Appeal No. UKEAT/0198/16/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 November 2016

Before

HER HONOUR JUDGE EADY QC

MRS M V McARTHUR BA FCIPD

MR H SINGH

UNITED LINCOLNSHIRE HOSPITALS NHS FOUNDATION TRUST APPELLANT

MRS J FARREN RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

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SUMMARY

UNFAIR DISMISSAL - Reinstatement/re-engagement

Unfair dismissal - remedy - re-engagement - section 116 ***Employment Rights Act 1996***

The Claimant was a long-serving Staff Nurse employed by the Respondent in A&E. During the course of a particularly stressful overnight shift, she had administered medication to four patients without prior prescription by a doctor and failed to properly complete records. She was dismissed for her conduct in these respects and because the Respondent considered she had failed to be honest in her initial response to the investigation when she said her record keeping had been satisfactory. On the Claimant's complaints of unfair and wrongful dismissal, the ET found she had been unfairly but not wrongfully dismissed; specifically, she had administered medication without prescription and failed in her record keeping but the Respondent had not shown reasonable grounds for its conclusion as to her dishonesty in that respect.

At the subsequent Remedy Hearing, the Claimant sought an order for reinstatement or re-engagement, which the Respondent resisted, contending: (1) it could no longer trust the Claimant to adhere to its Policy for Medicines Management, which raised patient protection issues and questions of public trust; and (2) more generally, it could no longer have trust and confidence in the Claimant because her response to the disciplinary case and her evidence before the ET had been dishonest. The ET accepted there was an issue in respect of the Respondent's Policy: if the Claimant was employed in its A&E department, the Respondent had a legitimate concern as to whether it could trust her to adhere to the Policy if faced with similarly stressful situations (as might be expected in that department). It considered, however, that an order for re-engagement into another department was practicable. It did not accept that the Respondent had shown that the Claimant had been dishonest; the ET considered she was capable of being trusted in another nursing role. In determining the amount of any back-pay

due to the Claimant, however, the ET accepted that she had contributed to her dismissal such that there should be a reduction of one third in any sums awarded. The Respondent appealed.

Held: allowing the appeal in part; the question of re-engagement remitted to the ET.

The statutory test laid down by section 116 **ERA** was one of practicability. The ET was required to reach a provisional view on this question (**McBride v Scottish Police Authority** [2016] IRLR 633 SC); practicability was something more than what might simply be possible, the order had to be "*capable of being carried into effect with success*" (**Coleman v Magnet Joinery Ltd** [1975] ICR 46 CA). The answer to that question was not determined simply by the fact that the Claimant had committed the act of misconduct in question, by the ET's rejection of the practicability of a reinstatement order or by its finding on contribution. The point was, however, put in issue by the Respondent's contention that it had lost trust and confidence in the Claimant - a matter that could plainly be relevant to practicability - because she (1) had committed the act of misconduct, and (2) had not been honest about that, either in the internal process or before the ET. To ask (as the ET had) whether the Respondent had established that the Claimant was in fact dishonest and to then apply its own conclusion to her honesty and trustworthiness was not the correct test. The ET had to ask (applying **Wood Group Heavy Industrial Turbines Ltd v Crossan** [1998] IRLR 680 EAT and **United Distillers & Vintners Ltd v Brown** [2000] UKEAT/1471/99) whether *this* employer genuinely and rationally believed that the Claimant had been dishonest. The ET having erred in its approach to the question of practicability, the appeal would be allowed on this basis and the Order set aside.

Accepting, however, that there might be more than one answer to the question of practicability (applying the correct approach) in this case, and that the ET was best placed to carry out the necessary assessment, the matter would be remitted to the same ET.

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HER HONOUR JUDGE EADY QC

Introduction

1. This is our unanimous Judgment, in which we refer to the parties as the Claimant and Respondent, as below. We are concerned with the Respondent's appeal against a Judgment of the Lincoln Employment Tribunal (Employment Judge Faulkner, sitting alone on 29 February 2016; "the ET"), sent to the parties on 6 April 2016, by which the ET ordered that the Claimant was to be re-engaged by the Respondent, the ET having earlier found that she had been unfairly dismissed. Representation before the ET was as it has been on this appeal.

The Relevant Background

2. The Claimant had been employed by the Respondent since 1992 and as a Staff Nurse since September 2006, employed in that capacity at the Respondent's Grantham & District Hospital. Over a night shift on 16 and 17 May 2014, an incident occurred which ultimately led to the Claimant's summary dismissal on 24 October 2014. That incident, and the way in which matters came to be progressed to a disciplinary investigation, are described by the ET in its Liability Judgment as follows:

> **"11. The background to this matter can be stated briefly, being tragic events which occurred on the night of 16 and 17 May 2014. The Claimant, employed by the Respondent since July 1992 and as a Staff Nurse since September 2006, was on duty in A & E. A young boy was brought to the Hospital apparently having suffered a cardiac arrest; despite the efforts of Hospital staff, he sadly died. As can be imagined, his adult family members were distraught, at least one collapsing and others damaging property. It is alleged that at some point later in the night the Claimant administered the drug Diazepam to four of the family members without prescription from a doctor and therefore in an unauthorised manner. The Claimant does not dispute that if she did so it was contrary to the Respondent's Policy for Medicines Management … and the Nursing & Midwifery Council ["NMC"] "Standards for medicines management" … It is also alleged that the Claimant failed to complete the required patient records, again contrary to the Medicines Management Policy … and to the NMC's "Record keeping, Guidance for nurses and midwives" …**
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> **12. Whilst in large part the Claimant accepts that her record-keeping was on this occasion wholly inadequate, she does not accept that she administered the drugs without prescription. Her case is that the drugs were prescribed by Dr Naqvi. The matter came to the Respondent's attention when Dr Naqvi informed an A & E Specialty meeting on 20 May 2014 that she had been asked by the Claimant to complete prescriptions when the Claimant had already given the drug to the patients, Dr Naqvi signing the prescriptions thereafter. The Claimant was not present at that meeting.**

