Appeal No. UKEAT/0061/16/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11 November 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

PERRYS MOTOR SALES LTD — APPELLANT

MR W EDWARDS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KEVIN McNERNEY (of Counsel) Instructed by: Rradar Limited 13 Waterside Business Park Livingstone Road Hessle HU13 0EG
For the Respondent	MR WALTER EDWARDS (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Unfair dismissal - conduct dismissal taking into account previous final written warning - fairness of dismissal - section 98(4) ***Employment Rights Act 1996***

The Claimant had been dismissed by reason of his conduct in making a false computer submission taken together with an extant final written warning for similar conduct. The ET found the dismissal was unfair: it was unclear as to the basis for the earlier warning and the ET considered the sanction of a final written warning fell outside the range of reasonable responses; furthermore, the Claimant had not been provided with training on the Respondent's operating procedures when he had transferred to its employment; more generally, he had been put under pressure and denied the help he had sought and the dismissal was unfair, although he had contributed to his dismissal by 50 per cent.

The Respondent appealed.

Held: *allowing the appeal*

The ET had taken into account matters that had not been put in issue by the Claimant, specifically the validity of the earlier final written warning and the question of training on the Respondent's procedures. It had, further, asked itself the wrong question in respect of the earlier warning (see **Wincanton Group plc v Stone** [2013] IRLR 178 EAT). By so doing, it had erred in its approach to the question of fairness and had substituted its own view for that of the reasonable employer. That said, the Respondent had not established that the conclusion that the dismissal was unfair was necessarily perverse. An ET properly applying the correct test and not taking into account irrelevant matters would still be entitled to consider issues of mitigating circumstances and, even in a gross misconduct case, might be entitled to find these to be such as to take a dismissal outside the range of reasonable responses (**Brito-Babapulle v Ealing**

Hospital NHS Trust [2013] IRLR 854 EAT). The appeal would be allowed but the matter remitted to a different ET for rehearing.

Although strictly unnecessary to address given that conclusion, the ET had also erred in determining the question of any reduction to the Claimant's award without first permitting the parties to address it on **Polkey** and contribution.

HER HONOUR JUDGE EADY QC

Introduction

1. In this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Judgment of the Ashford Employment Tribunal (Employment Judge Kurrein sitting alone on 3 August 2015; "the ET"), sent to the parties on 1 September 2015. Representation below was as it has been on this appeal. By its Judgment the ET upheld the Claimant's complaint of unfair dismissal but found he had contributed to his dismissal by 50 per cent.

The Background Facts and the ET's Decision and Reasoning

2. The Claimant's continuous service went back to September 1992, when he started working for a franchised Vauxhall dealer known as "Pomphreys". At the relevant time, he was employed as the Service Manager.

3. The Respondent is a franchisee for a number of motor manufacturers and has some 1,500 employees. On 1 September 2013 it took over Pomphreys and the staff, including the Claimant, transferred into the Respondent's employment.

4. In May 2014, the Claimant was given what the Respondent described as a "*first and final written warning*" in respect of issues relating to invoices dealt with in the Claimant's department. The notes of the disciplinary hearing at that time recorded the Claimant being asked if there were any other "fraudulent" claims, with, as the ET recorded, the Claimant responding, "*As far as I am concerned there's nothing fraud [sic] or illegal*". The warning itself, however, stated that the Claimant had been found guilty of having:

> **"21.1. Tampered with company paperwork.**
>
> **21.2. Caused costs to the business as a result of poor processes.**
>
> **21.3. Put the reputation of the Respondent at risk."**

5. The May 2014 decision had been made by the Respondent's Business Development Manager, Mr Daly, and the ET records his findings as set out in the warning letter as follows:

> **"22. … that the Claimant had tampered with company paperwork, including invoices, and that "this was considered as a fraudulent act on your behalf and a breach in trust." He recognised that the Claimant was "under pressure to correct his mistakes and clear work in progress", but made it clear that fraudulent acts could be considered as gross misconduct "and will not be tolerated going forward." Mr Daly thought there to be some minor mitigating circumstances because the Claimant "showed no intentional malice and no significant personal gain was sought." "**

6. The Claimant did not appeal against that warning.

7. In August 2014, an issue arose as to a faulty gearbox on a used car sold by the business. Vauxhall agreed to bear 80 per cent of the cost of work and parts but, for this to happen, a claim needed to be submitted within 45 days of the work being completed. The work was completed on 28 August 2014 but a claim was only submitted on 16 November 2014. This had been done by the Claimant, who then entered the date on which the work was completed as 20 October 2014: within the 45-day period preceding the submission, but incorrect as a matter of fact.

8. This and certain other issues relating to the Claimant's department became the subject of a subsequent disciplinary process and hearing. The Claimant explained that he had not picked up on the late submission of the claim because he had been under too much pressure; although he had been making almost weekly requests for additional help, that had not been forthcoming. He accepted he had altered the date on which the work had been completed, but that was because he thought that was the only way of enabling the submission to be made; he had not thought it would in fact be paid. Whilst what he had done looked very similar, from the

outside, to the conduct that had resulted in the May 2014 warning, he had no fraudulent intent, as he believed the claim would be rejected. He also referred to having spoken about the process to the Respondent's General Manager, Mr Knight, but he had been uninterested.

9. The disciplinary hearing was conducted by the Respondent's Group After Sales Director, Mr Kerry. He considered that the allegations against the Claimant had been proved and there was a breach of trust and confidence. He further concluded that, because the issues were so similar to those for which the Claimant had previously been given a final written warning, he should be dismissed on notice. The Claimant appealed but was unsuccessful.

10. In considering the Claimant's complaint of unfair dismissal the ET accepted that the Respondent had established a potentially fair reason for the dismissal, which related to the Claimant's conduct. Recording that the Respondent had led no oral evidence regarding the earlier warning, the ET noted that the Claimant's case was that he had not appealed that warning because he considered that the Respondent had a fixed view and he had feared for his job. In the light of its own findings as to the May warning, the ET expressed its:

> **"50. … serious concerns at the absence of an adequate explanation of the basis on which the finding by Mr Daly that the Claimant's acts were "fraudulent" was made."**

It concluded that the decision to impose a sanction of the severity of a final written warning in May 2014 had fallen outside the band of reasonable responses.

11. Turning to events after the May warning, the ET found the Claimant had been put under pressure not to write off costs but had been deprived of the help he had asked for. As for the investigation into the matters that had arisen in August 2014, there were deficiencies in the investigator's understanding of the relevant processes and a failure to fully investigate the

position of others whom the Claimant's explanation had implicated. As the Claimant had ultimately admitted that the claim had been fraudulent, it had been reasonable for Mr Kerry to accept that; there were, therefore, reasonable grounds for his belief that the Claimant was guilty of some form of fraudulent conduct. There were, however, no such reasonable grounds for any wider finding as to poor practice within the Claimant's department.

12. Turning to the fairness of the decision to dismiss in these circumstances, the ET reasoned as follows:

> **"65. The Claimant had previously been subjected to disciplinary proceedings for the manner in which he dealt with warranty claims. My findings of fact in that respect are set out above. These were the only disciplinary proceedings the Claimant had ever faced in over 20 years [sic] continuous employment. I thought it notable that those proceedings commenced just 6 months after the Respondent's acquisition of "Pomphreys". I accepted that there had been a "Roadshow" following the acquisition, but was concerned that there did not appear to have been any detailed induction for transferring staff into the Respondent's operating procedures and standards.**
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> **66. Against that, I bear in mind that although a final written warning was not justified at that time, the Claimant was clearly warned that he must not alter paperwork in respect of warranty claims. At the same time, he was promised monitoring, appropriate assistance and support that did not materialise. He was undoubtedly placed under unreasonable pressure to perform excessive duties over extensive hours, and was not assisted by the somewhat blasé attitudes of Mr Knight as to the procedures to be followed. All these matters either were known to Mr Kerry, or would have been if a reasonable investigation had been carried out.**
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> **67. I also thought it significant that the potential gain to the Claimant from his misrepresentation as to the date on which the work to Mrs K's car was completed was non-pecuniary in nature."**

