Appeal No. UKEAT/0150/19/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 29 October 2019

Before

THE HONOURABLE MRS JUSTICE EADY DBE

(SITTING ALONE)

MR J CASTANO — APPELLANT

LONDON GENERAL TRANSPORT SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN NECKLES (Representative)
For the Respondent	MR RUSSELL BAILEY (of Counsel) Instructed by: Howard Kennedy LLP No.1 London Bridge London SE1 9BG

SUMMARY

Victimisation – detriment – health and safety – section 44 ***Employment Rights Act 1996***
Unfair dismissal – automatically unfair dismissal – section 100 ***Employment Rights Act 1996***

The Claimant was a bus operator, operating out of the Putney bus garage, who claimed he had suffered detriment and automatic unfair dismissal on health and safety grounds under Sections 44 and 100 **Employment Rights Act 1996** ("the ERA"). These claims were struck out by the ET as having no reasonable prospect of success. The Claimant appealed against that decision on three grounds: (1) whether the ET erred in concluding that the Claimant was not someone designated by the employer, for the purposes of Sections 44(1)(a) and 100(1)(a) **ERA**, to carry out health and safety-connected activities; (2) in the alternative, whether the ET ought to have treated the Claimant as being an employee at a place where there was no representative or safety committee for the purpose of Sections 44(1)(c)(i) and 100(1)(c)(i) **ERA**; (3) in the further alternative, whether the Claimant could rely on Sections 44(1)(c)(ii) and 100(1)(c)(ii) **ERA**, as it had not been practicable for him to access the health and safety officer at the Putney bus garage.

Held: dismissing the appeal

Ground (1): the Claimant relied on the fact that he had health and safety responsibilities as a PCV licensed driver and under his contract of the employment; he contended that the **Vehicle Drivers (Certificates of Professional Competence) Regulations 2007** (which implemented **EU Directive 2003/59**) meant that he was effectively mandated to carry out health and safety responsibilities and this was sufficient to mean that he was "designated" for the purpose of subsection (1)(a).

Neither **Directive 2003/59** nor the **2007 Regulations** (which were concerned with drivers' qualifications and periodic training) gave any support for the suggestion that the Claimant was thereby "designated" to carry out health and safety functions in the workplace for the purposes of Sections 44(1)(a) and 100(1)(a) **ERA**. As for his more general health and safety obligations as a PCV licence-holder and/or under his contract of employment, these were no more than might

arise for many employees (including the Respondent's other drivers); it did not meet the specific requirement that the Claimant had been "designated" for the purpose of this protection.

Ground (2): the Claimant argued that his "place of work" for the purposes of Sections 44(1)(c)(i) and 100(1)(c)(i) was his bus, not the bus garage from which he operated. That, however, was plainly unarguable, not least as his contract specified that his place of work was Putney bus garage. The fact that his job function required him to leave that place of work did not change that position. As there was already a designated health and safety representative at the Putney bus garage, the Claimant did not fall within this protection.

Ground (3): the argument pursued under this ground did not appear in the Claimant's pleaded case below and did not seem to have been pursued before the ET. Even if the Claimant was permitted to take the point, however, it was impossible to see how his claim could be put under Sections 44(1)(c)(ii) and 100(1)(c)(ii) **ERA**: his case was put on the basis that he had been able to raise his health and safety concerns with the Respondent's managers and there was no suggestion that it had not similarly been practicable for him to raise those matters with the designated health and safety representative at his place of work.

Generally, there was no error of law or approach in the ET's reasoning and it had permissibly concluded that the Claimant's health and safety detriment and dismissal claims had no reasonable prospect of success.

THE HONOURABLE MRS JUSTICE EADY DBE

Introduction

1. This appeal raises questions as to the correct construction of the statutory protections against detriment or dismissal on health and safety grounds, as provided by Sections 44 and 100 of the **Employment Rights Act 1996** ("the ERA").