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> **13. Ms Shepherd [a Sister at the hospital] evidently reported the matter to Ms Charles [Matron for Medicine], who emailed Ms Shepherd on 21 May … outlining what she understood from their discussion, including the comment, "This medication was not prescribed at the time of administration". Mr Prydderch [Deputy Director of Operations] was copied into that email, having stated in an email to Ms Charles the day before, "Sounds like someone, ? 'Joyce' [the Claimant] decided to give someone in the family diazepam, then told Naqvi to write it up later. Naqvi hadn't even seen the patient but wrote it up anyway. Jeez." On 22 May … he emailed other colleagues, stating that Dr Naqvi "was just performing tasks under duress, from someone who it sounds is quite difficult and overwhelming". The Claimant takes that as a reference to her; it seems to me more likely than not that it was.**

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> **14. It was decided that the Claimant should carry out non-clinical work whilst the matter was investigated, rather than being suspended. On 23 May, Ms Charles prepared a short report for Mr Prydderch, headed "Preliminary Investigation" … The report stated that Dr Naqvi had informed the meeting on 20 May that the Claimant had asked her to complete the prescriptions for patients she had given the drug to "and there was no need for the doctor to see the patients". The report appears to have been prepared solely on the basis of what Ms Shepherd reported from the meeting of 20 May. The Claimant met with Mr Prydderch on 23 May as planned, was assigned non-clinical duties, but very shortly afterwards went off sick. It is not suggested that the Claimant had been subject to any disciplinary proceedings at any other time during her long employment with the Respondent."**

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3. The Claimant subsequently pursued claims of unfair and wrongful dismissal before the ET, in respect of which there was a Liability Hearing over three days in early November 2015; the ET's reasoned Judgment in that respect was sent out on 22 December 2015.

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4. Considering the Claimant's complaint of unfair dismissal, the ET accepted that the Respondent had made good a potentially fair reason for the dismissal, namely its belief that the Claimant had administered drugs to four patients without prescription and failed to adequately record the treatment of those patients. It concluded, nevertheless, that the Respondent's decision to dismiss the Claimant for that reason had been unfair: there was an assumption of guilt from the outset, which impacted upon the investigation; there were also procedural failings, in particular at the appeal stage, which rendered the process unfair.

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5. Considering whether the Respondent had reasonable grounds for its belief as to the Claimant's conduct, the ET expressed a number of concerns, in particular as to the way in which the Respondent had reached its conclusions on the Claimant's guilt on the core charges. One matter that particularly concerned the ET was the adverse inference the Respondent had

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drawn from the Claimant's initial response in the investigation as contrasted with what was apparent from the relevant CAS cards (a CAS card is a card produced automatically once a patient is booked into A&E with the intention that any care will commence thereafter). The disciplinary panel had relied on discrepancies between the Claimant's initial account - that she had completed the documentation correctly - and the content of the CAS cards, which showed she had not. It relied on that not only in deciding what was likely to have occurred on the night in question but also considered this suggested she had been untruthful, giving rise to "*questions about [her] honesty and integrity as a registered nurse*" (Liability Judgment, paragraph 44). For its part, the ET was critical of the Respondent's reliance on the content of the CAS cards to reach conclusions adverse to the Claimant: they had not been a reliable guide as to what had taken place, and to turn that material against the Claimant was unreasonable (paragraph 90).

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6. Turning to the wrongful dismissal complaint, the ET had to make findings as to what had in fact happened on the night of 16 and 17 May 2014. On the question of whether the Claimant had given drugs without prescription and thus without prior authority, it concluded she had (see paragraphs 99 and 102 of the Liability Judgment); that being in breach of the Respondent's policies and procedures, it amounted to serious professional misconduct, which provided grounds for summary dismissal under the Respondent's disciplinary procedure. In reaching that conclusion, the ET disregarded the content of the CAS cards and specifically drew no inference as to the Claimant's credibility from the fact that she had not recalled the state of the records when responding in the investigation some two months later. It considered the only relevance of the cards was to corroborate that the Claimant had departed from her normal practice - that is, to keep proper records - on the night in question, which suggested she had also departed from her normal practice in terms of her treatment of patients that night (see paragraph 100 of the Liability Judgment).

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7. The matter then returned to the ET for consideration of remedy on 29 February 2016; the hearing with which we are concerned and at which the Claimant confirmed she was seeking an order for reinstatement or re-engagement.

