Neutral Citation Number: [2025] EAT 13

Case No: EA-2022-000058-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date of deliberation: 4 October 2024
Date: 7 February 2025

Before

HER HONOUR JUDGE KATHERINE TUCKER
MR DESMOND SMITH
MS VIRGINIA BRANNEY

- -

Between

MR R SMITH

Appellant

-and-

JOHN RAYMOND TRANSPORT LIMITED

Respondent

- -

Mr R Smith the **Appellant** appeared in person
Miss Louise Short for the **Respondent**

Hearing date: 16 January 2024

- -

JUDGMENT

SUMMARY

Age Discrimination, Harassment

The Tribunal determined claims of harassment related to race and age and a claim of direct discrimination because of race and age. It dismissed the claims. One amended ground of appeal was advanced about the Tribunal's determination of one factual issue, it being asserted that the tribunal's decision in relation to it was either perverse or not Meek compliant.

The Tribunal decision could not properly be challenged on those grounds. Reading it as a whole its factual decision was properly explained in the decision. Other issues raised by the Claimant, acting in person, during the appeal did not establish any error of law or approach.

HER HONOUR JUDGE KATHERINE TUCKER

1. This is an appeal against the decision of an Employment Tribunal; Employment Judge Powell, members Ms. Kiely and Ms. Bishop. The decision was sent to the parties on the 13th of December 2021. The Tribunal dismissed the Claimant's claims of harassment and direct discrimination.

2. In this judgment, we refer to the Appellant as the Claimant and to the Respondent to the appeal as the Respondent, as they were before the Employment Tribunal.

3. At the appeal hearing, the Claimant represented himself and was assisted by his partner. The Respondent was represented by a manager, Ms Shortt. At the outset of the hearing, the Claimant stated that he believed he would be represented by counsel at the appeal hearing. This appears to have been because he received assistance through the ELAAS scheme at the Preliminary Hearing and believed that the same representative would represent him at the full appeal hearing. He expressed concern about his lack of experience of Tribunal proceedings, and, initially, stated that he felt he would have to ask for an adjournment. The EAT Judge explained the procedure and how the ELAAS scheme operates: that representation through ELAAS is provided for Preliminary Hearings and R.3(10) hearings, but not, generally, full hearings. The Judge explained that an adjournment could be requested and that he may be able to seek other pro bono advice or legal advice, but that the scheme operated by ELAAS did not extend to full appeals. Having heard that explanation, the Claimant and his partner considered that they could continue with the hearing and present the Claimant's case without the need to seek an adjournment.

The factual events leading to the claims before the Tribunal

4. We take the following summary of the relevant facts primarily from the Reasons of the Tribunal. The Claimant worked for the Respondent for a very short period of time, some three days between the 4th and 6th of December 2019.

5. The Respondent is a transport company which operates from several sites, including a site at Cannock. It operates a fleet of heavy goods vehicles, transporting goods and materials to and from customers' premises. The Claimant has a working background as an HGV driver, having worked in that industry for around 50 years and having owned his own vehicle transport business for a substantial period of time prior to 2009. However, prior to working for the Respondent, the Claimant had not worked regularly as an HGV driver for some six or seven years. The Claimant describes himself as an individual of Black Jamaican heritage, and, at the time of the events relevant to the claim before the Tribunal, was 77 years of age.

6. In 2019 the Claimant looked for work as an HGV driver, initially in Wales. Through a friend, he became aware of a vacancy with the Respondent for a role as an LGV driver who would be driving throughout the week and sleeping in the cab of his vehicle; a role known as a "tramper".

