Appeal No. UKEAT/0352/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 & 17 February 2015
Judgment handed down on 4 September 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MR I R RAMPHAL — APPELLANT

DEPARTMENT FOR TRANSPORT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PIERS VON BERG (of Counsel) Instructed by: H Batra & Co Solicitors Limited 83 Baker Street London W1U 6AG
For the Respondent	MR DAVID MITCHELL (of Counsel) Instructed by: Treasury Solicitor's Department Employment Group E1 One Kemble Street London WC2B 4TS

SUMMARY

UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal

The Claimant was employed by the Respondent as an Aviation Security Compliance Inspector.

The Respondent launched an investigation into possible misconduct by the Claimant in relation to his expenses and use of hire cars.

Mr Goodchild, a manager was appointed to conduct the investigation and act as dismissing officer if necessary. Mr Goodchild was inexperienced in disciplinary proceedings and during the course of preparing his report and decision received advice from the Respondent's Human Resources Department. The advice he was given was not limited to matters of law and procedure, and level of appropriate sanctions with a view to achieving consistency. The advice extended to issues of the Claimant's credibility and level of culpability. Mr Goodchild's first draft report contained a number of favourable findings so far as concerned the Claimant. For example, he found that the Claimant's misuse was not deliberate; there was no compelling evidence that the Claimant's actions were deliberate; he found that explanations given by the Claimant for expenditure on petrol were "plausible" and that he had made a persuasive argument in relation to his fuel expenditure and offered a compelling and plausible justification for fuel use being significantly in excess of that expected by the line manager. He concluded: he was minded to find the Claimant:

> **"guilty of misconduct rather than gross misconduct and that he should be given a final written warning as to his future conduct. …"**

After communications between Mr Goodchild and Human Resources, Mr Goodchild's position as evidenced by further drafts became more critical of the Claimant. Favourable and exculpatory findings were removed and in the eventual final report Mr Goodchild wrote that:

> **"Having given careful consideration to all the facts of the case, I am minded to conclude that, on the balance of probability, the claimant is guilty of gross misconduct in respect of both the misuse of the Corporate card and the misuse of hire cars funded by the Respondent. My recommendation is that he should be dismissed from his post."**

The recommendation was subsequently changed to one of summary dismissal which was effected. No new evidence came to light after the initial report and the Employment Judge failed to explain what it was that persuaded Mr Goodchild to change his views so radically. Human Resources appear to have sought to persuade Mr Goodchild to take a more critical view of the Claimant's conduct and to reject his explanations for certain expenditure that the Claimant had maintained was the result of mistakes by him as Mr Goodchild originally appears to have accepted. There was an inference that Mr Goodchild had been inappropriately lobbied by Human Resources and the Employment Judge had not given sufficient consideration as to what had led to Mr Goodchild's change of heart.

Although a dismissing or investigating officer is entitled to seek guidance from Human Resources or others, such advice should be limited to matters of law and procedure and to ensuring that all necessary matters have been addressed and achieve clarity. **Chhabra v West London Mental Health NHS Trust** [2014] ICR 194 applied.

A Claimant facing disciplinary charges and a dismissal procedure is entitled to expect that the decision will be taken by the appropriate officer, without having been lobbied by other parties as to the findings he should make as to culpability, and that he should be given notice of any changes in the case he has to meet so that he can deal with them.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is the appeal of the Claimant from a Decision of the Employment Tribunal at London (Central), 30 April 2014, presided over by Employment Judge Etherington, who sat alone. He dismissed the Claimant's claim for unfair dismissal. The appeal was referred to a Full Hearing by Mr Recorder Luba QC on 28 August 2014 (order dated 9 October 2014). He suggested that the parties should consider mediation through ACAS but the Respondent declined to agree, insisting it intended to contest the appeal. In an email dated 3 November 2014 to the EAT, the Respondent's solicitor wrote that the Respondent was not interested in settlement and would "fight" the appeal.

2. The principal point in the case, as will shortly be explained, related to the intervention by the Respondent's Human Resources Department in the decision taken by a manager to dismiss the Claimant. Mr Recorder Luba considered there was a real prospect of demonstrating on appeal that the Employment Judge had adopted an impermissibly generous approach to Human Resources' intervention, in light of the decision of the Supreme Court in **Chhabra v West London Mental Health NHS Trust** [2014] ICR 194. I shall come to this decision later in the Judgment.

