Appeal No. UKEAT/0256/19/AT

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 5 February 2020

Before

GAVIN MANSFIELD QC

DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

MR M BAH — APPELLANT

BERENDSEN UK LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR AJAY RATAN (of Counsel) Instructed By: Free Representation Unit 5th Floor, Kingsbourne House 229-231 High Holborn London WC1V 7DA
For the Respondent	MS VICTORIA WEBB (of Counsel) Instructed By: Lewis Silkin LLP 8th Floor Southgate House Wood Street Cardiff CF10 1EW

SUMMARY

UNFAIR DISMISSAL,WRONGFUL DISMISSAL

Unfair Dismissal: The Claimant appealed against the ET's dismissal of his claim for unfair dismissal. The Claimant had been dismissed for gross misconduct. The ET found that the Respondent had a genuine belief in the misconduct, which had been reached as a result of fair and reasonable investigation and disciplinary process. The Appellant appealed on the basis that the ET failed to address three central points. Appeal dismissed. The Reasons complied with r.62(5) ET Rules, the guidance in **Greenwood** and the authorities referred to therein. The ET was not obliged to deal with every point raised by the parties. None of the three points could have been material and the ET was entitled to reach a conclusion in the round without specifically referring to them.

Wrongful Dismissal: The ET failed to deal with the claim at all in its Judgment and Reasons. Appeal allowed by consent, remitted to the same ET if possible.

GAVIN MANSFIELD QC DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. This is an appeal against the Judgment of Employment Judge Siddall sitting alone at the London (South) ET sent to the parties on 23 March 2019. The Appellant, Mr Bah, was the Claimant below. He brought a claim against the Respondent, Berendsen UK Limited, his former employer. In this Judgment I will refer to the parties as Claimant and Respondent as they were in the Employment Tribunal below.

2. The Claimant's claim was for unfair dismissal and wrongful dismissal. The Claimant was an operator in the Respondent's laundry premises at a site in Brixton, South London. He had worked for the Respondent for many years: since 1995 or thereabouts. He was summarily dismissed by the Respondent on 13 November 2017. The reason given by the Respondent for this dismissal was gross misconduct relating to an incident on 3 July 2017.

3. The Tribunal heard the claim on 25 February 2019 in a one-day Hearing. The Tribunal heard from Mr O'Donovan the Dismissing Manager; Mr Duell the Investigating Officer; and Ms Erhuero the Head of HR for the South Eastern Region. The Tribunal heard from the Claimant on his own behalf.

4. The Claimant was represented at the Hearing before the Tribunal by Ms Blatchford, a representative from the Free Representation Unit. He has had the great fortune to be represented in this appeal by Mr Ratan of counsel through the Free Representation Unit. The EAT is

A extremely grateful to him for his assistance on a pro bono basis. The Respondent was represented both below and at this appeal by Ms Webb of Counsel.

5. The Tribunal in its Judgment found that the Claimant had not been unfairly dismissed. B The Employment Judge ("EJ") made no findings in relation to the wrongful dismissal claim which appears to be have been overlooked. The Claimant appeals on two grounds. Ground 1 is that the Tribunal erred in failing to reach Judgment on the wrongful dismissal claim. Ground 2; C the Tribunal erred in failing to consider or give Reasons for three important arguments made by the Claimant in relation to the unfair dismissal claim.

6. On 21 October 2019 Mr Matthew Gullick, sitting as a Deputy Judge of the High Court, D allowed the appeal to proceed to a Full Hearing on both grounds, although it is apparent from his Reasons he allowed ground 2 through with some hesitation.

Ground 1

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7. The Respondent's Answer at paragraph 4 admits that the Judge did not reach a Decision on the wrongful dismissal claim and does not oppose an order remitting the matter back to the Tribunal to reach a Judgment. I will return to the correct procedure for disposal of that claim F below after addressing ground 2.

Ground 2

G 8. Ground 2 is the appeal against the finding of unfair dismissal. Ground 2 alleges that the Tribunal erred in failing to deal with three arguments that went to the question of whether or not the Respondent had carried out a reasonable investigation into the alleged misconduct. Put very H broadly, those three points can be identified as follows.