2. In giving my Judgment in this matter, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the South London Employment Tribunal (Employment Judge Frances Spencer, sitting alone on 1 May 2018; "the ET"), sent to the parties on 24 May 2019. By that Judgment, the Claimant's claims of detriment and automatic unfair dismissal on health and safety grounds were struck out as having no reasonable prospect of success. Representation before the ET was as it has been before me today.

3. On the initial consideration of the appeal on the papers, Her Honour Judge Stacey was unable to see any proper basis for this matter to proceed to a Full Hearing. After further consideration at a Hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** however, His Honour Judge Auerbach was persuaded to permit the appeal to proceed on three grounds, as follows:

> (1) Whether the ET erred in concluding that the Claimant was not someone designated by the employer, for the purposes of Sections 44(1)(a) and 100(1)(a) of the **ERA**, to carry out health and safety related activities.

(2) In the alternative, whether the ET ought to have treated the Claimant as being an employee at a place where there was no representative or safety committee, for the purpose of Sections 44(1)(c)(i) and 100(1)(c)(i) of the **ERA**.

(3) In further alternative, whether the Claimant could rely on Section 44(1)(c)(ii) and 100(1)(c)(ii) of the **ERA**, it having not been practicable for him to access the health and safety officer at the company garage.

The Respondent resists the appeal, essentially relying on reasoning provided by the ET.

The statutory provisions

4. By Section 100 of the **ERA** it is provided as follows:

> **"100 Health and safety cases.**
>
> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—**
>
> **(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities.**
>
> **(b) being a representative of workers on matters of health and safety at work or member of a safety committee …**
>
> **…**
>
> **(c) being an employee at a place where—**
>
> **(i) there was no such representative or safety committee, or**
>
> **(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,**
>
> **he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,**
>
> **(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or**
>
> **(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."**

5. Section 44 of the **ERA**, so far as relevant, provides that an employee has a right not be subjected to any detriment by any act, or deliberate failure to act, done on the same grounds as those set out in Section 100.

6. These provisions are intended to implement the Framework Directive on health and safety, **Council Directive 89/391/EEC** on the introduction of measures to encourage improvements in the safety and health of workers at work. To that end, the protections provided by domestic law are to be interpreted in such a way as would best achieve the purpose of that Directive.

The factual background, the ET claim and the ET's decision and reasoning

7. The Claimant was employed by the Respondent as a bus operator working out of the Putney bus garage. He was dismissed by the Respondent, ostensibly on conduct grounds. At the time of the Claimant's dismissal he had less than two years' service and was thus unable to claim ordinary unfair dismissal under Section 98 of the **ERA**. The Claimant complained, however, that he was subjected to detriment and/or had been dismissed for health and safety reasons, contrary to Sections 44 and 100 of the **ERA**.

8. In support of these complaints, the Claimant says there was a background of his raising health and safety concerns with managers and making complaints about a specific controller, which had been ignored. More particularly, he relies on an incident that took place on 5 March 2017, when the Claimant says he declined to put passengers' health and safety at risk by immediately responding to a text from the controller whilst driving a bus. Having secured photographic evidence of the contact made by the controller, using his mobile 'phone, the Claimant had raised this with the Respondent. The Claimant contends, however, that he was then

subjected to various detriments. Specifically, he was disciplined for using a mobile 'phone in his cab and the Claimant says that the oppressive treatment to which he was then subjected caused him to become ill with stress. He further complains that, whilst he was on sick leave, the Respondent withdrew his sick pay and cancelled his pre-booked leave to try to force him to attend a disciplinary process.

9. It is common ground that the Claimant did not attend the disciplinary hearing called by the Respondent regarding the incident of 5 March 2017 and he was ultimately dismissed.

10. In his subsequent ET claim, the Claimant pursued a number of complaints. Relevantly, for present purposes, these included claims under Sections 44(1)(a) and (c) and 100(1)(a) and (c) of the **ERA**.

