Neutral Citation Number: [2025] EAT 174

Case No: EA-2024-001172-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 November 2025

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR K TAAK

Appellant

- and –

DPD GROUP UK LIMITED

Respondent

- -
- -

Daniel Matovu (instructed by Direct Access) for the **Appellant**
Paul Bownes (solicitor, Freeths LLP) for the **Respondent**

Hearing date: 6 November 2025

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant was dismissed by reason of misconduct. He had a prior record of around 25 years' unblemished service, but had then received a final written warning. The conduct leading to the dismissal had occurred during the currency of that warning, although the dismissing officer did not taken it into account.

An issue arose at the full merits hearing as to whether the dismissing officer had given consideration to the claimant's length of service. His counsel contended that, notwithstanding that his witness statement said he did, in light of the dismissal letter not mentioning it, and his answers to questions in cross-examination the tribunal should find as a fact that he did not consider it, and should find that this made the dismissal unfair.

The tribunal stated that it accepted the dismissing officer's evidence that he had considered length of service, but did not sufficiently address the argument that he had given contradictory oral evidence on that point. Given the importance that the claimant had attached to this issue as a point going specifically to fairness, the tribunal's otherwise thorough and meticulous decision was deficient in this regard. The appeal was allowed.

HIS HONOUR JUDGE AUERBACH:

1. The claimant in the employment tribunal was summarily dismissed for the given reason of gross misconduct. Two internal appeals were unsuccessful. He complained of unfair dismissal and wrongful dismissal. The matter came to a full merits hearing at West Midlands before Employment Judge C Knowles. The claimant was represented by counsel and the respondent by a solicitor. In a reserved decision, the tribunal dismissed both complaints. The claimant appealed. A single ground of appeal relating to the unfair dismissal complaint was permitted to proceed to this hearing.

2. The claimant has been conducting this appeal as a litigant in person and tabled his own written skeleton argument and a further revised written submission. But at the hearing today he had the benefit of being represented, for the first time, by Mr Matovu of counsel. The respondent was represented by a solicitor, Mr Bownes, who also appeared before the tribunal.

3. The tribunal's decision is long, thorough and detailed. However, for the purposes of this appeal the background facts found by the tribunal can be fairly shortly stated.

4. The claimant was employed by the respondent from 17 February 1997. In February 2018 he was promoted to the role of IT Operations Nightshift Manager. In that role he was provided with a company car. On 13 January 2022 he was given a first and final written warning for unauthorised use of a USB stick, and warned that any further offence within the next twelve months could result in dismissal. This was the first disciplinary sanction that he had received during his employment. He unsuccessfully appealed against that warning.

5. On 20 August 2021 a speed camera photographed the claimant's company car being driven at 48 mph in a 40 mph zone. On 22 July 2022 he was found guilty at the Magistrates' Court of failing to give information relating to the identity of the driver on that occasion. On 26 August 2022, due

to the number of existing points on his licence, the magistrates disqualified him from driving.

6. Between 26 and 30 August 2022 the claimant had exchanges with the respondent's transport department in which he made enquiries about the possibility of returning the car and receiving an allowance in lieu. He did not mention his recent conviction or disqualification.

7. In September 2022 the claimant appealed against both conviction and disqualification. At the first hearing in the Crown Court on 29 September, the disqualification was suspended pending the hearing of that appeal. Meantime, the conviction and disqualification had come to light as a result of an automated quarterly check on the claimant's status carried out in accordance with the respondent's procedures to which he had consented. That led to a disciplinary investigation in which he was interviewed, and then a disciplinary charge of failing to disclose the disqualification to the respondent. A disciplinary hearing was held on 30 September 2022 before Giuliano Silvestri.

8. The tribunal gives very detailed accounts of the discussions in the initial investigation meeting and at the disciplinary hearing. It suffices to note that the claimant's position was that he had been focused on his criminal appeal, which he thought would be quickly resolved. He was not driving in the meantime, and would have put the respondent in the picture had the appeal been unsuccessful. He did not accept that he was aware that he was under a duty of immediate disclosure. He had been given a policy document in 2019, but did not recall reading the whole of it. There was an issue as to whether the version he had been given was the one that Mr Silvestri was considering, which set out the relevant disclosure obligation. Following the hearing, Mr Silvestri verified that the claimant had been given that same policy and had signed a confirmation that he had read and understood it.

