Appeal No. UKEATS/0013/18/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 16 November 2018

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

MUEHLHAN INDUSTRIAL SERVICES LIMITED — APPELLANT

ANTHONY MURPHY — RESPONDENT

RESERVED
JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Ms H Maclean (Solicitor) Law at Work Limited Kintyre House 205 West George Street Glasgow G2 2LW
For the Respondent	Mr S Brittenden (of Counsel) Instructed by: Mr Paul Deans Thompsons Solicitors Berkeley House 285 Bath Street Glasgow G2 4HQ

SUMMARY

UNFAIR DISMISSAL: Reasonableness of Dismissal

The claimant, a scaffolder working offshore, was dismissed on conduct grounds, having failed to stop work and report two health and safety incidents immediately. He was dismissed and claimed unfair dismissal, which succeeded before the tribunal. The respondent appealed, claiming first, that the tribunal had adopted a substitution mindset and secondly that it had applied a discrete equity test rather than treating section 98(4) as imposing a single test.

Held :

1) **While the Tribunal had made an erroneous reference to establishing whether conduct had occurred in setting out the issues, that error was not material as it had not permeated to the substantive discussion by the tribunal. The central issue had been whether dismissal had been within the band of reasonable responses open to the respondent. In concluding that the dismissal was unfair by applying the correct test, the Tribunal had not substituted its view for that of the reasonable employer.**
2) **There was nothing in the point about the Tribunal addressing equity and the substantial merits of the case as a separate consideration. The Tribunal had simply reiterated the words of section 98(4) of the 1996 Act and had not gone on to give separate consideration to any test of equity.**

Appeal dismissed.

THE HONOURABLE LADY WISE

Introduction

1. The claimant was employed by the respondent as a scaffolder between 5 February 2010 and his dismissal on 10 February 2017 on conduct grounds. He was successful in a claim of unfair dismissal. The judgment of the Employment Tribunal in Aberdeen (Employment Judge J Hendry sitting alone) is dated 15 November 2017 and makes a monetary award to the claimant to which a 50% reduction for contributory fault is applied. While the respondent appeals the decision of unfair dismissal, there is no cross-appeal in relation to the finding of contributory fault.

2. The claimant was represented before the tribunal by Mr P Deans, solicitor and on appeal by Mr S Brittenden of counsel. While Mr C Bennison of counsel represented the respondent before the Tribunal, on appeal the respondent was represented by Ms H Maclean, solicitor. I will continue to refer to parties as claimant and respondent as they were in the Tribunal below.

The Tribunal's Judgment

3. In accordance with Rule 62(5) of the Employment Tribunal Rules, the judgment sets out the issues for determination, the material facts found relative to those issues, makes a self-direction in relation to the applicable law and gives reasons for its decision on how to apply the relevant law to the facts of the case. Paragraph 2 of the judgment states the following:

> **"2. The issues for the Tribunal were whether or not the claimant had committed an act of misconduct and if so, whether or not dismissing him in the circumstances was within the band of reasonable responses open to the employers in the circumstances."**

Of the findings in fact, the following paragraphs relate directly to the issues argued on appeal:

> **"6. The respondent provides scaffolding, painting and insulation services for clients including for many offshore clients. They are part of a large multi-national group of companies.**
>
> **7. The claimant was an experienced and competent scaffolder. He had worked offshore for approximately 10 years. He had a clean disciplinary record.**

8. **The respondent company takes health and safety duties seriously and tries to ensure that their employees are aware of this through their various policies and through tool box talks given before specific works commence. Work that is carried out on offshore platforms is tightly regulated because of the dangerous environment in which it takes place. Prior to the incident on the 3 February for which he was disciplined the claimant had on one occasion stopped a job when a broom handle fell out of a scaffolding pole and on another occasion he reported a potential hazard on a platform and the area was cordoned off.**

9. **The claimant attended a tool box talk on the 3 February before carrying out work that day. A style form was completed (JBp59). It provided guidance as to what he should do in an emergency namely to stop the job, contact his supervisors and to sound the alarm. He was also instructed to 'make the work safe' if an incident occurred. The claimant and his fellow workers signed the Toolbox Talk Record Form (JBp63) which included the instruction: 'Any issues or concerns STOP the job'.**

10. **The claimant also acknowledged that he would abide by the company's working practices set out in the Safety Handbook (JBp103). The Handbook provided that workers 'shall' report all accidents immediately (JBp105). At page three of the policy (JBp108) it provided that employees were responsible for reporting 'all accidents, hazards and near misses to their immediate Superviser'. An object being dropped over board was regarded as a reportable incident. The document indicated that breaches of the rules might lead to disciplinary action.**

11. **Employees such as the claimant were trained to go through a process of risk assessment if there was a change in working conditions caused by an environmental change or a hazard becoming apparent and to 'stop, think review' before completing the task. This process was set out in a document called 'Step Change in Safety' (JBp118).**