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8. The ET revisited its findings on liability, summarising its conclusion as to what had happened on 16 and 17 May 2014 as follows:

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> **"13. In deciding the question of liability in respect of the complaint of breach of contract, I found as a fact that the Claimant administered Diazepam to relatives of a deceased child, without prescription and therefore without authority, which the Claimant accepted at the Liability Hearing was in breach of the Respondent's Policy for Medicines Management and the NMC's Standards for Medicines Management (see paragraph 11 of the Liability Judgment). She also accepted that her record-keeping was far short of what it should have been. I made clear that I did not find the Claimant acted in a calculated manner, coldly and deliberately setting out to act in the way she did but from good motive and under significant pressure both emotionally and practically. In those circumstances, some employers would not have dismissed an employee with such long service and good record, but that did not render the dismissal unlawful given the Respondent's policies."**

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9. It recorded the Respondent's conclusion that the Claimant had made:

> **"10. … serious and numerous errors in relation to the administration of medication, any one of which could have led to serious patient harm. …"**

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10. It further recorded that the dismissal had been held to be the appropriate sanction because of what he dismissal letter described as:

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> **"10. … serious failings of "professional judgment and decision-making", meaning that a training programme "would not be successful". …"**

The ET noted that the disciplinary panel had reached that conclusion because:

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> **"10. … the Claimant had been untruthful [and] the employment relationship had "irretrievably broken down"."**

11. There had been both an unsuccessful appeal against the decision to dismiss and subsequently a re-hearing, albeit that the ET had not considered the latter to be relevant to the issues it had to determine on liability. The panel at the re-hearing - which the Claimant did not

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attend - reviewed the evidence, including the CAS cards, and held that the main charge against the Claimant had indeed been made out. The re-hearing panel concluded:

> **"11. … it was crucial that the Claimant acknowledge her errors, but that she had untruthfully failed to do so. This led the panel to find that she did not acknowledge the seriousness of what she had done, raising in their minds serious concerns about her professional integrity and the Respondent's trust in her. Had she acknowledged her error, the panel noted, dismissal may not have resulted. …"**

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In evidence before the ET, however, the Respondent was unable to explain how the Claimant's maintaining her innocence was a failure to acknowledge the seriousness of the issues.

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12. Turning to the question of reinstatement or re-engagement, the ET noted that the Respondent was a large employer and the Claimant was qualified to undertake a number of different nursing jobs. The Claimant accepted, given the ET's findings as to her conduct, that any compensation would be reduced for contributory fault but also observed that practicability was not really an issue relied on by the Respondent; the real question for the ET was whether granting an order for reinstatement or re-engagement would be just. The Respondent did, however, contend that it could no longer have trust and confidence in the Claimant, a matter that the ET accepted that it had to address, whether that was seen to go to practicability or to the justice of making a re-employment order (see paragraph 36 of the Remedy Judgment).

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13. The ET noted that the fact that dismissal was for a conduct reason did not, of itself, mean a re-employment order was unjust; it was required to assess the misconduct and consider the justice of such an order in the light of that misconduct. It was necessary, therefore, to be clear about what it was that had constituted the Claimant's contribution to her dismissal, allowing that where contribution is assessed to be high it might be necessary to consider whether this was consistent with the employer being genuinely able to trust the employee again

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(see per Simler J in **British Airways plc v Valencia** [2014] IRLR 683 EAT, referred to at paragraph 37 of the ET's Remedy Judgment).

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14. In this case, the ET had found that the Claimant had administered drugs to four patients without prescription, and the Claimant herself had accepted there were inadequacies in her record keeping. Against these facts the Respondent made two points as to why it regarded a re-employment order as unjust: (1) it would undermine the Respondent's Policy for Medicines

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Management ("the Policy"), which raised patient protection issues and questions of public trust, not least as to whether the Respondent had ceased to have trust in the Claimant's clinical judgement; and (2) the Respondent could no longer trust the Claimant, because her response to

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the disciplinary case and her evidence before the ET had been dishonest.

15. On the first of those points, the ET accepted that the proper operation of the Policy was

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a matter of utmost importance to the Respondent and to the public more generally, accepting:

> **"41. … the Policy could be undermined, and thus injustice done to the Respondent, if ordering reinstating or re-engagement signalled that the Claimant or any other employee could choose to ignore the Policy in the future."**

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16. On the other hand, the ET noted:

> **"43 … the Claimant had enjoyed very long service with the Respondent during which she maintained an unblemished record as a medical practitioner. The Claimant is therefore someone of considerable professional experience and good record. Secondly, I note that the Claimant has undertaken voluntary training in medicines management which is certainly some evidence of her commitment to her profession and, in my judgment, evidence of her understanding of the importance of the Policy. Thirdly … the Claimant had received many glowing character references, including some from colleagues. That suggests that she would not have difficulty in re-establishing herself as a trusted colleague amongst those she would work with if reinstated, and is an indication at least that she would establish similar relations if re-engaged in a different role. Fourthly … the fact that the NMC had not applied any interim order or condition of practice at this stage meant that serious sanction on their part is unlikely; this was not a point taken by the Respondent in any event."**

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17. The ET also considered it was important to take into account the circumstances of the night in question, which were particularly emotive and distressing, that being especially so for

the Claimant, as she had herself lost a child in earlier life. That said, the nature of A&E meant that staff would face stressful and demanding situations, and the Respondent's disciplinary panel had taken into account the difficulties the Claimant would face if she had to re-live the events of that night at some point in the future. On balance, the ET considered it would be unjust to order the Respondent to reinstate the Claimant into her nursing role in A&E (see paragraph 45 of the ET's Remedy Judgment).