Persons Involved

3. (i) Mr David Goodchild, Head of Land Security Compliance. Mr Goodchild was the Investigating Officer, who not only investigated but was also the Dismissing Officer, who determined the complaint against the Claimant and took the decision that he should be dismissed.

(ii) Mr Leslie Batten, the head of the Respondent's Human Resources Department.

(iii) Mr Christian Whitley, a senior Inspector and the Claimant's line manager.

(iv) Mr Paul McCorry, a Human Resources Officer.

The Factual Background

4. I have taken the factual background largely from the Decision of the Employment Tribunal and the documents in my bundle. There have been some inadequacies in the disclosure on the part of the Respondent, and the Claimant has had occasion to raise this on a number of occasions. Various documents were produced during the hearing. There is an absence of documents explaining advice given to Mr Goodchild by Human Resources and what caused a dramatic shift in Mr Goodchild's views about the culpability of the Claimant and the sanction that might be imposed. There has been inappropriate redaction of documents and unjustified claims for legal professional privilege. The matter has been mentioned by Mr Von Berg, but I have not really been addressed on the point in any detail although I did order certain documents to be produced in unredacted form. After I raised some queries on Day 1 the Respondent reviewed all redacted documents and served an unredacted copy of one document, as the original redaction was made in error. It also disclosed two further documents, neither of which added anything to the material before me. In any event I am satisfied that any omissions or unnecessary redactions were not the result of any improper attempt at concealment of evidence.

5. I start by making reference to the disciplinary procedure set out in the Respondent's staff handbook. The first step relates to an investigation which should be conducted by a person not involved in the incident. In relation to any formal disciplinary hearing, the

employee is to be sent copies of the investigation report and supporting material and any other material upon which the manager would rely at the hearing prior to the hearing.

6. The staff handbook advises how any hearing is to be conducted and that cases should be decided on the balance of probability, which is explained. The guide makes clear that a finding of gross misconduct would usually carry the penalty of dismissal, although the manager in exceptional circumstances might impose a lesser penalty. "Gross misconduct" is explained as being misconduct which is serious enough to overturn the contract between the employer and the employee, thus justifying summary dismissal. Acts which constitute gross misconduct are very serious, and a non-exhaustive list of examples of the types of offences which will normally be regarded as gross misconduct are set out. These include "very serious acts of negligence", "theft or fraud".

7. It is made clear that persons conducting investigations and disciplinary proceedings should consult Human Resources if they wish to do so at any stage of the proceedings. There is a service pledge from Human Resources, which includes "We won't make decisions for you, that's your job, but we will be there for you".

8. As I have already mentioned, the principal factual issue in this appeal is the extent to which the decision to dismiss, taken by Mr Goodchild, may have been improperly influenced by Mr McCorry and Mr Batten of Human Resources.

9. A number of documents were added to the bundle including clean copies of documents that had been redacted in their entirety. For example, there is a document dated 14 December 2012 (page 117m), which I required to be disclosed in unredacted form. The original in my

bundle was virtually redacted in full. It was wholly unclear why it had been redacted but it revealed that Mr McCorry had sent a revised draft of Mr Goodchild's report to Mr Lonergan. It may be that this was simply a revised draft sent to him by Mr Goodchild or it may be that there were amendments. I simply do not know. It has now been clarified that this was draft revision 4.

10. I will set out in schedule form details of interactions between Mr Goodchild and Human Resources.

11. I am also aware that legal advice was given and communications between Human Resources and the legal department and Mr Goodchild have not been disclosed because, I assume, legal professional privilege was claimed.

12. The Claimant joined the Civil Service in September 1995, holding various posts. Initially he was employed on a casual basis but later full-time and ultimately he became an HEO in the Transport Security and Compliance Division as an Aviation Security Compliance Inspector. The Claimant's duties involved overseeing transport and industry compliance with the appropriate rules and requirements. His duties included undertaking both open and covert inspections, and stakeholder meetings.

13. The Claimant, whose territory extended from Cornwall to Scotland, was required to spend a significant amount of time on the road, for which he was entitled to receive subsistence. In order to facilitate his travelling he was entitled to a hire car. The Claimant would pay various expenses, including hire cars, with a credit card that had been issued to him.

14. I believe that the Claimant was only at the office about once a month and he had little direct face-to-face contact with his line manager, Mr Whitley. It is unsurprising that the credit card was to be used only in connection with the Claimant's job and its use for personal expenditure was prohibited. There were limits on the subsistence to which the Claimant was entitled when close to his home.