12. **The respondent company worked for EnQuest on the Piper Alpha Platform. They had various policies in relation to safe working including a policy called 'Life Saving Rules'. It provided that if there was a breach of any rule the job should be stopped (JBp100). There were rules (JBp101) about working at height and preventing dropped objects. It provided that if there was a breach of a safety rule the job should be stopped immediately (JBp102). The police also provided that breaches would be taken seriously and the level of disciplinary response would depend on the identification of the basic cause and could range from modifying procedures, coaching and/or education to verbal or written warnings or to dismissal.**

13. **On 3 February 2017 the claimant and a colleague Steve Brown, were instructed to remove steel scaffold poles from a rack on the lower deck of the platform and place them in a pile to allow them to be taken by crane to another, higher, part of the platform. Before doing so they were given instructions regarding their task. The claimant and his colleague commenced work. They were on their own. There was no one working below them.**

14. **The claimant at times had his back to Mr Brown. In the course of this work Mr Brown made the claimant aware that as he had lifted a scaffold pole a smaller piece of metal pipe had slipped from the inside of the scaffold pole and had gone overboard. The claimant had been stacking materials facing away from Mr Brown and did not witness the accident. The claimant and Mr Brown discussed the matter briefly and concluded that there was no danger to themselves or others so they decided to finish the task. The claimant believed that the pole going overboard was a 'one off' incident. They were conscious that as they were on the bottom deck of the platform no-on else was working below them who could be injured. It was agreed that the claimant would report the incident to the superviser at lunchtime which was due in 30 minutes time. In the meantime, they agreed to look inside each pole before it was moved. The issue of finding a smaller tube which had been left inside scaffold poles had occurred before and been reported.**

15. **Shortly after the first incident, Mr Brown came across a smaller rusty piece of pipe in a scaffold pole and he threw it towards the pile of scaffolding tubes that was being assembled. The pipe bounced off the boards and into the sea. The claimant again did not witness this particular incident but was told by Mr Brown about it.**

16. The second incident was witnessed by the platform's Health and Safety Adviser Mr Ironside, who arrived at the scene and stopped the work. He then reported the incidents to the claimant's superviser.

17. The claimant was suspended as was Mr Brown. They were flow off the rig and the respondent company began an investigation.

18. Those working in the offshore oil industry such as the claimant are aware that health and safety is taken very seriously given the adverse and dangerous conditions offshore.

19. If objects fall from a platform into the sea this is a reportable event. Following the incident that the claimant was involved in an incident report was prepared for the Health and Safety Executive (JB67). It categorised the incident as a 'dropped object' incident and stated due to the weather conditions there were no boats nearby and as the incident had taken place on the production deck there was no potential of injury to personnel."

4. Findings 20 – 28 inclusive narrate the disciplinary process that took place and the decision to dismiss the claimant for gross misconduct. Paragraphs 29 and 30 are in the following terms:

"29. The claimant lodged an appeal (JBp88-90). In his letter of appeal the claimant argued that he was not clear about which procedure he had violated. He also asked which specific safety rules he had breached in relation to allegations 3 and 4. He pointed to the safety police (Safe Working Essentials) and indicated that his Trade Union representative had explained that he was part of a working group that had developed the system and he had asked Graham Holloway if perhaps it was this system which had been referred to when the company claimed procedures had been breached. Reference was made to the SWE booklet and specifically the section headed Dynamic Risk Assessment. It was argued that process had been complied with as the claimant and Mr Brown had stopped the job and considered thereafter checking the pipes for foreign objects. He indicated he thought he complied with the elements of the policy. They had reassessed the matter and had agreed to proceed but would now check the pipes before moving them. He reiterated examples of when he had stopped work when he had observed an issue. The appeal letter concluded:

> **'with the greatest respect to Graham, and when taking the points I have made above into consideration, I am so unaware of which "process" I failed to follow and what the actions actually were which endangered the health and safety of myself and others? As for the allegation around not stopping the job and reporting immediately; I maintain I complied with the SWE system, but if there is a dispute around this then it should be a learning for concerned.'**

30. The claimant pointed out that no one had been injured and that he had been honest about what had happened from the outset. His position was that the disciplinary sanction applied was disproportionate to the offence."

5. The internal appeal process is detailed in the Tribunal's judgment at paragraphs 31 – 33 inclusive and at paragraphs 34 and 35 the Tribunal found the following about the health and safety requirements applicable to the claimant:

"34. Health and safety is an important feature of working offshore and the companies operating in the North Sea take safety very seriously. EnQuest have a safety policy known as 'Life-saving Rules' (extracts of which are at JB100-102). The policy indicated that steps should be taken to prevent objects being dropped. It indicates that if someone sees someone breaking a life-saving rule they should stop immediately. Under the section 'Breaching the Rules' it states

- **The level of disciplinary response, if any, will depend on the identification of the basic cause and could range from modifying procedures; coaching and/or education; to verbal written warnings to a dismissal.**

35. The claimant indicated by signature on 24 April 2015 that he had received a copy of the Muehlhan Safety Handbook (JB103-109). The policy provides

- **Workers shall report all accidents immediately to their manager.**

At page three of the policy it indicates that in addition to disciplinary action which may be taken for breaches of the policy there may be personal responsibility for health and safety violations (JB108). The claimant acknowledged receipt of various policies when he started work (JB110). As part of the Muehlhan policy there is a summary of instructions (JB112)

- **To tell the team, prevent it happening again**
- **Maybe take action immediately**
- **Prevent others being hurt**
- **Act responsibly**
- **Please refer to Muehlhan Work Safe Policy POL-MGB-029.**

The policy at page 113 indicates that there is a risk to sub-sea equipment from dropped objects."

