Appeal No. UKEAT/0059/14/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 July 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR K NOOR — APPELLANT

METROLINE TRAVEL LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES LADDIE QC (Appearing through the Free Representation Unit)
For the Respondent	MR MARTIN FODDER (of Counsel) Instructed by: Metroline Travel Ltd Human Resources Department Comfortdelgro House 329 Edgware Road Cricklewood London NW2 6JP

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

PRACTICE AND PROCEDURE - New evidence on appeal

The Claimant, a bus driver, was dismissed for covering up a CCTV camera in his cab. His principal ground of appeal was that the Employment Judge was perverse in finding that it was reasonable to impose the sanction of dismissal for covering up a CCTV camera. Appeal rejected.

The Claimant had referred in his Notice of Appeal to fresh evidence and in effect made an application for the admission of fresh evidence. His counsel correctly took the view that it was better to raise that fresh evidence with the Employment Judge by way of an application for reconsideration. When an appeal is considered on paper at an early stage it is often the practice of the EAT to stay an appeal pending reconsideration by the Employment Judge or Tribunal. But here, where the matter arose at the final hearing, and where the application to adduce fresh evidence was a free-standing application raising no question of law, it was better to dismiss the appeal. In the event that the Employment Judge erred in law in reconsidering the case the Claimant would be able to appeal against that decision. Paragraph 10.1 of the EAT **2013 Practice Direction** considered.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Kasem Noor ("the Claimant") against a Judgment of Employment Judge Smail, sitting in Watford, dated 24 April 2013. By his Judgment the Employment Judge dismissed claims of unfair dismissal and breach of contract which the Claimant brought against Metroline Travel Ltd, ("the Respondent").

2. The principal ground of appeal concerns the sanction of dismissal. It is argued that the Employment Judge reached a perverse decision when he held that the sanction of dismissal fell within the range of reasonable responses. There is a subsidiary ground relating to the admission of fresh evidence, which is not pursued today, but which the Claimant seeks to keep open by staying that part of the appeal pending an application to the Employment Judge for reconsideration on the grounds of fresh evidence.

The Background Facts

3. The Respondent operates bus services in the London area. The Claimant worked for them as a bus driver from 8 March 2004 until his dismissal on 7 November 2012. On 20 October 2012 he was smoking as he began work on the night shift. He got into the cab of his bus and covered the CCTV camera facing the driver with a piece of tissue. The piece of tissue remained over the camera for more than an hour. The use of the tissue was discovered because there was an incident when someone threw something into the bus, breaking a glass shield. The incident was not in any way the Claimant's fault, but it led to the discovery that he had covered the camera.

4. The Claimant accepted that his conduct was wrong, but he gave an explanation for it. He said that within an hour or so prior to the start of the shift he had learned that his brother had been murdered by terrorists in Somalia. The hospital in Mogadishu had informed the family. He subsequently produced a document from the hospital in Mogadishu dated 5 November 2012 confirming the violent death of Abdirahman Noor. The Claimant said he was upset and confused by this tragic event and behaved out of character.

5. It was the Respondent's case at the hearing that it took a very serious view of the covering of a CCTV camera and that it had taken steps to draw its policy to the attention of employees. The Employment Judge found that it had been agreed by management and the union that CCTV cameras would operate uncovered and that it would be a matter of gross misconduct for any driver to cover a camera. The Employment Judge said that the Claimant knew both the covering up of the camera and smoking on the bus to be against company policy.

6. The Respondent, whilst accepting that the Claimant had indeed learned of his brother's death shortly before coming on shift, nevertheless dismissed the Claimant. Mr Forhall, who conducted the disciplinary hearing and took the decision, inferred that the Claimant was likely to have habitually in breach of the non-smoking and CCTV interference policies. But the approach of the appeal panel was different. The appeal panel was content to regard the incident on its own without drawing any inference that the Claimant habitually acted in the same way. They thought having a cigarette might be understandable in the circumstances, but they thought that no reaction to bereavement could excuse or explain the covering of the CCTV, which offended various health and safety policies, procedures and practices.

The Employment Judge's Reasons.

