

# Can a dismissal without any procedure be fair? Yes, in certain circumstances, according to the EAT: *Gallacher v Abellio Scotrail Limited UKEATS/0027/19/SS*

---

By [Daniel Brown](#)

3PB

## Facts

1. The Claimant commenced employment in December 2007 as a senior employee. From 2011 onwards she reported to Ms Taggart from 2011. In October 2012, the Claimant was promoted to the role of Head of Customer Delivery and Standards and at that stage her working relationship with Ms Taggart was very good. However, the Claimant's relationship with Ms Taggart began to sour after the Claimant sought a salary increase, which Ms Taggart did not have authority to give. In November 2014, Ms Taggart learned from another manager that the Claimant had made negative comments about her.
2. The Claimant perceived a change in business culture in 2015 and 'decided that she wanted out' although she did not resign. She raised the issue of a salary increase with Ms Taggart again in December 2015 and she received an increase in April 2016. However, Ms Taggart's impression was that the Claimant did not trust her to properly represent her position to Human Resources [5-6].
3. In January 2016 Ms Taggart required all of her direct reports to participate in an on-call rota. The Claimant objected to this and by October 2016 the Claimant had made it clear that she was looking for a role she considered to be more suitable within the Respondent [7-8]. There was a further disagreement between the Claimant and Ms Taggart in 2016 regarding the suitability of a candidate for a role that was to report to the Claimant; Ms Taggart took the view that the Claimant's favoured candidate was not ready for the post [9].

4. The Claimant was absent due to sickness for a period of seven weeks from mid-November 2016 and at this point in time Ms Taggart considered that her working relationship with the Claimant was deteriorating and that the Claimant was doing a job she did not enjoy [10].
5. The Claimant and Ms Taggart met on 10 January 2017 to discuss a wide range matters, including business challenges and a phased return to work. The content of the January meeting was summarised by Ms Taggart in an email to the Claimant to which the Claimant responded with substantial amendments [11].
6. In a meeting on 6 March 2017, the Claimant and Ms Taggart discussed the recruitment of one of the Claimant's direct reports and their other difficulties. Ms Taggart was taken aback by the Claimant's comments in the meeting and considered that the Claimant was attributing all blame for the deterioration of their relationship to her [12-13]. Around this time the Claimant's direct reports expressed concern about her leadership [13]. In addition, the business posted a trading loss around this time and this put pressure on Ms Taggart, as her directorate employed a significant part of the workforce [13]. Accordingly, the Respondent's view was that the business was entering a critical period and that that Ms Taggart needed to be able to rely on her reports [14].
7. In light of the above, Ms Taggart felt that there was a breakdown in trust between her and the Claimant and that this was disruptive to the business [15]. Ms Taggart did not consider the situation to be recoverable and decided that an immediate change was needed [15]. Ms Taggart discussed the situation with others and it was noted that there were no alternative roles for the Claimant elsewhere in the business. It was decided that the Claimant would have to be dismissed. Although the Respondent had disciplinary and performance management policies, given the reason for dismissal, it was decided that following a process would not help manage the situation [15].
8. The Claimant was informed of her dismissal at a pre-arranged annual appraisal meeting on 19 April 2017 [16]. The Claimant did not dispute the breakdown in trust [17]. She was not offered a right of appeal [18] but she was paid nine weeks' pay in lieu of notice. No other procedure was followed [19].

## **EAT judgment**

9. The reason for dismissal was not in dispute. The Claimant was dismissed for 'some other substantial reason' (s.98(1) ERA 1996), namely a breakdown of trust and confidence and the working relationship between the Claimant and Ms Taggart [37].

10. In light of the established reason, the ET's task was to decide whether the dismissal was fair in all of the circumstances (including the size and administrative resources of the employer's undertaking) in accordance with s.98(4) ERA 1996 [38].

11. The EAT noted that the ET was required to consider whether the decision to dismiss was within the band of reasonable responses; Choudhury P noted [39]:

*That band is not of infinite width and the Tribunal should be able to conclude that an employer's response was outside of the band without it being accused of substituting its own views for those of the employer: see Newbound v Thames Water Utilities [2015] IRLR 734 at [61]*

12. The ET directed itself correctly against substitution and as to the band of reasonable responses test [40]. Choudhury P had no doubt that the ET's judgment demonstrated that it had applied its direction correctly to the facts of the case [41].

13. The EAT recognised that [43]:

*The fact that no procedure is followed prior to dismissal would in many cases give rise to the conclusion that the dismissal was outside of the band of reasonable responses and unfair. Such procedures, including giving the employee an opportunity to make representations before dismissal and to appeal against any dismissal, are fundamental to notions of natural justice and fairness and it would be an unusual and rare case where an employe[r] would be acting within the band of reasonable responses in dispensing with such procedures altogether.*

14. However, it is well-established that there are rare cases in which procedures may be dispensed with 'because they are reasonably considered by the employer to be futile in the circumstances. Such a situation is contemplated in *Polkey v Dayton* [by Lord Bridge]' [44].

15. In this case, the ET found that a procedure would not have served any useful purpose and that 'if anything it would have worsened the situation' [45-46]. In light of the above, the ET's conclusion that the dismissal was fair was unassailable and the appeal was dismissed.

## Comment

16. Employers should not regard this case as an indication that, in general, where there is a breakdown of trust and confidence and/or working relationships, no procedure is required. Quite the opposite. This was a relatively rare case in which the employer decided, prior to dismissal, that a procedure would serve no useful purpose and the ET agreed. Ordinarily, the ET will be alive to the risk of employers alleging a breakdown in relations as 'a cloak for another reason for dismissal' [49(d)] and dismissals 'without following any procedures will always be subject to extra caution on the part of the Tribunal before being considered to fall within the band of reasonable responses' [51].

**This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the [3PB clerking team](#).**

31 August 2020



**Daniel Brown**

*Barrister*  
*3PB*

0330 332 2633

[daniel.brown@3pb.co.uk](mailto:daniel.brown@3pb.co.uk)

[3pb.co.uk](http://3pb.co.uk)