7. The Claimant telephoned the manager of the Respondent's Cannock department, Mr. Watson. Mr. Watson interviewed the Claimant during the telephone call and then invited him to attend the Cannock depot. The Claimant did so and was given a conditional offer of employment, the offer being subject to a driving assessment and successful completion of the induction process. Mr. Watson accompanied the Claimant on a driving assessment for about 40 minutes on the 4th of December 2019. After that assessment, the Claimant signed a Driver Risk Assessment (DRA) which had been completed by Mr. Watson. During the driving assessment Mr. Watson had marked the Claimant as having passed 21 of the 24 criteria listed on the assessment. He recorded that the three which were not ticked as passed required further training. However, none of the elements were marked as a fail. Mr. Watson considered that the three elements where further training was required were likely attributable to nerves and rustiness on the part of the Claimant. Those three areas were "lane discipline; position awareness/ vehicle position awareness; roundabouts and use of signals". No notes of concern were recorded about the reversing of the vehicle. Although there was a factual dispute

between the Claimant and the Respondent about whether the DRA had been completed during the drive, the Tribunal found in favour of the Respondent in respect of that issue. The Tribunal also found that the assessment recorded on the paper document was Mr. Watson's genuine contemporary judgment. The Tribunal noted that Mr. Watson was not alleged to have acted in a discriminatory manner. (See paragraph 23-25).

8. After the Claimant had accepted the offer of employment which was made, Mr. Watson informed other individuals working within the Respondent that the Claimant would be “d-manned”, i.e., accompanied by another driver during the week of the 4th of December 2019, before beginning to drive and work on his own the following week.

9. Initially, on the 4th of December, Mr. Watson arranged for Mr. Woodward, a recently qualified HGV driver, to accompany the Claimant. They worked together for the remainder of the day. Again, the Tribunal noted that Mr. Woodward was not alleged by the Claimant to have acted in a discriminatory manner. (See paragraph 29).

10. On the following day, the 5th of December 2019, the Claimant was accompanied by a different, more experienced, HGV driver, a Mr. Walton. The Respondent asserted that the change in driver was because Mr. Woodward had reported to the Respondent, specifically, to Mr. Harrison, the Transport Manager at the Cannock depot, that he was concerned about aspects of the Claimant’s driving on the 4th of December 2019. How and when that conversation took place was the subject of the ground of appeal which, following consideration at the sift stage of the EAT procedure has been permitted to proceed to a full hearing.

11. Mr. Watson gave evidence to the Tribunal that he had grave concerns about the standard of the Claimant’s standard of driving on the 5th and 6th of December 2019. For example, he asserted that the Claimant had hit the curb on a number of occasions, had mounted the curb on one occasion, and that he had struggled to reverse the vehicle into a bay, at one point hitting a bay marker. That

account was disputed by the Claimant before the Tribunal. In addition, he disputed Mr. Woodward's description of his driving. The Tribunal carefully considered the evidence, (see in particular, paragraphs 60-70) but ultimately concluded that the Respondent's witness evidence was to be preferred.

12. Mr. Watson reported his views about the Claimant's driving to Mr. Harrison. The Tribunal found that, having received the reports from Mr. Walton and Mr. Woodward, Mr. Harrison was genuinely concerned that the Claimant was not driving in a competent manner and that he dismissed the Claimant because of the reports of poor driving which he received and which he believed. (See paragraphs 71-73).

The Claimant's claims

13. The Claimant made a number of allegations of harassment for reasons related to race and age and of direct discrimination because of race and age. These included the following: -

a. That Mr. Harrison refused to let the Claimant get some hot water before setting off.
b. That Mr. Walton asked the Claimant, "Smith, what kind of name is that?" and stated "Say it, say it: you're 75 aren't you?"
c. That Mr. Walton had stated that he did not know why Mr. Harrison had asked to see him on the 6th of December 20 19, and that he was not a mind-reader
d. That Mr. Harrison dismissed the Claimant without any proper explanation of the reasons.

