Appeal No. UKEAT/0034/18/DA
UKEAT/0035/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 July 2018
Judgment handed down on 3 August 2018

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

MR P L C PAGLIARI

MR H SINGH

MR M S DOY — APPELLANT

CLAYS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARK DOY (The Appellant in Person)
For the Respondent	MS NAOMI OWEN (of Counsel) Instructed by: Mills & Reeve LLP 1 St James Court Whitefriars Norwich Norfolk NR3 1RU

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

PRACTICE AND PROCEDURE - Disposal of appeal including remission

An Appellant appealed against the decision of the Employment Tribunal ("the ET") that his dismissal was not unfair. He was dismissed for two incidents of threatening behaviour. His ground of appeal was that he had argued before the ET that his dismissal was unfair because another employee had been treated more leniently than he had, even though she had, on two different occasions, hit other employees.

The Employment Appeal Tribunal ("the EAT") allowed the Appellant's appeal. The EAT held that the argument had been raised in the Appellant's ET1, and at the ET hearing. The EAT further held that it was not enough for the ET to summarise, in its Judgment, the Respondent's submissions about the disparity argument. The ET should, in addition, have made factual findings about the Appellant's case on disparity and then explained how, if at all, those findings affected its analysis of the unfair dismissal claim.

The EAT remitted the case to a different ET for a rehearing.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from two Decisions of the Employment Tribunal ("the ET") sitting at Bury St Edmunds. The ET consisted of Employment Judge Laidler ("the EJ"). We will refer to the parties as they were below. Paragraph references are to the ET's first Judgment unless we say otherwise.

2. The Claimant appeals against a Judgment of the ET sent to the parties on 13 February 2016. The ET dismissed the Claimant's claims for unfair dismissal and for holiday pay. The Claimant also appeals against the ET's Decision, sent to the parties on 9 March 2017, to refuse his application for a reconsideration.

3. The Claimant represented himself. The Respondent was represented by Ms Owen. We are grateful to the Claimant and to Ms Owen for their oral and written submissions.

4. On the paper sift, HHJ Richardson decided that the Notice of Appeal disclosed no error of law. There was then a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules of Procedure**, at which the Claimant had the advantage of being represented by an ELAAS representative, Ms Platt. HHJ Eady QC decided that an amendment, for which she gave leave, did raise an arguable error of law in the ET's Decision. That was that the ET had not dealt with the Claimant's argument that the Respondent had dealt with his case and with that of a woman employee inconsistently. HHJ Eady QC was persuaded that he had raised this issue in his ET1, at the ET hearing, and in his application to the ET for reconsideration, and that the ET had not addressed it in its Reasons. She recorded that there was a dispute about whether

he had raised it during the disciplinary procedure. She held that the other grounds of appeal did not raise an arguable point of law.

The Facts

5. The facts are set out in the ET's Judgment. The Claimant had been employed since 2004, initially on a casual basis. His contract of employment required him to work 1,695 hours a year. He was paid a consistent salary throughout the year, but could be required in some weeks to work more hours than in other weeks. The contract provided for pay at two different rates. Which rate was payable depended on factors which were set out in more detail in the contract.

6. Examples of gross misconduct in the Respondent's disciplinary procedure included "*bullying and/or harassment in breach of the company's dignity at work policy*".

The Pay Dispute

7. In paragraphs 11 to 21 the EJ described the Claimant's dispute with his managers about how wages were paid for the night shift. The Claimant took this issue up with his managers. He was not supported by his union. There were two meetings in February and April 2016. After the second, Mr Smith, the Respondent's manufacturing director, wrote a letter dated 14 April 2016 to the Claimant. Mr Smith supported the approach of the Claimant's line managers.

The Incident on 14 April

8. Mr Bullen was the general manager. On 14 April the Claimant was on the night shift. After he got the letter from Mr Smith, he started to make comments about Mr Smith and Mr Bullen to his colleagues. These were reported to Mr Bullen. The Claimant was suspended so

that there could be an investigation. There was a dispute about exactly what the Claimant had said. The ET did not make any precise findings about what the Claimant said. Its conclusions (see paragraph 79) were that Mr Dyke, who made the decision to dismiss the Claimant, had reasonable grounds for believing that "*the Claimant had stated that he 'hoped they died', that he might have to kill them and hoped that Paul Bullen and Ian Smith's children got cancer and died*".