13. The ET concluded that the dismissal fell outside the band of reasonable responses and that was not rectified by the appeal. That said, the ET considered the Claimant had contributed to his dismissal to a substantial extent such that his basic and compensatory awards should be reduced by 50 per cent.

The Appeal

14. The Respondent's appeal raises four grounds: (1) whether the ET misdirected itself as to the approach it was to adopt in respect of the earlier warning, (2) whether the ET failed to adopt the correct legal test and/or made a perverse finding in concluding that the Claimant's

misconduct in making a false entry on a claim submission did not justify dismissal, (3) whether the ET had allowed irrelevant facts to inform its decision, and (4) whether the ET's finding on contributory fault could stand given that the parties had not been afforded the opportunity to make representations on this.

15. The Claimant resists the appeal, essentially relying on the reasoning of the ET. In submitting his Respondent's answer, the Claimant did seek to raise points of cross-appeal, but those were rejected on the papers by HHJ Shanks under Rule 6(12) of the **Employment Appeal Tribunal Rules 1993** and have not been pursued.

The Relevant Legal Principles

16. The ET was here concerned with the fairness of a dismissal on conduct grounds, thus applying the test laid down by section 98(4) of the **Employment Rights Act 1996** ("ERA"):

> **"(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) -**
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> > **(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."**

17. Doing so, the ET appropriately referenced the well-known guidance laid down in **British Home Stores Ltd v Burchell** [1978] IRLR 379 EAT, and the band of reasonable responses test (see, for example, **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439 EAT).

18. This was a case, however, where the Respondent had expressly taken into account the earlier, May 2014, warning; it is therefore helpful to further refer to the guidance provided in

respect of a reliance on earlier disciplinary warnings, usefully summarised by Langstaff P in **Wincanton Group plc v Stone** [2013] IRLR 178 EAT, as follows:

> **"37. We can summarise our view of the law as it stands, for the benefit of tribunals who may later have to consider the relevance of an earlier warning. A tribunal must always begin by remembering that it is considering a question of dismissal to which s.98, and in particular s.98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:**
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> **(1) The tribunal should take into account the fact of that warning.**
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> **(2) A tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an employment tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a tribunal is entitled to give that such weight as it sees appropriate.**
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> **(3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the tribunal is satisfied as to the invalidity of the warning.**
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> **(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore tribunal [sic] should be alert to give proper value to all those matters.**
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> **(5) Nor is it wrong for a tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.**
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> **(6) A tribunal must always remember that it is the employer's act that is to be considered in the light of s.98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur."**

19. As for the sanction of dismissal in a conduct case, it is accepted before me that a dismissal need not automatically fall within the range of reasonable responses purely because there is a finding of gross misconduct. The test is not a contractual one but one of fairness, as laid down by section 98(4), and mitigating circumstances may mean that it falls outside that range (see per Langstaff P in **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854 EAT).

Submissions

The Respondent's Case

20. On the first point of challenge Mr McNerney contends the ET erred by failing to leave undisturbed the validity of the final written warning issued in May 2014. The Claimant had neither appealed that warning nor attacked its probity as part of his unfair dismissal complaint. The ET had embarked upon a unilateral attack on the May warning, which was unwarranted by the case before it. Moreover, the ET had applied the wrong test - that of the band of reasonable responses - rather than asking whether there was any issue of probity or bad faith.

