Appeal No. UKEAT/0052/15/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 June 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR P M HUNTER

MR M SIBBALD

NOW MOTOR RETAILING LTD APPELLANT

MR E MULVIHILL RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GRAHAM WATSON (of Counsel) Instructed by: MILS Solicitors Canonteign House Lower Ashton Nr Exeter Devon EX6 7RH
For the Respondent	MR SIMON PARKES (Solicitor) Taylor Rose Law LLP Northminster House Northminster Peterborough PE1 1YN

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal

CONTRACT OF EMPLOYMENT - Wrongful dismissal

The Employment Tribunal did not apply section 98(4) correctly. It stated its own views without recognising or considering that there was a range of reasonable responses in respect of the matters in issue and deciding whether the employer's actions and opinions fell within the range. It decided the wrongful dismissal claim without any real separate reasoning as if it followed from the unfair dismissal claim. Appeal allowed. Case remitted for re-hearing afresh before a different Tribunal.

HIS HONOUR JUDGE DAVID RICHARDSON

1. By a Judgment dated 16 July 2014 the Employment Tribunal, sitting in London South (Employment Judge Silverman presiding), upheld claims of unfair dismissal and wrongful dismissal brought by Mr Eamonn Mulvihill ("the Claimant") against Now Motor Retailing Ltd, ("the Respondent"). The Respondent appeals against that Judgment.

2. The appeal came before Langstaff P under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**. He sent it through to a Full Hearing and directed that the hearing be undertaken by a constitution of Judge and lay members because it raised questions as to what might be acceptable practice given the size and administrative resources of the Respondent's business.

3. In order to understand the grounds of appeal it is necessary to set out the background facts in rather more detail than usual. We will then turn to the Employment Tribunal's Reasons and the submissions of the parties.

The Background Facts

4. The Respondent carries on business in the retailing, servicing, repair and MOT testing of motor vehicles. We are told that it has some 236 employees in a number of branches. The Claimant was employed by the Respondent as an MOT tester and service technician at the Respondent's Richmond branch. He had two final written warnings, one in 2007, another in 2012. Both had expired prior to the events with which this case is concerned.

5. The Respondent had a written alcohol and drugs policy. It forbade the consumption of alcohol at any time during the working day. The policy said in capital letters and bold type, "THIS INCLUDES LUNCH TIME". It warned that any employee found to be under the influence of alcohol would be considered to have committed an act of gross misconduct. It said that "Under the influence of alcohol" was defined as "the smell of alcohol on an employee's breath as witnessed by any member of staff or any line manager". The Claimant signed this policy in 2009.

6. On 5 October 2013 the Claimant lodged a grievance with the Respondent. Although the Employment Tribunal made no findings about it, it is common ground that the grievance primarily related to alleged treatment by Mr Shaw, the Service Manager, and the allocation of work within the branch. The grievance was investigated by the Respondent's Mr Taylor. It was rejected. During the course of the grievance Mr Taylor heard allegations about the Claimant relating to the consumption of alcohol and the way in which the Claimant treated colleagues at work. On 8 November the Claimant was suspended.

7. Following the Claimant's suspension the Respondent took statements from several employees. Five of those statements were shown to the Claimant in an anonymised form. There were two others, one of which was not shown to the Claimant. We will summarise them.

8. Statement number 1 described the Claimant as "derogatory, rude and inconsiderate", particularly saying that he was "rather aggressive and rude" to Mr Meacock, the Parts Sales Advisor. For the most part the statement complained about the Claimant taking the cream jobs at the branch and avoiding the less attractive jobs. At its conclusion it said the following:

> **"Since I started, I have noticed that [Eamonn] is typically rude and abrasive in the mornings, following on from lunch when I believe he never stays on site, he returns singing and much**

happier on the whole. When talking to him closely, he smells of alcohol. I believe he goes to The Crown pub."