18. The ET then turned to the second issue raised by the Respondent, that of the Claimant's dishonesty. Weighing up the evidence, the ET was, however, not satisfied that the Respondent had made good its case in this respect. The ET (at the liability stage) had addressed the discrepancies in the Claimant's explanation as against the CAS records, finding these were explicable given the events of the night in question and did not evidence dishonesty. Further, it did not find that the Claimant had been dishonest in her account to the ET: the ET found her to be a blunt and straightforward witness. It noted that the panel at the re-hearing had taken a rather different view - finding that maintaining her innocence meant she had not recognised the seriousness of breaching the Policy - but had not been able to justify that conclusion before the ET. For its part, the ET was satisfied that the Claimant had at no stage contested that acting in breach of the Policy was anything other than very serious. It concluded that, in an environment other than A&E, given her experience, record and professional commitment, the Claimant could clearly be trusted. Having taken that view, the ET considered it was just to order that the Claimant be re-engaged by the Respondent in a band 5 post at the Grantham & District Hospital, but outside A&E.

19. In completing its task in this regard, the ET turned to the question of any reduction for contributory conduct in the compensation to be awarded to the Claimant by way of back-pay

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and any further pay prior to compliance with the re-engagement order. Given its findings as to her conduct, the ET considered it would be appropriate for a reduction of one third to be made.

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The Appeal

20. The Respondent appeals against the re-engagement order on three grounds: (1) the ET erred in finding it would not be unjust to order the Claimant's re-engagement when it had rejected her case for an order for reinstatement or, alternatively, reached a perverse conclusion

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in that regard; (2) it erred in finding that the Respondent had not established the serious charge of dishonesty when this was the inevitable conclusion to be drawn from the ET's findings on liability, which it had not been entitled to revisit, or, again alternatively, this conclusion was

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perverse; and (3) even if the ET had been entitled to conclude that the Respondent had not made good the charge of dishonesty, it had applied the wrong test - the question was whether a reasonable employer could have concluded that the Claimant was dishonest. The Claimant resists the appeal, essentially relying on the reasoning of the ET.

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The Relevant Legal Principles

21. The ET's powers to make reinstatement and re-engagement orders are set out at sections

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112 to 116 of the **Employment Rights Act 1996** ("ERA"). Section 113 provides that orders may be made for reinstatement or re-engagement. Section 114 specifically defines reinstatement and section 115 re-engagement. By section 116 it is provided as follows:

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> **"116.** ***Choice of order and its terms***
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> **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement ...**
>
> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
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> **(3) In so doing the tribunal shall take into account -**

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> > **(a) any wish expressed by the complainant as to the nature of the order to be made,**
> >
> > **(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**

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(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement."

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22. It is common ground before us that an ET is to determine the question of reasonable practicability as at the date it is considering making a re-employment order; at which stage, it has to form a preliminary or provisional view of practicability (per Baroness Hale at paragraph 37, **McBride v Scottish Police Authority** [2016] IRLR 633 SC). The Respondent has a further opportunity (section 117(4)) to show why a re-engagement order is not practicable if it does not comply with the original order and seeks to defend itself against an award of compensation and/or additional award that might otherwise then be made under section 117(3).

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23. More generally, Mr Ohringer has helpfully summarised the principles relevant to an ET's approach to a re-engagement order at paragraphs 16 to 23 of his skeleton argument:

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"16. Under s.112 of the Employment Rights Act 1996 … a tribunal must enquire whether an unfairly dismissed claimant seeks orders for reinstatement or reengagement in preference to compensation.

17. In ss. 113 and 116 of the ERA 1996, the tribunal is given a broad discretion as to whether to order reinstatement, reengagement or neither and directed to take into account various factors. In relation to reengagement, those factors are:

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(a) any wish expressed by the complaint [sic] as to the nature of the order to be made,

(b) whether it is practicable for the employer … to comply with the order for reengagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether to make an order for re-engagement, and if so on what terms.

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18. Reinstatement and reengagement are the 'primary remedies' for unfair dismissal (*Rao v Civil Aviation Authority* [1992] ICR 503, unsuccessfully appealed to the Court of Appeal on other grounds [1994] ICR 495 and *Central & North West London NHS Foundation Trust v Abimbola* (UKEAT/0542/08), para. 14).

19. A Tribunal has a wide discretion in determining whether to order reinstatement or reengagement. (… *Valencia* … para. 7)

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20. If the employer maintains a genuine (even if unreasonable) belief that the employee has committed serious misconduct, then re-engagement will rarely be practicable. (paras. 10-11 citing *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680).

21. However as stated in *Timex Corporation v [Thomson]* [1981] IRLR 522, cited with approval by the Supreme Court in *McBride* … the Tribunal need only have 'regard to' whether reengagement is practicable and that is to be considered on a provisional basis only.

22. Simler J stated that contributory conduct is relevant to whether it is just to make an order. She emphasised that contributory fault, even to a high degree, does not necessarily mean it would be impracticable or unjust to reinstate. (*Valencia*, para. 12, citing *United Distillers & Vintners Ltd v Brown* (UKEAT/1471/99), para 14).

