

## **THE WORLD OF TOPSY TURVYDOM**

**(after W S Gilbert)**

**by Ashley Tucker**

### **Polkey v A E Dayton Services Limited [1988] ICR 142**

1. The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which dismissal takes effect.
2. An E.T. is not bound to hold that *any* procedural failure by the employer renders the dismissal unfair: it is one of the factors to be weighed by the E.T. in deciding whether or not the dismissal was reasonable within Section 98.
3. The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal, not on the actual consequence of failure.
4. In general, the employee should always be given the opportunity to explain.
5. Occasionally the offence is so heinous and the facts so clear that there is no point in the employer obtaining an explanation.
6. Where at the time of dismissal, it was not reasonable for the employer to dismiss without giving an opportunity to explain but facts subsequently

discovered or proved before the E.T. show that dismissal was in fact merited, compensation would be reduced to nil.

**Employment Rights Act 1996: Section 98A inserted by the Employment Act 2002**

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if-
  - (a) One of the procedures set out in Part 1 of Schedule 2 to the Employment Act 2002 (dismissal and disciplinary procedures) applies in relation to the dismissal,
  - (b) The procedure has not been completed, and
  - (c) The non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.
- (2) Subject to subsection (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Section 98(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.

**Employment Rights Act 1996: Section 98**

- (4) 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,...

**Barke and Burns!**

1. The Judgment fails to deal with an issue at all, or no reasons are given or no adequate reasons are given by the E.T.
2. The EAT and the CA do not wish this to be a fatal defect to a Judgment causing the matter to be remitted.
3. Burns v Consignia (No2) [2004] IRLR: Burton J calls for answers to questions that arose out of the notice of appeal: had it formed an opinion on grounds 1 and 2 of the appeal and if so whether it had reasons and if so what they were for not making a finding of unfair dismissal by reference to them; whether the ET had formed a view regarding ground 5 of the appeal and if so for what reason or reasons; ditto ground 6; the reason for the lack of finding referred to in grounds 10 and 11 of the appeal.
4. The parties were to be copied in on the responses and the parties were given liberty to apply to discharge the order.

5. Burns established that the EAT did have jurisdiction to seek clarification of the Judgment notwithstanding copies of the judgment and the written reasons had been entered on the register.
6. That decision was effectively incorporated into the Practice Direction (Employment Appeal Tribunal Procedure) 2004.
7. And Barke v Seetec Business Technology Centre Ltd [2005] IRLR 633 has seen the CA place its imprimatur on the practice albeit that it rejected Section 35(1) of the Employment Tribunals Act 1996 as the foundation for the EAT's jurisdiction and substituted Section 30 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 as the foundation.
8. Barke emphasised the overriding objective as does rule 3 of the Employment Appeal Tribunal Regulations 2004. The scope of the exercise of the jurisdiction is that adopted in Burns (and any additional thoughts Burton J may have).
9. The Burns procedure was to elicit historical facts:
  - a. What were the reasons for the finding?
  - b. Why is there no finding on that issue?

- c. Why is there no reference to that apparently important piece of evidence?

And so on.

- 10. An ET can add to any reasons it may give in its oral judgment in its written judgment; it can review its decision; it can have its decision referred to it by the EAT for further explanation.
- 11. It may come to be expected in the light of this that where it is apparent to the parties at the time of the judgment or the circulation of the written reasons that such inadequacies exist they ought to raise them rather than simply roll onto an appeal.
- 12. If the matter were to be appealed to the EAT and the EAT did not immediately choose to make any enquiry of its own, there is no reason why a Respondent to an appeal should not in its notice to the EAT suggest where appropriate that the EAT might make such an enquiry.