9. Statement number 2 also said that the Claimant was "consistently rude to members of staff". It said he shouted loudly "Parts" to get Mr Meacock's attention. Again, for the most part the statement complained about the Claimant's selfishness at work. However, the statement also said:

> **"A major problem with his poor workmanship and cause of his mistakes is his drinking within his lunch break. It is common knowledge within the workshop that Eamonn goes to the pub most days. He will come back to work smelling of alcohol which I have personally witnessed a number of times whilst talking to him."**

10. Statement number 3 confirmed that the Claimant made sarcastic remarks in the workshop and was abusive to Mr Meacock. It did not say that the writer had smelled alcohol on the breath of the Claimant. It did, however, say:

> **"… I and all the staff have noticed he is more aggressive after lunch!! I'm sure he visits the pub most lunch times."**

11. Statement number 4 was quite short. It said that the Claimant's behaviour in and around the workshop was inappropriate and demoralising. It too said that the Claimant would yell Mr Meacock's name and behave rudely towards him. It said:

> **"Often after lunch Eamonn will smell of alcohol as I believe he spends his lunch hour at the pub. This will usually end with Eamonn becoming argumentative with staff. …"**

12. A fifth statement said that the author had been made unhappy by comments from the Claimant about his family and difficulties concerning his divorce. This statement did not say anything about alcohol.

13. Mr Shaw also made a statement. His statement was signed and dated. He described the meeting at which the Claimant had objected to jobs being shared out in a fairer way. He said

the Claimant had refused to take part in a team meal and described his colleagues as "cunts", but he did not suggest that he had noticed the Claimant smelling of alcohol at work.

14. There was also a statement from Mr Chantler, the Area Service Manager. This was given on 7 November. He said that on that day he saw the Claimant's car parked outside the Crown public house at lunchtime. He went in. He saw the Claimant sat at the bar facing another man. There were two pint glasses on the bar, one next to each person containing what appeared to lager or cider in colour, both around half full. He walked past them and went out through the other end of the bar. Mr Chantler took no steps on that day to prevent the Claimant working; but the Claimant was suspended on the following day.

15. The Respondent sent the Claimant these statements in advance of the disciplinary hearing. There was one statement which they did not send. This was Mr Meacock's statement. That indeed said that the Claimant had been constantly aggressive over a significant period of time, shouting for his attention when serving customers and often singling him, Mr Meacock, out for bullying. The statement said that the Claimant knows where he lives and that he fears repercussions for having mentioned this matter by reason of the Claimant having spoken about grudges against people at his previous employment.

16. The Claimant prepared a detailed written response to the statements he had received. He pointed out that Mr Chantler did not see him drinking. He denied that the glasses seen by Mr Chantler were his. He said that a variety of drinks appear to look like lager or cider. He went through individual statements, pointing out inconsistencies in them and answering the criticisms. He pointed out that, as he believed, Mr Meacock had not accused him of bullying

and had not made a statement. He suggested that the team had been drinking on the premises on their last night out.

17. The Claimant's disciplinary hearing took place on 28 November 2013 before Mr McKenna. The Claimant handed in his statement. He was particularly asked about the alcohol allegations. He accepted that he went to the Crown public house sometimes at lunchtime. He denied drinking alcohol or that his breath smelled of alcohol. He denied bullying or rudeness to colleagues. He said that he knew "near enough" from whom all the statements came.

18. By letter dated 2 December the Respondent dismissed the Claimant. Mr McKenna found the allegations of alcohol consumption and bullying proved and found that each individually amounted to gross misconduct. He said, on the alcohol issue:

> **"… I find that with 4 statements from various members of staff confirming that they smelt alcohol on your breath after lunch breaks and your own admission that you do go to the Crown Public House in your lunch times; on the balance of probabilities I believe you have consumed alcohol regularly at lunch times and then worked under the influence of alcohol. …"**

The Employment Tribunal Hearing and Reasons

19. The Employment Tribunal took place on 2 and 3 June 2014. Both parties were legally represented. The Respondent called as witnesses Mr McKenna, who conducted the disciplinary hearing; Mr Taylor, who had investigated; Mr Shaw, who was the line manager; and Mr Royal, who dealt with the appeal.

20. It was the Respondent's evidence that employees at the branch felt intimidated by the Claimant and that Mr Meacock did not want his statement to be used at all, being genuinely in fear of reprisals from the Claimant. Mr McKenna said he would have come to the same decision whether Mr Meacock's statement had been revealed. He said he would have

dismissed for the drinking allegation alone. He felt the Claimant gave unconvincing and confused evidence.