23. Although the Tribunal is entitled to take into account contributory conduct in deciding whether to order reinstatement or reengagement, the question of whether the Claimant's employment would have been fairly dismissed in any event (applying the *Polkey* [*v A E Dayton Services Ltd* [1987] IRLR 503] principle) is irrelevant. This was the conclusion of the EAT in *The Manchester College v Hazel & Huggins* (UKEAT/0136/12, para. 40) which was upheld by the Court of Appeal [2014] ICR 989, para. 43)."

24. In this case, the ET's approach to the question of trust and confidence and how this might impact on its discretion to order re-engagement has been key. This has put the focus on the test that an ET is to apply in determining practicability, which was addressed by the EAT when overturning an order for re-engagement in **Wood Group v Crossan** [1998] IRLR 680:

> **"10. … we are persuaded in this case that it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations. It may seem somewhat incongruous that where a tribunal goes on to categorise the investigations into the belief as unfair or unreasonable, nevertheless, the original belief can found a decision as to remedy and the practicality of re-engagement, but it is inevitable to our way of thinking that when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist between an employer and employee, inevitably broken by such investigations and allegations can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, invariably to our minds will be compensation."**

25. Before us, the parties have approached the test of practicability at the first stage as one in respect of which there is a neutral burden of proof. They see the burden shifting to the employer if and when it seeks to avoid the making of an additional award of compensation under section 117 **ERA**. That said, where an employer is relying on a breakdown in trust and confidence as making it impracticable for an order for re-engagement to be made, the ET will need to be satisfied not only that the employer genuinely has a belief that trust and confidence has broken down in fact but also that its belief in that respect is not irrational (see paragraph 14 **United Distillers v Brown** UKEAT/1471/99).

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26. In the case of **Valencia** Simler J revisited the question as to how an ET was to undertake its task on the making of a re-engagement order, giving the following guidance:

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> **"7. It is accordingly clear that tribunals have a wide discretion in determining whether or not to order reinstatement or re-engagement. It is a question of fact for them. However, whereas an order for reinstatement is an order that the employer *shall* treat the complainant in all respects as if he had not been dismissed, an order for re-engagement is more flexible and may be made on such terms as the tribunal may decide.**
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> **8. The statute requires consideration of reinstatement first. Only if a decision not to make a reinstatement order is made, does the question of re-engagement arise. In making a reinstatement order the tribunal must take into account three factors under s.116(1) ERA: the complainant's wish to be reinstated; whether it is practicable for the employer to comply; and where the complainant caused or contributed to his dismissal whether it would be just to order his reinstatement.**

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> **9. Practicable in this context means more than merely possible but 'capable of being carried into effect with success': *Coleman v Magnet Joinery Ltd* [1974] IRLR 343 at 346 (Stephenson LJ).**
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> **10. Loss of the necessary mutual trust and confidence between employer and employee may render re-employment impracticable. For example, where there is a breakdown in trust between the parties and a genuine belief of misconduct by the employee on the part of the employer, reinstatement or re-engagement will rarely be practicable: see *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680 at [10] (Lord Johnston) in the context of misconduct involving drugs and clocking offences:**

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>> **'in this case it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations … when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist … can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee.'**

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> **11. Similarly in *ILEA v Gravett* [1988] IRLR 497 (albeit on very different facts) the EAT accepted that a genuine belief in the guilt of an employee of misconduct, even if there were no reasonable grounds for it, was a factor that had to be weighed properly in deciding whether to order re-engagement:**

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>> **'21. The tribunal ordered re-engagement and are criticised by the appellant employer for what they submit is a wholly perverse decision upon all the facts of this case. It is a possible view of that decision, but we do not seek nor do we need to go that far. An essential finding in the present case was that the authority had a genuine belief in the guilt of the applicant. It is said with accuracy that this is the largest education authority in the country and that it has a vast area to cover and a vast variety of posts into which the applicant could be fitted. It is, however, a common factor in any of those posts that the applicant would have the care and handling of young children of both sexes. Bearing in mind the duty of care imposed upon the authority and the very real risks should they depart from the highest standard of care, we take the view that this tribunal failed adequately to give weight to those factors in the balancing exercise carried out in order to reach their decision on re-engagement.'**

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> **12. So far as contributory conduct is concerned, this is relevant to whether it is just to make either order and in the case of a re-engagement order, on what terms. In cases where the contribution assessment is high, it may be necessary to consider whether the level of contribution is consistent with the employer being able genuinely to trust the employee again: *United Distillers & Vintners Ltd v Brown* UKEAT/1471/99, unreported, 27 April 2000 at paragraph14."**

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27. Although we have just cited passages from two cases in which different divisions of the EAT overturned ET orders for re-engagement, more generally we note as follows: (1) questions of practicability under section 116 are primarily for the ET and are likely to be difficult to challenge on appeal (see **Clancy v Cannock Chase Technical College** [2001] IRLR 331 EAT); and (2) ETs have a wide discretion in determining whether or not to order reinstatement or re-engagement; it is essentially a question of fact (see **Central & North West London NHS Foundation Trust v Abimbola** UKEAT/0542/08, at paragraph 15).