9. Mr Silvestri wrote to the claimant on 6 October 2022 dismissing him for gross misconduct. In summary, he concluded that, from the point of receiving the conviction and disqualification, the

claimant had a duty under the relevant policy to notify the respondent. He was satisfied that the claimant was aware of that obligation. The communication with the transport department would have been an ideal opportunity to inform the business, but the claimant had chosen not to do so. Mr Silvestri's letter concluded that he believed that the claimant had intentionally failed to disclose the disqualification "and due to the seriousness of the offence, I believe I have no alternative but to summarily dismiss you on the grounds of gross misconduct."

10. The tribunal found that Mr Silvestri had "concluded that the claimant's failure had been intentional and an act of dishonesty". At [71] and [72], the tribunal said:

> **"The dismissal letter did not make any reference to the claimant's length of service. I accept Mr. Silvestri's evidence that he did consider that but that he did not include it in his outcome letter because, given his conclusion about what the claimant had done, he believed that the matter was so serious that trust and confidence had broken down and that the only appropriate sanction was dismissal. Whilst he did not expressly refer to "trust and confidence" in his dismissal letter, I accept that he genuinely believed that trust and confidence had broken down, and that this is what he was seeking to convey when he described the "seriousness of the offence" in his letter. I accept that he did have regard to all the matters that had been discussed at the disciplinary hearing, including the circumstances of the offence that had led to the disqualification. However, this was not a factor that weighed heavily with Mr. Silvestri, because his concern was the failure to report the disqualification, rather than the conviction that had led to the disqualification.**
>
> **Mr. Silvestri did not take into account the claimant's earlier first and final written warning at the time that he reached his decision to dismiss."**

11. The claimant appealed. One of the points he specifically raised was that he had served for over 25 years. The appeal was heard by Steve Mills. In the course of the appeal hearing the claimant argued that his 25 year service should be considered. On 25 October 2022 Mr Mills wrote dismissing his appeal. The tribunal gave a summary of that letter, including the following at [79]:

> **"He had considered the claimant's service and looked at his disciplinary record but noted that the claimant already had a final written warning for breach of security operating procedures and that this was not the first time he had shown a total disregard for the respondent's policy and process. Mr Mills concluded that he had no choice but to uphold the original decision."**

12. At [80] the tribunal said this:

> **"Mr. Mills clearly had regard to the claimant's first and final written warning. As I did not hear evidence from Mr. Mills it was difficult to be sure about exactly how he had used this, but on the basis of his letter, I find that he ferred to this in explaining why he did not regard the claimant's long-service as a sufficiently mitigating factor to persuade him to overturn the dismissal."**

13. On 24 November 2022 the claimant's appeal to the Crown Court against conviction and disqualification was successful.

14. On 28 November 2022 there was a second internal appeal hearing before Sharon Hughes. Among the submissions that the claimant made was that he had always been an exemplary employee in his 25 years of service. Ms Hughes wrote to the claimant on 13 December 2022 rejecting his appeal. The tribunal's summary of her letter included the following at paragraph 92:

> **"As to the claimant's arguments that the sanction had been too severe and that his lengthy of service has not been taken into account, Ms Hughes referred to the discussion that had taken place during the appeal hearing about why the claimant had not disclosed his disqualification to the transport administrator and the claimant's account that he assumed that DAVIS [the automated quarterly check] would report to the respondent."**

15. The tribunal went on to find that Ms Hughes had not simply rubber-stamped Mr Silvestri's decision. At [94] it said the following:

> **"Ms. Hughes' view was that the claimant's failure to disclose his disqualification was so serious as to amount to gross misconduct, and to warrant dismissal by itself. She did not rely on the first and final written warning in reaching her decision that the claimant's appeal should be rejected."**

16. Further on, the tribunal summarised the submissions. Among the submissions made by the claimant's counsel in her skeleton argument the tribunal noted at [100(c)(viii)]:

> **"The claimant's 25 years of service and exemplary record up until 2022 should have been a heavy mitigating factor."**

17. Further on, at [100(e)(x)], the tribunal recorded her oral submission as follows:

> **"It had been inappropriate to consider the first and final written warning as Mr Mills had and the claimant's 25 year service was a heavy mitigating factor. Mr Silvestri's evidence had been that he did not need to consider length of service in order to reach his conclusion. Ms Hughes said that she had considered it but still felt the sanction was appropriate."**

18. In the course of its self-direction as to the law, in which it set out section 98(4) **Employment Rights Act 1996** and referred to a number of authorities, the tribunal said:

> **"Length of service may be relevant when deciding whether a decision to dismiss was reasonable (*Strouthos v London Underground* [2004] EWCA Civ 402)."**

19. The tribunal also cited **Taylor v OCS Group** [2006] EWCA Civ 702; [2006] ICR 1602 and its reference to the need to consider, in a case where there are deficiencies at an earlier stage, whether "the overall process was fair notwithstanding deficiencies at the early stage".

20. In the course of its conclusions on unfair dismissal the tribunal said at [133]:

> **"The claimant submitted that his length of service should have been a heavy mitigating factor. I have found that Mr. Silvestri did consider the claimant's length of service, but that in light of his conclusion that trust and confidence had broken down, he did not consider it relevant to refer to the claimant's length of service in his letter. Mr. Silvestri's decision to dismiss, notwithstanding the claimant's long service, was one that was open to a reasonable employer."**

21. The tribunal found that, at the appeal stage, Mr Mills had expressly considered long service but did not consider it to be a sufficiently mitigating factor. It also found that Mr Mills was entitled to have regard to the final written warning. The tribunal found that the decisions of both Mr Mills and Ms Hughes were within the band of reasonable responses open to them.

22. The notice of appeal contained three numbered grounds. It was considered on paper by DHCJ John Bowers KC. He permitted ground 2, only, to proceed. Ground 2 reads:

> **"The Tribunal failed to properly assess whether the claimants long service and mitigating actions were given sufficient weight in determining the appropriateness of dismissal. During the counsel's cross-examination of the respondent's witness he was asked, if he had taken the claimants long service in to consideration when concluding his decision, he**

> **said "No". The counsel's submissions in the reserved judgement with reasons, as referenced to point 100(e)(x). "Mr. Silvestri's evidence had been that he did not need to consider length of service in order to reach his conclusion." The tribunal failed to apply the evidence to the law, in particular, when the respondents witness stated he did not consider length of service as a factor when concluding his decision for dismissal, but the employment Judge incorrectly said "he did", as shown in 'points 71, 100(e)(x) and 133' of the reserved Judgement with reasons."**

23. DHCJ Bowers KC indicated that the claimant would need to produce a note of the crucial evidence on which he relied. In its Answer, the respondent stated that it considered the tribunal's findings of fact to be an accurate reflection of the evidence that had been given by Mr Silvestri.

24. The claimant did not apply to the employment tribunal for a transcript until September 2025. In the event he received it shortly before 9am this morning and it was circulated prior to the hearing. At the start of the hearing, I asked whether the representatives needed any more time to consider it. I was told that it had been given some consideration but Mr Matovu requested a short adjournment, which I granted. After the adjournment both representatives were ready to proceed.

25. The tribunal found that the reason for dismissal was conduct. Therefore it fell within section 98(2)(b) of the **1996 Act**. Accordingly, the tribunal had to apply section 98(4) to determine whether the dismissal was fair or unfair. That provides:

> **"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."**

26. As for length of service, in **Strouthos v London Underground Limited** [2004] EWCA Civ 402; [2004] IRLR 636 at [29] Pill LJ said:

> **"The fact that the appellant had been employed for 20 years with no warnings for gross misconduct was a factor they were entitled to take into account. Mr Craig makes a contrary submission at that point, relying on the decision of the Employment Appeal Tribunal in**