11. Under both Sections 44 (detriment) and 100 (unfair dismissal), subsection (1)(a) provides specific protection for employees who have been designated by the employer to carry out health and safety activities. In both instances, subsection (1)(c) then addresses the situation where there is no such designated representative in the workplace, or where there is but it is not reasonably practicable for the employee to raise the matter with that representative. As will be apparent from the statutory provisions set out above, these protections fall to be seen within a more comprehensive range of protections. In the present case, however, the Claimant's claims were put squarely under subsections (1)(a) and (c) of Sections 44 and 100.

12. For the purposes of subsection (1)(a) in each instance, the Claimant relied on the fact that he was a bus operator who was required to hold a PCV (Public Carrying Vehicle) licence and, as such, had health and safety responsibilities for passengers, other motorists and road users. It was

A the Claimant's case that his PCV operating licence meant he was being treated as a designated health and safety person of the Respondent.

B 13. In the alternative, the Claimant relied on subsection (1)(c) of Sections 44 and 100 **ERA**. Although the Claimant accepted there was a health and safety representative at Putney garage, he argued that was not in fact his workplace; his workplace was the bus route he was required to drive. As there was no designated health and safety representative on that route, as the only C employee driving the bus, the Claimant was thus the designated health and safety representative at his place of work.

D 14. The ET rejected those arguments. The Claimant's place of work was set out in his contract as being the Putney bus garage and it was plainly not the bus route or his bus. As for the first argument, although a bus driver might have more onerous health and safety responsibilities E than (say) an office worker, ultimately all employees have health and safety obligations in the workplace. The ET did not consider that the legislative protection was intended to confer rights on all employees; rather, the rights conferred by subsections (1)(a) and (c) were intended to be protections conferred on specific individuals within the workplace, either by the employer or by F the trade union or other workers' committee, unless there was no such representative. There was, the ET concluded, a difference between having contractual obligations to carry out health and safety duties in the normal course of work (as all the bus operators would) and being "*designated* G *by the employer to carry out activities in connection with preventing or reducing risk to health and safety at work*", which was the specific status protected by subsections (1)(a) and (c). Accordingly, the ET struck out the Claimant's claims under Sections 44 and 100 of the **ERA** as H having no reasonable prospect of success.

The appeal, submissions; discussion and conclusions

Ground 1

15. By this ground, the Claimant argues that the ET erred in concluding that he was not someone designated by the employer for the purposes of subsections 44(1)(a) and 100(1)(a) **ERA** to carry out activities in connection with health and safety. It is the Claimant's case that this provision is to be given a broad construction and he relies on the EU background to these protections, albeit not the Framework Directive on health and safety, **Council Directive 89/391/EEC**. Indeed, in presenting the Claimant's argument before me today, Mr Neckles stressed that he does not rely on that directive but puts the case instead on the basis that the domestic provisions must be construed to give effect to **Directive 2003/59** of 15 July 2003, on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers.

16. **Directive 2003/59**, as its title suggests, relates to the initial qualification and periodic training requirements for certain types of drivers, including (relevantly) PCV drivers such as the Claimant. **Directive 2003/59** lays down obligations on member states to ensure that particular matters are covered by the training to be undertaken by such drivers. The UK has sought to implement **Directive 2003/59** by means of the **Vehicle Drivers (Certificates of Professional Competence) Regulations 2007** ("the 2007 Regulations"). The Claimant says that by imposing such qualifying and training requirements on those who carry out certain types of driving functions – relevantly, driving passenger vehicles such as buses - the **2007 Regulations** require that the individual bus driver or operator is mandated by the employer to carry out certain health and safety functions. He argues that the **2007 Regulations** thus imposed a joint responsibility upon the Respondent and its PCV drivers (including the Claimant), which could not be transferred or assigned.

17. I am unable to see that either **Directive 2003/59** or the **2007 Regulations** assist the Claimant in this argument. **Directive 2003/59**, and the **2007 Regulations** that seek to implement it, concerns the qualification and periodic training of drivers such as the Claimant. Neither **Directive 2003/59** nor the **2007 Regulations** mandate or designate such drivers to then carry out specific health and safety functions or activities over and above those qualification and periodic training requirements.

