Appeal No. UKEAT/0067/05/DM & UKEAT/0307/05/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 19 October 2005

Before

HIS HONOUR JUDGE PETER CLARK

MR D CHADWICK

MR A J HARRIS

CENTRE WEST LONDON BUSES LTD — APPELLANTS

(1) MRS ADEKEMI GINA BALOGUN
(2) MR ADEIYI AMBALI — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RUSSELL BAILEY (of Counsel) Instructed by: Messrs Moorhead James Solicitors Kildare House 3 Dorset Rise London EC4Y 8EN
For the Respondents	Respondents neither present nor represented having been debarred by Employment Appeal Tribunal Order dated 4 October 2005

SUMMARY

Unfair Dismissal: Reasonableness of Dismissal

Unfair Dismissal. Conduct. Procedural fairness. Range of reasonable responses test applied. Employment Tribunal decision reversed.

HIS HONOUR JUDGE PETER CLARK

1. This case has proceeded before an Employment Tribunal at Ashford, chaired by Mrs Valerie Cooney. By their liability judgment dated 14 December 2004, that Tribunal upheld the Claimants, Mr Ambali & Mrs Balogun's complaints of unfair dismissal following their summary dismissal by the Respondent from their employment as bus drivers. By a remedies judgment dated 31 March 2005 the Tribunal awarded total compensation to Mr Ambali of £547.50 and to Mrs Balogun, £660.00 after making deductions both under the **Polkey** principle and for their contributory conduct.

2. On 21 January 2005, the Respondent entered a Notice of Appeal against the liability judgment, UKEAT/0067/05 (the first appeal); and against the remedies judgment by Notice dated 19 April 2005, UKEAT/0307/05 (the second appeal). Those appeals have been combined and now come before us for hearing.

3. On 4 October, I debarred both Claimants from taking part in these appeals. Mrs Balogun, by consent, and Mr Ambali having earlier been debarred by the Registrar's Order dated 18 May in relation to the first appeal and in the absence of any application by him to extend time for lodging an Answer to the second appeal. Mr Ambali did not attend the hearing on 4 October, nor did he make written representations.

The Liability Judgment

4. The Tribunal found that both Claimants were aware of the Respondent's drivers' hours rules. Drivers were not permitted to drive for more than 10 hours in 16; they were

obliged to take a break of least 8½ hours between shifts. On 24 May 2004 Mr Smith, the staff manager at the Respondent's Orpington bus garage where the Claimants were based, received reports from three members of staff, themselves drivers, that Mr Ambali had been seen driving a bus which should have been driven by Mrs Balogun during her duty shift the previous day and after Mr Ambali's shift had finished. Two of those reports related to the period 11.00 pm -11.22 pm and the third to an incident at 8.11 pm. After interviewing both Claimants, Mr Smith obtained statements from the three drivers who had made those reports. Those three drivers, Mr L Howes, Vicki Heymer and Mr M Boyland gave evidence before the Employment Tribunal at the remedies hearing held on 8 March 2005.

5. At the liability hearing the Tribunal accepted the evidence of Mr Smith, that upon initial interview, both Claimants admitted to him that Mr Ambali had driven Mrs Balogun's bus after his own shift had finished the previous day. Both gave as the reason that Mrs Balogun's bus had been overheating and that she was unwell. She said that she had a headache. Mrs Balogun denied that Mr Ambali had driven her bus earlier in the day. Mr Ambali admitted that he had done so. Mr Smith was told by the controller that neither Claimant had reported a problem either with Mrs Balogun's health or her bus. Both Claimants were suspended by Mr Smith and instructed to attend an investigatory fact finding interview with Mr Parker, service delivery manager, the following day (25 May 2004).

6. At his interview Mr Ambali, then represented by Mr Clark of his trade union, The Transport and General Workers' Union, told Mr Parker that he had not driven Mrs

Balogun's bus the previous day. Mr Smith had misunderstood him. The three drivers who had reported him were not telling the truth. Mrs Balogun told Mr Parker that Mr Ambali had simply reversed her bus for her on the bus stand while she tried to find water for its overheating engine. Mr Smith had also misunderstood her and like Mr Ambali, she accused the three drivers of not telling the truth. Mrs Balogun's log card for 24 May did not show that any other driver had driven her bus that day.