14. The Tribunal carefully considered each of these individual allegations. In terms of structure of its reasoning, initially, the Tribunal set out a record of the facts which appeared not to be disputed between the parties under the headings of "The evidence and facts which were not contested". This included the following passage in respect of the events of 4th December 2019:

> **"27. Mr. Smith then went out to work with a cab and trailer in the company of David Woodward. Mr. Woodward was a recently qualified HGV driver and his purpose**

> **was to introduce Mr. Smith to some of the regular sites which the lorries of the Cannock depot visited. He was also expected to show Mr. Smith the site procedures and methods at the customer depots.**
>
> **28. Mr. Smith and Mr. Woodward agree that they both took loads between Unilever and the Tesco depot at Litchfield and did a collection in Wakefield. They agree that Mr. Smith undertook the driving, but they differ as to the standard of Mr. Smith's driving and in particular Mr. Smith's confidence in reversing a trailer.**
>
> **29. We note that Mr. Woodward is not alleged to have harassed or treated Mr. Smith less favourably.**
>
> **30. Mr. Woodward, as confirmed by Mr. Harrison's evidence, spoke to Mr. Harrison following his return to the Cannock depot.**
>
> **31. Mr. Woodward confirm that he could not have spoken to Mr. Harrison face to face on his return to the Respondent's depot because the uncontested record of his tachograph for the 4th of December 2019 show Mr. Smith's lorry did not return until after 9:00 PM; a time by which Mr. Harrison was no longer at the depot.**
>
> **…**
>
> **34. Mr. Woodward's account of events before us is materially similar to that Mr. Harrison recalled Mr. Woodward giving to him on the evening of the 4th of December. Mr. Harrison's evidence is that, in response to Mr. Woodward's account, he allocated Mr. Smith a more experienced companion for the following day: Mr. Walton."**

15. The Tribunal then set out its analysis conclusions about disputed factual issues. At paragraph 52 the Tribunal identified that the Claimant asserted that Mr. Harrison's account of seeing Mr. Woodward at the depot on the evening of the 5th of December was untrue. It stated at paragraph 63 as follows:

> **"63. We take into account the degree of corroboration of Mr. Woodward's account from Mr. Harrison's evidence which confirms that Mr. Woodward gave a similar account on the day."**

16. The Tribunal also noted the similarity between the evidence of Mr. Woodward, Mr. Walton, and Mr. Watson about each of them having, to some different degree, concerns regarding the

Claimants driving. As noted above, ultimately the Tribunal concluded that the Claimant was dismissed because of the reports of poor driving which Mr. Harrison received and which he believed from Mr. Woodward and Mr. Walton. The Tribunal carefully considered each of the individual allegations of direct discrimination and harassment. It set out a detailed and thorough analysis of the relevant legal principles, the factual issues and ultimately dismissed all of the Claimant's claims.

The appeal

17. One amended ground of appeal was permitted to proceed to this full hearing following a Preliminary Hearing which took place before HHJ Beard. That amended ground of appeal (Amended Ground 4) was drafted by counsel who acted for the Claimant at the Preliminary Hearing through the ELAAS scheme. It is as follows:

> **"It was perverse and/or not meek compliant for the Tribunal to find that Mr. Woodward spoke to Mr. Harrison following his return to the Cannock depot on 4th December 2019 in circumstances where the Tribunal had found that Mr. Woodward could not have done so face-to-face, made no finding that the conversation took place by any other method and/or where Mr. Woodward admitted in cross examination that he did not do so."**

18. Following the Preliminary Hearing, an order was made dated the 20th of January 2023 which provided (at paragraph 6) that if either party considered that a point of law raised in the appeal could not be argued without reference to evidence given at the Employment Tribunal, the nature of which does not or does not sufficiently appear from the written reasons, steps should be taken to obtain either an agreed note of the evidence given or the notes of the Employment Judge. No steps were taken prior to the final hearing taking place. As set out above, the Claimant believed that he would be represented at the full appeal hearing. In accordance with the overriding objective, and so as to ensure that the Claimant was not disadvantaged as a litigant in person and without representation, and not withstanding the fact that this would lead, inevitably, to some delay, we reserved deliberations regarding our decision, making our decision and giving our decision in this matter until we had

received responses to questions we asked of the Tribunal. We asked the Tribunal to respond to the following questions:

(a) Did Mr. Woodward state in evidence (in cross examination) that he had not spoken to Mr. Harrison at all after he had returned to the depot after accompanying the Claimant who was driving on 4th December 2019.