7. The Employment Judge gave himself an impeccable self-direction as to the law in paragraphs 2.1-2.3 of his Reasons, summarising the key provisions of the legislation and making appropriate reference to the band of reasonable responses test. He concluded his summary with the following:

> **"As the misconduct in this case is admitted our enquiry is going to concern whether dismissal was a reasonable sanction open to a reasonable employer. That most certainly is not admitted by the claimant."**

8. The Employment Judge made findings of fact on which I have already drawn in this Judgment. He then stated his conclusions in the following terms:

> **"4.1 As I have made clear by reference to the authorities that I have read out above, my powers as an employment tribunal judge are limited. I cannot say that the reasoning of the appeal hearing was unreasonable or unfair in this case. Put this way, what on earth was the claimant doing covering up the CCTV in breach of clear guidelines on that occasion? I would have had much more concern had the appeal panel upheld the inference that this was a matter of habit. That evidence, it seems to me, was not fairly open to Mr Forhall to conclude. If he did think it was a matter of habit he could have made reference, or the investigating officer could have made reference to earlier CCTV. That evidence simply was not there and I may well have concluded that had the matter been decided on the basis of habit, that was not a finding open to a reasonable employer. That said, there still would have been enormous contributory fault but it seems to me the position on appeal has cured the position at the time of the original dismissal. The reasoning of Mrs Dawson and Mr Dalby is one I cannot find fault with.**
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> **4.2 The bereavement, tragic as it is, might, one suppose, explain smoking. It simply does not explain the covering up of CCTV camera and that is something it seems to me that the claimant cannot explain by reference to the bereavement. That was conduct flying in the face of well established policy which indeed had recently been made crystal clear to the drivers in the form of posters being put up in the garage.**
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> **4.3 Misconduct was the reason for the dismissal. There was reasonable ground for the belief in misconduct: the Claimant admitted the facts. It was reasonable for the Respondent to regard the covering up of the CCTV as gross misconduct and so dismissable.**
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> **4.4 Accordingly, this dismissal was not unfair. In terms of breach of contract it seems to me that the covering up of CCTV camera amounted to a repudiatory breach of contract by the claimant, meaning the respondent could dismiss him without having to pay notice. So for all of those reasons I am forced to conclude that claimant's claims fall."**

The Statutory Provisions

9. It is convenient next to set out the statutory provisions which the Tribunal had to apply. Section 98(1) provides that it is for the employer to establish the principal reason for dismissal and that it is of a kind specified in section 98(2) or some other substantial reason. Section 98(2)

specifies conduct. Section 98(4) provides that, where the employer has fulfilled the requirements of section 98(1):

> **"...the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

The Appeal

10. The Claimant's initial Notice of Appeal was found on paper to disclose no reasonable grounds for appealing. It was indeed a document heavily focussed on fact, with many supporting materials. The Claimant applied for a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** for this matter to be (inaudible) at a hearing. At that hearing Mr James Laddie QC represented the Claimant under the auspices of ELAAS. He identified three points and applied for permission to amend the Notice of Appeal. Cox J granted that application. Mr Laddie has appeared again, this time under the auspices of the Free Representation Unit. Mr Martin Fodder appears for the Respondent.

Perversity

11. Mr Laddie argues that the Employment Judge's conclusion on the question whether the sanction of dismissal was reasonable was perverse. He puts his case in two ways. Firstly, he submits that an Employment Tribunal, applying section 98(4) of the 1996 Act, was entitled to consider the fairness of the policy relating to dismissal for the covering of CCTV cameras. He suggests that the policy was plainly disproportionate and unfair. He points out that covering up CCTV might impact on an employer's ability to gather evidence but it would not cause a breach of health and safety. It is not suggested, he argues, that anyone has ever been hurt because a camera has been covered. The policy relating to covering of CCTV cameras was lumped

together by the Respondent with vandalism, whereas it could not sensibly be described as vandalism. He submits that the policy was so plainly disproportionate and unfair that the Employment Judge was bound to hold that it was.

12. Secondly, Mr Laddie points out that the policy was not absolute. It was described as applying "in the normal course of events" in the Respondent's evidence. The Claimant's circumstances, he submitted, could not possibly be described as "the normal course of events". It showed a closed mind, a rote application of the policy, to dismiss the Claimant in the circumstances, for what was, he would submit, a trivial incident.

13. In reply to these submissions, Mr Fodder questions whether the fairness of the policy as a whole was ever an issue at the Employment Tribunal. But he submitted, in any event, that the policy was plainly proportionate and fair. The CCTV system was not only for the purpose of evidence-gathering. It had an important deterrent effect. As to the way the policy was applied, Mr Fodder submits that the evidence before the Employment Tribunal showed a conscientious application to the circumstances. He points out that the Claimant was acting deliberately, as shown by his removal of the tissue once the act of vandalism had taken place. He reminds me that the decision was one of the employer, to be reviewed by the Employment Tribunal only to a limited extent. He reminds me of the narrow compass of a perversity appeal.