6. In the discussion and decision section of the judgment the Tribunal sets out the reasons for dismissal in this case in the following way:

"47. The first matter for the tribunal to consider was whether it had been satisfied by the Respondent that the reason for the dismissal was one of the potentially fair reasons for dismissal contained in section 98(1) or (2) of the Employment Rights Act 1996 ('ERA'). They had said that it was the claimant's conduct that had led to dismissal, so that it was for them to show that misconduct on his part was the real reason for dismissal, i.e. under s.98 (2)(b) of the ERA.

48. In the circumstances it is clear that the reason for dismissal was misconduct and what the employers had in mind at the time of dismissal was that the whole circumstances around the incident on the 3 February and that this 'related to the conduct of the employee' – s.98(2)(b)."

The passages in the discussion section relevant to the arguments on appeal include the following:

"50. Under paragraph (a) of this sub-section the question of whether the employer acted reasonably, particularly where the reason for dismissal related to conduct of an employee, often involves consideration of the adequacy of the employer's investigation and thus whether a reasonable employer could have concluded that he was guilty, i.e the *Burchell* test.

51. No issue as to the adequacy of the investigation itself was raised in the ETI. The claimant did argue however that the employers had failed to specify what policy he had breached. The real focus of the case was, therefore, firstly the substantive one of whether the claimant's conduct in itself could reasonably have been considered by a reasonable employer to be 'sufficient' reason for dismissal (taking account of any mitigatory factors) and secondly had he been forewarned that this conduct might lead to instant dismissal. A clear focus required to be maintained on exactly what that conduct was, what was the character of that conduct and the effect of the conduct.

52. The respondent expressly labelled that conduct as 'gross misconduct'. They described the breaches of the health and rules as amounting to a 'gross breach of duty'. The question of whether a dismissal is fair or unfair under s.98(4) of the ERA is not answered by deciding whether or not the employee has been guilty of gross misconduct…

53. This has been more recently confirmed by the EAT in Weston Recovery Services v Fisher (EAT0062/10) i.e. that the only relevant question is whether the conduct was 'sufficient for dismissal', according to the standards of a reasonable employer and whether dismissal accorded with equity and the substantial merits of the case (s.98(4)(a) and (b)).

54. It is of course perfectly reasonable for an employer in his disciplinary documentation to provide information or a forewarning on what kinds of misbehaviour may be regarded as serious enough for summary, or indeed any other form of dismissal. Indeed paragraph 23 of the ACAS code suggests this is done. In the present case there was reference to gross misconduct but no reference to a disciplinary code providing for summary dismissal in the event of a breach. What the employers relied on was the known importance of adhering to health and safety measures offshore and to the reference to disciplinary action in the EnQuest policy.

55. It must be recognised that given the dangers inherent in the claimant's normal workplace and also on the important emphasis that the respondent rightly puts on Health and Safety practice the issues raised are important and any failings are serious. However, I would suggest that despite his best efforts there were some ambiguities between the various in policies. Mr Bennison quoted the EnQuest policies in relation to possible disciplinary action yet Mr West indicated at the appeal that he was relying wholly on the company's own policies. In addition it seems clear from these various policies that they are designed to be applied with what could be called a common sense approach. If the workers concerned stopped and assessed a risk, and if that risk was small, carried on with the task that seems to fulfil the basic steps that constitute a 'Dynamic Risk Assessment' (JB p129 and 144). In a situation like this it is, of course, important to to ensure that staff are properly trained and briefed on health and safety matters but also that the potential for summary dismissal is highlighted as existing for any breach of those policies.

56. In considering the issue under s.98(4) I bear closely in mind, that every case is very much dependant on its own circumstances. The section itself expressly refers to 'in the circumstances'. I am conscious that the question of whether dismissal falls within the range or reasonable responses of a reasonable employer has to be looked at in the context of that employee in that particular employment (my own emphasis). Nevertheless the employer's reasoning must be the subject of rational analysis.

58. In some respects I did not find this an easy decision. An employer such as the respondents are fully justified in ensuring that health and safety rules are strictly adhered to. If in their disciplinary policy or in the claimant's contract they had what in effect was a 'zero tolerance' approach and it was clear that an transgression no matter how minor could lead to summary dismissal then they would have been on stronger ground in dismissing the claimant. I asked the question whether the claimant would have known that a delay in reporting the matter put his job at risk. The answer was not in my view clear at all that it did. Nevertheless, that was not what finally swayed my decision in this matter as looking at the situation overall the claimant did know that he should have reported this more quickly.