15. I shall now explain the circumstances that led to disciplinary proceedings being taken against the Claimant. On or about 7 February 2012, the Claimant was selected at random for an audit of his transport and subsistence claims for the period October/November 2011. On 24 May 2012, he was informed that some 50 items had been flagged up for examination. On 1 June 2012, he met with his line manager, Mr Whitley, and at the end of the meeting it appears to have been decided that none of the items required further consideration having regard to the Claimant's explanations.

16. In mid-June 2012, Mr Whitley was instructed to carry out further checks on the Claimant's claims for the period October 2011 to May 2012. He met with Mr Whitley, and four items required further specific consideration. The concerns related to overall fuel expenditure and purchase of early morning coffees. There was a query about a meal for two persons, but the Claimant was able to show that this was a "BOGOF" (buy one get one free) deal. He purchased a meal for himself so treated his mother to the free meal.

17. There was also an issue about a rail fare to the office when the Claimant had been called in for a meeting while on annual leave. There had been a claim for a meal in the restaurant and a petrol purchase, which the Claimant maintained were both the result of mistaken use of the

wrong credit card; he had used the Respondent's card in the belief that it was his. The meal cost £13.45 and the petrol £23.58. The Claimant repaid those sums.

18. All the Claimant's expense claims had been signed off by Mr Whitley. Mr Whitley sent a report that the Claimant had commented on. In relation to one item of expenditure which the Claimant said was "mistaken", he said that in fact it was genuine expenditure but he had put "mistaken" on the advice of Mr Whitley for reasons of convenience; the Employment Tribunal appeared to reject this. There appeared to have been several other mistaken purchases which the Claimant refunded.

19. The Respondent was suspicious because on some occasions the Claimant had bought not one but two cups of coffee and suspected that the Claimant had been treating someone to coffee. He was also within five miles of his home. However, the Claimant was able to establish that the days when he had purchased this coffee were days when he had long journeys to go and he found he needed more than one cup of coffee. This particular allegation appears to have been dropped, although it may have been revived at the time of the final disciplinary hearing.

20. The main concern seemed to be excessive petrol consumption and possible use of hire cars for personal reasons, which would constitute misuse. The suggested excess was reduced during the course of investigations.

21. On some date in June 2012, Mr Goodchild was appointed to carry out an investigation. His function initially was to determine if there was a case to answer. There was no issue that the Claimant, on his own case, had made a number of errors. Mr Goodchild met Mr Whitley,

and the vast majority of queries were answered satisfactorily. The only outstanding matters were those I have referred to above. Mr Goodchild had not previously acted in disciplinary proceedings so he met with Human Resources officers, familiarised himself with the disciplinary procedure handbook, to which I have already made reference, and, in particular, noted the distinctions between misconduct, gross misconduct and the appropriate penalties. He also received guidance in relation to the appropriate procedure.

22. There is no record of the advice that was given to Mr Goodchild.

23. On 3 August 2012, the Claimant was given notice of a disciplinary charge. I have not seen the disciplinary charge but it appears from other information in my papers to have been one of gross misconduct.

24. Mr Goodchild was appointed to carry out the disciplinary procedure as well as the investigatory procedure. A hearing took place on 13 August 2012. It does not appear that the Claimant was supplied with Mr Goodchild's draft reports at this point in time, but I have not been addressed on the point.

25. Between 10 March 2012 and 5 March 2013, when he was dismissed for gross misconduct, there was significant interaction between Mr Goodchild and Human Resources. I shall attempt to set this out in tabular form:

Date	Explanation of the document or meeting	Contents
1 July 2012 (Probably 12 July or possibly 3 July)	(Early July) meeting between Mr Batten and Mr Goodchild (according to Mr Batten). See page 198.	The meeting according to Mr Batten was confined to guidance on process and procedures. No note has been disclosed of this advice. According to Mr Goodchild, the purpose of the meeting was to seek advice and guidance on the procedure he should be following.
11 September 2012	On 11 September Mr Goodchild sent the first draft of his report to Human Resources.	Although this report was partly critical it contained a number of favourable findings so far as concerned the Claimant. These were all removed by the time one gets to Mr Goodchild's final report after communication by Mr Goodchild with Human Resources. For example he found that the Claimant's misuse was not deliberate; there was no compelling evidence that the Claimant's actions were deliberate; he found that explanations given by the Claimant for expenditure on petrol were "consistent" and "plausible" and that he had made a persuasive argument in relation to his fuel expenditure. However he later said that while the Claimant's evidence did not to his mind offer a fully convincing explanation for the volume of fuel purchased it did offer a compelling and plausible justification for fuel use being significantly in excess of that expected by the line manager. **"I am not able to prove that he is not telling the truth."** The recommendation is for a finding of misconduct simpliciter with the sanction of a final warning.
20 September 2012	Mr Goodchild had, according to his account, a meeting with Human Resources including Mr Batten, Mr McCorry and a lawyer.	I have no details of the advice given. I assume because legal professional privilege has been claimed. But it is evident from pages 183 and 184 (Mr Goodchild's witness statement) that advice was given as to the gravity of the allegations. According to Mr Goodchild among the matters brought to his attention were whether he had considered the fact that Mr Ramphal's personal

		credit card was a different colour from the credit card issued by the Respondent and this should be taken into account when assessing whether he could have used the wrong card when purchasing personal items; whether any finding could be made on how often hire cars had been used for non-business use in the light of an admission by Mr Ramphal that he had used hire cars for personal use (stopping at a supermarket on the way home) and such like and whether a statement by Mr Ramphal that he did not know hire cars should not be used to give lifts to friends or family "reflected on his integrity and trust". He was also reminded of the importance of consistency in approach.
25 September 2012	Memorandum Mr Batten to Mr Goodchild.	See Page 103. The memorandum suggests a number of factual alterations. It does not refer to the question of consistency but observes that it was "surely unreasonable to purchase food close to his home" and that he was at best "careless in the use of his credit card". There appear to have been three occasions when this occurred and Mr Batten said: **"A single mistake might be understandable but at least three times seems at best careless and again merits some comment in the Decision." (paragraph 4)** Mr Batten also suggests that as Mr Ramphal said he did not realise hire vehicles were not to be used to give lifts to friends or family this: **"demonstrates a question about integrity and trust which might be expected of a Compliance Inspector." (paragraph 6)** The note of 26 September from Mr Batten to Mr Goodchild, in which he thanks Mr Goodchild for going through his findings, suggests that factual issues as well as legal issues were the subject of discussion and advice.

12 October 2012	Further draft. Draft 2 of the report was produced and sent to Mr McCorry and Mr Batten by Mr Goodchild.	This report revises the findings and refers to "the sheer number of instances over a short period of misuse" so that it was "likely" the card had been knowingly misused. The recommendation is now changed to dismissal. The references favourable to Mr Ramphal in Draft 1, as set out above, were removed and three new findings added. **"The sheer number of instances over a short period of time leads me to conclude, on the balance of probability, he knowingly misused the Corporate Card and hire cars on a regular basis."** **"Whilst I cannot disprove each of these incidents did involve accidental use it does appear to be an unusually frequent occurrence."** **"However the number of occurrences identified over a relatively short period of time is impossible to ignore."** The Employment Judge does not appear to have considered whether these changes were as a result of the influence of Human Resources and whether such advice was proper.
23 October 2012	Draft 3 sent.	Not materially different to Draft 2.
16 November 2012	Reconvened disciplinary hearing.	
7 December 2012	Draft 4.	In this draft Mr Goodchild says he is unable to find that the misuse of the credit card or possible misuse of hire cars was deliberate or premeditated and recommended a final written warning. The next draft contains a substantial number of alterations from the earlier draft and the deletion of references favourable to Mr Ramphal. The most striking examples are at paragraph 3 where Mr Goodchild stated that: **"Having given careful consideration to all of the facts of the case, I am minded to conclude that whilst Robin is, by his own admission, guilty of having misused the Corporate Card and hire cars I am not able to demonstrate that this misuse was a deliberate and pre-meditated attempt to defraud the Department. Rather it appears to be the result of a failure by Robin to comply with Departmental rules and guidance."**