14. It is indeed important to keep in mind the respective roles of the Employment Tribunal and the Employment Appeal Tribunal. The task of the Employment Tribunal, once the employer has established the reason for dismissal, is to decide whether, in the circumstances, the employer acted reasonably or unreasonably in treating it as a reason for dismissal, having regard to equity and the substantial merits of the case. In reaching that decision the

Employment Judge must keep carefully in mind that there may be more than one reasonable way for an employer to deal with a situation. Essentially, the statute requires the Employment Tribunal to review every aspect of the dismissal to see whether the employer acted reasonably. This review includes the sanction imposed.

15. The task of the Employment Appeal Tribunal is more limited. The Appeal Tribunal hears appeals only on points of law (see section 21(1) of the **Employment Tribunals Act 1996**). In a case such as this, the Appeal Tribunal is concerned to see whether the Tribunal has applied correct legal principles and reached findings and conclusions which are supportable: that is to say not perverse if the correct legal principles are applied. The scope of a perversity appeal is limited. A finding or conclusion is perverse if and only if an overwhelming case is made out that no reasonable Tribunal, on a proper appreciation of the evidence and law, would have reached the conclusion concerned.

16. Once granted the basis upon which the Employment Tribunal proceeded, namely that there was a policy clearly enunciated to employees, including the Claimant, that covering CCTV cameras would generally be treated as gross misconduct, I do not think the Employment Judge can be said to have reached a perverse conclusion that dismissal was a reasonable sanction to impose. The Employment Judge did not explicitly deal with the question whether the policy itself was a fair policy. It was, I think, implicit in the Employment Judge's reasoning that he regarded the policy as fair, and the matter may scarcely have been argued before him. To my mind, the Employment Judge was entitled to conclude that a reasonable employer may take a serious view of the covering up of a CCTV camera by a bus driver. CCTV does not only provide evidence after an incident, although this is an important part of its

purpose, not to be overlooked. The very fact that CCTV is in use is a deterrent to passengers and members of the public who might be minded to commit acts of violence or disorder.

17. Moreover it is an incentive to drive and otherwise behave in a safe manner. Buses are important public service vehicles, requiring high standards of conduct by those who drive them. An employer might be subject to severe public criticism in the event of an incident or an accident taking place whilst CCTV was covered up especially if it emerged that a policy was not enforced. An employer, to my mind, is entitled to take the view that the deliberate covering up of a camera, even if there are personal mitigating circumstances, warrants dismissal.

18. As regards the application of the policy in the case of Mr Noor, I do not think that the Employment Judge's conclusion can be characterised as perverse. Some would consider the Respondent's decision harsh. But the question for the Employment Judge was whether it was within a reasonable range. The obscuring of the CCTV camera was deliberate, and it was obscured for more than an hour. It was not perverse for the Employment Judge to conclude that the Respondent acted reasonably in dismissing the Claimant.

Fresh Evidence

19. The Claimant has fresh evidence, which calls into question whether there was in fact a consistent policy of the kind which the Employment Judge understood there to be.

20. In June 2013, after the Judgment of the Employment Judge had been given orally, the Claimant met an employee, Mr Munya, who had been disciplined for a similar offence, arguably in rather worse circumstances and without the mitigation available to the Claimant. Mr Munya was dismissed on 2 June 2011, but on 23 June 2011 his appeal was allowed and a

final warning was substituted. The manager concerned said, in the letter allowing the appeal, "I do believe that you are entitled to a second chance." In the covering decision note, the reasons for the decision were said to be "Award not progressive nor consistent with company policy."

21. The Claimant's Notice of Appeal was prepared by the Claimant in person shortly after receipt of this information. It is right to say that he referred, in documents enclosed with the Notice of Appeal, to Mr Munya's case and that he enclosed relevant documents relating to Mr Munya. His Notice of Appeal and accompanying documents, however, ranged far and wide and it was not noted, on initial consideration of the papers, that there was or might be a question of fresh evidence.