18. In seeking to overcome this difficulty, Mr Neckles then took me to the contractual provisions relevant to the Claimant's employment with the Respondent and to the Respondent's disciplinary policy. He says that these demonstrate that the Respondent - seeking to comply with the obligations imposed by **Directive 2003/59** and the **2007 Regulations** - had effectively mandated the Claimant, under his contract, to carry out health and safety functions, such that he fell within the protection afforded by subsections 44(1)(a) and 100(1)(a) of the **ERA**.

19. It is right that the Claimant's contract included the following provisions:

> **"8.1 Health and Safety**
>
> **You are expected to take all responsible steps to safeguard your own personal safety and that of any other person who maybe effected by your actions at work and thus familiarise yourself with the company health and safety policy. It is displayed in all company premises. A copy of the policy statement is included in your introduction pack. If you require further copies please ask your local manager.**
>
> **8.2 Accidents at work reporting procedure**
>
> **Any accident, however minor, must be reported on the day of the accident. The appropriate accident form must be completed unless the surplus[?] of the accident prevent you from doing so. All the completed forms must be handed in to the duty supervisor. You are reminded that it is a requirement of law to report any road traffic accident that involves personal injury including falls from or within a bus, damage to another vehicle where particulars cannot be exchanged at the time, damage to property such a roadside furniture to the police as soon as possible or within 24 hours of the accident occurring. Failure to report accident/incidents even of a minor nature would resolve in disciplinary action being taken.**
>
> **8.3 Vehicle defects**
>
> **It is the responsibility of the driver to check their vehicle for mechanical defects in line with the daily vehicle checklist, i.e., lights, body damage etc., when on duty at the appropriate time. Any defects that you considered to be serious or may incur a prohibition notice must be reported to the engineering supervisor immediately in order to protect our operating licence and to ensure that any vehicle defect is properly dealt**

with is an requirement that all buses must be signed off by the last driver at the end of the day on the driver's defect report sheet. This is required whether there is a defect on the vehicle or not. Failure to comply with the vehicle defect reporting system will result in disciplinary action being taken."

20. It is also correct that the Respondent's disciplinary policy identifies a "failure to observe rules and regulations designed to ensure the safety of other members of staff or members of the general public of driving the company vehicle in a reckless or dangerous manner" as a potential example of gross misconduct. I am unable, however, to see any particular link between these provisions and any qualification or periodic training requirement under **Directive 2003/59** and/or the **2007 Regulations**. More particularly, however, I cannot see how these provisions do anything more than provide that the Respondent's employees have general obligations in relation to health and safety within the workplace; they do not designate each employee working to these contractual conditions as carrying out activities in connection with preventing or reducing risks to health and safety at work.

21. The Claimant stresses that the statutory protection under subsection 1(a) only requires that the employee concerned has been "designated"; it does not require that the employee be appointed. "Designation" is, the Claimant contends, a broader concept. More generally, the Claimant observes that in **Von Goetz v St George's Healthcare NHS Trust** UKEAT/1395/97, the Employment Appeal Tribunal (Lindsay P presiding) rejected the suggestion that the protection should be read in a limited way (relevantly in that case, as limited to the health and safety of other workers rather than to patients). The Claimant relies on **Von Goetz** as demonstrating that his concern for the health and safety of his passengers would be sufficient to engage the protections afforded by Sections 44 and 100, but also argues that the EAT in that case emphasised that these provisions should be afforded a purposive construction.

