Neutral Citation Number: [2025] EAT 11

Case No: EA-2021-000405-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Date: Wednesday, 7 August 2024

Before :

HIS HONOUR JUDGE BEARD

- -

Between :

HESHAM ELHALABI **Appellant**

- and –

AVIS BUDGET UK LTD **Respondent**

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MR DILAIMI (**Counsel,** represented through **Advocate)** for the **Appellant**
MR CAMPION (**Counsel,** represented by **Avis Budget UK Ltd)** for the **Respondent**

Hearing date: Wednesday, 7 August 2024

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JUDGMENT

SUMMARY

PRACTICE & PROCEDURE

UNFAIR DISMISSAL

RACE DISCRIMINATION

The ET did not fail to consider background evidence in dealing with race discrimination. It was entitled to reach the conclusions it did without drawing inferences as it found background evidence was not material to its decisions on the claims before it.

Potential procedural failings in conduct dismissals are many and varied. As such they are not, necessarily, obvious issues which the ET must consider if not raised by the parties. If not an obvious procedural failing then there is no requirement for the ET to deal with such an issue, even in the case of a litigant in person. The ET was entitled to consider the entirety of the dismissal process, including the appeal when asking if the claimant had been aware of the allegations he had to meet as an aspect of natural justice.

HIS HONOUR JUDGE BEARD:

1. I shall refer to the parties as "claimant" and "respondent", as they were before the Employment Tribunal (ET). This appeal is against the judgment of Employment Judge Anstis and members dismissing claims of race discrimination and unfair dismissal. The Judgment was promulgated as long ago as February of 2021 and relates to events which go back as far as 2018 and 2019. I want to thank both counsel for their very helpful submissions in respect of this appeal.

2. The grounds of appeal permitted to advance to this hearing by the Deputy High Court judge were as follows: Ground 1: that the tribunal erred by failing to consider and/or explain whether the dismissal was procedurally unfair in light of the fact that the claimant was not told of the most serious allegation before he was dismissed; Ground 2: that the tribunal erred by failing to consider and/or explain its conclusions in relation to the relevance of background evidence concerning the out-of-time allegations of race discrimination.

3. Ground 1 on unfair dismissal is based on the agreed fact that the original letter inviting the claimant to a disciplinary hearing did not deal with one of the reasons for which the claimant was eventually dismissed. The claimant was invited to a disciplinary hearing where, initially, this misconduct alleged was that he had failed to work at another of the respondent's outlets when instructed and that he had left an outlet unmanned and unlocked. The claimant, as the ET found, then obtained CCTV footage from the Respondent without authorisation. The CCTV footage was to show that he had not left the outlet unmanned as alleged. However, that led to a further allegation of gross misconduct, that the claimant should not have obtained the CCTV footage.

4. Following an investigation, the disciplinary hearing was arranged, however the claimant was unable to attend because he was ill. The claimant was asked instead to provide information in writing in response to questions (indeed, part of that approach was at his own request). The resulting answer that the claimant gave as to the CCTV footage was that he did not obtain it but that a former colleague had done so. The respondent then tested that explanation by

contacting the former employee. The former employee denied that he had obtained the footage. The respondent, as did the ET in its judgment, came to the conclusion that the explanation surrounding the CCTV footage was a dishonest account prepared by the claimant. The claimant was then dismissed on the basis of the initial allegations but also on the basis that he had been dishonest in responding to the questions by indicating that he had not obtained the CCTV footage.

5. The evidence in this case included reference to a number of complaints of discrimination which had been ruled as presented out of time at an ET preliminary hearing. It is those previous complaints that form the background evidence for ground 2. These complaints of race discrimination remained in the claimant's witness statement before the ET and are not specifically dealt with in the ET judgment. The claimant's argument questions whether these complaints were taken into account by the ET at all given that they are not referred to.