59. The second difficulty the respondents face is that both managers seem to have accepted that the claimant was in fact going to report the matter. I would have understood if they had entertained doubts about this but perhaps the claimant's previous excellent record swayed them. I cannot tell. But to say in the face of this finding that there was absolutely no mitigation is to go too far. Again, I could well understand a Manager accepting that this was some mitigation but nevertheless rejecting it as sufficient but that is not what happened here. Both Mr Holloway and Mr West rejected the suggestion that any mitigation existed here.

The respondent's arguments on appeal

7. Ms Maclean for the respondent advanced two grounds of appeal, namely that the Tribunal had adopted a substitution mindset and secondly had erred in applying a separate equity test. In

relation to the first ground, she contended that the question for the Tribunal had been a simple one namely whether the test in **British Home Stores v Burchell** [1978] IRLR 379 as explained in the subsequent decision in **Iceland Frozen Foods v Jones** [1982] IRLR 439 was satisfied. The correct legal tests were first, whether the respondent genuinely believed, on reasonable grounds following a reasonable investigation, that the claimant was guilty of the misconduct alleged; and, secondly, whether the sanction of dismissal for that misconduct fell within the range of reasonable responses open to a reasonable employer in those circumstances. Ms Maclean contended that the Tribunal fundamentally erred in addressing those questions. It had failed both to correctly identify and then follow the relevant legal tests and in doing so it impermissibly substituted its view for that of the reasonable employer. So far as the correct legal test was concerned, at paragraph 2 of the judgment the Tribunal had identified the first issue as being whether or not the claimant had committed an act of misconduct rather than whether the respondent genuinely believed that he had done so. That was plainly incorrect and demonstrated that from the outset of the judgment the Tribunal had approached the matter from the perspective of its own opinion rather than analysing whether the respondent's conduct was reasonable. Ms Maclean was unable to answer a question from the bench about whether parties had identified the issues for the Tribunal in advance. She accepted that it might be submitted that paragraph 2 represented an innocent mis-statement and she disputed that it could be regarded as such. It belied the whole of the Tribunal's substitution mind set. Accordingly, it cannot be ignored as if it was simply an infelicitous expression. The Tribunal had not applied the reasonable responses test and the starting point to see whether it had done so was paragraph 2 which could not be overlooked.

8. Turning to the discussion section of the judgment it was accepted that paragraph 56 set out, at least initially, the correct test. However, the last sentence, **"nevertheless the employer's reasoning must be the subject of rational analysis"** illustrated that the Tribunal somehow thought that this was an additional discrete step in the analysis for the Tribunal to carry out, as

opposed to the reasoning being for the employer. Reading paragraphs 2 and 56 of the judgment together it could be seen that the Tribunal had erred. There was no other way of reading paragraph 56 because the correct test of the viewpoint of the reasonable employer had already been dealt with in the sentence preceding the offending one.

9. It was accepted that the Tribunal was in an unusually advantageous position to consider the requirements and practices of an offshore employer. As a subcontractor operator in the North Sea the respondent was subject to various regulations and wider general practice and evidence about that had been before the Tribunal. There were a number of findings in fact that supported the respondent's view that the claimant's conduct was blameworthy and dismissal was the appropriate sanction. In particular, paragraphs 8, 9, 10, 11, 12, 18 and 19 of the Tribunal's judgment were on point. Health and safety was particularly important in the environment in which the claimant was working. He had been trained to **"stop, think, review"** before completing a task. He had acknowledged that he would abide by the company's working practices and that he had received a copy of the employer's handbook which required workers to report all accidents immediately to their manager. He had been aware that an object falling from a platform into the sea was a reportable event and he had confirmed that he was aware of the procedure in relation to that. The Tribunal had concluded that the claimant should have reported the event more quickly. In anticipation that counsel for the claimant would contend that that reliance on these factors was no more than an attempt to rerun the merits of the case or an undisclosed perversity challenge, Ms Maclean submitted that taking the findings together conclusion could be drawn that the Tribunal substituted its mind set for that of the reasonable employer. The final factor pointing to that substitution mind set lay in the reasoning at paragraph 62 where the Tribunal professed that it was **"difficult to understand the reasoning…"** of the employer that a warning would not have been sufficient in the circumstances. The respondent accepted that another employer in these circumstances may have chosen to issue the claimant with a final written warning. However, it

was not for the Tribunal to determine whether an alternative course of action might have been sufficient but only to decide whether a reasonable employer might have taken the decision to dismiss in these circumstances. In looking at substitution mind set one could look at what the Tribunal did not take into account as well as what it did.

10. In **Post Office v Foley** [2000] ICR 1283 Mummery LJ had pointed out that the process of determining whether the employer's decision fell within the band of reasonable responses must always be conducted by reference to the objective standards of the hypothetical reasonable employer and not by reference to the subjective views of the Tribunal in relation to what they, as an employer, would have done in the same circumstances. His Lordship explained that:

> **"…although the members of the Tribunal can substitute their *decision* for that of the employer, that decision must not be reached by a process of substituting *themselves* for the employer and forming an opinion of what they would have done had they been the employer, which they were not."**

The clearest example of the Tribunal falling into the trap of substituting their own view in the present case was the statement in paragraph 62 about finding it difficult to understand the reasoning.