9. First, a failure to interview two potential witnesses to the alleged misconduct: a security guard called Mr Thapper and an engineer called Mr Bac. Second, a failure to put the Claimant's account of events as gathered during the course of the investigation to the witnesses who provided evidence against the Claimant. Third, having made notes of the disciplinary hearing before Mr O'Donovan, a failure to keep those notes so that they were no longer available for the Tribunal.

10. In each case, the allegation is that the point was argued before the Tribunal, but the Tribunal failed to give reasons in relation to them and failed to turn its mind to, or properly address, the points.

The Facts and the ET's Decision

11. I turn now to the Tribunal's decision before returning to the parties' submissions on these three points.

12. The dismissal arose from an incident on 3 July 2017 during a night-shift. An allegation was raised by Mr Charles, the Night-shift Manager, in relation to an altercation that had occurred. The allegation is set out in an email which is before the EAT in the supplementary bundle on page 17.

13. In that email Mr Charles describes the events of that night resulting in a two-part altercation - first of all in his office and then elsewhere on the floor of the Brixton premises. He refers to a number of other people being involved. The email referred to Mr Sesay, Mr Affori, and Mr Uram and also to Mr Thapper and to Mr Bah. The Tribunal referred to that email and to the incident it describes at paragraph 7 of the Reasons. It recorded that the incident culminated in the police being called. On the Tribunal's finding, most likely each party called the police. The Tribunal goes on to record that the Claimant was removed from the premises by the police.

14. The Claimant was suspended following the events of 3 July and a disciplinary process was commenced. The Tribunal's Reasons at paragraph 10 to 17 make findings about the investigation carried out by Mr Duell and note the following:

(1) Mr Duell obtained witness statements, although he did not interview the witnesses himself: an approach of which the Tribunal in its Reasons was in due course critical.

(2) Mr Duell conducted an investigatory meeting with the Claimant. The Tribunal found at paragraph 11 that the Claimant had full opportunity to provide his version of events, which was that Mr Charles, Mr Sesay and Mr Affori had been abusive to him.

(3) A second meeting took place between Mr Duell and the Claimant at which the Claimant played an audio recording from his mobile of an altercation between the Claimant and Mr Sesay, most likely (the Tribunal found) on another occasion (paragraph 12).

(4) Mr Duell viewed CCTV footage of part of the incident after the Claimant had left the office. The footage was not retained, as the Tribunal set out in paragraph 16 of its Reasons. However, at paragraph 15 the Tribunal records that Mr Duell had seen the footage and said it could clearly be seen that the Claimant assaulted Mr Affori. Paragraph 16 goes on to record that Mr Duell met with Mr Affori to clarify his evidence in light of the CCTV footage.

(5) Following the investigatory meeting the matter was put by Mr Duell to the disciplinary hearing which was conducted by Mr O'Donovan.

(6) The Tribunal describes at some length a series of administrative errors relating to the invitation to the disciplinary hearing, which are not material for the purposes of this appeal.

(7) The Claimant attended a disciplinary hearing on 8 November. It is relevant to note the Tribunal's findings on a number of matters in relation to the disciplinary hearing. The Tribunal found at paragraph 23 that prior to the hearing the Claimant had received notes of

the investigatory meeting, the three statements given by members of the staff and the email from Mr Charles dated 3 July. Although the Claimant's evidence had been that the hearing took place over two days, it having been adjourned on the first day because he was upset, the Claimant had accepted in cross-examination that that was incorrect. The disciplinary hearing took place on one day (paragraph 27 of the Tribunal's Reasons).

15. The Tribunal found that the Claimant was shown the CCTV footage during the disciplinary hearing; paragraphs 24, 26, 27 of the Reasons. After seeing the CCTV footage, the Tribunal found that the Claimant was angry and abusive. He was escorted from the premises by security.

16. The Tribunal recorded that notes were taken at the hearing but had been lost; paragraph 26 of the Reasons. The Tribunal characterised that situation as extremely unfortunate, but having heard the evidence from the Claimant, Mr O'Donovan and the HR Manager at the disciplinary hearing, the Tribunal accepted in broad terms that the available evidence had been put to the Claimant and that he had been shown the CCTV footage; paragraph 26 of the Reasons.

17. Following the disciplinary hearing, a letter of 13 November 2017 confirmed the summary dismissal and the Tribunal sets out the findings from that letter at paragraphs 29 to 33 of the Reasons. In paragraph 31 the Tribunal found that during the Claimant's suspension he had visited the Brixton site on 17 August, contrary to instructions, and the police had been called on that occasion.

