Neutral Citation Number: [2025] EAT 4

Case No: EA-2022-001246-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 17 December 2024

Before :

JUDGE KEITH

- - - - - - - - - - - - - -

Between :

METROLINE TRAVEL LTD

Appellant

- and –

MR JUSTIN TAYLOR (DEBARRED)

Respondent

- -
- -

MR BROWN (instructed by Fidelity Law Ltd) for the **Appellant**
THE RESPONDENT was debarred from appearing

Hearing date: 17 December 2024

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JUDGMENT

SUMMARY

Unfair dismissal

The Employment Tribunal erred in failing to apply the law in considering whether the process by which, and the decision reached by the employer was within the range of reasonable responses. In doing so, the ET erred in substituting its view for that of the employer.

JUDGE KEITH:

1. These written reasons reflect the full oral judgment which I gave at the end of the hearing. I refer to the Appellant for the remainder of these reasons as 'Metroline' and to the Respondent as the 'Claimant'. The Claimant has been debarred from participating further in these proceedings following an order issued by the Registrar's team, sealed on 15th July 2024, because of his failure to comply with directions or respond to correspondence. The Claimant succeeded in his claim of 'ordinary' unfair dismissal, but his claim of automatically unfair dismissal for a health and safety reason, contrary to Section 100(1) Employment Rights Act 1996, was dismissed. There is no cross-appeal against that dismissal.

2. Metroline appeals against the decision of an Employment Tribunal (hereinafter, the 'ET') sitting in Watford, chaired by Employment Judge Bedeau, and sent to the parties on 3rd October 2022, which found that the Claimant was unfairly dismissed.

The ET's decision

3. The Claimant's claim relates to his dismissal following a physical altercation between himself and a third party. He was employed as a bus driver and, it is said, was involved in a physical fight with another bus driver working for a third-party bus company, over who should park in a parking bay, at a bus depot. Metroline summarily dismissed the Claimant following a complaint made by that third party bus company. The ET heard witness evidence from the Metroline's dismissing manager and a member of the appeal panel. The fact of the altercation having occurred was accepted, but the Claimant disputed its precise nature and context. In particular, he denied punching the other party, and explained that his actions were in the context of Covid social distancing at the time, and his fear that he was about to be seriously injured or that his life was at risk because of the other driver.

4. The ET referred, in making its findings of fact, to Metroline's disciplinary policy at

paragraphs [8] to [12] of its judgment. These include provisions relating to the disclosure of the CCTV and other evidence, the former specified as being permitted under Metroline's supervision. The ET went on to make findings in relation to the incident itself, the complaint by the third-party bus company, and, at para [16], the fact that the third party driver had not been interviewed prior to the complaint by his employers.

The ET's findings

5. In analysing the investigation process, at paras [20] to [22], the ET noted that the investigation meeting had been adjourned on one occasion because no union representative was available, and that Metroline declined to adjourn it on a second occasion, or to provide the CCTV recordings before the investigation meeting. However, the Claimant was subsequently able to view the recordings and provided with copies following the investigation meeting. The Claimant attended the investigation meeting under protest, as he was not accompanied by his representative, but he still answered questions. The Claimant also complained about not being able to view the CCTV recordings before being asked about them in the investigation meeting (para [26]). When allowed to view the CCTV recording, he said that it confirmed his version of events.

6. The ET found that between completion of the investigation meeting and a scheduled disciplinary hearing, a fellow bus driver, Ms West, provided a statement of what she had seen in her rear-view mirror. She observed there was a fight. She could not swear to what, if any, physical injury she saw inflicted by the two protagonists on one another. While she had separated the two, she had not witnessed any physical blows or punching, more grabbing. The ET found that prior to the disciplinary meeting, Metroline provided (via an email from the third party's managing director) still images of the incident and Ms West's statement. As a result, at the disciplinary hearing, the Claimant then provided a more detailed account of events, on which he elaborated and which the ET recited at paras [33] and [36]. The Claimant's representative also made detailed submissions,

including that the process was flawed because Metroline had not asked for the attendance of, or a witness statement from, the third-party bus driver, or requested a copy of any police investigation.