11. Turning to the second ground, Ms Maclean submitted that the Tribunal had also erred in seeming to apply a discrete equity test and so going beyond the process outlined in **Burchell** and **Iceland**. She referred to the decision in **Orr v Milton Keynes** [2011] ICR 704 where the court of appeal confirmed that the reference in section 98(4) to **"equity and the substantial merits of the case"** did not give rise to a separate equity test. There had been a submission in that case that the addition of these words in the subsection required an additional step to be taken to the reasoning process but that had been squarely rejected. The passage in which it was said that the Tribunal had apparently adopted an additional step or separate equity test was in paragraph 53 where, after reference to the case of **Weston Recovery Services v Fisher** (EAT 0062/10) the Tribunal stated that the relevant question was whether the conduct was sufficient for dismissal according to the

standards of the reasonable employer but then stated **"and whether dismissal accorded with equity and the substantial merits of the case"**. This was a shorter point but contributed to the overall submission that the Tribunal had erred further and impermissibly applied a separate test. Ms Maclean submitted that the appeal should be upheld and as there was no outstanding disputed factual matters this Tribunal could set aside the decision and substitute a finding of fair dismissal. If that was not thought to be possible the case should be remitted back to the same Tribunal who would no doubt look at matters properly in light of guidance given.

Submissions for the claimant

12. Mr Brittenden for the claimant submitted that there were two main reasons why the Tribunal had ultimately found this to be an unfair dismissal. The first was that the claimant had not been forewarned that failing to report an incident such as that which occurred on 3 February 2017 would lead to his dismissal and secondly the employer had failed to take mitigating factors into account. These factors critical of the employer's decision making were ones that it was legitimate for the Tribunal to take into account. In paragraph 55 the Tribunal had found, on the evidence, that a worker in a situation such as the claimant could stop, assess the risk and carry on with his work so that a common sense approach could permit actings not strictly in line with the policies. It was important also that at paragraph 58 the Tribunal had explained that if the respondent had adopted a **"zero tolerance"** approach such that any transgression of the health and safety policies and procedures, however minor, could lead to a summary dismissal, they would have been more likely to succeed in justifying this dismissal. The problem was that the claimant did not know that a minor failure to report would in fact put his job at risk. The Tribunal had been entitled to take this fact into account and its reasoning and there were a number of authorities that supported the Tribunal's approach including **Meyer Dunmore International Limited v Rogers** [1978] IRLR 167 (para 2); **Dairy Produce Packers Limited v Beverstock** [1981] IRLR 265 (paras 8 – 9); **W Brooks & Son v Skinner** [1984] IRLR 379 (para 16) and **Hoover Limited v**

Forde [1980] ICR 239. Reading the Tribunal's decision in this case as a whole it was clear that the claimant's lack of knowledge that a delay in reporting a minor matter put his job at risk was a relevant but not decisive factor in the reasoning. The respondent's arguments had failed to engage with this point or to face up to important factual findings that supported the Tribunal's decision. The case of **Newbound v Thames Water** 2015 EWCA Civ 677 at paragraphs 40, 41 and 74 put beyond doubt that failure to convey to an employee that a minor breach of policy or procedure may lead to dismissal was an important factor that could properly be taken into account.

13. Counsel submitted that the key consideration in the Tribunal's decision that dismissal was unfair related to the respondent's assertion that the claimant had provided **"absolutely no mitigation"** and a general failure on the part of the employer to consider important available aspects of that mitigation. It is clear from paragraph 59 that the respondent's witnesses, both managers, accepted that the claimant was in fact going to report the matter later. It was the failure to accept that as a mitigating factor that distinguished this case from one where mitigation was considered but rejected by the employer. Reading paragraphs 55 and 60 of the judgment together it was clear that the Tribunal, having recorded some ambiguities between the various policies of the respondent found that the employer had been wrong not to appreciate that the claimant may have misunderstood the interplay between the duty to report and a dynamic risk assessment which would permit him to continue working in circumstances where he was satisfied that there was no continuing danger. In other words, a reasonable employer may have wished the claimant to have acted differently but accepted that there were mitigating factors. Because of other mitigating factors such as the absence of risk to others and the fact that it was not the claimant who had initiated the problem the respondent was seen not to have reached a decision within the range of reasonable responses. The incident could be characterised as a transgression on the part of the claimant of a requirement to report immediately but instead to follow another policy of the respondent namely to carry out a dynamic risk assessment. The Tribunal's conclusion at

paragraph 63 was correctly stated. It was not an easy case but the Tribunal ultimately concluded that the employer had acted outwith the band of reasonable responses open to a reasonable employer. That was the implication of the well-established test to the facts found. Whether the respondent had acted reasonably was a pure question of fact and the Tribunal had faced that head on. It had identified two bases for finding that the dismissal was outside the band of reasonable responses. These were irrelevant and the findings in fact on which they were based were not challenged on appeal. It was clear that what the Tribunal found was that while there had been an element of culpable conduct sanction of dismissal was unfair. Even had the misconduct been more serious that would not, without more, have precluded the Tribunal from finding that the dismissal was unfair – **Weston Recovery Services v Fisher** UKEAT 0062/10 relied on by the Tribunal at paragraph 53 of the judgment.

