Neutral Citation Number: [2025] EAT 117

Case No: EA-2024-SCO-000047-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street Edinburgh EH3 7HF

Date: 8 August 2025

Before :

THE HONOURABLE LORD COLBECK

- -

Between :

MARTIN ANDREW & FRASER KERR **Appellants**

- and –

THE SCOTTISH MINISTERS **Respondent**

- -

Paul Deans (**Thompsons Solicitors**), for the **Appellants**
Michael Briggs (instructed by **Anderson Strathern LLP)** for the **Respondent**

Hearing date: 6 May 2025

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JUDGMENT

SUMMARY

Unfair dismissal; Whether employment tribunal entitled to consider matters not before internal disciplinary proceedings when considering reasonableness; Correct approach to be taken

An Employment Tribunal did not err in concluding that matters not put for consideration during the respondent's internal disciplinary proceedings could not be material to the reasonableness of their decision to dismiss. It was for the tribunal to consider the reasonableness of that decision in the particular circumstances of the case (see **Shrestha v Genesis Housing Association Limited** [2015] EWCA Civ 94).

The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the test set out in **British Home Stores Ltd v Burchell** [1980] ICR 303 will depend on the circumstances as a whole.

The Honourable Lord Colbeck:

Introduction

1. The appellants were each employed by the Scottish Prison Service ("SPS") as prisoner management officers. Following an allegation that the appellants had used inappropriate force on a prisoner, SPS carried out an investigation. Disciplinary hearings were convened. The allegations were subsequently established and the appellants were each summarily dismissed in March 2023.

2. The appellants each brought claims for unfair dismissal against the respondent. Following a hearing at Glasgow on 18 – 22; and 25 March 2024, before Employment Judge McManus and members, in a judgment sent to parties on 17 May 2024, the tribunal unanimously dismissed the appellants' claims for unfair dismissal.

3. The appellants' appeal was allowed to proceed in respect of two grounds. First, the tribunal erred in law by asking the wrong legal question. Second, it is argued that the tribunal erred in making certain findings of fact, which led to it not considering whether it was reasonable for the respondent to fail to investigate certain matters. It is argued that these failures were errors of law or in the alternative, the findings of the tribunal were perverse. I consider each ground in turn.

Ground 1

The appellants

4. The appellants argued that where dismissal is by reason of the employee's conduct, consideration must be made of the three-stage test set out in **British Home Stores Ltd v Burchell [**1980] ICR 303. Specifically, the appellants say that the respondent did not meet the second and third limbs of the test: the respondent having reasonable grounds to sustain a belief in misconduct, and the respondent having carried out as much of an investigation as was reasonable in all the circumstances of the case.

5. The tribunal formed the view that matters not put for consideration during the respondent's

internal disciplinary proceedings could not be material to the reasonableness of the decisions to dismiss (see the judgment of the tribunal at paragraph 47). The tribunal alluded that to do so would have been akin to substituting their decision for that of the respondent (see judgment at paragraph 53). The appellants contended that the tribunal adopted too narrow an approach because of fear of substitution, under reference to **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17.

6. The appellants' position is that the tribunal's approach was contrary to the finding of the EAT in **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** UKEAT/0032/09 that an Employment Tribunal does not necessarily substitute its own judgment for that of the employer by making findings of fact on matters not dealt with by the internal disciplinary hearing.

7. By refusing to consider matters out with the disciplinary proceedings, the tribunal erred in law. It unnecessarily restricted its assessment of the reasonableness of the investigation to matters that the respondent had in front of it at the time. The tribunal could not critically and objectively assess whether the respondent's decision to dismiss was reasonable in all of the circumstances. The tribunal could not answer the third limb of the test in **Burchell**, about whether the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

8. Had the tribunal followed the correct approach, it would have considered whether it was reasonable for the respondent to decide not to (i) obtain a medical report to verify the alleged injuries to the prisoner in question, when the prisoner had consented to the respondent accessing his medical records; (ii) consider whether the prisoner was intoxicated and the impact that could have upon his physical abilities, mental health or ability to clearly recollect an incident; and (iii) examine whether the prisoner had any motive to lie.