21. The Employment Tribunal's summary of the background was quite brief. On the question of unfair dismissal its summary of the law was also quite brief. It said that in relation to conduct dismissals the Respondent must establish the fact of its belief in the Claimant's misconduct, having reasonable grounds for believing in the misconduct based on a reasonable investigation.

22. The Employment Tribunal found that the Respondent's investigation and conclusions were flawed. The following paragraphs set out the Employment Tribunal's reasoning:

> **"25. The Tribunal finds that the Respondent's investigation into the Claimant's alleged misconduct and conclusions drawn from that investigation were flawed in that no written record was made by the investigation officer of the results of the investigation, no interviews were conducted with two workers whose work stations were adjacent to that of the Claimant and whose evidence might therefore have been relevant, and no interview took place with the Claimant himself.**
>
> **26. None of the statements which were taken during the investigation say that the Claimant was seen drinking on any occasion and none gives any specific day or dates on which the Claimant was said to have been observed at work under the influence of alcohol. In fact the issues of alcohol seems to have been dealt with only as an afterthought or side issue in two of the statements, references to it being confined to one small paragraph at the end of the statements.**
>
> **27. The Claimant was not shown or given a copy of one of the statements taken during the investigatory process and so had no means of challenging its contents despite the fact that the disciplinary officer did see and did rely on that statement in reaching his decision to dismiss the Claimant.**
>
> **28. None of the witnesses who had given statements were called to the disciplinary hearing and the copies of their statements were given to the Claimant anonymously so that the Claimant had no means of challenging the contents of those statements."**

23. The Employment Tribunal dealt with the allegation of bullying in paragraph 29 and returned to this allegation in paragraph 31. It will suffice to set out paragraph 29:

> **"29. Some of the witness statements which were used as evidence against the Claimant alleged he was guilty of poor workmanship. This was not the subject of a charge against him. Apart from the witness statement which was withheld from the Claimant, the only allegation in the other statements which could substantiate the allegation of bullying was that the Claimant raised his voice in asking for parts. That does not of itself constitute bullying and the Tribunal chooses to accept the Claimant's explanation that in a noisy workshop raising one's voice is sometimes the only way of being heard."**

24. In paragraph 30 the Employment Tribunal set out that the dismissal letter contained a "complete non-sequitur" in relation to Mr McKenna's conclusions on the alcohol charge. Otherwise the Employment Tribunal did not specifically deal with the alcohol charge. The following conclusions by the Employment Tribunal are, however, potentially relevant. Firstly, it noted in paragraph 31 that none of the Claimant's colleagues on the workshop floor had made any complaints about his drinking, workmanship or behaviour until they were approached by management after the Claimant had himself lodged a grievance. Secondly, it said:

> **"32. The Tribunal concludes that the Respondent sought to investigate a matter about which they has [sic] no complaint prior to the Claimant raising a grievance. Their investigation into the allegations was flawed for the reasons specified above (paragraph 20) with the result that they can have had no basis for their honest belief in the Claimant's guilt. The disciplinary process and decision to dismiss were similarly based on the same false premise."**

Finally, it said:

> **"34. Although the Respondent appears to have attempted to follow their own procedures (which are in compliance with the ACAS Code) their execution of the disciplinary process was badly flawed. Had they carried out those procedures diligently, in particular the investigation process, they would have discovered the unreliability of the allegations made against the Claimant and it is unlikely that disciplinary proceedings would have ensued or, if they had done so, unlikely that they would have resulted in a finding of gross misconduct attracting a penalty of dismissal. We do not therefore consider that either a Polkey reduction or contribution for fault it appropriate in these circumstances."**

25. The Employment Tribunal dealt with wrongful dismissal in the following manner:

> **"35. The Claimant's claim for breach of contract can only succeed if the Respondent wrongly dismissed him without notice. The Claimant was wrongly summarily dismissed for gross misconduct and is therefore entitled to be paid for a period of notice. This claim therefore succeeds as does the Claimant's claim for unfair dismissal but the Tribunal does not find his claim of automatic unfair dismissal to be substantiated."**