18. I turn now to look at the Tribunal's finding in relation the reason for dismissal, one of the first issues that it needed to determine and the issue identified in the agreed List of Issues as issue

A 1. Issue 2 was whether there was a genuine belief in the misconduct. The Claimant's case was that he was dismissed because of corrupt behaviour at the Brixton site, including that of Mr Sesay and Mr Affori, and that they were out for retribution in some way in relation to that.

B 19. The Tribunal considered that contention at paragraphs 34 to 40 and rejected it on the evidence. The Tribunal found at paragraph 40 that the reason for dismissal was the Claimant's conduct on 3 July. There is no appeal either against the rejection of the Claimant's alleged reason C for dismissal, nor against the finding that the reason for dismissal was a reason relating to misconduct arising out of the conduct on 3 July.

D 20. Having found that the reason was misconduct, the Tribunal recorded quite rightly that that was a potentially fair reason for dismissal at paragraph 41. It correctly directed itself as to the test in the well-known case of **British Home Stores Ltd v Burchell** [1978] UKEAT/108/78. It E then went on, as I read the Tribunal's Decisions, to apply the relevant questions under the **Burchell** test.

21. At paragraph 42 of the Reasons, the EJ directed herself that she must consider whether or F not the Respondent acted reasonably in deciding to dismiss the Claimant. At paragraph 43, she turns to the investigation carried out by Mr Duell. At paragraphs 43 through to 54 of the Reasons she addressed a number of issues concerning the investigation that had been carried out. In the G course of so doing she directed herself at paragraph 49 as follows:

> **"Case law has made clear that I must consider whether the process as a whole was unfair. Ms Webb refers me to the case of Shrestha v Genesis Housing Association [2015] IRLR 399 as authority for the principle that the investigation should be looked at as a whole when assessing the question of reasonableness. I adopt that approach here."**

H 22. Having considered the matters at 43 onwards and having directed herself as to the approach that had been taken in **Shrestha**, the EJ reached the conclusion that Mr Duell and Mr

O'Donovan had a reasonable basis from which to conclude that the Claimant had acted aggressively and in a threatening manner and that, despite a number of defects, the overall investigation was fair and reasonable. That conclusion can be seen in paragraph 54 of the Reasons.

23. I note as an aside that in the first sentence of paragraph 54, the EJ finds that "I find that in overall terms the process was unfair." I think, and the appeal has proceeded on the basis that, in fact what the Judge meant was that the process was "fair". That is certainly clear from what the EJ goes on to say in the same paragraph:

> **…"Both Mr Duell and Mr O'Donovan had a reasonable basis from which to conclude that the Claimant had behaved aggressively and in a threatening manner to other members of staff on the night of 3 July. Despite a number of defects, the overall investigation was fair and reasonable."**

24. In the passage from paragraphs 43 to 54, a number of specific defects have been set out by the Tribunal. Those were: 1) A failure by Mr Duell to interview the witnesses himself and to obtain proper witness statements, about which the Tribunal was critical. 2) Inconsistency between the initial evidence of Mr Affori and the CCTV evidence, a matter which was dealt with by Mr Duell speaking to Mr Affori again to clarify the position. 3) Errors in the administration around the disciplinary hearing which the Tribunal described as extremely poor. 4) The fact that the CCTV had only been shown to the Claimant during the course of the disciplinary hearing.

25. Factors that the Tribunal found made the decision reasonable included the following as expressed in the Reasons:

a. The Claimant had the documents prior to the disciplinary hearing of the evidence against him.

b. He was shown the CCTV footage which on the Respondent's evidence, accepted by the Tribunal, showed that he was acting aggressively. At paragraph 51, the Tribunal

found that the Claimant did not contradict that but argued that the CCTV evidence was fake.

c. The Claimant's own aggressive conduct at the disciplinary hearing would have confirmed to the Respondent's mind the conclusion that he had been aggressive on 3 July.

d. The Tribunal dealt with an issue where it found that the audio recording taken by the Claimant of his altercation with Mr Sesay did not assist the Claimant's case for the Reasons set out.