6. Dealing with ground 2 first, the submissions made on behalf of the appellant begin by referring to section 136 of the Equality Act at subsections (2) and (3) which provide:

> **"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

7. I was referred to *Zafar v Glasgow City Council* [1998] ICR 120, a House of Lords decision where the predecessor provision to section 136 was being considered. The case makes clear that it is not possible to draw an inference solely from the fact that someone has acted unreasonably towards an employee even when they were treated differently; it is an inadmissible inference to draw without "something more" in support. In order to prove discrimination (aside from proving detriment) the claimant must establish a difference in treatment and must show something more than that difference in treatment which would

permit an ET to draw a conclusion that the difference was based on a protected characteristic.

8. *Madarassy v Nomura International plc* [2007] EWCA Civ 33 makes the same point in a different way. It deals with the possibility of discrimination. A reasonable tribunal must be able to properly conclude from all the evidence that it was a matter which amounted to discrimination. *Deman v The Commission for Equality and Human Rights & Ors* [2010] EWCA Civ 1279 makes it clear that the "something more" need not be significant it can, for example, be a non-response to a legitimate question.

9. The claimant's argument is that the case law demonstrates that the claimant must show something other than unreasonable treatment. However, when considering this an ET needs to consider all of the evidence. It was argued that the claimant's witness statement demonstrated that he was maintaining his position in respect of three out-of-time allegations of race discrimination. The evidence supporting those three allegations could have amounted to the "something more" required to discharge the burden. The ET erred by failing to consider or alternatively to explain its conclusions on this background evidence.

10. In response to that, the respondent argued that this evidence was not critical to the ET findings. The ET did not need to deal with the out-of-time claims because they were not material towards the in-time claims. That is because the out-of-time claims related to historic failures to provide the claimant with training, to consider complaints about another employee and to promote the claimant. The Respondent argued that the allegations that led to the dismissal of the claimant were specific to events that occurred on 12 and 18 April 2019. There was no obvious time connection with these events and the earlier allegations. More importantly according to the Respondent was the fact that there was absolutely no crossover between the employees involved and the managers implicated in the two groups of complaints. In terms, the Respondent's argument is that the tribunal does not have to include every piece of evidence that it has considered in its judgment. The lack of materiality of these particular matters were such that the tribunal was entitled, in keeping with the concision that is required in judgments,

to deal only with those matters that were of specific relevance to its decision-making. It is important to note that in paragraph 6 of the judgment, the tribunal said this:

> **"During the course of the hearing it became clear that when the claimant said that this was permitted, what he meant was that his colleagues were not subject to disciplinary action for making false allegations against him. There were a number of problems with this. In the first place, it does not follow that because a number of the allegations against him were dismissed, those who raised them should be subject to disciplinary action. The second problem with the claimant's claim in respect of race discrimination was that he offered us no evidence from which we could properly conclude that his treatment had been a matter of direct race discrimination. His witness statement does not mention his race or anybody else's race at all. The claimant's position appeared to be that his treatment was so obviously unfair that it could only be explained by reference to his race. This will rarely if ever amount to material from which we can conclude that there has been race discrimination."**

11. The tribunal dealt with race discrimination, it seems to me, in a very short series of paragraphs, but they are sufficient to set out the understanding of the law because in paragraph 7 it reads as follows:

> **"Different treatment of different people and unreasonable behaviour by the respondent are not matters which amount to the something else necessary to give rise to an inference of race discrimination. There was nothing in this case from which we could conclude that the claimant's treatment was a matter of race discrimination"**

12. It seems to me that given (and I accept the respondent's submission in this regard) the difference between the earlier complaints, both when they occurred and the quality of those complaints along with the fact that different individuals were subject of the separate complaints, the ET has explained its conclusions sufficiently. The ET has not failed either to provide sufficient reasoning nor has it ignored the background evidence. It is relatively clear from the judgment that the background evidence was not sufficiently material. Therefore I find no substance to ground 2 of this appeal which is dismissed.