> **London Borough of Harrow Cunningham [1996] IRLR 256. The Tribunal cited with approval the judgment of the Court of Session in AEI Cables Limited v McLay. [1980] IRLR 84. They quoted from the head note in that decision:**
>
> **" ... Although an employee's length of service -- the remaining reason given by the industrial tribunal for finding the dismissal unfair -- is a relevant consideration in many cases, it would be wholly unreasonable to expect an employer who had been deceived by the employee, in the way in which the respondent deceived the appellants in the present case, to have any further confidence in him and to continue him in his employ. The quality of the employee's conduct in the present case was of such gravity that the length of his prior service was of no materiality."**
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> **The Tribunal in Cunningham (HHJ Peter Clark presiding) stated that the headnote did reflect the contents of the judgment in McLay, and added:**
>
> **"In our judgment, the Court of Session is there saying no more than that in cases of serious misconduct length of service will not save the employee from dismissal. That is trite law."**
>
> **I accept those propositions, but it all depends on the circumstances. The statements in McLay and Cunningham do not, in my judgment, exclude a consideration of the length of service as a factor in considering whether the reaction of an employer to conduct by his employee is an appropriate one. Certainly there will be conduct so serious that, however long an employee has served, dismissal is an appropriate response. However, considering whether, upon a certain course of conduct, dismissal is an appropriate response, is a matter of judgment and, in my judgment, length of service is a factor which can properly be taken into account, as it was by the Employment Tribunal when they decided that the response of the employers in this case was not an appropriate one."**

27. There was a short, concurring judgment from May LJ. Dyson LJ agreed with the outcome.

28. This topic was also considered by the EAT in **Hewston v OFSTED** [2023] IRLR 878 (the case went to the Court of Appeal but it did not consider this issue). The EAT said the following:

> **"99. Whether, or how, length of service is significant in a given case is fact-sensitive and depends on which party has raised it, or attached significance to it, and why. It is the substance of the issue being raised in the given case that matters. It is common, for example, for an employee to contend that a long period of service during which (if it be so) they have had a clean disciplinary record, and/or a long period of service during which they have made a positive or significant contribution to the employer's endeavour, are factors that should have a bearing on the assessment of the conduct in question and/or the punishment for it. It is also common for employers to regard as relevant, as the case may be, the employee's lack of experience in the job, or, conversely, their appreciable experience. "Length of service" may be used as a label, or proxy, for such issues or for others.**
>
> **100. In the present case the respondent contended that the extent of the claimant's experience was relevant to whether he ought to have appreciated that what he did was**

> **seriously wrong. But the tribunal had evidence that the claimant, for his part, relied on the fact that he had raised what he regarded as his long and unblemished record of service in the course of the disciplinary process. That being so, it was incumbent on the tribunal to consider whether the respondent gave any consideration to that. The fact that the tribunal took on board the respondent's – different – point, about his wide experience is not, in our view, sufficient; nor is the reference at the start of the decision, to the dates of employment. In our judgment it was an error for the tribunal not to address, in substance, whether the respondent considered, and if so, how, this aspect of the claimant's internal case."**

29. Both representatives before me agreed that how the tribunal may approach this aspect is immensely fact-sensitive. There may be cases where the tribunal properly concludes that a failure by the employer to consider length of service as a mitigating factor by itself renders the dismissal unfair. Conversely, there may be other cases where the tribunal properly concludes that the conduct found was of such a nature that, even if the employer did not give any consideration to length of service, that did not render the dismissal unfair.

30. That is borne out by authorities such as **Strouthos**, and **Spence v Manchester United**, UKEAT/0285/04 and **Arnold Clark Automobiles v Spoor** [2017] IRLR 500. I was referred also to **Alexis v Westminster Drug Project** [2024] EAT 188 but I do not think that lays down any new or different principle of law. It was a case where the nature of the conclusions reached, about the relationship having irretrievably broken down, were such that the employee's length of service could properly on the facts of that case be regarded as an irrelevant consideration.