26. Having reached its conclusion that the overall investigation was fair and reasonable at paragraph 54, the Tribunal went on to consider whether or the not the dismissal was within the band of reasonable responses. At paragraph 55 it decided that it was within the band of reasonable responses and that the decision was within the range of options available to the Respondent. There is no appeal against that finding.

27. I turn now to the respective parties' submissions on this appeal. The Claimant does not take issue with the specifics of the matters that were addressed by the Tribunal but takes the point that three material issues were not addressed at all by the Tribunal's Reasons. No reason why given for not addressing them and the Tribunal erred in failing to have regards to them.

28. Mr Ratan supports that contention in relation to these issues by pointing to ground 1 where, as is accepted by the Respondent, the Tribunal failed altogether to deal with the wrongful dismissal claim. Mr Ratan says that EAT can therefore have no confidence that the Tribunal had the relevant points in mind.

29. The Claimant says that each of the points appeared in the List of Issues. This morning I was given a replacement List of Issues which was a later version to that which had originally been included in the supplementary bundle. I proceed using the numbering as it appears in the later list. I was told that that was the List of Issues that was handed up on an agreed basis at the Hearing in February of last year.

30. It is right to say that at least two of the three issues do appear in the List of Issues. The point in relation to Mr Bac and Mr Thapper is at point 4a of the list of issues. The point in relation to the notes of the disciplinary hearing appears at point 6b.

31. Point 4b in the List of Issues is said to cover the second of the Appellant's point, which is Mr Duell's approach to gathering evidence from witnesses was flawed. It is not entirely clear to me that 4b relates to the particular criticism made in the second issue taken by the Claimant today. It seems to me to relate to the broader point which was canvased by the Tribunal at the Hearing below that Mr Duell had himself not gathered statements from the witnesses and those which were obtained were not complete.

32. I have seen the Claimant's FRU representative's note of her closing argument, made a day or so after the Hearing. I accept that, insofar as is possible, the note is an accurate record of what was said by her on the day. It is clear from that note that each of the three points relied on in the appeal was canvassed during the course of the Claimant's closing submissions. I was also taken to the passages in the cross-examination of Mr Duell where the first two points were referred to.

The Appellant's Submissions

33. I will deal briefly now with the Claimant's submissions in relation to the three points. The first point is that Mr Thapper and Mr Bac were potential witnesses who could be identified

A from the employer's evidence and who were not tainted by the Claimant's allegations of corrupt motive. They therefore ought to have been interviewed in case they had given a different account that may have supported the Claimant's case or undermined the Claimant's accuser's case.

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34. The second point is given that there was a conflict of evidence as to the events on 3 July, as will be apparent from what the Claimant said about it and what the other witnesses said about it, the Investigating Officer, Mr Duell, should have put the Claimant's account of events to the C other witnesses so they could comment on it.

35. The third point is a point to which I have already referred: there was a procedural defect insofar as there were no notes kept of the disciplinary hearing. Notes had been taken but not kept D after the event. The Claimant below relied on the authority of **Vauxhall Motors Ltd v Ghafoor** [1993] ICR 376 EAT in support of the proposition that the failure to retain notes amounted to a procedural defect rendering the decision unfair.

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36. The Claimant is right to say that the first two of those three points are not referred to the Reasons of the Tribunal at all. The third point is referred to and is characterised as being extremely unfortunate by the Tribunal in its Reasons. However, the Tribunal does not expressly F address the question of whether or not the failure to retain notes itself rendered the decision unfair.

37. The central question on this appeal is whether the absence of reference to those points renders the decision an error of law, either for the failure to provide Reasons or because it shows G a failure to consider, in reaching its Judgment, a necessary ingredient of the claim. The Claimant relies upon the decision of the EAT (His Honour Judge Hand QC) in the case of **Greenwood v NFW Retail Ltd** [2011] ICR 896 EAT. He took me to passages at paragraph 69 and 71:

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> **"69. Mr Davies's main criticisms were twofold. The first group related to the issue of redundancy. The Employment Tribunal identified the issue as being whether or not the redundancy was a "sham" but confined it to "whistleblowing" when there were other components. He accepted that some of the other aspects had been addressed at paragraph 5 but**

that failed to refer to, let alone resolve, a number of the contentions made by the Appellant and his witness in their evidence to the Tribunal. Some important issues could be inferred to have been decided against the Appellant. But if it was inferred that his evidence had been rejected, he did not know why the Employment Tribunal had rejected his evidence that the Rivendell Plant Manager had not been seriously ill, why the fact he had not received letters had been rejected, why his challenge to the alleged policy of looking at 4 sites instead of 6 had been rejected and why he was said not to be suitable for the post that had been filled by recruitment.