(b) Please provide a copy of the Employment Judge's notes of the evidence given by Mr. Woodward at the hearing.

(c) Was it asserted by the Claimant at the hearing that the witness who attended to give evidence, and asserted that he was Mr. Harrison, was, in fact, Mr. Jeff Williams?

(d) If the answer to (c) is yes, what, if any, steps or decisions were taken about that matter.

(e) Did the Claimant assert that he was dismissed by Mr. Jeff Williams, not Mr. Harrison?

19. In particular, during the appeal the Claimant asserted that the person purporting to be Mr Harrison at the Tribunal hearing had, in fact, been Mr Williams.

20. There was delay in the Tribunal responding to these questions, and then further delay in allowing the parties to see and make submissions in relation to them, time being arranged for deliberations and approval of the final judgment. That delay is regrettable. However, we considered that it was important that the questions were asked so that the case advanced by the Claimant was properly considered and addressed.

21. The Employment Judge informed the EAT that the Judge's notes were not available and, appeared to have been lost after they had been sent from Mold Court Centre (where the Tribunal sat) to Cardiff. However, the Judge provided an audio recording of the evidence. The Judge informed the EAT that Mr. Woodward's evidence (given at 2hours and 16 minutes on the audio file submitted to the EAT) was that on his return to the depot on the 4th December he did not speak to Mr. Harrison, but that he had sent a message to Mr. Harrison. The Judge further stated that both Mr. Williams and Mr. Harrison gave oral evidence before the Tribunal, but that it was not asserted that Mr. Harrison was, in fact, Mr. Williams; but that, Mr. Williams was also cross-examined by counsel for the Claimant on the issue of dismissal. Further, during the course of the evidence counsel confirmed

(having taken specific instructions from the Claimant) that the Claimant did not assert that the person who dismissed him was the witness Mr. Williams. (At 3 hours and 14 minutes in the audio recording) The Respondent asserted that the Judge's responses reflected an accurate account of what had been said in evidence. The Claimant maintained his position and views as set out in submissions before the EAT.

The law

22. An appeal lies to the EAT in respect of an error of law only. This is explained in more detail in paragraph 2.2 of the EAT Practice Direction 2023. In particular, paragraph 2.4 the Practice Direction explains that it is not an error of law for a Tribunal to make a factual finding with which one party disagrees with; to reject some or all of one party's evidence; to prefer the evidence of the other side; or, to make a decision which one side thinks should have been made differently. (See in particular paragraph 2.4.1) However, an error of law *may* occur where a Tribunal reached a decision which no reasonable Employment Tribunal, properly directing itself on the law, could have reached (paragraph 2.5.2(d) of the Practice Direction.) If that bar is crossed, the Tribunal's decision is said to be 'perverse'. An error of law may also occur where a Tribunal gave reasons that do not, in broad terms, enable a party to understand why they lost (see paragraph 2.5.1(g) of the Practice Direction).

23. A Tribunal must set out the reasons why it reached the conclusions it did so that, in broad terms, each party must know why one won, and the other lost. **Meek v Birmingham City Council** [1987] IRLR 250.