7. The ET made findings on the dismissing manager's reasons for his decision at para [41]. There was no doubt about the physical altercation, with the two allegations proven, namely that the Claimant had left his bus cab contrary to training, and second, he had entered into a physical confrontation. The manager concluded that the CCTV footage appeared to show the Claimant having punched the other driver on the side of the head. While the third-party driver had boarded the Claimant's bus and appeared to attempt to pull the Claimant off the bus, the Claimant's response had been disproportionate. The level of violence which the Claimant had used was unnecessary and the Claimant had continued to pursue the third party. At para [42], the ET found that the manager's reasons included that had the Claimant stopped, once the third party had been removed from the vehicle or acted in accordance with his training by ensuring he was safely and securely in his cab, the matter would have been very different. The Claimant had not stopped and had attempted to pursue the driver in a violent and confrontational manner.

8. The ET made findings about Metroline's appeal process at para [47] onwards. The Claimant's grounds of appeal included that he had not seen the CCTV recordings before the investigation meeting, there had been no official complaint from the third-party driver, and he had not been accompanied at the investigation meeting. Nothing, he added, had been mentioned about the level of provocation and there was no evidence to support the allegation of leaving the cab, with no procedure described which meant that it was inappropriate for him to have done so.

9. At para [51], the ET noted Metroline's appeal panel's consideration of the case of another Metroline colleague who had been dismissed but then reinstated on appeal, in what the Claimant said was a similar situation. The ET also noted that the appeal panel referred to having watched the CCTV footage and seeing the Claimant punch the other driver on the side of his head and lunging at

him.

10. The ET further noted at paras [57] to [58] that during the appeal process, a witness statement had been obtained from a different third party employee, a Mr Christophi, Moreover, a YouTube video of an incident said to be comparable to that of the Claimant, where one of the Claimant's colleagues had been dismissed, but reinstated, was also considered. At para [60], the ET noted what Metroline regarded as what distinguished that other case, namely the reinstated employee's remorse, in contrast to the Claimant.

11. The ET went on to view the CCTV footage itself, which it described at paras [61] to [67] and asked questions of the Claimant. It is said that the ET appeared, at least on the face of it, to express its view of what had occurred. At para [65], the ET found that the Claimant had genuinely feared for his safety, and that in that context he had pushed the third-party driver. At para [66], the ET said that it had difficulty in coming to the view that there was evidence depicting the recording of the Claimant punching the other driver.

The ET's recital of the law and conclusions

12. The ET directed itself to well-known case law at paras [69] to [82], which I do not recite in full, except to touch on the two well-known tests of **British Home Stores v Burchell** [1980] ICR 303, and the points made in **Sainsbury's Supermarket v Hitt** [2003] ICR 111 CA, that the range of reasonable responses applies as much to the investigation as to the decision to dismiss. In the case of **Taylor v OCS** [2006] ICR 1602 CA, what mattered was not whether an appeal is by way of a re-hearing or review, but whether the disciplinary process is fair overall.

13. Having rejected the claim of automatically unfair dismissal at para [83], about which I say no more, the ET found that the Claimant's dismissal was unfair, by reference to the test in **Burchell**. The remainder of the ET's reasons which are relevant to this appeal are at paras [85] to [95]:

"85. Firstly, the Respondent [Metroline] did not provide the CCTV footage on which it relied to either the Claimant or the Claimant's representative before the investigation meeting. The Respondent's disciplinary policy and procedure, paragraph 2.9, states:

'CCTV footage will be made available under supervision…'

86. Secondly, Ms West's, Bus Driver, working for the Respondent, her statement was not available to the investigation meeting according to the notes of the meeting but was dated the same day, 17 November 2020. It is unclear why this document was not given to Ms May on the day shortly after the meeting.

87. Thirdly, Ms May did not request statements from the Sullivan's driver, the Go-Ahead Garage Controller, or request CCTV recordings from Sullivan buses.

88. Fourthly, the evidence of a hospital admission by the Sullivan's bus driver or medical report appears not to have been requested by the investigating officer. There is no evidence of the report of the incident the Sullivan's bus driver made to the police.

89. There does not appear to be any acknowledgement by the Respondent that the Claimant could be leaving the cab of the bus because he was at the end of his shift and needed to travel from Turnpike Lane to Potters Bar.