…

71. We have been prepared to travel as far as we can down Dr Hardy's road. Even though we have concluded that since 2004 a judgment must fulfil the requirements of rule 30(6), we have been prepared to look for the structure of rule 30(6) and, using the approach in Meek, to seek to unearth the substance of the rule even though it might be obscured by the narrative form of the decision. We have reminded ourselves that this Tribunal should not see rule 30(6) as a straitjacket. But having done so, we think this judgment neither articulates the issues as fully as the rule requires nor sets out the facts relating to those issues adequately nor explains its reasons for reaching the conclusions adequately. Ultimately Dr Hardy was constrained to say of facts and matters that were not discussed in the judgment that we must conclude the Employment Tribunal had rejected them. In our judgment when that approach has to be taken, it is a good indication that the judgment does not comply with the rule and is not adequately reasoned. Applying our conclusions on the law to this judgment and, having examined it with care, we are driven to the conclusion that the judgment does not comply with Rule 30(6) either in form or substance and, is inadequately reasoned to the extent that it is erroneous in law."

38. He also took me to the decision of the Court of Appeal in **Jafri v Lincoln College** [2014] ICR 920, per Laws LJ at paragraph 21 page 927F:

> **"I must confess with great respect to some difficulty with the "plainly and unarguably right" test elaborated in *Dobie*. It is not the task of the EAT to decide what result is "right" on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."**

39. Essentially, the Claimant argues that the failure to deal with the points amounts to an error of law and once that error is established, whether or not the point would or might have made any difference to the outcome should be approached on the same basis that this Appeal Tribunal deals with the matter in remission or substitution of its own decision having found an error of law. It was argued before me that unless there is no realistic prospect of the contentions making a difference to the outcome, then there is an error of law and the EAT ought not to get involved in the exercise of what the outcome might be. If there is a point that could have affected the outcome, says Mr Ratan, it was an error of the Tribunal in failing to turn its mind to those contentions.

40. In summary, he says these are points which were expressly identified in the list of issues, actively pursued in oral closing and were or could have been material to the outcome of the case. Logically, they needed to be considered and they could have affected the outcome.

The Respondent's Submissions

41. I turn now to Ms Webb's submissions on behalf of the Respondent dealing first with the question of Reasons. She quite rightly directs me to the **Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013** Rule 62. Rule 62(5) says this:

> **"In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated."**

42. Ms Webb also took me to the well-known decision in the case **Meek v City of Birmingham District Council** [1987] IRLR 250, the decision of the Court of Appeal per Bingham LJ in the well-known passages in relation to the giving of reasons in the ET; paragraphs 8 through to 11:

> **"Tribunals are required to give reasons for their decisions.**
>
> **The overriding rule on this subject is in these terms:**
>
> **"The decision of a Tribunal shall be recorded in a document signed by the Chairman which shall contain the reasons for the decision."**
>
> **It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted.**
>
> **Nothing that I have just said is, as I believe, in any way inconsistent with previous authority on this subject. In UCATT v Brain [1981] I.C.R. 542, Lord Justice Donaldson (as he then was) said at page 551:**
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> **"Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law ... The reasons are then recorded and no doubt tidied up for differences between spoken English and written English. But their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis.**
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> **This, to my mind, is to misuse the purpose for which the reasons are given."**

43. That passage from **Meek** was referred in the Decision of His Honour Judge Hand QC in the case of **Greenwood** to which the Claimant's counsel referred to me in the course of this appeal; that appears in **Greenwood** at paragraph 40 of page 908 of the ICR reports. His Honour Judge Hand QC sets out the passage for **Meek** that I have just quoted at paragraphs 8 to through 11. He goes on, at paragraph 41, to deal with the Court of Appeal's decision in the well-known case of **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409.