13. There is a level of complexity in dealing with ground 1. The chronology of events is perhaps

of some importance. On 12 April 2019 the claimant had been accused of leaving a store unattended. There was a dispute as to whether this was for a period of two minutes or a period of 30 seconds, but the store was still in his sight on either account. On 15 April 2019 the claimant began a period of sickness absence which lasted to the end of his employment. However, on 18 April 2019 the claimant, despite being off work sick, travelled to the respondent's outlet for a period of 50 minutes between 7.00 pm and 7.50 pm.

14. There was an investigation based on the allegations that the claimant had refused to go to a different outlet and had left the store unattended. That investigation included a meeting on 25 April 2019 with claimant. It is clear that the claimant, at that meeting, indicated that he possessed relevant CCTV footage. The claimant showed the CCTV footage but refused to tell the manager dealing with the investigation how he had obtained the footage. The investigator believed that the claimant obtaining the CCTV footage might have been in breach of the respondent's policies. He further thought that it also might have breached GDPR requirements. On 7 May 2019 the respondent sent a letter to the claimant inviting him to attend a disciplinary meeting. That letter set out, in bullet point form, allegations of gross misconduct. These were carrying out an act detrimental to the respondent, a breach of trust and confidence, a breach of the CCTV, breach of data protection and GDPR, carrying out an act which might bring the company into dispute and gross negligence in the performance of duties. A basis of the allegation is also set out as: that on 12 April the claimant was asked to collect a car from a different area and had refused; the claimant had been left to man the outlet and to serve customers but that on his return to the outlet a manager had found the store unattended and insecure. Further information provided was that in the investigation meeting the claimant had CCTV footage from the outlet and had not followed proper security processes in obtaining it. That the claimant had recorded confidential company information on a personal phone without permission from the security team or management. It was said that these could constitute gross misconduct and could lead to dismissal.

15. The claimant was, as indicated, off sick at this time. Because of this a number of potential adjustments to the usual procedure for a disciplinary meeting were offered to the claimant. The claimant accepted the proposal for questions to be sent to him. The claimant sent his answers in writing to the respondent. The claimant was asked specifically about how he had obtained the CCTV footage. The claimant's answer set out that a former employee had obtained the CCTV footage for him. In further investigation the former employee was contacted by the decision-maker. The former employee denied that he had any involvement in obtaining the CCTV footage.

16. The claimant was dismissed. The dismissal letter makes it clear that the above allegations were upheld. However, the decisions maker also relied on the dishonesty of the claimant in his responses on obtaining the CCTV footage.

17. The claimant appealed his dismissal. When the claimant attended the appeal meeting, he maintained that it was his former colleague who had obtained the CCTV footage. On appeal the decision to dismiss was upheld.

18. It is worth emphasising that the tribunal dismissed the claimant's claim of wrongful dismissal. This was on the basis of their own conclusions that the claimant was dishonest in the account about how the CCTV footage was obtained, an account he maintained before the tribunal. The tribunal are clear that they were unsure that the other allegations relied on to dismiss the claimant were sufficient reasons to dismiss claimant. However, the tribunal held that the dishonest response, demonstrated a very serious breach of trust. They considered that such dishonesty would be considered gross misconduct and would support the substantive reason for dismissal being fair.

19. The claimant was not told of the investigation and the dishonesty allegation prior to the dismissal taking place. That is common ground between the parties. That is the procedural issue which I am being asked to adjudicate upon. That amounts to a procedural failing with which the tribunal should have engaged and did not. This was not raised by the claimant before

the Employment Tribunal. However the claimant contends that the tribunal should have dealt with that question automatically. The claimant contends that it is such an obvious point of natural justice that the tribunal should have recognised that he was a litigant in person, and engaged with the point.