90. The disciplinary hearing was flawed, in that, firstly, it did not rectify the flaws of the investigation by requesting witness statements or evidence or request CCTV footage from the Sullivan's buses. Secondly, Mr McManus, felt that Ms West's evidence did not add anything to either the investigation or to the disciplinary hearing relying on the fact that Ms West's observations were limited and through her rear view mirror. They did not question her at all about what she had seen before, during and after the incident. Thirdly, there was almost total reliance on CCTV footage for evidence, plus the email from the director of Sullivan buses, to the director of the Respondent, and the Claimant's incident report. Based on the notes from the disciplinary hearing and the Claimant's evidence, it appears that the hearing was conducted in a manner that whatever the Claimant had to say was either not taken into account or given little weight which contributed to his disengagement from the process. This was clearly demonstrated by Mr McManus playing the CCTV recording, stopping the footage at key points, turning the monitor round to show stills to the Claimant, asking the Claimant to confirm what he, Mr McManus, thought was happening. He did not, in an open-minded manner, give the Claimant the opportunity to explain his version of the incident as the Claimant did during the ET hearing. In any event, this is something that should have been established during the investigation. This was very important as Mr McManus believed that the Claimant had punched the Sullivan's bus driver.

91. Fourthly, the appeal hearing did not rectify the flaws in the investigation or in the disciplinary hearing. This was despite Mr Wright, in his witness statement, at paragraph 7, stating:

"We considered all the evidence and we agreed that to a certain degree, there could have been more done in the investigation, in terms of obtaining witness statements or reports and questioning those witnesses."

92. Fifthly, the Respondents' disciplinary policy and procedure, paragraph 3.10, states:

> "If at this stage new evidence is brought forward, it will be open to the manager considering the appeal to refer the matter back to the manager who held the disciplinary hearing to re-hear the case in light of the evidence concerned."

93. The appeal hearing managers were aware of new evidence in the form of a witness statement that Go Ahead Garage Controller, Mr Christophi and Ms West's report but chose not to refer the matter back to the disciplinary manager.

94. Sixthly, the Claimant cited as a comparator during his appeal, the case of Mr George Loughlin, the incident at Willesden Garage. After viewing the YouTube footage of this incident, the ET was of the view that the Loughlin incident is worse than the incident as shown on the CCTV footage of the Claimant's interaction with the Sullivan bus driver. Our reasons for taking this view are as follows:

94.1 In the Loughlin incident, Mr Loughlin shoved or pushed the inebriated customer or passenger a number of times. During one of these times, he grabbed the man by the top of his arms and partially spun him around resulting in him falling to the ground. Towards the end of the incident, Mr Loughlin pushed the man's left arm up behind his back and forcibly ejected him from the premises. In the Claimant's case, he pushed the Sullivan's bus driver off the platform of his bus when he feared for his physical safety as the driver had something in his hand. The subsequent scuffle outside the bus, as far as it was captured by the CCTV, shown to the ET, appeared to be a combination of the Sullivan's bus driver holding on to the front of the Claimant's clothing and the Claimant trying to contain him in a bear hug. The Claimant did not show sustained aggression towards the Sullivan's bus driver whereas Mr Loughlin did show aggression through a number of acts towards the inebriated man.

94.2 The Loughlin incident took place in daylight in the yard of the garage in full view of members of the public passing by on the pavement outside the yard. The Claimant's interaction with the Sullivan's driver took place in the evening, within an undercover garage in which, according to the Claimant's evidence, the public were not permitted or present. The ET takes the view that the Loughlin incident was more likely to do greater damage to the Respondent's reputation.

94.3 The Loughlin incident involved three employees of the Metroline who stood around the inebriated man, whereas the incident involving the Claimant, involved two people only, namely the Claimant and the Sullivan driver.

94.4 In the Claimant's case it was the Sullivan's driver who committed the first aggressive act by stepping on to the platform of the Claimant's bus and invading his personal space, while appearing to reach into his pocket with his right hand and being in an agitated state. This was, in the ET's view, a provocative act on his part. In relation to the YouTube video it would appear that Mr Loughlin committed the first aggressive act and followed this up with other aggressive behaviours.

94.5 During the disciplinary hearing the Claimant expressed regret that the incident took place, but that he did not instigate it. Further, it was not in his character to

behave in that way. He, therefore, expressed some remorse which was not taken into account or if it was taken into account, was not accorded the weight it deserved.

94.6 In contrast, Mr Loughlin expressed remorse for his aggressive behaviour towards the inebriated man, which he accepted, during the appeal hearing, he had initiated. He was asking to be reinstated to his employment with the Respondent. He was, subsequently, re-employed.

95. For the above reasons we have come to the conclusion that the Claimant's dismissal was substantively unfair."

Metroline's appeal

14. In a Notice of Appeal filed on 17th May 2023, Metroline raised five grounds of appeal.

Ground (1)

15. The ET had failed to make any, or any proper, finding as to what Metroline's reason for dismissing the Claimant was, at paras [83] to [84].