9. The Claimant was signed off sick, with stress, on 19 April.

The Investigation

10. On 28 April 2016 Mr Dyke saw each of the employees who was thought to have been on the night shift on 14 April. Mr Dyke interviewed each in the presence of Nathan Hollis, a union representative and the Deputy Father of the Chapel. Mr Caxton, another manager, sat in and took notes. Four further employees were identified as having been on the night shift. Mr Dyke also interviewed them. The Claimant was suspended on full pay by a letter of 29 April 2016 "*pending an investigation into an incident of Threatening Behaviour*". The letter is at page 69 of the bundle the Claimant produced for the hearing of his appeal at the Employment Appeal Tribunal ("the Claimant's bundle"). The letter said that he would be contacted shortly to arrange an investigation meeting.

The Investigation Meeting

11. The Claimant was asked to an investigation meeting. The meeting was on 9 May 2016. He had two union representatives with him, Mr Hollis and Mr Mimms. Notes were taken (pages 70 to 73 of the Claimant's bundle). The notes do not purport to be a verbatim record of the meeting (see the italicised passage at the top of the notes). It is not clear whether the

Claimant was asked to agree them as an accurate record. Before the meeting the Claimant had written to Mr Bullen apologising for his behaviour. He gave a copy of that letter to Mr Dyke. He maintained his apology at the meeting. He said that he had been picked on for years. Examples given in paragraph 37 of the ET's Decision. The trade union representatives supported the Claimant. Their view was that he had just "*lost it*". They said that some nasty people had reported the incident and it should not have come to this. They considered that the Claimant had been picked on.

12. Mr Dyke decided that there was a disciplinary issue which needed to be addressed with the Claimant. He was going to invite the Claimant to a disciplinary meeting on 16 May 2016.

The Incident on 13 May

13. Before he did so, Mrs Nobbs, the administrator who had taken notes at the 9 May meeting, told Mr Dyke that on 13 May the Claimant had come in to hand in a sick certificate. She had been on reception. He said he was surprised not to have heard from Mr Dyke. He asked her if he had done anything yet. He said he did not care what happened now as "*I will expose this company to the media and on social media. I will show them how corrupt this company is. All the flexis agree this company is taking money from them, how would you like it? … I am going to find out where Bullen lives and I will go and tell his Mrs what kind of a bloke he really is*" (see paragraph 39). The ET appears to be quoting from a document in this passage, in all likelihood, a statement from Mrs Nobbs (see paragraph 46). We did not see this statement. There was a document in the Claimant's bundle which reported what Mrs Nobbs is said to have said, but it is not her statement. It appears to be a diary note, perhaps compiled by Mr Smith (Claimant's bundle, page 114). The Claimant told us that it was a document which was produced at the first ET hearing in Huntingdon.

14. Mrs Nobbs did not feel threatened by the Claimant but said that she could see that he was keyed up and trembling with anger. Mr Dyke was concerned for Mr Bullen's safety. He told Mr Smith who spoke to Mr Bullen and reported the incident to the police.

The Letter of 17 May

15. The Claimant was invited, by a letter dated 17 May 2016, to a disciplinary hearing on 20 May 2016 "*regarding allegations of Threatening Behaviour*" (Claimant's bundle, page 74). As the ET recorded, the letter said that the Claimant might be subjected to further disciplinary sanctions if the Respondent considered that "*the allegations are founded*". The letter did not say what those sanctions might be, or give details of the allegations.

The Hearing on 20 May and the Dismissal

16. The hearing was conducted by Mr Dyke. Mr Earl, the Web Room Line Manager, was also there. The Claimant was accompanied by two union representatives, Mr Riseborough, the Father of Chapel, and Mr Mimms. Ms Burke took the minutes. The notes of the meeting (Claimant's bundle, pages 80 to 81) start by saying that "*all parties were reminded that this meeting was to provide an outcome for the recent investigation carried out into threatening behaviour from Mark Doy*".

17. The ET found that the Claimant said that he had nothing to add following the recent investigation meeting. He had apologised and could not take back what was said. Mr Dyke then referred to a further incident involving more threatening behaviour and asked the Claimant to explain. The Claimant did not believe he had said anything threatening but, "*I just think Paul Bullen's wife should know what he is doing to us flexi workers and me*". Mr Dyke said that the Claimant could not go around saying things like he has. The Claimant said, "*I*

apologise, I am still very upset regarding the matter and I have already resigned myself to the fact that I have lost my job".