9. Even if these points had not been expressly made during the disciplinary process, they went to the root of the decision to dismiss which was heavily based on the alleged injuries sustained. The respondent's belief in the injuries went beyond the evidence that was available to it in the photographs. The appellants also argued that the tribunal should have considered whether it was

reasonable for the respondent to conclude that the appellants had received appropriate training on completing Use of Force forms when there was no evidence that this was the case.

10. The appellants also argued that the tribunal was also not able to properly address the second limb of the **Burchell** test, if the respondent had reasonable grounds for the belief of misconduct. This argument is based upon the disciplinary hearing manager making findings of fact that contradicted the prisoner's narrative.

11. By limiting the matters it considered to only those expressly raised in the disciplinary process, the tribunal erred in law because it could not objectively determine if the respondent had reasonable grounds to believe that there was misconduct by the appellants. An objective assessment of whether the dismissal was reasonable in all the circumstances permitted consideration of circumstances out with matters raised during the disciplinary process.

The respondent

12. The first ground of appeal is founded on an alleged misdirection at paragraph 47 of the tribunal's judgment. In particular, the tribunal's use of the words "could not" in relation to matters not put to a dismissing officer during an internal procedure and their decision to dismiss. Applying the approach in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, the decision must be read fairly and as a whole. It is not open to the appellants to isolate certain words or phrases within the judgment.

13. The context of paragraph 47 is important: the tribunal set out the relevant law between paragraphs 33 and 40. This appeal has not been brought on the basis of any error identified in those paragraphs and no error is contained within them. Paragraph 47 is contained in a short section of the judgment under the sub-heading of "Comments on Evidence". Paragraph 47 should be read in the context of the preceding paragraph. In this paragraph (46), the tribunal found that "*all witnesses [had been] straightforward, credible and consistent in their evidence*". Paragraph 47 follows on from this and is an attempt to explain that finding. That is, the appellants made submissions which sought to impugn the dismissing officer's decision to dismiss; the employment judge rejected those

submissions by finding that the dismissing officer was a witness whose evidence she could place reliance on. She was simply explaining her reasoning for doing so: that is, that the reasonableness of his decision to dismiss could not be attacked on the basis of things he did not know.

14. The approach in the first ground of appeal runs contrary to the approach set out in **Greenberg**. It is semantic, it divorces one sentence entirely from its surrounding context and it fails to consider the judgment as a whole. The tribunal correctly identified the relevant legal principles and can be presumed to have applied them. The approach taken by the tribunal to the reasonableness of the respondent's investigation is set out between paragraphs 50 to 55. This should be the Appeal Tribunal's focus for any errors by the employment judge in relation to applying law. There are none: the employment judge held that, although the appellants' representative had "suggested […] some valid considerations" in cross examination (paragraph 53), the investigation was nonetheless "within the reasonable band" (paragraph 55). The employment judge's reasons for why she thought the information ingathered by the respondent during the investigation was sufficient to provide a reasonable basis for sustaining their original suspicions are detailed in some length at paragraph 52 of the tribunal's judgment.

15. **Sandwell & West Birmingham Hospitals NHS Trust** does not assist the appellants. It was a substitution appeal. The present appeal is not a substitution appeal. It is the opposite. That is, the appellants are in effect arguing that the tribunal erred in *not* substituting its views for those of the respondent. Appellate guidance for determining when a tribunal has substituted its own views does not map onto the converse situation.

16. When the tribunal's decision is looked at in the round, with particular focus on the paragraphs relating to the reasonableness of the employer's investigation, it is clear from the wording of these paragraphs that the employment judge not only considered the additional lines of inquiry suggested on behalf of the appellants at the tribunal hearing but actively acknowledged their validity. The employment judge was correct to remind herself to remain guarded against the risk of substitution. There is therefore no basis upon which it can fairly or sensibly be alleged that the employment judge

felt she was not entitled to consider these additional possible lines of inquiry.

17. The correct approach is set out in the Court of Appeal's judgment in **Shrestha v Genesis Housing Association Limited** [2015] EWCA Civ 94 (at paragraph 23). This is the approach that was taken by the tribunal in this case. There has been no error of law.