Ground (2)

16. The ET had failed to make any, or any proper, finding as to whether Metroline had reasonable grounds for believing that the Claimant was guilty of the misconduct for which he was dismissed.

Ground (3)

17. The ET had substituted its own view or failed to apply the test of a range of reasonable responses to all procedural and substantive aspects of the disciplinary process. In upholding that the dismissal was unfair, at paras [87], [88], [90] and [93], the ET based this on what evidence Metroline had obtained and the weight attached to that evidence, without considering whether it was within the range of reasonable responses not to obtain further evidence, or to place particular weight on such evidence, or for the appeal panel not to refer additional evidence back to the initial

disciplining manager. In relation to the final question, the dismissing manager, Mr McManus had given a witness statement in which he had concluded at para [16] that it was not necessary to take a statement from the Sullivan driver and at para [90] of the judgment that Ms West's evidence did not add anything, as her observations were limited and through her rear view mirror. A member of the appeal panel, Mr Wright gave evidence that additional statements and reports would not have added anything to the investigation or to Mr McManus' decision making, and the ET's citation of para [7] of Mr Wright's statement at para [91] of the reasons was partial and misleading, by omitting this part of his evidence while citing a different part of the same paragraph.

Ground (4)

18. The ET failed to reason whether any identified procedural errors were remedied or, if it did, its conclusions were perverse. The ET had found that the investigation was flawed because CCTV footage was not made available to the Claimant before the investigation hearing (para [85]) and because Ms West's report was not available or considered at the investigation stage (para [86]), Metroline relies on five aspects which played an important part of that analysis, on which the ET was silent:

(a) the CCTV footage had been shown to the Claimant during the investigation hearing (para [26]);

(b) the Claimant had been provided with still CCTV images in advance of the disciplinary hearing (para [31]);

(c) the CCTV footage was shown to the Claimant during the disciplinary hearing (paras [34] to [35]);

(d) the CCTV footage was considered at the appeal stage (paras [49] to [55]) and

(e) Ms West's report was provided to the Claimant in advance of the disciplinary hearing (para [31]) and considered at the disciplinary and the appeal hearings, (paras [31], [40] and [93]).

Any conclusion, briefly put at para [91], that the appeal process and hearing did not remedy any flaws could not stand, as it was based on the ET's misunderstanding of the evidence, namely a partial quotation from para [7] of Mr Wright's witness statement.

Ground (5)

19. The ET had erred in its assessment of what is said to be inconsistent treatment between the Claimant and a comparator. The ET was entitled to evaluate the Claimant's claim that his case was analogous to the incident involving Mr Loughlin incident but had failed to evaluate and explain why Metroline's conclusion that the cases could be distinguished was outside the range of reasonable responses. It was clear from paras [94.1] to [94.6] that the ET had formed its own view and substituted its decision.

Grant of Permission

20. Mathew Gullick KC, a Deputy High Court Judge, granted permission on 9 March 2023. The grant of permission is not limited in its scope. Without limiting the scope of the grant of permission, he commented that:

> "I am rather less sure about the arguable merits of the first two Grounds of Appeal numbered paragraphs 1-2) which contend that the Employment Tribunal erred in law in failing to make any finding about the reason for dismissal or any finding as to there being reasonable grounds for the employer's belief in misconduct. As it appears to me, the Employment Tribunal's reasoning at paragraphs 84-96 of the written reasons can only be based on the premise (even if the Tribunal may not have made an express statement to that effect) that the Appellant employer's case on the reason for dismissal was accepted. Nonetheless, because there does not appear to be any express finding as to the reason for dismissal in the written reasons and because the Appellant may wish to raise the issues set out in the first two grounds as being supportive of the other grounds of appeal, I will permit all the grounds of appeal to proceed to Full Hearing."

Discussion and conclusions

21. Without discourtesy to Mr Brown, whose submissions and skeleton argument have assisted me, I do not propose to recite those except to explain why I have reached my decision.

Grounds (1), (2) and (3)

22. These grounds are inextricably linked so I consider them together.

23. In relation to grounds (1) and (2), I note Mathew Gullick KC's comments that the ET's conclusions can only be based on the premise, even if not expressly stated, that Metroline's case on the reason for dismissal and belief in the Claimant's misconduct was genuine, even of not reached following a fair procedure. Even if is this one reading of the judgment, Mr Brown argued that the ET erred in the latter case by jumping straight to what it regarded as procedural flaws, failing to apply the appropriate structure of an assessment of what was at all stages within the band of reasonable responses, and substituting its view.