18. Mr Dyke told the Claimant that the police had been notified. He asked the Claimant if he had anything more to add. Mr Mimms asked if he could see the statement about the latest incident as Mrs Nobbs's statement had not been provided.

19. The EJ then quoted from the notes of the meeting. "*Neil, Sam and Steve entered another room so the union representatives were aware of what had been said*". The ET Judgment continues, "*It appears from the evidence heard that the union representatives were then made privy to Gill Nobbs' statement but not the Claimant*". The ET said that the document Mr Dyke gave to the union representatives was at page 64 (of the ET hearing bundle; we do not think that that document was in the Claimant's bundle). The ET said, "*He had not said that they should not show it to the Claimant. He was unaware who read it. There was no Police statement*". The "he" in the second and third sentences in this passage appears to be Mr Dyke. The passage does not contain a finding about whether or not the union representatives showed the statement to the Claimant. We infer from the submissions of the Respondent that are recorded in paragraphs 66 and 67 of the Judgment that it was the Respondent's case that Mrs Nobbs' statement was not shown to the Claimant.

20. The meeting was adjourned for Mr Dyke to consider the case. He decided that the Claimant had admitted what he had said and had apologised for it, but he could not see any evidence that the Claimant appreciated why "*such examples of threatening behaviour were unacceptable. He was aware that Paul Bullen had moved his wife and children out of his home when he had been informed of the incident on 13th May. Such threatening behaviour was not*

acceptable in the workplace and in his opinion a clear example of gross misconduct". It is not clear whether the first "he" in the second sentence of this passage refers to Mr Bullen or to the Claimant. We consider it more likely than not that it refers to Mr Bullen.

21. The ET said that it was clear, despite the investigation and his suspension, that the Claimant "*did not appreciate the seriousness of his behaviour as he had made further direct threats against Paul Bullen and his family on 13th May …*" (paragraph 48). It is not clear whether this is a description of Mr Bullen's reasoning, or a finding by the ET.

22. In considering the appropriate sanction, Mr Dyke said that he took into account the Claimant's length of service and "*his previously [sic] disciplinary record*" (we think that the word "clean", or "good" must be missing from this phrase). Mr Dyke considered that because the Claimant had "repeated" his behaviour, there had been "*a complete breakdown of trust and confidence in him as an employee*". The Claimant had offered no acceptable mitigation and Mr Dyke "*could not feel confident that the Claimant would not behave in the same way again*". The ET recorded Mr Dyke's evidence that he considered that the stress which the Claimant reported "*did not excuse such extreme behaviour*". The pay decision, right or wrong, "*did not warrant making threats against the Managers concerned. The Claimant had then repeated the threatening behaviour nearly a month later and therefore it could not be considered a heat of the moment reaction to the decision*". Mr Dyke thought that dismissal was "*the only option*" (paragraph 50).

23. It seems from paragraph 50 that the EJ asked Mr Dyke about the relative importance, in his mind, of the two incidents. Mr Dyke "*confirmed to the Judge that the second incident in the reception completely influenced his final decision*". The Claimant did not initially think that he

had done anything wrong. Mr Dyke was "*forced to the conclusion that the Claimant did not know how he was presenting to others, what he was saying and how his body language came across*".

24. The ET do not refer to the letter of dismissal. It was from Mr Dyke (Claimant's bundle, page 82). It said that following the disciplinary meeting, "*I am writing to confirm the decision made at the meeting to dismiss you for Gross Misconduct relating to Threatening Behaviour*". The letter did not elaborate further. The letter also told the Claimant that he could appeal against that decision.

25. The ET referred in paragraph 51 to "*the Claimant's witness statement now produce[d] in these proceedings*". The EJ records Mr Dyke's evidence that "*he had never seen that sort of detail before from the Claimant in connection with what he alleged was going on within the Respondent. It was not before him at the time that he took the decision to dismiss*".