14. Responding to the specific arguments presented by Ms Maclean, Mr Brittenden confirmed that neither he nor his opponent knew the source of paragraph 2 of the judgment. It was possible that it represented issues framed by the parties or it emanated from the Tribunal. Either way, it was an error for the Tribunal to say that the issue was whether the misconduct took place. However, it was noteworthy that paragraph 2 also contained an unimpeachable reference to the test in section 98(4) and whether dismissing the employee was within the band of reasonable responses open to the employer. The Tribunal subsequently directed itself correctly on the **Burchell** test (paragraphs 47 and 48) where it is clear that it is a reasonable belief in the misconduct rather than whether it took place that is essential. Accordingly, any error in the statement in paragraph 2 was not carried through to the all-important reasoning of the Tribunal. The erroneous reference was accordingly academic and could not be relied upon to suggest that the Tribunal's approach generally was somehow tainted.

15. Turning to substitution mind set Ms Maclean had relied on a combination of paragraph 2 and paragraph 56 and the reference in the latter paragraph to the employer's reasoning being the subject of rational analysis as a rider to the overall question of whether dismissal fell within the range of reasonable responses. Counsel submitted that paragraph 56 was no more than an observation on the range of reasonable responses test. It was perfectly acceptable to consider the rationality of the employer's analysis because an irrational employer would be one inevitably acting outside the range of reasonable responses. That the Tribunal understood that it was the employer's reasoning that must be assessed and not the Tribunal's thought processes had it been the employer is clear from the very sentence highlighted for criticism by Ms Maclean. There was no question of any additional test or erroneous addition to the standard test. So far as paragraph 62 was concerned and the reference to **"it is difficult to understand the reasoning…"** in counsel's submission the complaint made by the respondent was, properly evaluated an undisclosed perversity challenge. The reference in paragraph 62 had to be read within the context of that paragraph as a whole and in light of the findings of fact. It was perfectly proper for the Tribunal to evaluate the approach taken by the employer and to find that there had been a failure to consider properly whether a warning would have been something that would have taken the decision into the band of reasonable responses. Concluding that the sanction of dismissal was outside the range of reasonable responses was the same as saying that a sanction short of dismissal should have been applied. It was difficult to see how else the Tribunal could have elaborated on its decision. No question of a substitution mind set arose and the correct test had been applied.

16. So far as ground 2 and whether the Tribunal had applied a separate test of equity was concerned, at paragraphs 52 and 53 of the judgment the Tribunal refers to first the case of **Redbridge London Borough v Fishman** [1978] ICR 569 from which the Tribunal had quoted and **Weston Recovery Services v Fisher** UKEAT 0062/10, the latter a decision simply having adopted the reasoning in **Redbridge** in short form. While neither of those cases is directly in point

in relation to any separate tests of equity, the Tribunal had been absolutely correct to say that the only relevant question was whether the conduct was sufficient to justify dismissal according to the standards of the reasonable employer and in accordance with equity and the substantial merits of the case. The Tribunal treats the matter as a single question, which it is under section 98(4)(a) and (b) of the 1996 Act. The use of the conjunctive **"and"** makes that clear and there could be no criticism of the way in which the Tribunal expressed itself in paragraph 53. The import of section 98 (4) was that while it imposes a single test both parts (a) and (b) have to be addressed. That is exactly what the Tribunal was doing. Far from using equity and the substantial merits of the case as some sort of trump card, the Tribunal's conclusions, as expressed at paragraphs 62 and 63 were, correctly, articulated by reference to the range of reasonable responses test. The respondent had not been able to point to any error in the approach taken by the Tribunal at paragraph 53 and there could be no question of the application of a separate equity test.

17. On disposal, counsel submitted that in accordance with **Jafri v Lincoln College** [2014] ICR 920, CA it would be impermissible for this Tribunal to substitute its own decision and the proper course was to remit, should the respondent be successful to the Tribunal. For the reasons given, however, he submitted that there had been no error of any kind on the part of the Tribunal and that the appeal should be dismissed.

Discussion

18. Section 98 of the Employment Rights Act 1996 ("ERA 1996") includes the following provisions:

> **"(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

(2) A reason falls within this subsection if it –

...

(b) relates to the conduct of the employee.

…

(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, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

That is the statutory test that the Tribunal required to apply having regard to the dicta in **British Homestores Limited v Burchell** [1978] IRLR 379, **Iceland Frozen Foods v Jones** [1982] IRLR 439 and **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23 all of which contain guidance as to the correct approach.