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Submissions

The Respondent's Case

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28. Addressing first the issues raised by the second ground of appeal, Mr Bourne contends that the ET's conclusions in its Liability Judgment could only support a finding of dishonesty. Accepting the ET had at the remedy stage expressly said it had not made such a finding in its Liability Judgment (see paragraph 14 of the Remedy Judgment) and that the Respondent could not point to an express finding of dishonesty in the first Judgment, the ET had nevertheless made findings from which dishonesty must be inferred. Contrary to the Claimant's case, the ET had found that she had administered medication without prescription. It had, further, found that she had told Dr Naqvi that the patients had been "*seen and sorted*", despite her knowledge that they did not want to see a doctor and had not done so. When the Claimant subsequently obtained Dr Naqvi's signatures on the prescriptions - after she had administered the medication, as the ET found - far from being confused she must have known she had acted in breach of the Policy and was seeking to rectify that or to conceal it. Having made those findings, it was inconsistent for the ET to speculate why the Claimant might have maintained her denial (paragraph 48, Remedy Judgment); it was either impermissibly revisiting earlier findings of fact

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or, by finding that the Claimant had not acted dishonestly, was reaching a conclusion that was irreconcilable with its earlier findings and thus properly to be described as perverse.

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29. Turning to the first ground of appeal, if the ET's finding of the absence of honesty could not stand, then the inevitable conclusion that the Claimant was dishonest needed to be weighed in the balance by the ET in considering practicability and/or the justice of a re-engagement order. The ET was required to consider whether the Respondent had reasonably believed that the Claimant had given one or more untruthful accounts of her actions on the night in question. In deciding that it had not discharged the burden of proving dishonesty, the ET was applying too high a test, requiring that the Respondent prove the Claimant had been dishonest rather than considering whether there was evidence on which the Respondent could reasonably conclude she had been. The evidence relied on by the Respondent was overwhelming: the Claimant's evidence at the investigation and disciplinary stages and also before the ET.

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30. The ET had been required to take into account its earlier findings as to why a reinstatement order was not practicable and its conclusion that the Claimant had contributed to her dismissal by a third. Properly applying **Manchester College v Huggins** UKEAT/0136/12 at paragraph 28, the ET should have held it was not proper to order re-engagement. Although the EAT in **Manchester College** had held it was not necessarily inconsistent or perverse to order re-engagement when an ET had declined to make a reinstatement order, that was a case where the Claimants had been utterly blameless. On any view, one third was a substantial degree of contribution; the ET had failed to explain why, despite this, it considered it just to depart from guidance provided in the authorities. Further, it was irrelevant to take account of the fact that the Claimant could have applied for nursing roles in another Trust; the issue was the Respondent's ability to trust her (see paragraph 27 of **Valencia**). It was equally irrelevant

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that the Claimant's colleagues had given her much support; they were not her employer, and there was no evidence that they knew she had given inconsistent accounts.

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31. That led into the third ground of appeal: even if the ET was entitled to conclude that the Claimant was not dishonest in the context of its findings on liability on the unfair dismissal claim, it had then to determine whether the Respondent's conclusion as to her dishonesty was one that a reasonable employer could have reached (see **Crossan** at paragraph 10). Accepting in that regard that there were two issues to be considered - (1) whether the Respondent had a reasonable belief that trust and confidence had broken down, and (2) whether it had a reasonable belief that trust and confidence was incapable of being cured - where the employer has reasonably concluded the employee was guilty, it was hard to see how an ET could order re-engagement. The question for the ET was not whether the Respondent *should* have trust and confidence but whether it *could* do so. It might be possible for a different employer to have that confidence, but that was not seeing this from the perspective of the Respondent.

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The Claimant's Case

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32. For the Claimant, Mr Ohringer reminds us that the Respondent had practically conceded that it would be practicable to re-engage the Claimant but argued that she had contributed to her dismissal and therefore that it was unjust to do so. Contrary to the Respondent's case on ground 1, the ET had been referred to the relevant statutory provisions and case law; this was really a perversity appeal. There was, however, a proper evidential basis for the ET's decision, not least as: (1) the Respondent had itself led evidence going to mitigation, displaying confidence in the Claimant's clinical ability outside the pressures of an A&E department; (2) it had not established that the Claimant was dishonest during the disciplinary process or the ET hearing (as the ET found, "*she struck me as a blunt and straightforward individual*", paragraph

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49); and (3) the ET did not accept the Respondent's inference that the Claimant's denial meant she was failing to show that she understood the seriousness of the issues. If the Respondent was now saying it should not re-engage the Claimant because of its continuing and entirely subjective distrust of her, despite the ET's findings to the contrary, that was an argument about practicability (see **Valencia** at paragraph 10), but the Respondent had conceded before the ET that it would be practicable to re-engage the Claimant. Further, or alternatively, the Respondent's unsupported and irrational assertion that it had lost trust and confidence in the Claimant did not make re-engagement unjust or impracticable, otherwise any opposed order for re-employment would automatically fail. It had to be for the ET, not the Respondent, to decide if an order was appropriate (see **Oasis Community Learning v Wolff** UKEAT/0364/12).

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33. Turning to the second ground of appeal, the ET made no findings of dishonesty in the Liability Judgment and expressly stated that it had not done so (see paragraph 14 of the Remedy Judgment); that had to be the end of that point.