26. The first sentence of this passage is opaque to anyone who does not have a copy of the Claimant's witness statement (and that includes us). The uninformed reader of this passage does not know what material in the Claimant's witness statement Mr Dyke was commenting on. This sentence is also unsatisfactory because it does not explain, either, exactly what Mr Dyke's evidence about this (unspecified) "detail" was, or what, if anything, the ET made of Mr Dyke's evidence on this topic. We do not know, therefore, whether Mr Dyke was saying that he knew nothing at all about what the Claimant was describing in his witness statement, or if he was saying he knew about it in general terms, but not in detail. If "*what ... was going on within the Respondent*" is a reference to the Claimant's allegations of disparity of treatment, this is especially unsatisfactory.

Preparations for the Appeal

27. In paragraphs 52 to 54 the ET described the preparations for the Claimant's appeal. The Claimant submitted an undated appeal letter, which we have seen (Claimant's bundle, pages 83 to 85). In that letter he asked Mr Smith to meet him for a private talk off-site. Mr Smith told the ET that he considered that the letter was premature as the Claimant had not yet received a letter confirming his dismissal when he sent it - although it is clear from the notes of 20 May meeting, and from the dismissal letter, that the Claimant was told on 20 May 2016 that he had been dismissed. The notes of the 20 May meeting, moreover, make clear that the Claimant was told that he had the right to appeal to Mr Smith within seven days.

28. Mr Smith told the union that if the Claimant wanted to appeal he should send a formal letter setting out his grounds of appeal (see also Mr Smith's letter to the Claimant dated 26 May 2016, Claimant's bundle, page 86). The Claimant did so (page 87 of the Claimant's bundle). As the ET recorded, the Claimant referred to his belief that the stress he was under had not been properly considered at the disciplinary hearing, and to his long clean record. He was asking to be reinstated.

29. Mr Smith wrote to the Claimant on 1 June 2016. The appeal hearing was to be on 9 June 2016. The Claimant sent a further undated letter to Mr Smith, saying that "*I cannot be sorry enough for everything that I have said towards Paul*" (pages 89 to 91 of the Claimant's bundle for this appeal to the Employment Appeal Tribunal ("the EAT")). He expressed his regret for what had happened. He said it would never happen again; "*None of what I said, I meant*".

The Internal Appeal

30. In paragraphs 55 to 57 the ET described the appeal and its outcome. The ET referred to Mr Dyke's "short" notes of the appeal meeting (Claimant's bundle, page 92). The Claimant was accompanied by Mr Mimms and by Mr Hollis. The Claimant added little to his letters. He wished to have the appeal considered "*based on the amount of stress he was under*". He was sorry for what he had said and had not meant anything by the comments. The incidents should have been dealt with by a line manager. He emphasised his length of service. He had hardly been off sick. He was a good and hard worker. He had never reported any grievance or issues. Mr Mimms suggested that "*the matter had been blown out of all proportion and should have been "nipped in the bud'*"".

31. Mr Smith wrote to the Claimant on 13 June (Claimant's bundle, pages 93 to 94). He said that the appeal "*has been unsuccessful*". It had been a hard decision because of the Claimant's good record. But the Claimant had put him in an impossible position by his actions on 13 May. "*Whether you meant the words you came out with or not the people it affected can't help how it made them feel. I shouldn't be put in the position where I have to involve the police due to the threatening behaviour of an employee and no employee should feel they can't leave their family at home while they are at work to the point they have to go and move them out of their house. That is what the outcome was of your actions that day Mark. You have to understand that people react and feel threatened by aggressive and threatening behaviour as they don't know if you mean what you say or may carry out what you have said*". Mr Smith hoped that the Claimant would change his approach to people and have a healthy career elsewhere.

32. In paragraph 57, the EJ recorded that Mr Smith emphasised, in his evidence, "*that had the second incident … not happened then he believed they would have looked into assisting the Claimant back to work. Once the second incident had happened and so much anxiety had been caused to the employees involved that was just not possible*". We are not clear to which "employees" this sentence refers. Mrs Nobbs told the ET that she did not feel personally threatened by the Claimant (see paragraph 40 of the ET's Decision). Taken at its highest, the Claimant's statement was not a physical threat to any employee; he said, on the account of Mrs Nobbs, that he was going to find out where Mr Bullen lived and "*go and tell his Mrs what kind of a bloke he really is*".

The ET1

33. The ET summarised the ET1 very briefly in paragraph 1. The ET did not refer to the disparate treatment argument which the Claimant raised in his ET1.