19. The first point for determination is the significance or otherwise of the reference in paragraph 2 of the judgment to an issue for the Tribunal being whether or not the claimant had committed an act of misconduct. Ms Maclean for the respondent contended that this was a clear error and one which signified, from the outset, that the Tribunal had adopted a substitution mindset. For the claimant Mr Brittenden contended that any error in the statement in paragraph 2 was not carried through to the substantive reasoning of the Tribunal. Having considered matters I have concluded that the reference to determining whether or not the claimant had committed an act of misconduct in paragraph 2 is clearly erroneous in law. However, it is not on its own sufficient to amount to a material error of the type that would vitiate the whole decision unless the error related to an operative part of the Tribunal's judgment on what were in reality the issues for determination. Reading the judgment as a whole, it is apparent that, by the stage of the final hearing before the tribunal, there was little or no dispute that there had been two incidents that the respondent regarded as gross misconduct of a type justifying dismissal. While there had been some

dispute about whether there had been an act of misconduct during the respondent's internal procedures, the focus had shifted by the time of the hearing. Accordingly, while the first of the three stages of the approach set out in **Burchell** requires consideration of the genuine belief on the part of the employer of the fact of the misconduct, there was ultimately no dispute about that issue in the present case. The central dispute in the tribunal proceedings was whether, the conduct of the claimant having been established, the sanction of dismissal for that conduct had fallen within the range of reasonable responses open to the employer. The erroneous reference in paragraph 2 to the fact of the commissioner or otherwise of an act of misconduct is not replicated in the discussion section of the judgment. There is specific reference at paragraph 52 to **Redbridge London Borough v Fishman** [1978] ICR 569 and the test being that of whether the dismissal was fair or unfair and not whether the employee has in fact been guilty of gross misconduct. At paragraph 52 the Tribunal focuses the relevant question as being whether the conduct was **"sufficient for dismissal according to the standards of a reasonable employer in accordance with the equity and substantial merits of the case"**. Further, there is reference to the question of whether the dismissal fell within the range of reasonable responses at paragraph 56. For these reasons, I am satisfied that the erroneous reference in paragraph 2 in articulating the issues for the Tribunal did not permeate the substance of the judgment. The provenance of the way in which the issues were articulated in the form set out in paragraph 2 is unknown. It is clear from the paragraphs I have referred to that the Tribunal was in no doubt about the correct approach under section 98(4) of the 1996 Act and that there was an appropriate self direction to relevant case law at paragraph 49. It seems to me that the only relevance of paragraph 2 is its possible relationship with the first substantive ground of appeal relating to substitution mindset to which I now turn.

20. In the case of **Foley v Post Office** [2000] ICR 1283 Mummery LJ reiterated authoritatively the requirement that a Tribunal must not substitute its own decision for that of the employer. He expressed the matter as follows:

> **"It was also made clear in *Iceland Frozen Foods Limited*, at pp.24g-25b, that the members of the tribunal must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the employer. Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses 'which a reasonable employer might have adopted.'**
>
> **In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to 'reasonably or unreasonably' and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their *decision* for that of the employer, that decision must not be reached by a process of substituting *themselves* for the employer and forming an opinion of what they would have done had they been the employer, which they were not."**

21. The issue in the present appeal is whether the Tribunal stepped over the line between substituting its own decision for that of the employer, which can be acceptable, and the Tribunal Judge substituting himself for the employer, which is not. The two specific passages in the judgment that are said to illustrate that the Tribunal in this case crossed the dividing line are at paragraph 56 and the reference to **"nevertheless the employer's reasoning must be the subject of rational analysis"** and at paragraph 62 where the judgment stated that the Tribunal found it **"difficult to understand the reasoning"** of the respondent that a warning would not have been sufficient on the facts found. Ms Maclean referred also to various findings in the Tribunal's judgment that could be used to support a conclusion that the respondent's decision to dismiss had fallen within the band of reasonable responses. Dealing first with the reference at paragraph 56 it is noteworthy that the expression complained about is contained within a paragraph in which the correct test is first set out. The Tribunal was clearly aware that the question of whether dismissal fell within the range of reasonable responses required to be looked at in the context of the particular employee in question in the relevant employment. It seems to me that the word **"nevertheless"** that precedes the Tribunal's view that the employer's reasoning must be the subject of rational analysis is no more than an attempt to acknowledge the challenges of applying an objective case to a set of personal or individual circumstances. In any event, I consider that there is nothing objectionable about commenting that an employer's reasoning must be the subject

of rational analysis by the Tribunal. The Tribunal is required to analyse the approach of the employer in order to determine whether the response fell within the reasonable available range. It was contended that when paragraphs 2 and 56 of the judgment were read together the substitution mindset became obvious. However, there is in my view no particular relationship between the two. As already indicated, paragraph 2 represents a misstatement of what the Tribunal was going to decide. Paragraph 56 focuses the central issue for determination by the Tribunal which was whether or not dismissal fell within the range of reasonable responses for a reasonable employer. It was squarely within the remit of the Tribunal in this case to analyse the respondent's reasoning in order to decide whether or not that reasoning withstood scrutiny using the objective test. The conclusion of the Tribunal was, albeit with the hesitation articulated at paragraph 63, that the respondent acted outwith the band of responses open to a reasonable employer and so the dismissal was unfair. The rational analysis that it undertook was that required by the legislation and supporting authorities.