20. The respondent raises the *Kumchyk* principle, that a new point such as this should not be dealt with on appeal. The claimant contends that it is not a new point. This is because section 98(4) covers all of procedural and substantive unfairness. That was the complaint the claimant was making. Further, in any event, even if it is a new point, the claimant argues it is a knockout point which I ought to in any event allow as a point of appeal.

21. I deal first with section 98(4) of the Employment Rights Act 1996. It provides that:

> **"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

22. When raising new points can be permitted is dealt with in *Secretary of State for Health v Rance* [2007] IRLR 665, and *Langston v Cranfield University* [1998] IRLR 173. In the latter case His Honour Judge Peter Clark said the generally-accepted principle that a party will not be permitted to raise new points on appeal which could have been ventilated below is contextual. There are cases where a principle is so well established that an a tribunal may be expected to consider it as a matter of course. In *Small v Shrewsbury & Telford NHS Trust* [2017] EWCA Civ 882 Underhill LJ endorsing Langstaff P, setting out this:

> **"I would go so far as to say that it is important where there are litigants**

> **in person, ever more familiar in Tribunals, that a Tribunal should approach what is a matter of such familiarity as the redundancy questions addressed in *Langston v Cranfield* or the unfair dismissal liability criteria addressed in *Burchell* and *Iceland Frozen Foods* or in general terms the heads of loss identified in *Norton Tool v Tewson* in dealing with compensation. But this approach is one which is not of universal application. It applies only where the principle is so well-established that an Industrial Tribunal might be expected to consider it as a matter of course."**

Underhill LJ went on

> **"irrespective of whether Langstaff P was right in his eventual conclusion, I would endorse the observations which I have quoted about the importance of an Employment Tribunal taking for itself points which arise, in his phrase, 'as a matter of course', irrespective of whether they have been taken by the parties before them".**

23. In *Spink v Express Foods Group* [1990] IRLR 320, the then-president, Wood J, held that:

> **"It is a fundamental part of a fair disciplinary procedure that an employee know the case against him. Fairness requires that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence."**

24. This is emphasised in *Strouthos v London Underground Ltd* [2004] EWCA Civ 402, Pill LJ dealing with matters obiter but indicating the following approach:

> **". . . it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. . . It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged."**

25. Pill LJ later said in further obiter comments, "Where care has clearly been taken to frame a charge formally and put it formally to an employee, in my judgment, the normal result must

be that it is only matters charged which can form the basis for a dismissal".

26. HHJ McMullen, QC, in the case of *Celebi v Scolarest Compass Group UK & Ireland Ltd* UKEAT/0032/10/LA, stated:

> **"As is plain from *Strouthos*, it is a fundamental right that someone who is being accused of dishonesty should have that point made to them. We indicated to Mr Barnett, in response to his submission that what Pill LJ had said in *Strouthos* was not binding, that we would apply it. Pill LJ was giving elementary guidance as to fairness in all proceedings, including internal discipline in the workplace."**

27. The EAT in that case held that an elementary step in the procedure relating to section 98(4) was not complied with, that is, alerting the claimant to a charge of dishonesty, which she faced and which the manager had in mind.

28. Then the case of *Sattar v Citibank NA & Anor* [2019] EWCA Civ 2000 was referred to. The Court of Appeal with Sir Patrick Elias sitting said:

> **"It is obviously an elementary principle of justice that the employee should know the case he or she has to meet. It is equally obvious that it is the employer's obligation to put that case so that on a fair and common sense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address."**

29. The relevance of an appeal to the issue of procedural fairness is dealt with in *Taylor v OCS Group Ltd* [2006] EWCA Civ 702. Smith LJ held at paragraph 38 that the question is not whether the appeal amounted to a rehearing or a mere review. Rather the question to be addressed sis whether, due to the fairness or unfairness of procedures adopted, the thoroughness or lack of it, the process and the open-mindedness or not of the decision-maker, the overall process was fair. His a procedure could be fair notwithstanding any deficiencies at a particular stage. A tribunal should consider the procedural issues together with the reason

for dismissal as they find it to be.

