvy submits that, whilst he accepts that the point that I found in favour of the Appellant is not expressly stated in those terms in the Notice of Appeal, nevertheless a fair reading of the Notice of Appeal and his Skeleton Argument and the decision of HHJ Serota QC on the sift should lead to the conclusion that at least in part the point that I have found in the Appellant's favour does figure in one or more of those documents.

33. I bear very much in mind what I have been told, that the Appellant is a person with very limited resources, who has borrowed money, I am told, from the Church in order to finance these proceedings and therefore this is an application which is of some real importance to her. However I have come to the conclusion that Mr MacCabe is correct in his submission that on the basis that I have so found, if the Appellant, advised by Mr Ogilvy, who whilst he is not a qualified barrister or solicitor, has certain legal qualifications, if the point had been put in the Notice of Appeal or in the Skeleton Argument in the terms that I found in favour of the Appellant, then the costs of this hearing may well have been avoided.

34. In those circumstances I reject the application. Doing the best I can in terms of justice to both parties, I consider that it would not be right that the Respondent should incur any of the costs of this hearing, appreciating as I do that of course the costs are the court fees that the Appellant has had to pay in order to gain access to this Tribunal.