34. On page 3 of the handwritten rider to his ET1, the Claimant said that people at work had made much worse comments than he had. He described threatening language from one employee to another which had been overheard by a shift manager, who did nothing about it (page 28). A workmate had a run in with another, and said, "*Who are you going to kill next in your car*". His answer was "*I hope your next wife*". One of those employees, the Claimant said, was the nephew of the shift manager. The Claimant said that in February 2015, the same shift manager saw a woman employee punch Mr Poll in the face. A few weeks later she had hit another worker. She still had her job and did not even receive a verbal warning. He also referred to an incident "*several years ago*" when an engineer was caught "*playing with himself downloading porn on the Clay's wi-fi*". The Claimant said that this employee still had his job.

A The overall conclusion as expressed in the ET1 was that losing his job was "*disproportionate unfair dismissal*".

B 35. At the hearing of the appeal, the Claimant told us that the shift manager he referred to in the ET1 was called Mr Peter Mansfield, and that the woman employee was Ms Sara Becks. The Claimant told us that he was sure that the shift manager, who was still Mr Mansfield, knew about the second incident when Ms Becks hit a fellow employee. The second employee, he told us, was Mr Colin Burrows. We do not know whether we have spelt that employee's name correctly.

C

D *The ET3*

36. The ET quoted the ET3 in paragraph 2. The Claimant was dismissed for "*serious and persistent verbal threats and harassment against his line manager, Mr Paul Bullen, and at various times threats against Mr Bullen and his family*". The ET3 does not reply to the allegation of disparate treatment.

E

The Submissions to the ET

F 37. The ET summarised the Respondent's submissions in paragraphs 58 to 75 of the Decision (nearly three pages), and the Claimant's in six lines, in paragraph 76. The ET records the Respondent's submission (paragraph 71) that the "*two verbal comments ... were extremely serious*".

G

38. In paragraph 73, the ET recorded the Respondent's submission about consistency of treatment. The Respondent submitted that, despite being represented, the Claimant had not raised inconsistency of treatment at the disciplinary hearing "*or the hearing*". We consider it

H

likely that in this submission, as summarised, "the hearing" was intended to refer to the internal appeal hearing, rather than at the ET hearing, because the Claimant was not represented at the ET hearing. The ET recorded the submission that the Respondent could not consider matters that were not raised at the time. "*The incidents were not reported at the time and did not come to the attention of management. Had they then appropriate action would have been taken. There is no evidence of [any] similar behaviour where the Claimant was treated more seriously. The matters of concern appear to have been of a different nature. They are not comparable to the circumstances here*".

The ET's Reasons

39. The ET set out the law in paragraphs 77 to 78. It referred, correctly, to the well-known test in **British Home Stores Ltd v Burchell** [1978] IRLR 379.

40. The ET's conclusions on unfair dismissal are in paragraphs 79 to 81. The ET was satisfied that the reason for the dismissal was conduct. When Mr Dyke "*formed that view*" he had investigated reasonably and had reasonable grounds for that belief. He had reasonable grounds for believing that the Claimant "*had stated that he 'hoped they died', that he might have to kill them and hoped that Paul Bullen and Ian Smith's children got cancer and died*". About a month later, "*further threats were made against Paul Bullen to Gill Nobbs. These were extremely threatening and a cause of concern*" (paragraph 79).

41. In paragraph 80 the ET said that it was not ideal that Mr Dyke held the disciplinary hearing. But the Claimant was represented by "*experienced trade union officials and no point was taken about this at the time*".

42. The ET was satisfied that the Respondent acted fairly in deciding that "*this was a reason to dismiss the Claimant. There were two separate incidents of extreme verbal threats being made*". The Claimant could no longer say "*that this was a one off incident in the heat of the moment when he returned to reception a month later and made similar threats. The fact that he may not, he says after the event, have ever intended to carry out the threats is of no consolation to the employees at the time that they were made against. Mr Bullen felt the need to move his family out of his own home*". The Respondent had an obligation to other workers as well as to the Claimant and dismissal was in the band of reasonable responses.

The Application for Reconsideration

43. The Claimant applied for reconsideration in an email sent on 23 February 2017. In paragraph 3 of his application he referred to the punching incident involving Ms Becks. He also referred to another incident he had found out about later, when three members of staff had kept their jobs despite having stolen a high-profile book before its release date.

