

Neutral Citation Number: [2022] EAT 144

Case No: EA-2020-000159-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 September 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

Between :

Oxford University Hospital NHS Foundation Trust

Appellant

- and -

Mr I Khan and Mr M Ali

Respondents

Mr M Ali

Cross-Appellant

Oxford University Hospital NHS Foundation Trust

Respondent

Hilary Winstone (instructed by Cater Leydon Millard Limited)
for **Oxford University Hospital NHS Foundation Trust**

Andrew McPhail (instructed by Bower Bailey Solicitors) for **Mr Ali**

Mr Khan did not appear but relied upon the skeleton argument submitted for the Preliminary Hearing

Hearing date: 9 September 2022

JUDGMENT

SUMMARY

UNFAIR DISMISSAL, CONTRACT OF EMPLOYMENT

The appeal and cross-appeal essentially assert perversity. The employment tribunal reached conclusions that were open to it on the evidence. The appeal and cross-appeal are dismissed.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against the judgement of the employment tribunal, Employment Judge Gumbiti-Zimuto, after a hearing held from 16 to 20 of December 2019. The judgement was sent to the parties on 7 January 2020. Mr Khan and Mr Ali (collectively the claimants) brought claims of wrongful and unfair dismissal against Oxford University Hospital NHS Foundation Trust (the respondent).

2. In determining the claim of wrongful dismissal the employment judge had to determine as a matter of fact what had taken place. The employment judge held that Mr Khan had assaulted a colleague, Brian Da Cruz. The assault took place in a small office. The employment judge held that Mr Ali had been present in the office when the assault occurred and did not intervene to prevent it. He concluded that the assault by Mr Khan was an act of gross misconduct and, accordingly, Mr Khan was not wrongfully dismissed. The employment judge concluded that Mr Ali's presence and failure to intervene was not sufficient to constitute gross misconduct, and so he was wrongfully dismissed.

3. The respondent appeals against the finding that Mr Ali was wrongfully dismissed, contending that it was perverse for the employment judge not to have concluded that Mr Ali was involved in a joint enterprise with Mr Khan and had stood in front of the door to the office, preventing Mr Da Cruz leaving or seeking assistance and/or that his failure to intervene or report the incident itself should have been held to be gross misconduct.

4. Mr Khan, cross-appeals against the finding that he assaulted Mr Da Cruz contending, by the two grounds that were permitted to proceed, that the employment judge failed to mention and take into account: (1) his contention that he had accused Mr Da Cruz of sitting on the counter in the respondent's canteen, thereby breaching health and safety rules, which was his motive for making a false accusation of assault; and (2) the evidence of Mr Mahmud that Mr Da Cruz had said that he was out to get Mr Khan and had boasted of having got rid of him.

5. The employment judge also found that the dismissals were unfair. Mr Khan and Mr Ali, were employees of the respondent but were managed by staff employed by Carillion Plc. Jo Berry, an employee of Carillion Plc, conducted the disciplinary hearings for Mr Khan and Mr Ali. They suggested that there had been an altercation between Mr Khan and Mr Da Cruz that had been witnessed by Mr Singh. Mrs Berry asked Mr Caulfield, who had conducted the investigation, to interview Mr Singh. The employment judge found that the

investigation with Mr Singh had not been concluded at the time that the decision was taken to dismiss Mr Khan and Mr Ali. Mrs Berry had not seen the finalised notes of the investigation meeting with Mr Singh (indeed the employment judge concluded she may not have seen any notes) before making her recommendation to dismiss. The recommendation was acted upon by Mark Neil, an employee of the respondent, who took the decision to dismiss. The employment judge concluded that the failure to complete the investigation so that Mrs Berry had the finalised statement of Mr Singh before taking her decision rendered the dismissals of both Mr Khan and Mr Ali procedurally unfair. Consideration of any **Polkey** reduction and contribution were put off to a remedy hearing.