7. Both Claimants were instructed to attend a disciplinary hearing before Mr Johnson, the operations manager, at the Orpington garage on 2 June. The charges, of which the Claimants had prior notice, were, in the case of Mr Ambali, breach of drivers' hours regulations, taking control of a bus without authority and failing to seek appropriate authorisation. Mrs Balogun was charged with allowing someone else to drive the vehicle that she was in charge of without authority, failing to seek appropriate authorisation and falsification of a log card. Both Claimants attended on 2 June, accompanied by their trade union representative, Mr Swan. The meeting was called for 10 a.m. Mr Johnson spoke to Mr Swan and informed him that he wanted to deal with the respective hearings consecutively. Mr Swan took a procedural point that arranging both hearings to be heard at 10 a.m. was a breach of procedure. He would not allow the Claimants to take any further part in the proceedings, nor he would permit Mr Johnson to explain that he wanted to hold separate hearings. Mr Johnson indicated to Mr Swan that in these circumstances he would hold the hearings in the absence of the Claimants, Mr Swan did not relent and the hearing proceeded in their absence. The Tribunal found (Reasons paragraph 24) that holding consecutive hearings was an appropriate course for

Mr Johnson to take. Mr Swan acted unreasonably in taking a procedural point and telling the Claimants not to take part.

8. Mr Johnson had asked the three reporting drivers to attend the hearing. However, he did not question them; he proceeded on the papers which included the interview reports of Mr Smith and Mr Parker, the three drivers' witness statements and Mrs Balogun's duty log card for 24 May. Based on that material, he dismissed both for gross misconduct. The Respondent's disciplinary rules included, amongst examples of offences characterised as gross misconduct, failure to observe rules/procedures affecting the safety of employees or the public. Both Claimants appealed. Those appeals, heard separately, were dismissed following hearings at which each was represented by a union official, not including Mr Swan. Based on those findings, the Tribunal concluded:

   (a) that the Respondent had established a potentially fair reason for dismissal: conduct in each case;

   (b) Having found that Mr Johnson was entitled to hold consecutive disciplinary hearings and that Mr Swan was unreasonable in telling the Claimants not to take part in the proceedings, the Tribunal went on to find that the Claimants themselves were not to blame for this state of affairs; that whilst Mr Johnson could properly attribute blame for what the Tribunal described as "the abortion of the hearings" scheduled for 2 June to Mr Swan, he could not reasonably attribute blame to the Claimants themselves. A reasonable employer, they held, would have rearranged the hearings for another day so that the Claimants could be present and able to put their cases as the Respondent's disciplinary rules provided. Mr Johnson's decision to go ahead with the disciplinary

hearing in these circumstances was unreasonable. (the absent Claimants' point).

(c) Further, Mr Johnson failed to question the witnesses present, the three drivers, but proceeded on the basis of their witness statements. That, the Tribunal held, compounded his failure to act fairly by holding the hearings in the absence of the Claimants (the witness questioning point).

(d) Those procedural defects were not cured by the subsequent appeals which did not take the form of rehearings.

(e) In the case of Mr Ambali, Mr Jones, one of the two area managers holding his appeal hearing, spoke to Mr Johnson during an adjournment. This, the Tribunal considered, was an indication that justice was not seen to be done in his appeal (the appeal point).

(f) In the case of Mrs Balogun, the decision to dismiss her was questionable since "the finding of falsification of a log card was clearly not correct" (Reasons paragraph 29). The Employment Tribunal's basis for that finding is there set out as follows:

> **"The decision to dismiss itself was questionable in the case of Mrs Balogun, since the finding of falsification of a log card was clearly not correct. Mrs Balogun had failed to state on her log card for 24 May 2004 that Mr Ambali had been driving the bus, but since it was her case as put to Mr Parker and at the appeal hearing that he had not done so it is not likely that she would have inserted his name on the log card. In any case, it is questionable whether a failure to state that another person is driving a vehicle amounts to a 'falsification'"** (the log card point).

Based on those findings, the Tribunal concluded that the dismissals were unfair under Section 98 of the **Employment Rights Act 1996**.