Submissions

26. On behalf of the Respondent Mr Graham Watson submits that the Employment Tribunal failed to apply section 98(4) of the **Employment Rights Act 1996** correctly, substituting its own judgment for that of the Respondent rather than asking whether the Respondent had acted reasonably. Mr Watson submitted that this was demonstrated by the Employment Tribunal's criticisms of the Respondent's investigation. The Employment Tribunal criticised the

Respondent for not making a written investigation whereas seven witness statements were taken. The Employment Tribunal criticised the Respondent for not interviewing the Claimant at the investigatory stage when the **ACAS Code of Practice** does not make such an interview mandatory. The Employment Tribunal criticised the Respondent for using anonymised statements and for withholding Mr Meacock's statement when these courses may be justified (see **Hussain v Elonex plc** [1999] IRLR 420 and **Asda Stores Ltd v Thomson & Ors** [2002] IRLR 245). He supports this submission also by reference to specific aspects of the Employment Tribunal's reasoning: specifically the finding that the evidence against the Respondent was unreliable and the Employment Tribunal deciding that it would "choose to accept the Claimant's explanation". The Employment Tribunal, he submitted, should have asked whether the Respondent was reasonable in its findings. It should not have criticised the Respondent for taking into account an expired written warning without considering whether it was within the range of reasonable responses to do so. Mr Watson submitted in the alternative that the Employment Tribunal's decision was perverse, both in the respects which we have identified and overall.

27. On behalf of the Claimant Mr Simon Parkes submits that the Employment Tribunal was not guilty of a substitutionary mindset. It was its task to review the investigation and decide whether it was reasonable. The Employment Tribunal was entitled to find the investigation unreasonable and this involved no error of law. If the investigation was unreasonable, the Employment Tribunal was entitled to find that the Respondent had no proper basis for concluding that the Claimant was guilty of misconduct.

28. Mr Parkes submitted that the Employment Tribunal did not reach its own conclusion about the evidence. In context the reference to the evidence against the Respondent being

unreliable was a reference to the flimsiness of the evidence. Mr Parkes emphasised that prior to the Claimant's suspension no concern had been raised relating to the Claimant working with alcohol on his breath. Mr Parkes took us through the findings which Mr Watson criticised, submitting that they were not perverse. He emphasised the high hurdle presented by the test for perversity. See **Yeboah v Crofton** [2002] IRLR 634.

Statutory Provisions

29. Section 98(1) of the **Employment Rights Act 1996** provides that it is for the employer to establish the principal reason for dismissal. Section 98(2) identifies conduct as a potentially fair reason. Section 98(4) provides that, where the employer has fulfilled the requirements of section 98(1):

> **"(4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

Discussion and Conclusions

30. It is important to keep in mind the different roles of the Employment Tribunal and the Employment Appeal Tribunal. It is the task of the Employment Tribunal to apply section 98(4). It must apply the objective standard of the reasonable employer to all aspects of the dismissal: investigation, process, fact-finding and sanction. It must recognise that in many cases (though not necessarily all) there may be a band or range of ways in which a reasonable employer may act.

31. There is an appeal to the Employment Appeal Tribunal only on a question of law. In the context of appeals concerning section 98(4) of the **Employment Rights Act 1996** the Appeal

Tribunal must itself be cautious of substituting its own opinion for that of the Tribunal. The Court of Appeal has emphasised this latter point in a number of cases. In **Fuller v London Borough of Brent** [2011] IRLR 414 at paragraphs 28 to 31 Mummery LJ summarised the position as follows:

> **"28. Unfair dismissal appeals to this court on the ground that the ET has not correctly applied s.98(4) can be quite unpredictable. The application of the objective test to the dismissal reduces the scope for divergent views, but does not eliminate the possibility of differing outcomes at different levels of decision. Sometimes there are even divergent views amongst EAT members and the members in the constitutions of this court.**
>
> **29. The appellate body, whether the EAT or this court, must be on its guard against making the very same legal error as the ET stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the ET without committing an error of law or reaching a perverse decision on that point.**
>
> **30. Other danger zones are present in most appeals against ET decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.**
>
> **31. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the ET, but then overlooked or misapplied at the point of decision. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