24. The EAT will not interfere with factual determinations made by a Tribunal unless the facts found by the Tribunal can properly said to be perverse. Where an allegation of perversity is made, it is important that an appellate body does not, through too close examination of the evidence and the findings of fact made by the Tribunal, stray into substituting its own assessment of the evidence by overturning findings of fact made by the Tribunal. A ground of appeal based on perversity will only

succeed where an overwhelming case is made out that a Tribunal reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and law, would have reached. See **Yeboah v Crofton** [2002] IRLR 634. This might include, for example, a situation where there was no evidence to support a particular finding of fact. As to the role of an appellate Tribunal in general, see **DPP Law v Greenberg** [2021] EWCA Civ 672 (CA) and in **Oxford Said Business School and White v Helslop** [UKEATPA/0110/21/VP], particularly paragraph 48:

> **"48. The working assumption must be that an Employment Tribunal, which has made no clear error of law, has reached no impermissible conclusion of fact. This working assumption should not easily be displaced by hypercriticism of reasoning, or lack of reasoning, or of the way in which a decision is either structured or expressed. Any decision could usually have been expressed or structured differently, and perhaps a different court might have preferred a different structure or form of expression if it had had the task of writing the decision in the first place. It is, equally, always easy to say that an extra word or sentence would have improved a decision's resilience against an ex post facto attack following detailed scrutiny of it in preparation for an appeal. But that does not in itself mean that the original decision is wrong. The question is not whether the decision is ideal, or even excellent, but only whether it is good enough, with reasoning which is sufficient, and free of demonstrable error. If it passes that test, the facts (including inferences of fact, and findings of secondary fact) should remain where the independent (and, in the case of Employment Tribunals, specialist) Tribunal of fact has left them."**

Submissions

25. The arguments advanced at the Preliminary Hearing on behalf of the Claimant were as follows:

a. The Tribunal found, and recorded at paragraph 30, that Mr. Woodward spoke to Mr. Harrison after he (which is presumed to be Mr. Woodward) returned to the Cannock Depot. However, in the next paragraph, the Tribunal set out that that discussion could not have been face to face given the time of Mr. Woodward's and the Claimant's return.

b. No explanation is provided in the Reasons as to how and when Mr. Woodward and Mr. Harrison spoke. Paragraph 7 of the skeleton argument prepared by ELAAS for the Preliminary Hearing provided as follows:

> **"7. The Claimant's recollection … is that Mr. Woodward during cross-examination accepted not merely that he could not have spoken to Mr. Harrison *fact-to-face* on 4th December 2019, but that he could not have spoken to him *at all* that night… the Claimant states that Mr. Woodward admitted it was *"not true"* that he spoke to Mr. Harrison on the evening of 4th December 2019 …"**

c. The only apparent justification for the conclusion at paragraph 30 that there was a conversation at all was the "degree of corroboration" of Mr. Woodward's account with Mr. Harrison's of the events of that date.

d. It was submitted that such a justification came close to being perverse and that, in fact, on the basis of the Claimant's recollection Mr. Woodward's oral evidence did not corroborate Mr. Harrison's.

e. It was submitted that the error was material because credibility was such a crucial and determining factor in the Tribunal's reasoning. It was submitted that the error cast doubt on the entire Judgment.

26. In oral submissions at the appeal hearing the Claimant made lengthy submissions to the effect that it was not the 'true' or 'real' Mr. Harrison who gave evidence at the Tribunal, but that Mr. Jeff Williams, another transport manager, attended the hearing and pretended to be Mr. Harrison. He submitted that it was Mr. Williams who dismissed him and to whom reports were made of bad driving and with whom he had contact at the Respondent. This appeared to raise arguments which were not considered by the Employment Tribunal and appeared to go beyond the single ground of appeal before us. The Claimant submitted, however, that it was all linked. It was at times, difficult to follow some aspects of this submission. However, having taken time to understand it, this issue was one matter in respect of which questions were asked of the Employment Judge as set out above. Although it has taken time, we are satisfied with have done all that is reasonably possible to fully analyse the case advanced by the Claimant.

27. The Respondent submitted that the Tribunal fully and comprehensively set out relevant facts, made sound findings of fact and applied the correct legal principles to those facts. It was submitted that the criticisms made of the Judgment fell far short of the high test of perversity.

