

Appeal No. UKEAT/0301/17/LA

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

At the Tribunal
On 22 March 2018

Before

HER HONOUR JUDGE MARY STACEY

(SITTING ALONE)

MR J CAMERON

APPELLANT

EAST COAST MAIN LINE COMPANY LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR RICHARD COLBEY
(of Counsel)
Instructed by:
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For the Respondent

MR ED WILLIAMS
(One of Her Majesty's Counsel)
Instructed by:
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SUMMARY

CONTRACT OF EMPLOYMENT - Wrongful dismissal

The claim of wrongful dismissal is remitted back to the same Employment Tribunal to make findings of fact (with additional evidence only if the Tribunal considers it necessary) and to decide for itself whether the Claimant was wrongfully dismissed. The Tribunal erred in appearing to decide the wrongful dismissal claim by reference to the statutory test for unfair dismissal. In scrupulously resisting the temptation of the substitution mindset for the purposes of the unfair dismissal claim in accordance with the wording in section 98 **Employment Rights Act 1996** and the applicable case law, the Tribunal does not appear to have directed itself on the wrongful dismissal cause of action nor made the findings of fact necessary to make a determination of the question.

A **HER HONOUR JUDGE MARY STACEY**

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1. This is an appeal against the Decision of the Employment Tribunal, heard at Watford, on 7 to 10 August 2017 before Employment Judge Bartlett sitting with members, with Judgment and Reasons being sent to the parties on 15 September 2017. I shall continue to refer to the parties by reference to their status below.

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2. The case concerns the Claimant's dismissal from his employment with the Respondent rail company as a shunter following an allegation that a driver had brushed a train that the Claimant had given clearance to proceed. All the complaints - unfair dismissal, wrongful dismissal, age and race discrimination - were dismissed by the Employment Tribunal.

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3. The only issue live at this appeal is whether there was an error of law in the Employment Tribunal's approach to wrongful dismissal. When the case came before Her Honour Judge Tucker at the sift stage, the appeal was permitted to go forward for a Full Hearing on the basis that it was arguable that the Employment Tribunal had applied an incorrect test to a claim for damages for wrongful dismissal, and it had not been considered as a separate issue to the unfair dismissal complaint. Further, it was not clear whether the Tribunal had found that the conduct for which the Claimant was dismissed constituted gross misconduct.

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4. Both parties have been extremely ably represented before me today and I am grateful to them.

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5. The four-day Employment Tribunal hearing carefully considered and correctly directed itself as to the applicable law and made the findings of fact necessary to decide whether the

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A Claimant had been unfairly dismissed in accordance with section 98 and the relevant case law.
The Employment Tribunal meticulously avoided the substitution mindset trap and considered
B all relevant matters: whether the Respondent had a genuine and reasonable belief in the
Claimant's misconduct, whether a fair and proper procedure had been followed, and if the
decision to dismiss fell within the range of reasonable responses available to a reasonable
employer (see, for example, paragraph 18 of the Decision). It also set out the law and issues
C relevant to the claims of direct race and age discrimination in the opening paragraphs of its
Reasons for its decision.

D 6. However, in relation to the wrongful dismissal claim, which is of course a different and
distinct exercise requiring a separate legal direction, different factual considerations and a
different burden of proof, it is not listed as an issue for determination and nor are the relevant
issues set out. In the Judgment section of the overall Decision, however the Tribunal states at
paragraph 1:
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**"1. ... As the claimant's unfair dismissal claim fails and as a result of our findings in this
respect the claimant's claim for wrongful dismissal must also fail."**

F Although no reference is made to wrongful dismissal in the Tribunal's Reasons.

G 7. Mr Williams QC today has skilfully sought to argue that if one considers the findings of
fact from the body of the Reasons, it is clear that what the Tribunal was intending to say was
that given its findings of fact in relation to the unfair dismissal complaint, the Claimant had also
not been wrongfully dismissed, and it was merely infelicitous wording for the Tribunal to
appear to have suggested that it followed as a consequence of the finding of a fair dismissal that
H it was not wrongful, and there was no error of law by the Tribunal.

A 8. Mr Williams' second route seeking to uphold the Employment Tribunal's judgment was
B that the Tribunal's findings of fact made it inevitable that the Claimant had committed a
C repudiatory breach of his employment contract and the Respondent was entitled to summarily
D dismiss him for that breach.

Route 1

C 9. In the Reasons for their Judgment, the Employment Tribunal have clearly not
D considered wrongful dismissal since it is not mentioned anywhere: it is not identified as an
E issue to be determined and nor does the Tribunal address whether it concluded that the
F Claimant's behaviour constituted gross misconduct or behaviour justifying summary dismissal.
G It only considered matters through the prism of what a reasonable employer was entitled to
H conclude. Nor did the Tribunal consider the relevant test applicable to cases of wrongful
dismissal - see, for example, **Neary v Dean of Westminster** [1999] IRLR 288 or **Adesokan v
Sainsbury's Supermarkets Ltd** [2017] EWCA Civ 22. It did not set out if there were any
express contractual clauses defining misconduct, or implied terms, or make a finding of fact as
to whether the Tribunal considered there had been behaviour constituting misconduct, and if so
if it justified summary dismissal. It is trite law that whether something is gross misconduct is a
question of fact and is an objective test.