32. What is involved in a careful reading of the Employment Tribunal's Reasons to see if it has properly applied the law? There tend, in our experience, to be two features which may contribute to a conclusion that the Employment Tribunal has not applied the section 98(4) test. Firstly, there may be signs which indicate that the Employment Tribunal has, in effect, made and proceeded from its own findings of fact, when it should have started with the employer's findings and asked whether those findings were reasonable. Secondly, there may be signs that the Employment Tribunal's criticisms of an employer apply an extremely high standard without recognising that there is a range of acceptable ways of investigating and deciding a disciplinary matter. Even if these signs appear to be present, the decision must still be read in the round in order to decide whether it is really vitiated by error.

33. We have reached the conclusion that there are indeed features in the Employment Tribunal's Reasons which demonstrate that it has not applied the section 98(4) test. We begin with the question of process. The Employment Tribunal had four main criticisms of the investigatory and disciplinary process. We will take them in turn.

34. (1) The Employment Tribunal's first criticism was that no written record was made by the investigator of the results of the investigation. We have found this criticism difficult to understand. Seven witness statements were taken during the course of the investigation. The criticism must presumably be that some running record should have been kept of what the investigator did over and above a record of the evidence he obtained or else that an investigation report should have been produced. In our experience that is to apply an extremely high standard. An experienced investigator in a very large organisation may perhaps keep such a record or produce such a report, particularly in a serious case, but it is not general practice to do so.

35. It is relevant to take into account the **ACAS Code**, the provisions of which have statutory force (see section 207(2) of the **Trade Union Labour Relations (Consolidation) Act 1992**). The relevant code, **Code of Practice 1 2009**, does not in its body say that a written record of investigation is required but the foreword says that:

> **"Employers would be well advised to keep a written record of any disciplinary or grievance cases they deal with."**

36. There is also an ACAS Guide on **Discipline and Grievances at Work**. This suggests that records should include the following: the complaint against the employee; the employee's defence; findings made and action taken; the reason for actions taken; whether an appeal was

lodged; the outcome of the appeal; any grievance raised during the disciplinary procedure; subsequent developments; notes of any formal meetings.

37. This Guidance seems to us to state general practice, to which we would add that an employer is generally expected to keep a written record of what is said by any employee whose evidence is relied on in support of a disciplinary allegation. Usually (as here) it will be in statement form.

38. The Respondent appears to us to have complied with good practice as indicated by the Guide in the recording of the investigation. In particular statements were reduced to writing. We do not think the Respondent was required by general standards of good practice to have kept an investigation log or to have produced an investigation report, though this may be done by an experienced investigator in a large organisation. In our view the Employment Tribunal appears to have applied a very high standard. It does not appear in its Reasons to have considered whether there was a range of acceptable ways in which an investigation could be carried out. That was the task which it was required to perform by section 98(4).

39. (2) The Employment Tribunal's second criticism of process was that there were no interviews with two workers whose workstations were adjacent to the Claimant. Nor was there an interview with the Claimant himself. So far as the interview with workers is concerned, this appears to us to be a fair criticism. We can see that an Employment Tribunal, applying the correct test, could well find that the Respondent's investigation fell below a reasonable standard in failing to interview such workers. So far as a failure to interview the Claimant is concerned, the **ACAS Code** does not mandate such an interview and there is, in our experience, a range of

practice. The Employment Tribunal has not, as it should have done under section 98(4), considered whether the procedure adopted in this case fell within the range of such practice.

40. (3) The Employment Tribunal's third criticism was that the Claimant was not shown Mr Meacock's statement. The Employment Tribunal seems to proceed on the basis that this must be unreasonable and unfair. It is, however, not necessarily so. The **Code** says that statements should "normally" provide copies of any written evidence (paragraph 9). The Guide says that in certain circumstances, for example to protect a witness, the employer might withhold some information. So, applying section 98(4), there may be circumstances in which it is reasonable to withhold a particular statement so long as the employee knows the case he has to meet - see **Hussain v Elonex**. In this case the Respondent gave in evidence a specific explanation for deciding to withhold Mr Meacock's statement. The Employment Tribunal's task was to evaluate, pursuant to section 98(4), whether the Respondent's course of action fell within the range of reasonable responses. There is no recognition of that task in its Reasons.