9. Finally, in dismissing the Respondent's application for costs (Reasons paragraph 35) the Employment Tribunal said this:

> **"It may be that there was evidence before the Respondent's management from which they could reasonably have come to the conclusion that the Claimants were not telling the truth".**

The Remedies Judgment

10. Having heard from the three reporting drivers, the Tribunal additionally found as fact:

    (a) that on the evening of 24 May 2004, Mr Ambali was driving Mrs Balogun's bus during her shift and at times when he was off duty. He drove the bus on a scheduled route and he did not just reverse it on its stand in the depot.

    (b) The above occurred without the authority of the Respondent's management and the driver's log card, completed for that date, did not show that Mr Ambali had been driving the bus.

Based on the whole of their findings, the Tribunal concluded:

    (1) that had Mr Johnson held a disciplinary hearing with both the Claimants and the three reporting drivers present, he would have been reasonably entitled to conclude that the Claimants were guilty of gross misconduct: dismissal would then have been within the range of reasonable responses open to this employer;

    (2) applying the **Polkey** principle (**Polkey v A E Dayton Services Ltd** [1987] IRLR 503), each Claimant's compensatory award was limited to two weeks' pay, that being the period of time before Mr Johnson could reasonably have held the adjourned disciplinary hearing;

    (3) the Claimants contributed to their dismissal by their own conduct and

(a) the basic award fell to be reduced by 75%. It would not be right to reduce it to nil because there were, said the Tribunal "mitigating circumstances";

(b) the compensatory award fell to be reduced by 25% under Section 123(6) of the 1996 Act. That was because the compensatory award had already been reduced under the **Polkey** principle.

The First Appeal

11. It is convenient to consider separately Mr Bailey's challenge to each of the four findings by the Employment Tribunal which contributed to their conclusion that the original decision to dismiss both Defendants was unfair.

(i) The absent Claimant's point.

12. The Tribunal found that Mr Johnson was entitled to hear the Claimants' cases consecutively and that Mr Swan, their representative, acted unreasonably in taking a procedural point and telling the Claimants not to take part in the hearings. In challenging the finding that Mr Johnson nevertheless acted unreasonably in continuing with the hearing in their absence, Mr Bailey submits as follows:

(a) There was no evidence before the Tribunal that had Mr Johnson adjourned the proceedings, then the Claimants would have taken part in consecutive disciplinary hearings at a later date. That is correct. However, this point, we think, goes more to remedy than to liability.

(b) The more substantial submission is that the Employment Tribunal was wrong to find that the Claimants could not be held responsible for the advice of their trade union representative not to participate in the hearings on the basis of a

misguided (as the Employment Tribunal found) procedural objection. We accept his contention that the position is at least analogous to, if not stronger than, the facts in **Harris and Shepherd v Courage (Eastern) Ltd** [1982] ICR 509 where it was held that the employer had not acted unfairly in proceeding to hear and determine internal disciplinary proceedings involving allegations of theft where the employees had been advised by their solicitor not to participate for fear of prejudicing any forthcoming criminal proceedings taken against them.

In these circumstances, we find that the Employment Tribunal fell into error in separating the Claimants from their trade union representative's unreasonable behaviour. If they chose to accept that advice and not participate in the disciplinary hearings, then the employer, here Mr Johnson, cannot properly be criticised for following a procedure which the Tribunal found to be reasonable. We also accept that because the Respondent's procedure did not expressly deal with the position where the employees declined to participate, that did not somehow compel Mr Johnson applying the reasonable employer test to adjourn the proceedings.

(c) We also agree with Mr Bailey that this is not a case in which the employees were denied the opportunity to be heard, as the Employment Tribunal found at Reasons paragraph 24. The opportunity was given; they, on the advice of their trade union representative, declined to take it up.

13. Accordingly, we find that the Tribunal was in error in finding that a reasonable employer would have postponed the proceedings. In so finding, the Tribunal failed to apply the range of reasonable responses test equally applicable to procedural as well as substantive fairness: see **Whitbread v Hall** [2001] ICR 699. This was a case in which a reasonable employer might postpone the hearing; another equally reasonable employer might proceed in the Claimants' absence on the particular facts of this case.

14. Where we part company with Mr Bailey is on his submission that in a case such as this, where a trade union representative takes a bad procedural point and, as a result, his members withdraw from the disciplinary proceedings, that an employer will always be entitled to proceed in their absence. That degree of certainty, it seems to us, is inconsistent with the range of reasonable responses test which must be applied to the facts of each individual case.