31. I was given a copy of Mr Silvestri's witness statement that formed his evidence in-chief. At [16] he wrote:

> **"I did consider the claimant's length of service in the business and based on the above findings it was clear that the claimant was aware of his obligations and was dishonest in failing to disclose his conviction. Due to the seriousness of the offence and subsequent breakdown of trust and confidence, I was of the view that this amounted to gross misconduct and therefore the only appropriate sanction in the circumstances was summary dismissal."**

32. As I have described, we also had the benefit of the transcript of the whole of Mr Silvestri's

oral evidence. At the start he confirmed that his statement was true. In the course of cross-examination by the claimant's then counsel, there are the following exchanges:

> **"Q. Now, there's no mention of his 25 years of service being a mitigating factor in your dismissal letter, is there?**
> **A. No.**
> **Q. And that's because you failed to consider the length of service when you made the decision to dismiss him.**
> **A. There's no need to have that, in my opinion, for the conclusion.**
> **Q You didn't need to consider his length of service, given your conclusion?**
> **A. Correct."**

33. There was also a further exchange a little further on, to which Mr Matovu also referred:

> **"Q. But if it's not something you knew at the time, why would it give context to the outcome?**
> **A. Because, as it says, there are no alternatives to dismiss would have been appropriate in circumstances, and dismissal would have been the only alternative option available to me."**

34. This topic were not revisited either in the few questions that there were from the judge after cross-examination was completed, nor in re-examination by Mr Bownes.

35. Mr Bownes submitted to me that the transcript showed that the oral evidence given by Mr Silvestri was in line with his written evidence in-chief. It did not show him conceding that he had given no consideration at all to the claimant's length of service. It was put to him, that he had not referred to length of service in his dismissal letter, because he had not considered it; but the answer he gave did not indicate that he agreed with that proposition.

36. Mr Bownes also submitted that the tribunal's decision at [71] had accurately captured the totality of his evidence. The evidence that the judge said she accepted in the opening lines of [71] was his evidence in-chief about having considered length of service. Then she went on to refer to the evidence he had given in cross-examination about why he had not mentioned that in the dismissal letter, and then she referred again to his evidence in-chief, that the breakdown in trust and

confidence was so serious that the only appropriate sanction was dismissal.

37. Mr Matovu relied upon it having been specifically put to Mr Silvestri that the reason why he had not referred to considering length of service in the dismissal letter was because he had not in fact considered it. Mr Matovu submitted that what his reply did *not* do was *disagree* with that proposition, nor otherwise maintain that he *had* considered length of service. If that answer was, at best, ambiguous, the ambiguity was resolved in the next exchange when it was put to Mr Silvestri, in terms, that (his position was that) he *did not need to consider* length of service, given his conclusion; and his unambiguous reply was "correct". Mr Matovu submitted that this was reinforced by the further answer he gave later, that dismissal was the "only option" available to him.

38. Mr Matovu said that this showed, therefore, that under cross-examination Mr Silvestri did acknowledge and accept that (despite what he had written in his statement) he had not considered the claimant's length of service. That was, as it were, his last word on the subject, as there had been no attempt by Mr Bownes to revisit or clear up the matter with him in cross-examination. Mr Matovu submitted that this was clearly an aspect relied upon by the claimant's counsel before the tribunal as being a significant factor affecting the fairness or otherwise of the dismissal. In those circumstances, it was at the very least unsatisfactory, and inadequately explained, for the judge to say that she accepted Mr Silvestri's evidence that he did consider length of service, without commenting at all on the further evidence he had given in cross-examination or what she made of it. He submitted that, at its highest, the judge should have accepted his evidence in cross-examination as accurate; but at the very least she should have addressed the conflict in his evidence and explained her overall conclusion about whether he truly did consider length of service.

39. I have found this point of appeal to be very finely balanced. That is for the following reasons. Firstly, I have had the benefit of reading the written evidence in Mr Silvestri's witness

statement, and of reading a transcript of what he said in cross-examination, but I did not have the benefit of actually hearing that cross-examination as the judge did. The finding of fact, was squarely a matter for the employment judge. The EAT cannot rerun that exercise. It can only intervene if the judge's reasoning is perverse or not *Meek*-compliant, or she has failed to address (or address properly) an argument that was a material and significant part of the claimant's case.