44. In paragraph 2 of its brief Decision refusing the application for reconsideration, the ET said: "*The points made by the Claimant in his application have been made at the hearing of his claim for unfair dismissal. The tribunal has made its findings on those points*". We do not consider that is an accurate statement, as the ET made no findings on the incidents pleaded in the ET1, and could not have made any findings about the new matter the Claimant mentioned in his application for reconsideration, as he mentioned it for the first time in his application for reconsideration. This Decision confirms that the Claimant raised the disparity argument at the ET hearing.

Discussion

45. This appeal raises a short point. It is whether the ET's Decision shows that the ET grappled with the Claimant's argument that he had been unfairly dismissed because he had been treated differently from a woman employee, who was not disciplined for either of two incidents of physical violence. He raised that argument clearly in his ET1. He must have raised it at the ET hearing (perhaps in his witness statement; we do not know) because the ET records the Respondent's submissions about that argument (paragraph 73), and see the Reconsideration Decision.

46. Ms Owen submitted that the ET dealt with the consistency argument in a proportionate way. The ET is not obliged to resolve every dispute, but only those points which are central to the question it has to decide ("*the principal important controversial points*", per Peter Gibson LJ in **High Table Ltd v Horst** [1997] IRLR 513 CA, at paragraph 24). She accepted that the ET's Reasons need to tell the parties why they won or lost, but submitted that the inconsistency argument was not such a point. It had not been raised by the Claimant at the internal hearings (although, as HHJ Eady QC recorded, there was a dispute about that).

47. In any event, Ms Owen submitted, a disparity argument would have been bound to fail. She referred us to **Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352. In paragraph 24 of its judgment the EAT in that case summarised the argument of Mr Tabachnik (as he then was) for the employer. His submission was that there were three kinds of case in which a disparity argument might be relevant. He conceded, third, that evidence as to decisions made by an employer "*in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to [dismiss] and that some lesser penalty would have been appropriate in the circumstances*".

48. The EAT in that case accepted counsel's analysis of "*the potential relevance of arguments based on disparity*" (paragraph 25). The EAT added that Industrial Tribunals "*would be wise to scrutinize*" such arguments carefully. "*It is only in the limited circumstances that we have indicated that the argument is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument*". The EAT added that there was a risk that such an argument could distract a Tribunal from considering properly the issues raised by section 57(3) [that is, section 98(4)]. The focus is the particular circumstances of the employee's case. Tribunals should be flexible, and should not be encouraged to adopt a "*tariff approach*" to industrial misconduct.

49. We do not consider that the EAT in that case adopted the whole of counsel's argument in paragraph 25 of its judgment. It adopted a less stringent test to the third class of case identified by counsel than the test which counsel proposed. The test the EAT adopted was whether the cases for comparison were "*truly similar or sufficiently similar*" rather than whether the cases were "*truly parallel*".

50. Ms Owen also referred us to **Securicor Ltd v Smith** [1989] IRLR 356. The Court of Appeal allowed an appeal against a decision of the EAT, upholding a decision of an Industrial Tribunal that an employee had been unfairly dismissed. The employer had dismissed two employees for their part in an incident in which both had broken the employer's rules about how cash was handled. At the final appeal stage, the employer decided to allow the appeal of one employee but to affirm the other employee's dismissal. The Tribunal decided that each employee was equally culpable and that they should both, therefore, have been dismissed. The Court of Appeal held that the question the Tribunal should have asked was whether the

employer's decision on the appeal was within the band of reasonable responses. The decision of the appeal panel could only have been perverse (as the Tribunal had held) if it had no rational basis. Stocker LJ described the reasoning of the appeal panel at paragraph 22 of his judgment. There was nothing irrational about that reasoning. In essence, the view of the appeal panel was that the two employees were not equally culpable for the same incident and there was material before the panel which supported that view.

51. The **Smith** case does not help us very much because, contrast paragraph 22 of Stocker LJ's judgment, there is nothing in the Decision of the ET in this case which tells us what, if anything, the employer made of the disparity argument on the facts of this case, and there are no findings by the ET which would enable a reader of the Judgment to know what the ET made of the argument, either. We accept, of course, that if the Respondent had addressed these issues, the question for the ET would have been whether the Respondent's decision to dismiss the Claimant was irrational given its (apparent) decision not to dismiss, or even to give a warning to, the woman employee. But the Respondent did not address them. Nor did the ET. We are not fact finders. We cannot go so far as to say that the disparity argument in this case was so weak that no reasonable ET, properly directing itself in law, could have accepted it. We simply do not know. We therefore reject the Respondent's argument that, on the facts, the ET would have been bound to reject the disparity argument.