44. He quotes from the Court of Appeal's decision in that case at paragraphs 16 through to 19, but I note in particular this at paragraph 17, 18 and 19:

> **"As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example *Flannery* at page 382. In the *Eagil Trust* case, Griffiths LJ stated that there was no duty on a Judge, in giving his reasons, to deal with every argument presented by Counsel in support of his case:**
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> **'When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted, and the reasons which led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge in giving his reasons to deal with every argument presented by Counsel in support of his case. It is sufficient if what he says shows the parties, and if need be the Court of Appeal the basis on which he acted…''…**
>
> **"18. In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions. But when considering the extent to which reasons should be given it is necessary to have regard to the practical requirements of our appellate system. A Judge cannot be said to have done his duty if it is only after permission to appeal has been given and the appeal has run its course that the court is able to conclude that the reasons for the decision are sufficiently apparent to enable the appeal court to uphold the judgment. An appeal is an expensive step in the judicial process and one that makes an exacting claim on judicial resources. For these reasons permission to appeal is now a nearly universal prerequisite to bringing an appeal. Permission to appeal will not normally be given unless the applicant can make out an arguable case that the Judge was wrong. If the judgment does not make it clear why the Judge has reached his decision, it may well be impossible within the summary procedure of an application for permission to appeal to form any view as to whether the Judge was right or wrong. In that event permission to appeal may be given simply because justice requires that the decision be subjected to the full scrutiny of an appeal."**
>
> **"19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."**

45. Ms Webb says that **Meek** does not support a submission that each and every argument has to be dealt with head-on in the Reasons. The question is a matter of judgement. The Tribunal's task is to identify the key issues, make findings of fact and apply the law.

46. Ms Webb further submits that the points taken are not material. On the first point it was not accepted that Mr Bac would have been a more neutral witness and neither Mr Bac nor Mr Thapper were present for all of the incident. Neither of them was present for the passage prior to the CCTV footage nor indeed during the CCTV footage.

47. Ms Webb relies on the CCTV footage as the striking detail in the case referred to by the Tribunal in paragraphs 15, 25, 44 and 47. The Tribunal accepted the Respondent's evidence as to what the CCTV footage shows. She points out there was no allegation of corruption affecting either the evidence of Mr Charles or Mr Uram.

48. It was alleged that Mr Charles had treated the Claimant unfairly about leave but not that he was part of whatever corruption activity was going on nor part of any wider plan to get rid of the Claimant. She did not accept the prospect that Mr Thapper or Mr Bac would have contradicted the other witnesses, but even if they had the CCTV footage was clear in what it showed.

49. On the second point, she said there was no basis for a requirement to put competing witness statements to witnesses for their comment. On the third point, the failure to retain notes, she submitted that the **Vauxhall** case was distinguishable on its facts as the failure to maintain notes was a significant issue on the facts of that case. In this case, the process of making notes and then failing to retain them or losing them did not show any unfairness to the Claimant.

Discussion and Conclusions on Ground 2

50. I turn now to the discussion and conclusions on the competing arguments on this ground of appeal. The Tribunal, having made a finding that the reason for dismissal was the reason relating to misconduct, specifically misconduct on 3 July, correctly addressed the questions of whether or not there was reasonable grounds for the Respondent's belief in misconduct and whether or not that belief was based upon a reasonable investigation and a reasonable disciplinary procedure. Those were the main issues required to be addressed by **Burchell** and were identified in the headline "Issues" in the List of Issues.

51. The question central to this appeal is to what extent did the Tribunal have to address every criticism raised by the Claimant in the sub-issues or in the argument. To what extent if it failed to address one of those issues had the Tribunal erred in law in its approach?

52. In my judgment, the question of the adequacy of Reasons has to be seen as fact specific in its content. Having had regard to the decisions in **Greenwood** and in **Meek,** and in particular the passage in **English v Emery Reimbold** referred to in **Greenwood**, it is clear that there is no bright line as to what amounts to adequate Reasons.. It is a matter of assessment on the facts of a particular case.

53. In this case, in my judgement, it is difficult to separate out the question of whether or not there was an error in failing to deal with the point from the question how material or substantial the particular point was. Where the issue is about the failure of a Tribunal expressly to deal with an argument, the question of materiality is relevant at the first stage -whether it is an error of law not to deal with it.

54. An ET is not to be criticised for not dealing with every trivial or irrelevant detail. Similarly, where it does not deal with a point that was trivial or irrelevant, it can easily be assumed to be swept up in the broader conclusion that it reaches, particularly on a matter such as this where the broader issue is whether or not an overall process has been fair or reasonable. One needs to grapple with the materiality of the allegation in reaching a decision on whether or not it was an error on the part of the Tribunal not to deal with it.