41. (4) The Employment Tribunal's fourth criticism was that statements were given to the Claimant anonymously. Again the Employment Tribunal seems to proceed on the basis that anonymise witness statements must be unreasonable and unfair. Again, it is not necessarily so. See **Linfood Cash and Carry v Thomson** [1989] IRLR 235 and **Asda Stores v Thomson**. Again, the Respondent gave its explanation for anonymising statements. The Employment Tribunal has not mentioned it or evaluated it against the standard laid down by section 98(4). There is a further point concerning these statements. The Employment Tribunal said that "the Claimant had no means of challenging the content of those statements." This conclusion by the Employment Tribunal appears to us to be without foundation. The Claimant could and did

challenge the content of the statements, in particular in the quite lengthy written reply which he produced before the disciplinary hearing.

42. We have therefore concluded that the Employment Tribunal has not applied the section 98(4) test in its criticisms of the disciplinary process. It has largely relied on these criticisms in reaching its conclusion that the dismissal was unfair.

43. We turn then to consider the Employment Tribunal's reasoning concerning the substantive allegations of bullying and consumption of alcohol. Part of the Respondent's case related to the Claimant's treatment of Mr Meacock. All the witnesses said that the Claimant treated him poorly and shouted at him. The Employment Tribunal said that this did not itself constitute bullying and that the Tribunal chose:

> **"… to accept the Claimant's explanation that in a noisy workshop raising one's voice is sometimes the only way of being heard."**

44. But this was not the correct approach. The statements taken by the Respondent did not accept that it was appropriate for the Claimant to shout at Mr Meacock. The correct approach for the Employment Tribunal was to find what the Respondent's conclusion was on this matter and why and then to ask whether the Respondent's conclusion was reasonable.

45. On the question of alcohol consumption it is difficult to see how the Employment Tribunal reasoned at all. The Respondent had witness statements attesting to the Claimant's visits to the public house and alcohol consumption, in particular three witnesses who stated expressly that he smelled of alcohol after lunch. One would expect to find in the Employment Tribunal's Reasons consideration of the question whether it was reasonable for the Respondent to consider these statements honest and reliable and to accept them. This reasoning is not

present. The Employment Tribunal appears to rely on its criticisms of the flawed investigation alone.

46. In paragraph 34 of the Employment Tribunal's Reasons it said that if the Respondent had carried out its procedures diligently it would have discovered "the unreliability of the allegations made against the Claimant". Mr Watson criticises this finding as indicative of a substitutionary mindset and perverse. If it was intended by the Employment Tribunal to found part of its reasoning for the finding of unfair dismissal, this remark would indeed have been indicative of a substitutionary mindset. However, paragraph 34 appears to us to be dealing with issues of **Polkey** and contributory fault. We must confess that it is not easy to understand how the Employment Tribunal so discounted the witness statements of the Respondent's witnesses that it made no finding at all under the **Polkey** doctrine; but that is not an issue for us today.

47. Standing back, we consider that the Employment Tribunal, while correctly stating that it must apply the standard of the reasonable employer, did not do so in respect of its criticisms of the Respondent's disciplinary process. Some of its criticisms are, to our mind, insupportable and some demonstrate no recognition of a "range of reasonable responses" test. Moreover, insofar as it stated any conclusions on the question whether the Respondent had a reasonable belief in the Claimant's misconduct, it started from its own view of the facts.

48. The Employment Tribunal's reasoning in relation to the breach of contract claim for wrongful dismissal is extremely brief. It stated a conclusion with no reasons at all. It seems to have thought that its conclusion on wrongful dismissal was bound up with the unfair dismissal decision. In our judgment the wrongful dismissal claim must also fall with the unfair dismissal claim in the circumstances of this case.

49. It follows that the appeal must be allowed. This is not a case where the Employment Appeal Tribunal can substitute a conclusion of its own. The matter will be remitted for re-hearing before a freshly constituted Employment Tribunal. This should hear the matter entirely afresh, reaching its own conclusions on the question of unfair dismissal, **Polkey**, contributory fault, and wrongful dismissal.