21. As for the conduct that had directly led to the dismissal decision, having found that the Respondent had an honest belief that the Claimant was guilty of fraudulent conduct and had reasonable grounds for that belief, it was perverse or, alternatively, showed an error of substitution for the ET to find dismissal for that reason fell outside the range of reasonable responses (the second basis of challenge). During oral argument Mr McNerney accepted that one way of reading the ET's decision was as including the finding that the Respondent had not carried out a proper investigation of the mitigating circumstances (as might be relevant, **Brito-Babapulle**). He maintained, however, that an employer must have been able to dismiss in these circumstances; the decision must still have fallen within the range of reasonable responses.

22. Further/alternatively, the ET had (see the third ground of appeal) allowed irrelevant factors to inform its decision on fairness. As well as its view on the earlier warning, the ET had taken into account the Respondent's earlier takeover of the Claimant's former employer. It had, however, never been part of the Claimant's case that he did not understand the systems or procedures introduced and operated by the Respondent; in any event, he had been earlier warned as to the Respondent's expectations.

23. Finally, by the fourth ground, the Respondent objected to the ET's finding of a 50 per cent reduction for contributory fault having said that it did not wish to receive submissions on contribution at that stage. The Respondent had, further, been precluded from making detailed submissions on **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 HL, which should have preceded any finding on contribution.

The Claimant's Case

24. In his submissions in response, the Claimant relied on the ET's findings but added the following observations.

25. In respect of the May 2014 warning, he observes that he had felt he could not contest it; he had fears of the impact on his employment if he had.

26. As for what had happened in August 2014, his manager, Mr Knight, was aware of what the Claimant was intending to do. It was the only way he could submit the claim, which would enable the account to be closed, and he had been open about this. The problem had arisen because the person responsible for the submission had given notice to leave the business. The Claimant had offered to take over their outstanding work but had been told to leave it, and it was only after they had actually left that it became apparent that the submission had not been made as it should have been. When the Claimant had later entered the submission, that would have been apparent to the Respondent, which was monitoring computer entries on a daily basis. It was only because the Claimant was then blocked from using the computer that he could not complete the submission, which would have resolved the problem in any event.

Discussion and Conclusions

27. Section 98(4) **ERA** requires an ET to assess the fairness of a dismissal having regard to the reason shown by the employer and to the circumstances of the particular case. The reason relied on by the Respondent in this case included the earlier disciplinary warning; it was one of the relevant circumstances. There was no dispute that a final written warning had been issued in May 2014 and was still extant at the time of the subsequent matters that had led to the dismissal itself. There was equally no dispute that the Claimant had not sought to appeal against that warning: he might not have agreed with it, but he had accepted himself as bound by it. An employee's decision not to challenge a disciplinary warning might, of course, involve a careful balancing of issues; not least a concern not to prolong a point of dispute with their employer. And where an employee retains a sense of grievance as to the probity of the earlier warning, or its manifest inappropriateness, it might still be open to them to put this in issue in any later ET proceedings relating to a dismissal that took that warning into account; that could be a further relevant circumstance to which the ET should have regard, albeit within the constraints explained in **Wincanton**.

28. The primary difficulty in the present case is, however, that the Claimant had not raised any issue in respect of the earlier warning in any sense relevant pursuant to **Wincanton**. It was not a matter of which he had complained in his ET1. He had referred to the May warning, but in the context of explaining how he had asked for more support (something promised to him in the warning letter but not forthcoming), and a challenge to the warning was not identified as an issue before the ET (see its very short summary of the issues at paragraph 2 of its Reasons). The Respondent's failure to call oral evidence on the subject of the May 2014 warning could thus be forgiven; it did not consider it needed to do so: there was no issue either as to the

validity of that warning or the Respondent's ability to rely on it when subsequently taking the decision to dismiss.