24. While the ET's judgment must be read as premised on a finding that Metroline had established the reason for dismissal (ground (1)) and that it genuinely believed that the Claimant's actions constituted misconduct (part of ground (2)) I am satisfied that the ET did err in its analysis of the reasonableness of that view, by implication, based on a substitution of its view for that of Metroline and its analysis of Metroline's procedure (ground (3). Despite reminding itself of the law, nowhere in the ET's analysis does it apply the concept of the range of reasonable responses. Its criticism, in particular, that several pieces of evidence had not been requested at the investigation stage was not explained in the context of whether that omission was still within the range of reasonable responses.

25. I also accept that at the disciplinary stage, the ET had failed to consider Metroline's view that the witness evidence of Ms West did not add anything, as her observations of the altercation

were limited and through a rear-view mirror. I accept the challenge that there was no finding that the failure to question Ms West was outside the range of reasonable responses, or that it was outside the range of reasonable responses for the dismissing manager to rely heavily upon the CCTV footage.

Ground (4)

26. I further accept the challenge that Metroline's appeal panel was aware of new evidence, and its policy makes clear that it had a discretion as to whether to refer matters back to the original disciplining manager. Mr Wright had explained why the appeal panel had not done so, on the basis that the new evidence would not have had an effect on the dismissing manager's decision, in the crucial passage at para [7] of his witness statement. That analysis is simply not conducted by reference to the range of reasonable responses.

27. I further accept that the ground discloses an error of law, as the ET failed to consider the process as a whole, merely stating the conclusion that the appeal process did not remedy any flaws in the earlier investigation hearing or process. That does not explain or engage with the various findings that the CCTV footage had been shown to the Claimant at various stages in the processes, as had Ms West's statement. It was incumbent upon the ET to analyse that in the context of the range of reasonable responses and, if it concluded that it was out with that range, to explain why.

Ground (5)

28. The clearest example of the ET's substitution error is contained in the ET's analysis of the Claimant's submission of an analogous case, Mr Loughlin, which the ET had accepted as a valid one, at para [94]. The ET had noted Metroline's case for distinguishing the Claimant's case from that of Mr Loughlin, at para [60], namely the Claimant's alleged lack of remorse in contrast to Mr

Loughlin. The ET failed to consider whether that view, namely, to distinguish the two cases, was within the range of reasonable responses, noting in particular the authority of **Paul v East Surrey District Health Authority** [1996] IRLR 305 (CA), and the attitude of the Claimant to his conduct (para [36]). Instead, what the ET did was to carry out a line-by-line analysis expressing its views on the difficulty of seeing what the CCTV footage depicted, and its view that Mr Loughlin's incident was worse because the Claimant did not show sustained aggression. Indeed, I accept the challenge that that was contrary to the views of Metroline when it stated that the Claimant had continued in his actions, and nowhere was that view countermanded, nor is it suggested that that is out with the band of reasonable responses.

29. I accept further the challenge that it was not for the ET to decide whether the incident was more likely to do greater damage to Metroline's reputation, or that the weight that any remorse need have placed upon it was a matter for the ET, rather than a question of whether the weight was within the band of reasonable responses, particularly where the appeal panel had not accepted the Claimant to have been genuinely remorseful.

30. Drawing these conclusions together, I accept that the ET's judgment is, regrettably, fundamentally flawed, and that the substitution of error affects every stage of the analysis of the claim for ordinary unfair dismissal. For the avoidance of doubt, the decision in respect of automatic unfair dismissal is unaffected by my decision, and I emphasise that there has been no cross-appeal against that rejection by the Claimant.

31. I am satisfied that it is appropriate to remit matters to a different Employment Judge who may hear the matter alone, subject to the views of the Regional Employment Judge, as there is no longer any claim other than ordinary unfair dismissal. My reason for doing so is, first, because the decision itself, as indicated, is fundamentally flawed. Second, by reference to the well-known authority of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, there is a risk of a second

bite where such clear views have been expressed. Third, because practically although she has not yet retired, Employment Judge Bedeau is said to be retiring imminently within the next month, and the likelihood of the matter being considered afresh in that time frame is unlikely.