52. We also reject the Respondent's argument that the ET dealt proportionately with this point by summarising the Respondent's submissions on it (Judgment, paragraph 73). The short answer to this argument is that the Claimant had raised this point in his ET1. The Respondent recognised that it was at least potentially relevant to the fairness of the dismissal, because it made submissions to the ET about it. The ET's Decision does not explain to the Claimant why

this argument did not influence the ET. He does not know why he lost on this point. There is a range of reasons why he might have lost. The ET might have made negative findings of fact on various issues. The ET's assessment might have been that the incidents happened, but were not sufficiently similar to support a finding of materially disparate treatment. A further possibility is that, despite recording the Respondent's submissions on this issue, the ET overlooked the issue when reaching its conclusions.

53. An essential preliminary to evaluating this issue is reasoned findings of fact on the allegations in the Claimant's ET1. What, if anything did Ms Becks ("the comparator") do? Did any of the Respondent's managers know about the comparator's conduct? What action, if any, did any of the Respondent's managers who knew about the conduct of the comparator take in response to the comparator's conduct? What did Mr Dyke and Mr Smith know about this? This ET made no such findings. Moreover, it seems to us that, if the ET found that the conduct alleged by the Claimant occurred, and that the Respondent knew about it, the ET would have been required to make a comparison between the conduct of the comparator employee, and the Claimant's conduct. That would require a proper focus, it seems to us, on the 13 May incident, in particular, as it is clear to us that the evidence to the ET both of Mr Dyke and of Mr Smith was that it was the second incident which made them decide to dismiss the Claimant, or to uphold the dismissal, as the case might be. The ET should have asked itself what the Claimant actually said, rather than assigning vague and hyperbolical descriptions to his "threats" such as "*extremely threatening*" and "*extreme verbal threats*". What the Claimant threatened to do, it seems, in short, was to go to Mr Bullen's house and tell Mr Bullen's wife what kind of a bloke Mr Bullen was. On its face, unwise as this threat may well have been, it is not an "extreme" threat, nor was it made directly to Mr Bullen, or to his wife. The effect that the reporting of the Claimant's words by Mrs Nobbs may have had on Mr Bullen is relevant, but a question which

is at least equally important is the extent to which, objectively speaking, the Claimant's conduct was culpable.

54. A further potential issue, identified by one of our number in questions to Ms Owen, is what the managers knew about the "culture" of the workplace. Managers' knowledge of the "culture" of a workplace is potentially relevant to an argument about disparity of treatment. Managers may know about "the sort of thing" which goes on in a workplace without necessarily knowing about every single incident. In this context, consistency of treatment has two relevant aspects: sanctions should be applied properly, and the categories of behaviour to which they are applied should be consistent.

55. Ms Owen suggested in her submissions that if Mr Mansfield did not "escalate" the conduct of the woman employee, so that more senior managers were not aware of it, the treatment of the woman employee was not relevant to the fairness of the Claimant's dismissal. We are not persuaded that that point is necessarily right; it is an issue which the ET would have to explore, in order to be able to consider the disparity argument in its proper factual context. It is not intuitively obvious that an employer can insulate itself from a potential unfair dismissal claim by claiming that the managerial left hand did not know what the managerial right hand was doing. The decision of the Court of Appeal in **Orr v Milton Keynes Council** [2011] EWCA Civ 62, [2011] ICR 704, is however, authority for the proposition that the relevant knowledge of managers for the purposes of an investigation of misconduct is what is known by the manager or managers to whom the function of investigating and disciplining the employee is delegated. We, and the ET, are bound by that approach. We note that that issue may in due course be considered by the Supreme Court, which has given permission to appeal against the

decision of the Court of Appeal in **Royal Mail Ltd v Jhuti** [2017] EWCA Civ 1632, [2018] ICR 982. In **Jhuti** the Court of Appeal followed the reasoning in **Orr** on this point.