29. Notwithstanding the fact that it had not been identified as at issue between the parties, the ET took it upon itself to look behind the May 2014 warning, making findings as to what it really related to and whether therefore the penalty had fallen within the permissible range. That was an error of law. First, because the ET was engaged in determining a point that had not been in issue before it. Second, because the ET then applied the wrong test, asking itself whether the warning fell within the range of reasonable responses rather than asking whether it had been issued for an oblique motive or was manifestly inappropriate, absent good faith and without *prima facie* grounds for making it (see **Wincanton**).

30. I have questioned whether I can disregard this error on the basis that it did not in fact taint the ET's decision: ultimately, the ET concluded that, although a final written warning was not justified, the Claimant was clearly warned that he must not alter paperwork in respect of warranty claims (see paragraph 66 of the ET Reasons). I do not consider, however, that I can do so. Although it is hard to be clear as to the precise impact of the point, the warning had not been put in issue save by the ET itself and, by so doing, the ET failed to consider the fairness of the dismissal against the existence of a valid final written warning.

31. It is useful at this stage to also consider the other factor taken into account by the ET, which the Respondent complains was simply irrelevant, that is the ET's regard to the absence of any detailed induction for transferring staff such as the Claimant in respect of the Respondent's operating procedures and standards (see ET paragraph 65). It was not part of the Claimant's case before the ET that he did not understand the relevant procedures and standards; his case

was that he was under too much pressure, had personal health issues and was asking for help and guidance but being ignored. A change in employer and consequential change in operating procedures might well be relevant circumstances in a conduct dismissal case, but they had not been identified as such here. That again raises a question as to why the ET considered this a relevant point of concern.

32. The answer to that point might be that ultimately the ET accepted it went nowhere; it allowed that the Claimant had been clearly warned not to alter paperwork in respect of warranty claims. That said, I do not consider I can simply ignore the point. The ET itself describes this as a notable issue, and it was against that background that it judged the reasonableness of the decision to dismiss: that is, against a change in operating procedures and standards that had not been put in issue by the Claimant.

33. By its second ground of appeal, the Respondent goes still further and complains that the ET failed to adopt the correct legal test, or made a perverse finding, when it failed to hold that the Respondent had fairly dismissed the Claimant given, as the ET accepted, that there were reasonable grounds for the Respondent's honest belief that his conduct was potentially dishonest and in some way fraudulent.

34. Read together with the first and third grounds, I do consider that the ET erred in its approach to the question of fairness: although it had reminded itself that it was not to substitute its view for that of the reasonable employer (that it was to apply the range of reasonable responses test), the ET then went on to do precisely that which it said it should not. It took into account matters not in issue before it, and thus failed to consider properly the matters taken into

account by the Respondent; it allowed its own view on these to set the context for its inquiry into the issue of fairness. Its conclusion on fairness is thereby undermined.

35. Was it, however, perverse for the ET to fail to conclude that the Respondent could fairly dismiss given the relevant circumstances of the case; that is, given the finding of honest belief in potentially dishonest conduct, reasonable grounds for such belief and, as the ET ought to have allowed, given the fact that this was against an extant final written warning? I certainly agree that the ET failed to assess the issue of fairness in the correct way, but I consider the suggestion that the conclusion was necessarily perverse is not made out.

36. The Respondent itself apparently saw this as a case where the dishonest conduct was not the end of the matter; it dismissed, on notice, because of this conduct taken together with the earlier warning (although I accept that the decision to dismiss on notice this might simply have reflected recognition of the Claimant's long service). For its part, the ET was also heavily influenced by its findings, adverse to the Respondent, that the Claimant had been promised assistance that had not materialised, had been put under unreasonable pressure to perform excessive duties over extensive hours, and had not been assisted by management. It criticised the Respondent's investigation in failing to properly look into the Claimant's case in these respects and had expressed doubts as to whether they had been taken on board by Mr Kerry when making the decision to dismiss.