30. In dealing with the case of *Dundee City Council v Malcolm* UKEATS/0019/15, Langstaff J stated that an Employment Tribunal must remain neutral and cannot enter the arena on behalf of a party. It is to listen to cases made for each party and not substitute its own view of the way in which the case should have been put. In *Osinuga v BPP University Ltd Legal Team* [2022] EAT 53, compares the limited exceptions to the rule as seen in *Langston v Cranfield* University. Where a redundancy is being considered a tribunal should, as a matter of course, consider issues the issues of consultation, selection and alternative employment unless the parties have ruled them out. In *Osinuga*, when considering *Langston* and *Remploy Ltd v Abbott and others* UKEAT/0405/14, the EAT came to the conclusion that there are some but few obvious matters in employment law which the ET should investigate, whether or not they are raised by parties. However, it is proper for the EAT to explore whether a particular issue falls into that "obvious" category. The EAT will not generally consider arguments not advanced before the tribunal, see *Chapman v Simon* [1994] IRLR 124 the jurisdiction of the tribunal is limited to the complaints made before it. That actually deals much more with the actual complaints in law rather than specific aspects of 98(4). In *Kumchyk v Derby City Council* [1978] ICR 1116 clearly the EAT may, in appropriate circumstances, consider a new point of law. Those circumstances are very limited. In *Secretary of State for Health v Rance* [2007] IRLR 665 it is pointed out there are limits to when a new point can be dealt with. This is a discretionary power and should only be exercised in limited, exceptional circumstances and avoided where fresh issues of fact would need to be investigated.

31. Summing up the law the EAT should not deal with any new points raised which were not dealt with by the Employment Tribunal save in certain exceptional circumstances. Amongst those exceptional circumstances are where an Employment Tribunal should recognise that there well-established principles in place which it should automatically consider as part of a process

of considering fairness. As an example, in an unfair dismissal case involving conduct, the tribunal should be applying the so-called *Burchell* principles as being obvious. However, in the case law these "obvious" circumstances have mainly been related to redundancy claims. Even where redundancy is involved, the tribunal does not have to consider matters if there had been significant legal input see *Remploy*. There the issues had been hammered out between representatives prior to the hearing. Part of the conclusions on fairness will inevitably involve questions of natural justice, and inevitably questions of natural justice require an employee to know which circumstances are alleged in the disciplinary process.

32. It is clear also, it seems to me, that the tribunal should have in mind the distinction between a legally represented party and an unrepresented party in its approach the relevant issues. In the Employment Tribunal whilst it is generally an adversarial process there is also an inquisitory function to be kept in mind.

33. The argument advanced on behalf of the claimant is that the claimant was not notified of an allegation of dishonesty in respect of the CCTV footage. It is contended that this was a breach of natural justice; it should have been put to the claimant. The tribunal should have taken that point for itself because the claimant was a litigant in person. It is submitted that the Employment Tribunal had all the evidence that it needed in order to decide the point, and the principle of notifying a disciplinary charge is so fundamental or a basic proposition that the ET committed an error of law by ignoring that. The alternative argument is that if that is not correct then this is an obvious knockout point in terms, that the tribunal, had they considered the issue, would have decided that the dismissal was not fair. When I addressed claimant's counsel as to the issues which arose because of the way in which the claimant approached the disciplinary it was argued that a further step needed to be taken after the issue emerges. He argued that there should be a new investigation to deal with that issue. It mus,t on every occasion be something that is put to the claimant to give them an opportunity to respond. It is a fundamental principle of justice, and the ET should have taken it on board.