55. Given that the points raised by the Claimant were subject to cross-examination and argument, it is hard to think that an EJ, who otherwise on the face of the Reasons has properly directed herself as to the appropriate legal approach, would have not dealt with these points if she thought they significantly detracted from her overall conclusion on the reasonableness of the process and the fairness of the procedure.

56. In my judgement, although the points were raised, none of them were, or could in any realistic way have been, , likely to be material. It is understandable that they were no dealt with given the nature of the points. .

57. Before dealing with each of them in turn, I note the following. Although the points are in the List of Issues, the List of Issues contains 15 main issues. All of the points raised by the Claimant are sub-issues. The Mr Bac and Mr Thapper point is one of four sub-issues on the question of reasonable investigation. I have already indicated I am not entirely persuaded that the failure to put competing accounts to the witnesses (point 2) falls within issue 4b or not; it is certainly not clearly so. The notes point (point 3) appears as one of seven sub-issues under the procedural fairness issue at issue 6. So we are looking at best three sub-issues out of a long List of Issues..

58. Dealing with each of them in turn, first, the Bac and Thapper witness evidence point. As Ms Webb has submitted, they were only witness, if to anything, to part of the events and not the part of the events which featured in the CCTV. Given the CCTV and the other evidence upon which the Tribunal relied, it is hard to see what they might have said that would have cast any doubt on the Respondent's case or assisted the Claimant.

59. There is no allegation made against Mr Charles of any animus against the Claimant, yet it was he, Mr Charles, who identified Mr Bac and Mr Thapper as being present for even part of the events on 3 July. Indeed, if he had any animus against the Claimant, it is unlikely that he would have raised those two individuals as being additional people who were present at the events in question.

60. Mr Charles's email of 3 July gives an account of what Mr Bac and Mr Thapper saw and did which is extremely unhelpful to the Claimant as it shows him continuing to behave in an aggressive manner. If they had been questioned and given evidence consistent with Mr Charles said they would have said that would not have assisted the Claimant at all. The only way in which interviewing those two individuals might have assisted the Claimant is if those individuals had given evidence which was inconsistent with what Mr Charles had had to say.

61. However, in the light of the circumstances in which the evidence had come to light seems to me highly unlikely, indeed speculative, that they would have had said anything to have assisted the Claimant. Therefore, the prospects of that evidence being a necessary enquiry to have assisted the investigation seems to me to be entirely speculative.

62. I note that the potential for evidence from Mr Bac and Mr Thapper did not loom large in the preparation of the case. No reference was made by the Claimant during the investigation or disciplinary stage that evidence should have been taken from Mr Bac and Mr Thapper. No

mention of either individual was made in the ET1 or in the Claimant's witness statement to the Tribunal.

63. There was no indication even at the Hearing that they might have, or would have been likely to have, said anything different to what Mr Charles said about them in his account in the email. Therefore, in my judgement, it is understandable that the Tribunal did not need expressly to deal with that particular point.

64. The second point is that the Tribunal did not expressly deal with the fact that the evidence of the Claimant was not put to the witnesses for them to comment on. I see no basis for that to have been done. I have been taken to no authority or guidance or procedure that indicates that that was a necessary step.

65. The investigator, Mr Duell, had competing accounts from the witnesses and the decision-maker could make a decision to the extent appropriate assisted by the CCTV footage as to which was right. It is difficult to see in practice how anyone would have benefited or what would have been gained from the exercise the Claimant contended for.

66. As to the third point, the failure to retain notes, I accept Ms Webb's submission that the **Vauxhall** case is a very different case. In that case, the notes of the Hearing were the only record of the evidence against the employee because he had not been provided with witness statements setting out the accusations against him. They were read out to him in the Hearing and the note of the Hearing was all that he had.

67. In any event, **Vauxhall** presents slender authority for the proposition that it is a procedural defect not to retain notes of the Hearing, at least as a general proposition. In that case the Court of Appeal overturned a decision below that a dismissal had been unfair. In doing so it dealt with a number of arguments, some of which it accepted, some of which it rejected.