6. In the case of Mr Ali, the employment judge also concluded that the dismissal was unfair because the respondent had failed to establish what specific conduct they had concluded Mr Ali was guilty of, that resulted in the decision to dismiss him.

7. The respondent contends that it was perverse to find the dismissals unfair by reason of the failure to finalise the evidence of Mr Singh. The respondent contends that the evidence established that Mrs Berry knew something about Mr Singh's evidence and that it was of no real significance. Mr Neil had a copy of Mr Singh's statement. Mr Singh's statement was before Mark Wittich when he determined the appeal. The respondent asserts that the employment tribunal erred in finding that the appeal did not remedy the procedural defect in the dismissal process.

8. The respondent also contends that the employment judge substituted his view of the conduct of Mr Ali for that of the respondent, and he should have accepted that Mrs Berry concluded that Mr Ali had been an active participant because he had blocked the door, preventing Mr Da Cruz from leaving the office or seeking assistance and/or that the decision of the employment judge was perverse in holding that the respondent had not established the specific conduct on the part of Mr Ali that was its reason for dismissing him.

9. Mrs Winstone, who represented the respondent, accepts that the threshold for establishing perversity is set very high. The Court of Appeal has found it necessary on a number of occasions to remind judges of the EAT that their role is limited to determining whether there is an error of law in a decision of the employment tribunal, most recently in **DPP Law Ltd v Greenberg** [2021] IRLR 1016.

10. It is difficult to know what has happened if you were not there when it happened. The further you are removed from the incident the more difficult it is to determine what happened. Justice requires that the parties

to a dispute should have a fair hearing before an independent judge. That is what the parties to this case had in the employment tribunal. The employment judge had to determine the matter on the basis of the totality of the evidence. Once the parties have had a fair hearing before an impartial judge, that generally is the end of the road. An important component of justice is finality. Disputes should be determined with reasonable dispatch. Once the case has been determined the parties should generally put the matter behind them and get on with their lives. Parties do not get the opportunity to re-litigate their disputes, seeking to add further evidence or shift the emphasis of the arguments. That is why judges at the appellate level must tread very carefully, even if they may initially be surprised by the outcome in a case. Things may appear very different at a remove to how they appeared to those who were at the hearing and read all of the documents. This was particularly brought home to me when during my original reading into the appeal I noted that I did not have the interview notes with Mr Singh. It was difficult to understand what their relevance might be without reading them. Mr Singh was also called to give evidence at the hearing. I did not have his witness statement or those of any of the witnesses. I asked for the ET bundle and the witness statements so I would have any documents that I might need when I read further into the appeal. The more material I looked at, the greater, I realised, was the risk of being tempted to redetermine factual issues. It also brought home to me the fact that there is no note or transcript of the evidence. I had only some of the information that was before the employment judge, who also had the benefit of seeing live evidence. That is why as a nearly universal rule the EAT only looks at the findings of fact made by the employment tribunal and only such documents as it is absolutely essential to read. The EAT should not be second guessing the factual findings of the employment tribunal on what will necessarily be only a part of the material that the tribunal considered.

11. Having considered all the material before me, and the submissions of counsel, standing back, I have concluded that this is precisely the type of case where the EAT should not intervene.

12. I consider it was clearly open to the employment judge to conclude that Mr Khan had assaulted Mr Da Cruz. He was entitled to consider that the key evidence was that of Mr Da Cruz, who he found to be a reliable witness. Mr Da Cruz had immediately reported the assault, had been visibly extremely distressed and had shown his injuries to others. Mr Khan and Mr Ali had denied that anything untoward had occurred but they were seen on CCTV footage in animated conversation in the vicinity of the office. The judge was not required to refer to every piece of evidence. The employment judge did not mention that the claimants had suggested

that there was a possible motive for Mr Da Cruz to fabricate the assault and they had been able to call a witness who supported this suggestion and alleged Mr Da Cruz had said he was out to get Mr Khan prior to the incident and had boasted of his success afterwards. It is clear that the employment judge rejected that evidence. He was not required to spell it out. His key finding was that he accepted that the assault had taken place. There was ample evidence for him to reach that conclusion. Accordingly, the cross-appeal fails.