56. Ms Owen submitted that it was relevant that the Claimant's trade union representatives did not raise the disparity point at the internal hearings. We mention here that we were troubled by the union's apparent acquiescence in a procedure at the dismissal hearing which deprived the Claimant of the opportunity to see the Respondent's evidence of Mrs Nobbs's account of what the Claimant said on 13 May 2016, and if what the Claimant told us is right, by their failure to do anything further for him after his dismissal, such as arranging for him to be represented at the ET. In our judgment, whether or not trade union representatives raise a point in the course of an internal procedure is not decisive of the question whether or not a point is relevant to the fairness of a dismissal. The attitude of the union representatives is potentially relevant, but it cannot absolve an employer, or the ET, of their distinct responsibilities to consider all the relevant points on their own merits.

57. We also reject the Respondent's submission that the ET dealt with this issue proportionately (by doing no more than to summarise the Respondent's submissions on it) because the Claimant did not make much of the issue to the ET.

58. The first point is that we do not know how much the Claimant made of this issue in the ET, because none of us was there. We do know that he raised it in his ET1. We also know that the Respondent was sufficiently concerned about the issue to make the submissions to the ET which are recorded in paragraph 73.

59. The second point is that the Claimant was representing himself at the ET. We do not consider that, as a litigant in person, he could be expected to appreciate the potential legal significance of the various experiences in the workplace to which he referred in his ET1. We could not, on this appeal, give much, if any, weight to the fact (if it is a fact) that the Claimant did not stress this issue at the ET hearing. We bear in mind what Lord Sumption JSC said recently about litigants in person (in the different context of civil claims to which the **Civil Procedure Rules** apply) when he gave the judgment of the majority **Barton v Wright Hassall LLP** [2018] UKSC 12, [2018] 1 WLR 1119 (paragraph 18):

> **"18. … I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. …"**

60. ETs are used to conducting hearings in which one or sometimes both the parties are unrepresented. We do not underestimate the difficulty of extracting legally relevant material, whether from handwritten grounds submitted by litigants in person, or from their oral submissions. This, however, was a case in which a potentially relevant point had been made by the Claimant, in his ET1 at least, and acknowledged as such by the Respondent in its submissions to the ET. We do consider, making, as we do, every allowance for the difficulty of conducting a hearing at which one side is not represented, that the ET should have considered this point expressly, and along the lines that we have suggested above. We recognise that ETs must be careful not to compromise their impartiality by appearing to take, still less to invent, points for one side rather than for the other. We do not consider that, on the facts of this case, there was any such risk. When a relevant point of this kind has been raised during a hearing, as

it was in this case, an appeal to proportionality does not in our judgment excuse a failure by the ET to deal with it expressly.

Conclusion

61. Our conclusion is that, for the reasons which we have just given, the ET erred in law in its approach to the disparity argument. We therefore allow the appeal against the Judgment of the ET sent to the parties on 13 February 2016. That conclusion makes the appeal against the ET's refusal to reconsider the Judgment (sent to the parties on 9 March 2017), academic. We nevertheless record our concern that, contrary to the assertion to that effect in the Reconsideration Decision, the ET had not made any findings on the disparity argument which, among other things, was raised in the Claimant's application for reconsideration. Had that appeal stood on its own, we would have allowed it.

Disposal

62. This is plainly a case in which the Employment Appeal Tribunal could not substitute a decision that the Claimant was unfairly dismissed for the ET's decision that his dismissal was not unfair.

63. We heard submissions from the parties at the hearing about what steps we should take if we were to allow the appeal. There are at least three possibilities. The first is to remit the case to the same ET for it to make findings about the disparity argument. The second is to remit the case to a different ET with the findings of the original ET preserved (apart from the conclusion) for the ET to consider the effect of the disparity argument on the fairness of the dismissal. The third is to remit the case to a different ET for it to consider it afresh.

64. We considered these options carefully. The Claimant did not favour the first option. He submitted that the EJ had made her mind up already. We do not discount the professionalism of the EJ. It does seem to us, however, that the perception of an unrepresented litigant is of some importance. We therefore decided against the first option. We considered that the second option was not satisfactory because of the difficulty of isolating the disparity argument from the overall factual picture. We considered that the nature of the factual investigation which was required (see paragraphs 53 to 55) would make it difficult to integrate findings about the disparity argument with the existing findings. Moreover, the ET would need to investigate whether the Claimant raised the disparity argument in the course of the disciplinary procedure, and make findings about that. Our considered view is that the fairest way of dealing with the disparity argument, and integrating the relevant findings with findings on the rest of the case, is to remit the case to a different ET for a complete rehearing.