22. So far as the expression **"difficult to understand the reasoning"** is concerned, that phrase is on the face of it more indicative of a possible substitution mindset; again, however, the context is important. Quite apart from the requirement to read the judgment as a whole, the specific words complained about are contained within two paragraphs, 62 and 63, both of which refer to the band of reasonable responses test. The Employment Judge in this case had heard the evidence of the respondent's general manager and from their managing director. Accordingly, the paragraphs referred to must be understood against the background of the respondent's witnesses having had an opportunity to explain their reasoning for imposing the sanction of dismissal at the time rather than some lesser sanction. The Tribunal had set out in full the letter to the claimant giving reasons for his summary dismissal (paragraph 27 of the judgment). The respondent's view had been that there were no mitigating factors in relation to the claimant's behaviour, notwithstanding his clean disciplinary record and a narration of the reasons given by the claimant for not reporting the

incident under discussion immediately. The claimant's position was reiterated in the context of the internal appeal as set out at paragraph 29 of the judgment. The basis for the Tribunal's remark about it being difficult to understand the respondent's reasoning appears to be based on an absence of satisfactory evidence that mitigation was properly considered and a lesser sanction contemplated, all as part of the determination of whether the ultimate decision taken was outside the band of reasonable responses. There was clear evidence that the claimant had not appreciated that a delay in reporting an incident of the type that occurred would likely lead to dismissal and it was in part the respondent's failure to appreciate that and to characterise the situation of one where there was no mitigation that did not withstand objective scrutiny. In all the circumstances, without something more than the expression **"it is difficult to understand",** I do not consider that the contention of a substitution mindset is made out. The Tribunal was well aware of the need to conduct the scrutiny of the employer's decision making by reference to objective standard of the hypothetical reasonable employer and the judgment is peppered with references to the correct test.

23. Insofar as Ms Maclean sought to draw attention to certain findings by the Tribunal which could have, at least arguably, supported a different conclusion than that reached, I do not consider that these pointed to any substitution mindset. There were a number of findings that the Tribunal required to make to establish the events that had taken place and what the reasonable belief of the employer about those events was. Some of those findings were relevant to the decision on contributory fault which is not the subject of any cross-appeal. Any attempt to suggest that those findings ought to have led to a different conclusion would normally be framed as a perversity challenge. That is not the situation in the present appeal, with Ms Maclean having disavowed any intention to characterise her appeal as one of perversity. Even if this was a case where, on the facts found, the Tribunal could have reached a different decision, it is not for this Tribunal to open up the merits to review unless the Tribunal has erred in its approach. On the first ground of appeal I conclude that, with the exception of the single erroneous reference to a matter not forming part of

the substantive decision making process, the Tribunal made appropriate self directions on the approach to be taken to section 98 in a conduct case and, having subjected the respondent's actings to an appropriate level of scrutiny, decided that, while the claimant was to some extent at fault, the sanction of dismissal had been outside the range of reasonable responses open to the company. It is clear from the judgment that the decision was not an easy one for the Tribunal but I do not consider that any error of law of the type suggested by the first ground of appeal has been made out.

24. On the second ground of appeal the contention was that the Tribunal had erred in applying a discrete equity test which would be contrary to the decision of the Court of Appeal in **Orr v Milton Keynes** [2011] ICR 704. In that case, the court endorsed the approach taken by Lord Simon in **W Devis & Sons Ltd v Atkins [1977] ICR 662** under previous legislation, namely that the words **"..equity and the substantial merits of the case"** show only that the word "reasonably" (now in section 98(4)) is to be widely construed. As Aitkens LJ put it in **Orr,** the words of section 98(4)(b) **".. do not import any notion of a second consideration by an employment tribunal".** The basis for Ms Maclean's argument on this point was that in paragraph 53 the Tribunal recorded the relevant question as being whether the conduct was sufficient for dismissal according to the standards of the reasonable employer **and** whether dismissal accorded with equity and the substantial merits of the case. On this second ground I have no hesitation in accepting the submissions of Mr Brittenden, namely that it is plain from both paragraphs 52 and 53 of the judgment that the Tribunal treated the matter as two parts of a single question and not two separate tests. The references to the case law in **Redbridge London Borough v Fishman** and **Weston Recovery Services v Fisher** that precede the expression complained about make that clear. The Tribunal, far from indicating that it would go on and consider the matter of equity and the substantial merits of the case used that expression as part of the general overarching requirements of section 98(4) of the 1996 Act. The use of the conjunctive

'and' cannot be taken to indicate that the tribunal was somehow moving onto a separate consideration it is not followed by any such separate analysis. There would require to be something much more than repetition of the words of section 98(4) to advance a point of this sort with any success. The Tribunal did not move on to any separate consideration of equity and the substantial merits at all.

Disposal

25. For the reasons given above I have decided that no material error on the part of the Tribunal has been made out by the appellant on either ground and the appeal will be dismissed.