68. It rejected a ground of appeal that the Tribunal had been wrong to regard the failure to make proper notes as a procedural defect. As I read the Judgment, it is no more than the Court of Appeal respecting the ambit of decision-making of the Tribunal in holding that the decision that it was a defect not to have made proper notes was a conclusion that the Tribunal was entitled to come to. In any event, of course, a procedural defect does not itself mean that a decision to dismiss is unfair, nor is it the language of the statutory test in Section 98(4).

69. The question raised under statue is whether or not this dismissal was unfair in all the circumstances, and the Tribunal had to consider whether it was unfair in the light of the principles set out in **Burchell** having regard to the Court of Appeal decision **Sainsburys Supermarkets Ltd v Hitt** [2003] ICR 111 CA in which the Court of Appeal made clear that the Tribunal's exercise in reviewing the procedure and investigation carried out is one that is subject to a band of reasonable responses test.

70. Nothing is said to show how this dismissal was rendered unfair by a failure to retain the notes of the disciplinary hearing. No internal appeal was raised by the Claimant, so there was no appeal hearing at which he might have made use of the disciplinary notes to have reached a different outcome. It has not been said that he was put off appealing because he did not have the notes of the disciplinary hearing.

71. Therefore, the notes, had they been kept, would have served no purpose in the internal process and would have led to no difference in outcome to the decision to dismiss. I accept that evidentially at the Tribunal Hearing, when the Tribunal had to consider what had happened at the disciplinary hearing, the absence of notes may possibly have made that exercise more difficult for the Claimant to demonstrate what had happened. However, it is important not to confuse the evidential difficulties at the Tribunal Hearing of ascertaining what has happened from the

question of whether or not the dismissal itself had been fair or unfair, and I see nothing to indicate the latter.

72. Indeed, as I read the note of the Claimant's closing submissions (Supplemental Bundle page 41), it was the evidential difficulties at the Tribunal Hearing that were advanced by the Claimant's representative. The notes say as follows:

> **"There were no notes of the disciplinary meeting. I respond to VW's, that is Claimant [sic] for the Respondent's arguments in her submissions. I took the Judge to the relevant paragraph in *Vauxhall Motors*. I said the whole point of the notes is to provide evidence. This is a problem here when there are different accounts of the meeting. The problem is *a fortiori* when there is no note of the disciplinary hearing at all."**

73. That seems to point to evidential difficulties in the course of the Tribunal Hearing and not anything that affected or infected the decision to dismiss.

74. Therefore, in my Judgement, despite the admiral efforts of Mr Ratan to outline the significance of these points, I am not persuaded that there is anything material in any of these three points nor that a Tribunal could or would have regarded there as being anything material in them. The EJ did carry out an evaluation of the process followed and its reasonableness in some considerable detail. She reached findings of facts and she evaluated the fairness and reasonableness of the investigation and the disciplinary process as a whole in accordance with the test in **Burchell**. In my judgement, there is no basis to disturb the conclusion reached by Tribunal that the dismissal was not unfair, and I dismiss ground 2 of the appeal.

Disposal

75. I turn now to the question of disposal. I have dismissed ground 2, so the decision on unfair dismissal will stand. Ground 1 is a matter that has not been decided by the Tribunal and the parties have agreed that it needs to be remitted to the ET. Mr Ratan submits that given that there is an error by the Tribunal in failing to deal with this point, it ought to be remitted to a

differently constituted Tribunal. Ms Webb says it can go back to the Tribunal that dealt with the unfair dismissal.

76. For the reasons as set out by Ms Webb in her skeleton argument on page 6 and applying the guidance in the case of **Sinclair Roche & Temperley & Ors v Heard & Anor** [2004] UKEAT/0738/03, it seems to me wholly disproportionate for this matter to go back to a differently constituted ET. It is clear that having focused on the unfair dismissal complaint, the Tribunal has simply overlooked the question of the contractual wrongful dismissal claim. I have no reason to think that if this matter goes back to EJ Siddall she would not deal with the matter with proper care and attention.

77. I bear in mind also that the findings that have been made in relation to unfair dismissal, though on some different issues to those live in the wrongful dismissal, will no doubt be of relevance to the Tribunal in considering a wrongful dismissal claim. Therefore, I conclude on ground 1 that the wrongful dismissal claim should go back to EJ Siddall. I allow the appeal on ground 1 to be remitted, if possible, to EJ Siddall and I dismiss the appeal on ground 2.