G 10. It follows that it is an error of law for an Employment Tribunal to have failed to
H consider wrongful dismissal as a separate claim to unfair dismissal, and Mr Williams' valiant
attempt to rely on route one in his grounds of appeal was bound to fail.

A Route 2

11. A more interesting argument is route two. Mr Williams argues that, notwithstanding the absence of reasoning, by luck if not judgment, the Employment Tribunal’s findings and reasoning result in the inevitable conclusion that the Claimant committed a repudiatory breach of contract entitling the Respondent to dismiss without notice. The difficulty for the Respondent however is that the Employment Tribunal is so meticulous in its respect for the Respondent’s role as a decision taker in the unfair dismissal claim and it so punctiliously directed itself to avoid the substitution mindset, that it did not make the necessary factual findings. An example is found in paragraph 18:

“18. ... The relevant legal tests means [sic] that the employment tribunal must not substitute its judgement for that of the employer. The tribunal is not permitted to find that it would not have dismissed [the Claimant] and therefore his dismissal was unfair under the law. ...”

12. Mr Williams has been unable to identify any findings of fact by the Employment Tribunal as to the alleged misconduct. It notes that the “allegations against the Claimant were serious misconduct” (paragraph 81) and that it was reasonable for the employer to “treat the conduct ... as a reason to justify a dismissal for gross misconduct” (paragraph 85.3) but does not anywhere make its own findings. Recording that there has been an allegation of serious misconduct, is not of course the same as finding that there has been serious misconduct. Throughout it is only the reasonableness of the employer’s belief that the Tribunal has considered in accordance with **British Home Stores Ltd v Burchell** [1978] IRLR 379. It is not possible to infer from their findings what their findings would have been on the issues required to determine the wrongful dismissal claim. Contrary to the assertion in the last sentence in paragraph 1 of its Judgment, it does not follow that “as the Claimant’s unfair dismissal claim fails and as a result of our findings in this respect that Claimant’s claim for wrongful dismissal must also fail”. The decision cannot stand.

A 13. Both parties invited the EAT to use its powers under section 35(1) of the **Employment
Tribunals Act 1996** to exercise powers of the Employment Tribunal. Mr Williams submits
B that the conclusion is unarguably right and Mr Colbey argues that it was plainly and unarguably
wrong.

C 14. Section 35(1) only authorises the Employment Appeal Tribunal to record a decision
which, on the facts found, it could have directed the Employment Tribunal to record. I find it is
D simply not possible in this case. The Employment Tribunal has a fact-finding function and, as
per the opening line of *Hard Times* in the words of Mr Gradgrind: “Now, what I want is Facts”.
Without those, it cannot be known if the Claimant was wrongfully dismissed, and Employment
E Judge Bartlett and her two lay members were best placed to make those findings. Even if the
parties had consented to this Tribunal making findings and had invited the Tribunal to decide
the point by taking the hint offered by **Kuznetsov v Royal Bank of Scotland** [2017] EWCA
Civ 43, I would have declined the request since the facts are not discernible from the
information before me and it is not the function of this Tribunal. I appreciate that a remission
back involves a delay and expense, but nothing else is possible in this case.

F 15. The next dispute between the parties was whether it should be remitted to the same
Tribunal or a fresh Tribunal. Mr Williams suggested it should go to the same Tribunal - which
would be the normal course unless the criteria and guidance set out in **Sinclair Roche &
G Temperley v Heard** [2004] IRLR 763 apply, whereas Mr Colbey suggested a fresh Tribunal
would be preferable. The difficulty for Mr Colbey is that all the points indicate a remission
back to the same Tribunal. There is no question of bias or partiality by the Tribunal and in all
H other respects, it is an impeccable decision. The original Tribunal was extremely professional
in its approach, apart from this short, Homeric nod in relation to the wrongful dismissal claim.

A There is nothing to suggest that the Tribunal will be clouded by its error, or that it will approach
the case with a closed mind when it comes to consider the wrongful dismissal test to the
evidence that was before it. The passage of time is not excessive, and it would, in my view, be
B appropriate and proportionate for the same Tribunal to continue to have the confidence of the
parties, as it certainly does this Tribunal, to determine the matter.

C 16. Accordingly, I order that the wrongful dismissal part only of the case be remitted back
to the same Tribunal to decide - with further evidence only if it decides it necessary - whether
the claim for wrongful dismissal succeeds or fails. I set aside that part of the Judgment in the
last sentence of paragraph 1, to that extent only.

D 17. The issues for the Tribunal to decide, bearing in mind that it is the Respondent's burden
of proof to prove to the civil standard, are:

E (1) In the incident alleged by Mr Munro of being brushed by the train, what was
the Claimant's behaviour? It will be for the Tribunal to decide whether the
behaviour or conduct of the Claimant around the incident can or should be
F categorised as misconduct or negligence by reference to the evidence and the facts
found.

(2) Did that behaviour, when viewed objectively, amount to a repudiatory breach
of contract?

G (3) Was the Claimant wrongfully dismissed?

H 18. It is a fact-finding exercise and a matter for the Tribunal's judgment based on those
facts. The Tribunal is referred to Adesokan v Sainsbury's Supermarkets Ltd, Neary v Dean

A of Westminster, and Sinclair v Neighbour [1966] 3 All ER 988 and All paragraphs 520 and 522 in *Harvey* to assist the Tribunal in reaching its decision.

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