13. Mrs Winstone repeatedly referred to there having been a joint enterprise between Mr Khan and Mr Ali. In the claim of wrongful dismissal, it was for the respondent to establish that Mr Ali was guilty of conduct that fundamentally breached his contract of employment. The employment judge accepted that Mr Ali was present and did not intervene to assist Mr Da Cruz when he was assaulted. However, the employment judge was not persuaded that the evidence established any greater degree of involvement. Mr Ali could have been involved in a number of different ways. The use of the term joint enterprise suggests that there might have been some premeditated plan for Mr Khan to assault Mr Da Cruz. Mr Ali might have been an active participant or might only have gone into the office with Mr Da Cruz and been present when the assault occurred but been too frightened to intervene. The employment judge heard evidence from Mr Da Cruz, Mr Khan and Mr Ali. I cannot conclude that it was perverse of the employment judge to decide that the evidence had not established any more than that Mr Ali was present in the office and did not intervene to assist Mr Da Cruz. It was open to the employment judge to conclude that did not constitute gross misconduct.

14. I consider that the employment judge was entitled to conclude that the failure to await finalised evidence from Mr Singh rendered the dismissals procedurally unfair. Mrs Berry had sought the evidence because the claimants asserted that there have been a previous altercation in which Mr Da Cruz appeared to be accusing Mr Khan of something and Mr Khan said if he was not left alone he would report the matter. Mrs Berry thought the matter sufficiently significant that it merited further investigation. I cannot see how it can be said to be perverse for the employment judge to have concluded it was procedurally unfair for her to recommend dismissal before that evidence had been finalised. While Mr Neil's witness statement suggested that he had Mr Singh's interview note when he accepted Mrs Berry's recommendation, there does not appear to have been any evidence as to how he had taken it into account. The employment judge concluded that Mr Wittich did not understand the basis upon which the claimants asserted that the evidence supported their case, thinking that because Mr Singh referred to an altercation that supported Mr Da Cruz's case. The employment

judge heard the evidence of Mr Wittich. I cannot see that it was perverse of the employment judge to conclude that the appeal had not remedied the defect in the disciplinary process.

15. Finally, I do not consider that the employment judge substituted his analysis for that of the respondent in considering the conduct of Mr Ali. There is one sentence in paragraph 78 of the judgment that is somewhat unfortunately worded:

The allegation found against Mr Ali was that he had facilitated the assault of Mr Da Cruz by securing the door, preventing Mr Da Cruz from leaving or being assisted.

16. The following sentences and paragraphs make it clear that the employment judge concluded that the allegation against Mr Ali had developed over time. Mr Da Cruz initially did not mention Mr Ali. The original charge against Mr Ali was put as “A serious neglect of duty and responsibility”. That was the that was found to have been established against Mr Ali. In Mrs Berry's notes of her decision in Mr Ali's case, she stated:

Having considered carefully the evidence available I believe that on the balance of probability Mr Ali failed in his duty and responsibility by not attempting to prevent an assault on a colleague

17. That is different to the allegation that Mr Ali was an active participant in a joint enterprise and blocked the door to prevent Mr Da Cruz from leaving or seeking assistance. I consider that the employment judge was entitled to reach the conclusion he did at paragraph 86:

From the material that appears to have been before Mrs Berry she appears to have made the conclusion that Mr Ali's account of the event was not true, but does not appear to have gone on to decide what it is he did that in fact facilitated the assault beyond his mere presence which in my view would not without more justify a conclusion that there was gross misconduct.

18. Accordingly, the appeal and cross appeal are dismissed.