Discussion

18. The present appeal is one which turns upon the appellate tribunal's interpretation of the reasons given by the tribunal. The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical (see **Greenberg** at paragraph 57(1), citing **Brent v Fuller** [2011] ICR 806).

19. The judgment of the tribunal is clear and concise. It extends to 57 paragraphs over 21 pages. After sections covering the background; the proceeding; and the issues (paragraphs 1 – 8), it sets out the findings in fact made by it (at paragraphs 9 – 32), followed by sections dealing with the relevant law and submissions (at paragraphs 33 – 44) before the section within which the passage criticised by the appellants is to be found. As noted above, the passage is found in a section entitled "Comments on Evidence", which is in the following terms:

> "**Comments on Evidence**
>
> 45. Evidence was heard on oath or affirmation from all witnesses.
>
> 46. All witnesses were straightforward, credible and consistent in their evidence. It was noted that Melanie Bowie is not operational and so do not have first-hand experience of injuries which could be sustained with appropriate use of force.
>
> 47. Much of what was relied upon by the claimants in respect of the unreasonable extent of the investigation had not been put to the respondent prior to their dismissals, or at appeal. Matters not put for consideration during the respondent's internal proceedings could not be material to the reasonableness of the decision to dismiss. As stated during these proceedings, we must not substitute the employer's decision but rather consider the reasonableness of that decision in the particular circumstances.
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> 48. It is well established that 'contemporary documents are always of the utmost importance' (**Onassis and Calogeropoulos v Vergottis** [1968] 2 Lloyd's Rep 403, at para 431). Applying the above guidance, significant weight was attached to the position in relevant contemporaneous documents."

20. I set out the section in full as the context in which paragraph 47 appears is of importance. It is a section that deals with the tribunal's assessment of witnesses and, thereafter, how it views (as a matter of law) how it is required to approach the situation it found established, as a matter of fact.

21. The appellants' submission before the tribunal, to the effect that in the particular circumstances the respondent failed to conduct an adequate investigation and so caused unfairness, was rejected (see paragraph 50 of the judgment). The tribunal sets out nine separate reasons for reaching that conclusion. It goes on to explain the position it took in relation to the issues before it.

22. There remains, therefore, the issue of whether the tribunal erred in law in forming the view that matters that were not put for consideration during the respondent's internal proceedings could not be material to the reasonableness of the decision to dismiss; and that they could not substitute the respondent's decision but rather consider the reasonableness of that decision in the particular circumstances.

23. The correct approach is set out by the Court of Appeal in **Shrestha** at paragraph [23]. To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the **Burchell** test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the **Burchell** test will depend on the circumstances as a whole.

24. The tribunal gave careful regard to the circumstances of the investigation and formed the conclusion (see paragraph 55 of the judgment) that the extent of the investigation was within the reasonable band.

25. In relation to the first ground of appeal, the tribunal did not err in law.

Ground 2

The appellants

26. The second ground of appeal is linked to the first. The appellants challenge the tribunal's finding (see paragraph 47 of the judgment) to the effect that "*much of what was relied upon by the Claimants in respect of the unreasonable extent of the investigation had not been put to the Respondent prior to their dismissals, or at appeal*". They identify what are maintained to be factual errors on the part of the tribunal in determining that the respondent's handling of the appellants' appeal was fair.

27. The appellants maintain that the tribunal's factual errors meant that it did not consider whether it was reasonable for the respondent to fail to investigate the points identified (see paragraph [8] above). These failures are said to amount to errors of law which, in turn, led to the tribunal's finding that the respondent had carried out a reasonable investigation in all of the circumstances. Additionally, or in the alternative, the appellant argued that the findings of the tribunal were perverse. The tribunal made a finding that no reasonable tribunal, on a proper appreciation of the evidence and the law, could have reached.

The respondent

28. The respondent submitted that neither the tribunal's conclusion nor any of the findings in fact made by it were perverse.

Discussion

29. The second ground of appeal developed into a "perversity" ground at the prompting of the sifting judge, who observed that it appeared to be an impermissible attack on the findings of the tribunal. In light of the conclusion I have reached in relation to the first ground there is little to add in respect of the second.

30. The tribunal reached findings it was entitled to reach on the evidence. Those findings cannot be said to be perverse.

Disposal

31. The appeals are dismissed.