22. If the Employment Appeal Tribunal notes that there is an application or question about fresh evidence, it will operate a policy, set out most recently in paragraph 10.1 of the **2013 Practice Direction**. This reads as follows:

> **"10.1 Usually the EAT will not consider evidence which was not placed before the Employment Tribunal unless and until an application has first been made to the Employment Tribunal against whose judgment the appeal is brought for that tribunal to reconsider its judgment. Where such an application has been made, it is likely that unless a judge of the EAT dismisses the appeal as having no reasonable prospect of success the judge will stay (or sist) any further action on that appeal until the result of the reconsideration is known.**
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> **The Employment Tribunal as the fact-finding body, which has heard relevant witnesses, is the appropriate forum to consider 'fresh evidence' and in particular the extent to which (if at all) it would or might have made a difference to its conclusions. It remains open to an intending appellant to contend that there has been an error of law if the Employment Tribunal is in error of law in refusing to reconsider its decision, and if so then to refer to evidence which was not placed before the Employment Tribunal at the time it made its initial decision but was placed before that Tribunal for the purposes of seeking or hearing a reconsideration of its decision."**

23. That is, in my experience, the practice which is usually adopted at the stage where appeals are sifted. It is a practice which has been in force for some years. It was crystallised to some extent in **Employment Appeal Tribunal Practice Statement** dated 17 April 2012 and then incorporated in the current Practice Direction.

24. Underlying this practice is a quite basic feature of the Employment Appeal Tribunal. It deals, as I have already said, only with questions of law. Occasionally an application to adduce fresh evidence may be intimately linked with a question of law, but this is rarely the case. Freestanding applications to the Employment Appeal Tribunal to admit fresh evidence, divorced from any question of law, are plainly inappropriate.

25. Mr Laddie, recognising these basic principles, has not sought today to pursue an application to adduce fresh evidence in relation to Mr Munya. He has said that the Claimant's intention is to make an application to the Employment Judge for reconsideration. He submits that the appropriate course in the meantime is to stay the appeal, a course which would be taken generally if the matter were at the sift stage. Mr Fodder, on the other hand, submits that there is essentially nothing left in the appeal, and the ground should be dismissed.

26. Mr Laddie puts forward two reasons why the appeal should be left open. The first is that if the appeal is dismissed, it might be argued before the Employment Judge that it is an abuse of process for there to be an application for reconsideration. I make it plain that it will not be an abuse of process for the Claimant to apply to the Employment Judge for reconsideration based on the fresh evidence. It is - for the reasons which I have already explained - the natural forum for consideration of that question.

27. There are to my mind arguable grounds for granting a reconsideration in the circumstances which I have outlined concerning Mr Munya's dismissal, which appears to have taken place some time after the supposed introduction of the policy about which the Employment Judge heard evidence. An application to the Employment Judge for reconsideration will not be an abuse of the process. It will, of course, be out of time – but the

Employment Judge should, and I hope will, bear in mind that although the Claimant did not pursue the matter by way of application for review, he did produce it in his appeal documentation to the Employment Appeal Tribunal in June 2013.

28. Mr Laddie's second argument is that he ought to be able to keep open the existing Notice of Appeal so that, should there be an application for review which is unsuccessful and which gives rise to a question of law, he may pursue that in the existing appeal.

29. It is not the normal practice of the Employment Appeal Tribunal to permit the amendment of a Notice of Appeal to allow an appeal against a different or subsequent decision. It tends to produce confusion. It makes time limit provisions difficult to operate. (By "time limit", I mean the time limit for appealing to the Employment Appeal Tribunal, which is strictly enforced). It is the Employment Appeal Tribunal's usual practice to require a separate Notice of Appeal. That practice seems to me to be beneficial and sensible. Mr Laddie points out that that will result, or may result, in the payment of a fee by his client, but that does not, to my mind, outweigh the beneficial features of the Employment Appeal Tribunal's general rule of practice.

30. The position in this case is that any application for the introduction of fresh evidence could only be pursued as a freestanding matter. It is plainly inappropriate for it to be pursued that way when the very same issue is, properly and sensibly, to be the subject of an application to the Employment Tribunal for that very matter to be determined. It seems to me much more sensible to dismiss the appeal and leave the Claimant, in the unlikely event that there is any error of law in the Employment Judge's subsequent determination, to pursue a fresh appeal. That seems to me to be correct both in principle and as a matter of practice.

31. I should record finally that there were other grounds relating to disparity, which concerned two other employees of the Respondent. Those were not fresh evidence grounds. Mr Laddie indicated they were not pursued today.

32. In the circumstances the appeal will be dismissed. I express gratitude to Mr Laddie for the work that he has done on the Claimant's behalf and to both Counsel for their submissions to me today.