

Unfair appeals following an (otherwise) fair dismissal: [Milrine v DHL Services Ltd](#) [2026] EAT 31

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Most practitioners will know that a proper appeal process can “rescue” a flawed disciplinary procedure, rendering a dismissal fair in spite of those initial flaws. But can will a flawed appeal process render an otherwise fair dismissal unfair?

The answer, as is well established, is that it can, although the absence of an appeal process, or the unfairness of that process, will not always be fatal.

In this decision (arising from a Scottish case), Judge Barry Clarke, sitting with two industrial members, gives a helpful summary of the relevant principles and provides a helpful and pithy rule of thumb that may be useful to practitioners as it is to Tribunals:

“the more striking the defects at the stage of an internal appeal, the more it is incumbent upon an ET to demonstrate in its decision why it has decided that a dismissal was, overall, fair”

Factual Background

Mr Milrine had been dismissed from employment by DHL Services Ltd on grounds of capability, following a long period of sickness absence.

However, Mr Milrine objected to his manager dismissing him on grounds that he thought she had insufficient seniority to make that decision. He was invited to appeal the decision, and did. His appeal included two additional grounds of appeal (that appear to have been of greater substance).

The HR business partner, Ms Gard, accepted the appeal and offered Mr Milrine what was described as “an opportunity to re-hear the Capability Hearing”. However, the manager who the appeal had been assigned to simply refused to accept the appeal: he considered it should be kept within Mr Milrine’s division of the business.

A new manager was appointed by Ms Gard. One appeal meeting was aborted because Mr Milrine was without a TU rep, and an another because the new manager became unwell at late notice.

One begins to have a degree of sympathy with Ms Gard, who then suggested a third manager to hear the appeal, which Mr Milrine didn't accept. She offered him the opportunity of selecting between the first two managers (indicating she would escalate matters if the first continued to refuse to hear the appeal), and also left Mr Milrine to choose a new date.

Mr Milrine, instead, entered early conciliation and presented a claim to the ET on the basis that he had been prevented from pursuing his appeal, and because he was concerned about time limits. The Respondent did not make any further efforts to chase up with Mr Milrine about whether he in fact wished to pursue his appeal.

The ET ultimately decided that the dismissal had been fair. It found that the Claimant had elected not to pursue the appeal that had been offered to him, rather than proceed with early conciliation. Mr Milrine appealed.

Summary of Legal Principles

Having reviewed the relevant authorities, the EAT summarised them into a helpful list at Paragraph 40 of the judgment. The full list is reproduced at the end of this article, for ease of reference. However, in summary:

- The Tribunal is to apply the statutory test in s.98(4) of the ERA 1996
- That test should be applied to the dismissal process as a whole, including any appeal, which is “an important and normal component” of fairness
- An appeal which is not offered, or which is defective, can render an otherwise fair process unfair
- However, a failure to offer an appeal or a defective process does not “automatically or inevitably” require a finding that the dismissal was unfair
- Where an appeal would have been futile it can be properly concluded that failing to offer it does not render a dismissal unfair
- However, where it is merely the case that it is *unlikely* to have made a difference that is relevant only to a Polkey deduction rather than liability

Decision of the EAT

The EAT noted that the ET, in this case, had not had regard to the case of *West Midlands Co-Operative Society v Tipton* [1986] ICR 192 which established that unfairness in the appeal stage can render a dismissal unfair, and had not made any findings that the appeal would have been futile or otherwise explain why the dismissal was unfair notwithstanding the obvious defects in the appeal process (which it had noted and criticised).

It also noted that this was a very particular case - the lay members of the EAT were said to be of the view that “they had never seen an appeal quite like it”.

Considering that the defects at the stage of an internal appeal were so striking that the ET was required to clearly set out why it did *not* render the dismissal unfair, and hadn’t sufficiently done so, the EAT upheld the appeal.

The EAT decided that it was able to determine the matter for itself rather than remitting the matter, and made a finding of unfair dismissal (albeit with the parties seeming to agree upon a 100% Polkey deduction).

Annex: Excerpt from Judgment

40. The following principles can be derived from the case law summarised above:

40.1 The starting point, and the focus throughout, must always be on the statutory test set out in section 98 ERA.

40.2 The statutory test requires an examination of the dismissal process as a whole, including the internal appeal stage (*Tipton*; *Taylor*; *Tarbuck*).

40.3 An appeal is an important and normal component of fairness (*Moore*). This is underlined, as a matter of good employment relations, by the Acas Code of Practice.

40.4 A failure by an employer to offer an appeal, or an appeal that is procedurally defective, may render unfair a dismissal which, by sole reference to the initial decision to dismiss, would otherwise have been fair. Put another way, there is no requirement that an internal appeal is only relevant where it is capable of curing an earlier defect or otherwise making a difference to the outcome (*Tarbuck*; *Mirab*).

40.5 It is an error of law for an ET to exclude from its consideration whether a failure by an employer to offer an appeal, or an appeal that is procedurally defective, involves

unreasonableness for the purposes of the statutory test. It should be part of the ET's overall assessment (Mirab).

40.6 A failure by an employer to offer an appeal, or an appeal that is procedurally defective, does not automatically or inevitably require a finding of unfair dismissal (Knightley). It is simply one of many factors for the ET to consider (Gwynedd Council). The statutory imperative is to consider the particular circumstances of each case; in some cases, it can properly be concluded that an appeal would have Judgement approved by the Court for handing down *Milrine v DHL Services Limited* © EAT 2025 Page 18 [2026] EAT 31 been futile, such that a failure to offer an appeal would not make the dismissal unfair (Moore).

40.7 If the ET considers that the employer acted unreasonably in failing to offer an appeal, or by conducting a procedurally defective appeal, but further considers that a proper appeal would have made little or no difference to the outcome, that should sound in remedy rather than liability (Polkey; Tarbuck).

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