(ii) Questioning the Witnesses

15. In a sense, our finding on the first point informs our conclusion on this second point of appeal. The apparently rigid proposition, emerging from the Northern Ireland Court of Appeal case of **Ulsterbus Ltd v Henderson** [1989] IRLR 251, that the opportunity to cross-examine witnesses in internal disciplinary proceedings is not a necessary element of fairness, under what is now Section 98(4) of the 1996 Act, has been softened by the EAT judgment (Wall J presiding) in **Santamera v Express Cargo Forwarding** [2003] IRLR 273 which allows of exceptional cases, where a failure to permit the employee to cross-examine witnesses may render the dismissal procedurally unfair.

16. However, in the present case, the three drivers were available to be questioned at the disciplinary hearing had the hearing not been aborted in the circumstances earlier outlined. We accept Mr Bailey's submissions that where written statements had been obtained from the drivers, it was necessary for Mr Johnson to question them further unless there were matters which required further elucidation. We take no account, at this stage of the enquiry, of the Employment Tribunal's subsequent finding of fact that, having heard them, those witnesses gave truthful accounts and the Claimants did not (Remedies reasons paragraph 3(i)). We rest our finding on this part of the case on the basis that Mr Johnson was entitled to accept the drivers' accounts in the absence of challenge by or on behalf of the Claimants.

(iii) The Log Card

17. This point, dealt with at paragraph 29 of the Tribunal's Liability Reasons, relates to the case of Mrs Balogan only. Mr Bailey first submits that it is not clear from the Tribunal's reasons whether this point alone rendered an otherwise fair dismissal in the light of our earlier findings unfair. We agree. However, the findings at paragraph 29 are, in any event, open to these objections. First, the question for the Tribunal, applying the **Burchell** approach, was whether the Respondent had an honest belief, based on reasonable grounds, following a reasonable investigation that Mrs Balogan had falsified her log card.

18. Instead of asking themselves that question, the Tribunal appear to have found as fact that it was clearly not correct to find, as did the Respondent, that she had falsified her log card. Pausing there, that seems to us to be a clearly impermissible substitution by the Tribunal of their view for that of the employer. In any event, their reasoning is flawed and the finding is impermissible. It seems to be predicated on the basis (a) that it was Mrs Balogan' case that Mr Ambali had not been driving her bus; therefore (b) she would not have inserted his name on the log card. But this overlooks the employer's finding at the disciplinary stage, based on the evidence of the three drivers that Mr Ambali had been driving her bus. If that was a view reasonably open to the Respondent, and plainly it was on the material before them, then by omitting to record that fact on the log card, Mrs Balogan was falsifying the log. It did not record that anyone other than she had driven the bus.

19. Again, we observe that not only was that a reasonable belief on the part of the employer, but subsequently (and immaterial to this part of the enquiry) the Employment Tribunal found as fact that Mr Ambali had driven Mrs Balogan's bus and this fact had not been entered on her driver's log (Remedies Reasons paragraph 3(i) and (ii)).

20. In these circumstances we have concluded that, on this point, as with the two earlier points taken in the appeal, the Tribunal materially misdirected themselves.

(iv) The Appeal Point

21. This relates to the Tribunals' criticism of the procedure used at Mr Ambali's appeal, whereby Mr Jones spoke privately to Mr Johnson during an adjournment. We accept Mr

Bailey's submission that this type of procedural defect, if it be so, does not render unfair an otherwise fair dismissal at the original disciplinary stage (see **Whitbread v Mills** [1998] ICR 776). The defect found by the Employment Tribunal on appeal did not demonstrate any flaw in the original disciplinary decision: **Post Office v Marney** [1990] IRLR 170.

Conclusion

It follows that the first appeal must be allowed. Having rejected each of the four grounds on which the findings of unfair dismissal were posited by the Employment Tribunal, we consider that this is a proper case in which to reverse the findings of unfair dismissal and dismiss both complaints: see the approach of the Court of Appeal in **J Sainsbury's Supermarkets Ltd v Hitt** [2003] ICR 111.

Second Appeal

22. It necessarily follows that the second appeal succeeds. The compensation orders must be set aside. We therefore do not find it necessary to consider the separate points taken by Mr Bailey in the second appeal in relation to the Tribunal's approach to the assessment of compensation in these cases; nor does he invite us to do so.