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34. On the third ground, the test for the ET was to see whether the Claimant had been shown to be dishonest, and it had found that the Respondent had not established this. Whilst the question of the Respondent's own genuine belief could be a relevant factor, the test remained one of practicability. It was therefore not irrelevant for the ET to ask whether the Respondent had established that the Claimant was dishonest, albeit that was not the determining question, which remained that of practicability. The ET's Judgment showed a number of steps taken where it had rejected the Respondent's case on trust and confidence (in particular, see at paragraphs 11 and 18). If it had not fully shown how those findings had fed into its reasoning at paragraphs 48 and 49, that could be made good by a **Burns v Royal Mail Group plc** [2004]

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A ICR 1103 / **Barke v SEETEC Business Technology Centre Ltd** [2005] EWCA Civ 578 reference back to the same ET; alternatively, the matter should be remitted to the same ET.

The Respondent in Response

B 35. Mr Bourne objected to the suggestion that the issues of dishonesty had been put differently below and reminded us that the question of practicability had remained before the ET. On disposal, it was his submission that if the appeal was allowed then it should properly be C remitted to a different ET, if the EAT did not feel able to substitute its own conclusion.

Discussion and Conclusions

D 36. The statutory test laid down by section 116 **ERA** is one of practicability. In this case, the ET was at the first stage of the process involved in any re-employment order - the employer has a second chance to argue impracticability, under section 117(4) - and was thus required to E reach a provisional view as to practicability (per Baroness Hale in **McBride**). Practicability is more than what might simply be possible: the order has to be capable of being carried into effect with success (see the passage from **Coleman v Magnet** [1974] IRLR 343, cited at paragraph 9 of **Valencia** above).

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37. In the present case, having accepted the Respondent's argument as to the importance of maintaining respect for its Policy and thus not ordering reinstatement, the ET was concerned G with the other aspect of its objection, which went to the question of trust and confidence, an issue that can be relevant to the question of practicability even on a provisional view of that question. The Respondent was saying it had irretrievably lost trust and confidence in the H Claimant given: (1) her misconduct in administering mediation to four patients without prior prescription, as the ET had found was the case; and (2) her dishonesty in resisting admitting

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what she had done both in the internal process and before the ET. The Claimant had admitted her record keeping had been inadequate but not that she had administered the drugs without prescription; her case was that they had been prescribed by Dr Naqvi. The ET had found as a fact (it being required to do so for the wrongful dismissal case) that the Claimant was wrong about that: she had administered the drugs before Dr Naqvi had signed the prescriptions. It had, however, rejected the Respondent's case that it had reasonably concluded that the Claimant was dishonest given the inconsistency between her account in the investigation and the CAS cards. That said, the ET had not had to make a finding whether the Respondent had, on other grounds, formed a genuine and rational belief that the Claimant had been dishonest; that was the question it had to confront at the Remedy Hearing.

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38. Doing so, the ET observed that it had not made a finding of dishonesty in its Liability Judgment (see paragraph 14 of the Remedy Judgment). We agree; it had not been required to do so. It had neither made an express finding in that regard, nor, contrary to the Respondent's case on appeal, is such a finding necessarily to be inferred. Specifically, the ET had not upheld the Respondent's particular way of putting its concern about dishonesty at the dismissal decision stage, and had not accepted the rationale of the re-hearing panel that the Claimant's failure to admit her error meant the Respondent could not trust she appreciated the seriousness of what she had done.

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39. At the remedy stage, the ET further made the following observations:

> **"48. It is true that the dismissal panel concluded that the Claimant had been untruthful both to them and during the investigation, which they said meant that the employment relationship had broken down. That said, I note again that none of those panel members were [sic] present at any point so that their conclusions in this regard could be challenged or tested, for example against Mr Ohringer's counter-suggestions that the Claimant's account may well have been due to confusion in recalling events (as I indicated in the Liability Judgment I found it entirely unsurprising that she did not correctly recall the state of the patient records - the same may well have been the case in relation to the night's events generally) or, as I believe to be more likely, an internal difficulty in coming to terms with what had happened. It is also instructive in this regard to consider the conclusions of Ms White's panel which disregarded some of the key matters relied upon in the earlier hearings and considered evidence that they had not and**

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> **could therefore be said to have been the Respondent's most comprehensive and balanced consideration of the case. Their decision that to dismiss the Claimant was appropriate, having found that she had breached the Policy, was focussed in a rather different direction, namely their conclusion that she did not acknowledge her errors such that she had not recognised the seriousness of her actions. Had she acknowledged her errors, they said, dismissal may not have resulted. In terms of the possibility of continued employment therefore, the focus of this panel was on ensuring that what had happened would not be repeated."**

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It asked itself (paragraph 49) whether the Respondent had "*established its serious charge that the Claimant was dishonest*", then stated its own conclusion: the Respondent had not discharged that burden because the ET itself considered the Claimant to be "*blunt and straightforward*" and - on its own assessment of her experience, record and professional commitment - concluded she could be trusted in a different environment to A&E.

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40. That, however, was not the correct question for the ET. As the case law makes clear (see **Crossan** at paragraph 10, cited above), it had to ask whether this employer genuinely believed that the Claimant had been dishonest, and - per the EAT at paragraph 14 of **United Distillers v Brown**, see above - whether that belief had a rational basis. It was, after all, *this* employer - not some other and certainly not the ET - that was to re-engage the Claimant. The issue of trust and confidence had to be tested as between the parties in order to determine, even on a provisional basis, whether an order for re-engagement was practicable, whether it was capable of being carried into effect with success, whether it could work. The Respondent might have reached a conclusion as to the Claimant's honesty by an impermissible route in its dismissal decision and might also have drawn the wrong inference at the re-hearing, but the ET still needed to ask, as at the date it was considering whether to order re-engagement, whether it was practicable or just to order *this* employer to re-engage the Claimant. It thus was the Respondent's view of trust and confidence - appropriately tested by the ET as to whether it was genuine and founded on a rational basis - that mattered, not the ET's.