22. Addressing first the Claimant's reliance on the **Von Goetz** case, it is right to say that in allowing the **Von Goetz** appeal, the Employment Appeal Tribunal reasoned as follows:

> **"28. We see no reason, simply in point of construction of a domestic provision, to limit the ambit of, for example, 1(c) and 1(e), so that they should be concerned only with harm or possibilities of harm at the dismissed employee's place of work or to his fellow employees, or to any employees. Indeed, nowadays, it is not all uncommon for one worker to stand alongside his fellow, not even knowing whether the fellow worker is, truly speaking, an employee at all, rather than someone on a contract for services, engaged by way of an employment agency.**
>
> **29. As for the argument that the Directive is limited to 'workers' and that section 100 was intended to implement it, even if both parts of that submission were true (and we do not say for a moment that they are false) that does not militate against giving the full width of the ordinary meaning to section 100. Mr Lynch has taken us in great detail through the provisions of the Directives and Council Resolutions and Articles to show the multitudinous references to 'employees', sometimes to 'workers', but it seems to us that that is nothing to the point."**

23. In reaching this view the Employment Appeal Tribunal specifically considered a further possible example that it considered:

> **"…possibly might fall within 1(1)(e). On a wet and icy day, a bus inspector sees a bus about to leave the depot, on a passenger route, with bald tyres. The inspector tells the driver not to take it out, fearing for the safety of the driver, the conductor, the passengers on the bus when they get on, pedestrians and other road users. He is fired. Would it really be an answer that the other persons he sought to protect from danger were not, or were not necessarily employees, or were not fellow employees, and were not at the inspector's place of work?"**

24. The first difficulty for the Claimant is, however, that the Judgment in **Von Goetz** does not assist in terms of his claim under subsection (1)(a) of either Section 44 or Section 100 **ERA**: that is a protection specifically directed at those employees who have been designated by the employer to carry out health and safety activities. That was not the provision in issue in **Von Goetz**. In that case, the question before the ET had related to protections afforded under subsections 100(1)(c) or (e); that is, where the complainant had brought to the employer's attention, by reasonable means, circumstances he reasonably believed to be (potentially) harmful to health and safety (subparagraph (1)(c)) or where, in circumstances of danger, reasonably believed to be serious and imminent, he had taken the appropriate steps to protect himself or other person from the danger (subparagraph (1)(e)). Whilst there is a precondition to the protection afforded under (c) - it only bites where there was either no designated health and safety representative or, if there was, it was not reasonably practicable for the complainant to raise the

matter by those means - neither of these provisions requires that the complainant has been *designated* by the employer to carry out health and safety activities. To the extent that the Claimant seeks to contend that, as a result of holding a PCV licence he was to be treated as a designated health and safety person of the Respondent, **Von Goetz** does not provide direct assistance.

25. As for the argument that **Von Goetz** provides more general assistance as an aid to the construction to the protections under Section 44 and 100 **ERA**, that is certainly true to the extent that the Employment Appeal Tribunal in that case made clear that the activities undertaken by an employee or concerns raised need not be limited only to other workers. Again, however, that does not assist the Claimant: the ET did not strike out his claim because his concerns had related to passengers or other road users rather than other workers. More particularly, I cannot see that the Claimant's reliance on the guidance in **Von Goetz** enables him to overcome the requirement specifically laid down by subsection (1)(a), that the employee in question has been designated by the employer to carry out health and safety activities.

26. In seeking to understand what is meant by that requirement, I am bound to refer back to the Framework **Directive 89/391**, notwithstanding Mr Neckles' decision not to rely on this. In so doing, I note that **Directive 89/391** requires member states to put in place protection against disadvantage being imposed on "*workers representatives with specific responsibility for the safety and health of workers*". Such representatives are defined by Article 3(c) of **Directive 89/391** as follows: "*...any person elected, chosen or designated in accordance with national laws and/or practices to represent workers where problems arise relating to the safety and health protection of workers at work*." Under domestic law, that protection is duly afforded by subsection (1)(a) within the context of both Sections 44 and 100 of the **ERA**.