37. Can I say that, given those findings, an ET must still have found the decision to dismiss to fall within the band of reasonable responses? I do not think I can. I bear in mind that mitigating circumstances might take a dismissal outside the range even where there is a finding of gross misconduct (see **Brito-Babapulle**). An ET must, of course, not substitute its view for

A that of the reasonable employer, but it is still entitled to consider how mitigation might fit in, whether it was such that it really did take the dismissal decision outside the range of reasonable responses in the particular circumstances of the case.

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38. In the present case - given my conclusion that the ET adopted an erroneous approach in relation to the earlier warning and had taken into account matters of which the Claimant had not complained - the ET's Judgment cannot stand and I must allow the appeal. The perversity challenge thus really goes to disposal: if I agreed that the ET's conclusion was perverse (so, applying the correct test to the facts found, the only permissible conclusion was that the dismissal was fair), there would be only one outcome, and I would be required to substitute a finding that the Claimant's claim failed. I do not, however, consider there was only one possible outcome to this case. Whatever conclusion I might have reached, I must therefore remit this matter.

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39. For completeness, however, I turn to the fourth ground, which is really a fair hearing complaint: the ET made a finding as to the level of reduction of the Claimant's award without having first permitted the parties to make submissions in this regard. The ground of appeal in this respect relates to both contributory fault reduction - 50 per cent - and any **Polkey** reduction. On the latter point it is to be inferred that the ET concluded no such reduction should be made: **Polkey** would have needed to have been considered before contributory conduct (for good measure, I am also told that no submissions were permitted on this question at the subsequent remedy hearing). More specifically, Mr McNerney tells me at that, at the liability hearing, he had asked whether the parties should make submissions on these issues but was told the ET did not wish to receive such representations at that stage.

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40. There is often an overlap between liability, **Polkey** and contributory fault, such that it is sensible to address these issues together. That will, however, be a matter for the ET and it may be considered inappropriate to adopt that course given the circumstances of any particular case. The point having specifically been raised by the Respondent's counsel, and the ET having indicated that it did not wish to take such submissions at the liability stage, an issue of natural justice did, however, arise when the ET then proceeded to determine the issues of contribution and (by implication) **Polkey** without permitting any further representations. Had it been necessary for me to do so, I would therefore also have allowed the appeal on this basis.

Disposal

41. After giving my judgment in this matter, I permitted the parties to make further representations on disposal. For the Respondent, Mr McNerney contends this should be remitted to a different ET; that would be proportionate - this is a Judge-alone case that can be held in one day - and, further, by the time the case returns to the ET it will inevitably mean that even the same Employment Judge would need to start again; moreover, there had been a finding of a fundamental failure of approach that gave rise to questions of confidence in the ET, and the overriding objective meant that it should be remitted to a different Tribunal. For his part the Claimant says that the matter should go back to the same ET; it was already seized of the matter and had made findings at the original hearing. I also heard from his partner, who has expressed concerns to me as to the Claimant's mental state and his ability to deal with a further hearing afresh before a different ET. I have also been told that his finances have been hit, he will be unable to afford representation and will find having to reargue his case in front of a different ET extremely difficult.

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42. I have had regard to the factors laid down in **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763 EAT and to the overriding objective. Doing so, I consider I am bound to remit this matter to be considered afresh by a different ET. I do not take that decision lightly and very much take on board the pressures that this might place on the Claimant. I have, however, to consider the interests of justice in relation to the case as a whole and in respect of both parties. I have made adverse findings in my Judgment that go to the heart of the approach adopted by the ET and have found that it wrongly imported factors not raised by the Claimant and fell into the error of substitution. I bear in mind the question of proportionality and can see no reason why this should not remain a one-day hearing before an Employment Judge, sitting alone (and, given the delay that has occurred, I agree that the matter would have to start afresh even if before the same ET). On that basis, and even allowing that I would seek to try to place the Claimant on as equal a footing as I can, I consider that justice demands that the matter be considered afresh by a different ET.

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