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41. We make clear that we are not saying that we find that a re-engagement order was not a permissible remedy in this case. The answer did not have to be in the negative simply because the ET had found that a fundamental part of the substantive charge against the Claimant had been made good or because it had concluded that her compensation should be reduced by a third, given her contributory conduct, or because it had refused to order reinstatement. These were all relevant considerations but were not necessarily determinative and we would not have allowed the appeal simply on those bases. In particular, we observe that stating the bare facts of a case can seem to suggest a particular answer, but the assessment of practicability for the purpose of a re-engagement order requires a far more nuanced consideration of the position; something that an ET is very much best placed to undertake. In this case the assessment undoubtedly included the Claimant's long experience, her past good record and professional commitment; all matters that permissibly weighed with the ET. We equally do not say that the ET was wrong to have regard to evidence of references from other employees: we can see why an ET might not consider such evidence to be relevant, and we do not consider these were given great weight in the present case, but it is all a matter of assessment for the ET.

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42. What we consider the ET did have to do was to consider, as at that point in time, whether the Respondent had made good that which it said made it impracticable or unjust to order re-engagement; that it could no longer have trust and confidence in the Claimant. Given the ET had found that the Claimant had committed the act of misconduct in question, that might not seem to have been an obviously irrational position, but, as Mr Bourne accepted in oral argument, it was not the only question. The ET also needed to consider whether the Respondent had made good its case that trust and confidence could not be repaired, whether its belief in her dishonesty was such that a re-engagement order was unlikely to be carried into effect with success. The ET was thus entitled to scrutinise whether the Respondent's stated

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belief was genuinely and rationally held, tested against the other factors the ET considered relevant. It was, however, still a question to be tested from the perspective of the Respondent, not that of another employer, still less that of the ET: was it practicable to order *this* employer to re-engage *this* Claimant? And, unfortunately, we do not feel able to conclude this was the approach adopted by the ET. We consider that paragraphs 48 and 49, in particular, set out the conclusions reached by the ET itself, standing in the shoes of the employer, testing the question of practicability from the ET's perspective rather than asking what was practicable as between these parties, the parties to the re-engagement order it was considering making. That being so, we consider we are bound to allow this appeal and set aside the Order.

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43. For the reasons we have explained, however, we do so because we are not satisfied that the ET approached its task from the correct perspective, not because we conclude that its decision was necessarily perverse. We do not, therefore, consider this is a case where we can substitute our own conclusion: it remains a matter for the ET, more than one conclusion is possible. Having heard from both parties on the question of disposal and bearing in mind the guidance provided in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT, we consider the appropriate course is to remit this matter to the same ET. This is an ET that has been charged with determining the issues in this case over a period of time, both at the liability and remedy stages. Save for the issue of re-engagement, no challenge has been made to its conclusions, and we give credit to the ET for its careful work in this case: whilst we have criticised its approach on the re-engagement order, this is not a Judgment that was fundamentally flawed. Moreover, it is plainly proportionate to remit a case of this nature to the same ET, which is familiar with it and is responsible for the primary findings of fact already made. For completeness, we have also considered whether we could, as Mr Ohringer suggested, remit this matter to the ET under the **Burns**/**Barke** procedure but we do not consider

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A this would correctly represent the Judgment we have reached. It is not a matter of asking the ET to make good aspects of its reasoning; we have identified a point on which it has approached its task from the wrong perspective, and we are asking it to undertake that

B assessment anew, guided by this Judgment. We therefore allow the appeal and direct that this matter is remitted, assuming that it is still practicable, to the same ET for re-hearing on the question of re-engagement.

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Costs

44. Having given our Judgment in this matter the Respondent has applied for its costs in terms of its fees incurred in pursuing this appeal, in the sum of £1,600, an application made

D under Rule 34A(2)(a) of the **Employment Appeal Tribunal Rules 1993** (as amended). The Claimant resists that application. It is observed on her behalf that the EAT has a wide discretion in this regard, there is no automatic assumption that such an order should be made

E and, more specifically, there could be no assumption that the Respondent will succeed on the matter at the heart of this appeal when it returns to the ET. Having considered the application and submissions made to us, we grant the Respondent its costs, limited to £1,600, to be paid - consistent with the undertaking that Mr Bourne has given - only at such time as the Respondent

F pays the Claimant's fees in the underlying ET proceedings. Our reasoning is as follows. The Respondent has been successful, at least in part, on its appeal. That being so, our jurisdiction under Rule 34A(2)(a) is engaged. Whilst it might be that the ET at the remitted consideration

G of this matter makes the same decision, the fact is that the Respondent has had to pay these fees in order to appeal so as to get the ET to approach its task on what we have said would be the correct basis. It has not been suggested to us that those acting for the Claimant suggested any

H alternative course that might have avoided the Respondent incurring any part of the fees. That

being so, the approach will generally be that a successful Appellant will be entitled to recover its fees from the party who resisted the appeal and we allow the application in this case.