40. However, in this case, I consider that, looking at the evidence of the dismissal letter, Mr Silvestri's written witness statement, and then the text of the questions he was asked on this subject in cross-examination and the answers that he gave, it is at least the case that his answers in cross-examination could potentially be read as conflicting with his written statement, and indicating that he had not in fact considered length of service, or, at least, as being, ambiguous or not clear on that point. I note in this regard that, entirely properly and scrupulously, the submission made by the claimant's counsel before the tribunal used the precise words of the question that she had put, namely that he did not need to consider length of service in order to reach his conclusion.

41. Having regard to all of that, I have paused to reflect whether the EAT should disturb the decision on this point; but ultimately I have concluded that, given the significance that was attached to the point on the claimant's behalf, and given the fact that Mr Silvestri was cross-examined on the point and the answers that he gave, the judge needed to say something more than she did, to address this aspect of the evidence, in order to sufficiently explain why, having taken into account the content of the dismissal letter, and what she made of what he had said in cross-examination, she accepted the evidence that Mr Silvestri had given in his witness statement, that the claimant's long period of clean service (prior to the written warning) had been specifically considered by him.

42. I should add that, in common with the sift judge, I consider that this was overall an extremely thorough, careful and conscientious decision, which analysed the evidence and the

arguments with conspicuous care and good sense. However, I conclude that the decision did materially fall short in its treatment of this point.

43. I have already had submissions from both representatives as to what, in that event, I should do next. Mr Bownes argued that the decision should not be disturbed having regard: first, to the finding that Mr Silvestri's decision to dismiss notwithstanding the claimant's long service was one that was open to a reasonable employer; and, secondly, to the findings that the decisions of both Mr Mills and then Ms Hughes, who dealt with the two appeals, were reasonably open to them, the issue of length of service having been canvassed in terms by the claimant at the appeal stage.

44. However, I am persuaded by Mr Matovu that the conclusion at [133], that Mr Silvestri's decision to dismiss notwithstanding the claimant's long service was open to him, was premised on the finding earlier in that paragraph that he *did* consider the claimant's length of service. It does not address the alternative scenario of what the judge might have thought, had she found that he had not considered it at all. The fact that the judge considered it was open to him, having considered long service, to decide that it did not preclude dismissal or point away from dismissal, does not necessarily mean that she would have regarded it as fair not to have considered it at all.

45. Similarly, I cannot be entirely sure that, had the judge concluded that Mr Silvestri had not considered the long service at all, she would have nevertheless concluded, having regard to what happened at the two appeal stages, that this did not affect the fairness of the dismissal. Ultimately, neither Mr Matovu nor Mr Bownes argued that there was only one possible right answer, such that I could substitute my decision for that of the tribunal, though Mr Matovu indicated that, if the matter were remitted to the tribunal, and it then found that Mr Silvestri had *not* considered length of service, he would argue strenuously that that would make the dismissal unfair, and Mr Bownes indicated that, if that was how the findings played out, he would argued strenuously that it did not.

46. I will therefore allow the appeal and remit the matter to the tribunal to make a fresh finding of fact, about whether Mr Silvestri considered the claimant's length of service; and then, taking account of all the other findings and conclusions already reached, to determine whether this was a fair or unfair dismissal. If the tribunal's conclusion is that it was an unfair dismissal it will, of course, need to allow an opportunity for arguments at the remedy stage, including as to *Polkey* and/or contributory conduct, as may arise.

47. Both representatives agreed and submitted that, in the unusual facts and circumstances of this case, whilst the matter should be remitted on that narrow basis, and the other findings of fact and conclusions already reached should not be disturbed, nevertheless the respondent should have the opportunity to call Mr Silvestri to give evidence afresh, and, the claimant to cross-examine him afresh, on this point. I agreed to so direct.

48. The representatives, however, disagreed as to whether that further hearing should be before the same judge. Mr Matovu was concerned as to whether the same judge would be able to come to this aspect of the matter entirely afresh. I am sure, given the high level of detailed care and conscientiousness of this decision overall, that the same judge would approach her task in that way. But I also consider it important that, whatever the outcome may be next time, both parties should be able to have complete confidence in it; and I think that goal will be better served by directing remission to a different judge who can bring a fresh pair of eyes to it.