27. In respect of the Claimant's attempt to lay claim to the protection afforded to designated health and safety representatives, I therefore consider the ET was right to find that his case had no reasonable prospect of success: the Claimant had not been "*designated*", as would be required for this protection; rather, as was common ground, another employee had been specifically designated to carry out that role. The fact that other employees – specifically, bus operators such as the Claimant - also had some health and safety obligations as part of their duties did not mean that they had been designated to carry out this far more specific role; they had not. Indeed, if the Claimant's argument was right, all of the Respondent's drivers holding PCV licences would have been designated for the purposes of subsection (1)(a). They plainly were not. Subsection (1)(a) is directed towards the situation in which a particular employee has been designated, over and above their ordinary job duties, to carry out specific activities in connection with preventing or reducing risks (essentially, a health and safety officer's function). Appointing an employee to do a job in which they must exercise some responsibility to take care of their own health and safety and that of others (which, per **Von Goetz**, could extend beyond other workers) is not the same thing.

Ground 2

28. By the second ground of challenge, the Claimant contends that the ET erred in failing to treat him as being an employee at a place where there was no representative or safety committee for the purposes of Section 44(1)(c)(i) and 100(1)(c)(i) of the **ERA**. The Claimant says that the place of work for these purposes must be the place where the employee performs his duties, not the base from which he works. Accepting that there was a designated health and safety representative at Putney garage, the Claimant argues that this was not his place of work. Rather, he contends that he carried out his work on the road, plying the bus route that he was required to drive, and there was no designated representative there.

29. This is a point without merit. Whilst the Claimant was obviously employed to drive a bus on a particular route, the statutory provisions in issue clearly envisage the place of work as being the location at which the employee's job is based, even if their job function requires them to be away from that location for some or even most of the time. As the Respondent submits, the concept of a place of work (although it is sometimes phrased differently) is not uncommon in employment law. Thus, for example, a trigger for a redundancy dismissal under Section 139 of the **ERA** is the cessation or diminution of work at the place where the employee was employed. If that question had arisen for consideration in the Claimant's case, it is obvious that his place of work would be Putney bus garage; it would not be described as his bus or his bus route.

30. The ET did not err in its conclusion that the Claimant could not rely on subsection (1)(c)(i): there was designated representative at Putney bus garage and that was the Claimant's place of work. The Claimant's case to the contrary was simply not arguable.

Ground 3

31. In the further alternative, the Claimant seeks to rely on Sections 44 (1)(c)(ii) and 100(1)(c)(ii) of the **ERA**, contending that it had not been practicable for him to access the health and safety officer at Putney garage. Notwithstanding Mr Neckles' assertion that this point was included within his submissions before the ET, I am not persuaded that this was an argument specifically taken below, either in the Claimant's pleaded case or in oral submissions.

32. Notwithstanding this difficulty, I have, in any event, considered whether this might have been an arguable point for the Claimant. It is, however, apparent from the documentation in this case that the Claimant made his complaints and raised his concerns upon his return to the garage – indeed, it is very much part of the Claimant's case that he had done so. Having thus been able

to raise his concerns at Putney bus garage, it is clear that it would also have been practicable for the Claimant to access the health and safety representative at the garage. Mr Neckles argues that the Claimant also raised oral concerns when he was away from the garage but I cannot see that this has any relevance to the point. Subsection (1)(c)(ii) would only come into play if (relevantly) it had not been reasonably practicable for the Claimant to raise a health and safety matter with the representative at the workplace. That was plainly not a difficulty the Claimant faced. In putting his case below, the Claimant had complained that he was subjected to detriment and then dismissed because of the concerns he raised with the Respondent's managers. There was no suggestion that, although he was able to raise matters with the Respondent's managers (whether that was orally when out on his bus or in writing when he returned to the bus garage) it was not reasonably practicable for him to do so through the designated health and safety representative. Again, the point is simply not arguable.

Conclusion

33. Striking out a claim is a draconian step, which should not be taken where there are factual disputes that are required to be resolved. That was not this case. Indeed, the ET assumed the facts to be as the Claimant contended. Thus taking the Claimant's case at its highest, the ET permissibly concluded that his claims under Sections 44 and 100 of the **ERA** were not reasonably arguable. In reaching that decision the ET did not err in law or in its approach. For the reasons given, I am therefore bound to dismiss this appeal.