34. The respondent says that the ET were not required to take it on board. The ET were in a position where they were dealing with the procedural points that the claimant had raised. The claimant should have raised that issue if it was a specific matter that he wanted dealt with. It is not for the tribunal to start creating a case for a claimant. The tribunal, having not had the matter drawn to their attention, were able to decide matters as they did. They did so on the basis of the case put before them. The respondent also argued that the appeal had dealt with any procedural fault. The claimant had all of the information before him, including the decision on dishonesty, at the appeal.

35. In my judgment, the tribunal was dealing with a section 98(4) claim. The section 98(4) claim sets a broad test of fairness. The test considers the reasonableness of the employer's decision. In order to do that the tribunal examines the whole disciplinary process, that is what is set out in the *OCS* case. The consideration of a whole process requires a tribunal to examine both the appeal and the initial disciplinary hearing. In considering such a process, the tribunal would, potentially, have to consider with a wide number of factual issues which might impact on procedural fairness. For example, the claimant might raise complaints about the investigation, the information provided in preparation for a hearing, a failure of opportunity to respond, or even the identity of a decision-maker. These matters are the types of complaints about process that can come before a tribunal; no doubt there are many more. In my judgment it would be too burdensome a task to require of a tribunal that it consider every potential matter of procedure where there might be fault, these are not obvious matters every tribunal should explore, every time.

36. That leaves the question of natural justice: should the tribunal have picked up on the point raised? The respondent made a decision to dismiss where the claimant had not been given the opportunity to respond specifically to the finding of dishonesty on the account he had given. I am not persuaded by the respondent's argument that I should look to the appeal and consider what the outcome would have been even if dishonesty is discounted. However, it does appear

to me that the question of natural justice not only relates to initial decision but to the appeal and to the scope of section 98(4).

37. The *OCS* decision requires a tribunal to look at the whole process. The tribunal would need to understand that there was a particular part of the procedure complained about. For example if the complaint is a poor investigation, the tribunal needs to be aware of that as an issue it needs to consider. Without that it would not necessarily inquire into a poor investigation. This is because although there has been a poor investigation, it is accepted by a party that other parts of the procedure have rectified that particular failure. Therefore, a tribunal which takes such a point when examining a whole procedure would be making the case for an claimant, when the issue has not been raised. In my judgment this is unlike a redundancy case, where the "obvious" issues are clear. A conduct unfair dismissal involves rather more nuanced issues. In my judgment, therefore, this was a point that was not raised before the Employment Tribunal. The Employment Tribunal did not have an opportunity to consider that point in the process as a whole, which it would be required to do, and in the circumstances it seems to me quite clear that it is new point that it would be unjust to allow to be argued at this appeal stage.

38. Even if I am wrong to consider that this a is a matter that is not appropriate to raise on appeal there are reasons to dismiss the appeal. The tribunal made a factual finding of dishonesty on this issue. At the end paragraph 27 of the judgment it is clear that the tribunal had in mind procedural matters as part of its approach to dealing with this case. That finding of dishonesty and the consideration by the tribunal of procedure seems to me to be of some importance. In argument the claimant, submitted that the procedural failing was a knockout point. In order to be a knockout point it would have to be an obvious point. It is not so obvious when the whole procedure is considered not just the initial dismissal decision. What is clear in the tribunal's decision is that the finding of dishonesty matched the finding of dishonesty by the respondent. That also played into the question of whether it was reasonable to dismiss the claimant because of dishonesty. The tribunal had considered the entirety of the process and it had procedural

matters in mind. Dishonesty was clearly an issue at the stage of the appeal having been part of the decision to dismiss. The claimant didn't raise the specific point of procedure that he had not been warned about dishonesty. Whilst that complaint has some force before the appeal it does not when the whole process is considered. In the appeal, although there was again a further investigation by approaching the former employee, the claimant could have expected that to be done without further recourse to him. In my judgment, even if I was dealing with the matter on the basis that the claimant was allowed to raise this new point before the Employment Appeal Tribunal, it would nonetheless have to be dismissed in those circumstances. It is on that basis that the appeal is dismissed.