28. It was submitted that it was important to note that there was no factual dispute before the Tribunal that the Claimant was allocated to work with Mr. Walton, not Mr. Woodward on his second day of work: to this extent the Tribunal was fully entitled to conclude that there was some degree of similarity between the Respondent's witnesses. Further, the finding that the conversation between Mr. Harrison and Mr. Woodward was not face to face did not mean that it was perverse to conclude that there had been a conversation between them at all. Reading the Judgment and Reasons fairly, and as whole, it was clear that there was little dispute that there had been some communication between them and that the Tribunal was satisfied that Mr. Woodward's reported concerns about the Claimant's driving on 4th December was the reason why he was allocated to drive with a more experienced driver over the next two days. The Respondent disputed the Claimant's account of the oral evidence given at the hearing.

Conclusions

29. We preferred the Respondent's submissions. Reading the Tribunal's Judgment and Reasons fairly, and as a whole, we consider that its conclusions are neither perverse nor inadequately reasoned.

30. It is clear that the Tribunal found, having heard the evidence, that any conversation which took place between Mr. Harrison and Mr. Woodward could not have taken place face-to-face. Nonetheless, it does not follow that the Tribunal's conclusion that a conversation took place at all, was perverse. In context, given that paragraph 30 appears under the heading of 'agreed facts' it appeared likely that there was little, if any, dispute about the fact that there had been communication between Mr. Woodward and Mr. Harrison after Mr. Woodward had been with the Claimant on 4th December 2019 and because of reports about the Claimant's driving, Mr. Harrison made a decision that he should be accompanied by Mr. Walton the following day. See for example, the Tribunal's conclusions that it was the reports from Mr. Walton and Mr. Woodward (para 71) which led to Mr. Harrison's genuine concerns about the Claimant's driving which led, ultimately, to his dismissal (para

73). The further information provided by the Employment Judge recorded that Mr Woodward's evidence was that on his return to the depot on the 4th December he did not speak to Mr. Harrison, but that he had sent a message to Mr. Harrison.

31. The Judge further stated that both Mr. Williams and Mr. Harrison gave oral evidence before the Tribunal, but that it was not asserted that Mr. Harrison was, in fact, Mr. Williams; but that, in any event, Mr. Williams was also cross-examined by counsel for the Claimant on the issue of dismissal. Further, during the course of the evidence counsel confirmed (having taken specific instructions from the Claimant) that the Claimant did not assert that the person who dismissed him was the witness Mr. Williams. From that information it appeared that the issue raised by the Claimant and identified in paragraph 19 above was considered fairly and appropriately at the hearing. On the information before us there was no basis upon which this matter could said to amount to an error of law or approach on the part of the Tribunal.

32. We consider that the amended ground of appeal does precisely that which is not permissible: it requires a reading of the Tribunal's Reasons and Judgment which is overly critical, requires a focus on one or two particular sentences, at the expense of a fair reading of the decision as a whole. We do not consider that the finding is perverse. Rather, the conclusions could have been expressed differently, perhaps in more detail, perhaps in a different way. There is, however, no overwhelming case that the Tribunal made a factual determination which no reasonable Tribunal, properly directing itself could have reached. The Tribunal concluded that Mr. Woodward reported to Mr. Harrison concerns about the Claimant's driving on 4th December 2019. Both Mr. Woodward and Mr. Harrison's evidence supported the fact that a communication or conversation took place. The Judge has informed the EAT that the evidence was that a message was sent between them. That is wholly consistent with that set out above, that there was communication between Mr Harrison and Mr Woodward about the Claimant's driving. Further, the appointment of Mr. Walton to drive with the

Claimant on 5th and 6th December 2019 was also consistent with that evidence and factual determination.

33. We considered that the Tribunal's Reasons were well written, clearly structured and impressively detailed, particularly in respect of the scrutiny given to each individual allegation of discrimination and harassment.

34. For all these reasons we dismiss the appeal.