		And at paragraph 75, he was minded to find that the Claimant was guilty of misconduct rather than gross misconduct and that he should be given a final written warning. In the subsequent draft (again I believe after communication between Mr Goodchild and Human Resources) the above passage is replaced with: **"Having given careful consideration to all the facts of the case, I am minded to conclude that, on the balance of probability, Robin is guilty of <u>gross misconduct</u> in respect of both the misuse of the DfT Corporate card and the misuse of hire cars funded by the DfT. My recommendation is <u>that he should be dismissed</u> from his post." (My underlining)**
11 December 2012	Email from Mr McCorry to Mr Batten.	Subject: "Draft decision report". Mr McCorry says that he had "overlooked this on Friday". I do not know to which report he is referring, nor whether he was referring to a conversation "last Friday" of which we have no details.
14 December 2012	Page 117m. Email Mr McCorry to Mr Lonergan.	This shows that a revised draft was sent to Mr McCorry. The original page 117m was wholly redacted but after a direction from me, an unredacted copy was made available.
30 January 2013	A meeting takes place between Mr Goodchild, Mr McCorry and Mr Lloyd (also of Human Resources).	Mr Batten was not in attendance. The evidence he has given, however, that the main concern was that Mr Goodchild had not been applying the balance of probabilities and that his reasoning in assessing the value of the evidence did not tie in with his conclusion about the inappropriate use of the credit card and hire car; see Mr Goodchild's witness statement, paragraph 18 at page 185. Again, there is no record of any meeting on 30 January 2013. This is significant because it was at that meeting or immediately after that Mr Goodchild appears to have been advised (see page 192) that there should be a summary dismissal for the reasons of consistency.

11 February 2013 Draft 4	I believe this is the date, but it would appear to be a draft report. This appears to be a copy of Draft 2.	This document was not provided on disclosure and was only supplied after Mr Von Berg saw it referred to as an attachment (I assume in document 104a). This contains the following: **"While I accept that Robin's mitigation offers a plausible (although not entirely convincing) explanation the sum of the incidences of misuse identified, the sheer number of these incidences over a short time period leads to conclude that on the balance of probabilities he knowingly misused the corporate card and hire cars on a regular basis."** In relation to misuse of hire cars Mr Goodchild revisited these with the explanations of Mr Ramphal. Mr Goodchild was now unconvinced that various factors offered a satisfactory explanation for the amount of fuel purchased and the suspicion remained the most likely explanation for excessive fuel use was non-work related use of the car. Finally at paragraph 38, in relation to petrol use he believed that Mr Ramphal's mitigation offered a plausible though not entirely convincing explanation for a "few of the instances" of misuse: **"there are several other instances over a relatively short period of time that lead me to conclude on the balance of probability he knowingly misused both the DfT Corporate Card and hire cars funded by DfT. He is therefore guilty of gross misconduct and my recommendation is that he should be dismissed."** The phrase "knowingly misused" appears at paragraph 41 Draft 2, but is omitted on Draft 4 (and the final Draft).
11 February 2013	Email from Mr Goodchild to Mr McCorry.	Attaches a redraft of his report (subject: Draft decision report transec). Again I am unclear as to which version of the report this refers to. I do not know what comments, if any, were made Mr McCorry. Contains findings favourable to Mr Ramphal subsequently removed in draft largely in relation to fuel usage.
11 February 2013	Draft 5	This appears to be in the same form as Draft 4, but it now recommends dismissal for gross misconduct.

13 February 2013	Two emails from Mr McCorry to Mr Lonergan (Legal Department), copied to Mr Batten.	Draft decision letter sent to Mr Lonergan. Reference to "need to provide [Mr Goodchild] with a template for a decision letter".
20 February 2013 (Dated 27 February 2013)	Draft 6 appears to be sent to Human Resources.	Recommends summary dismissal for gross misconduct - sent by Mr Goodchild to Human Resources; the response is not known.
27 February 2013	Date on Final Report.	
5 March 2013	Draft 6, becomes final sent to Human Resources; not known if commented upon.	Issued as the final report and sent to the Claimant along with a letter of dismissal.

26. None of the draft reports are dated, nor marked with a draft number, and I am by no means sure which report was prepared on which date; nonetheless there is a clear move from the original view after contact between Mr Goodchild and Human Resources leading to a complete change of view on Mr Goodchild's factual findings and recommendations as to sanction. Favourable comments are removed and replaced with critical comments; the overall view of culpability becomes one of gross negligence and the recommendation of sanction becomes summary dismissal for gross misconduct instead of a final written warning. I am concerned at possibly not being able to identify which draft was which and its date. However, the transition I have referred to in Mr Goodchild's view is clear.

27. Before I turn to the Decision of the Employment Tribunal, the hearing took place over three days commencing on 9 December 2012. The Employment Tribunal reserved its decision (and I believe that Employment Judge Etherington was indisposed). On 1 December 2013, the Claimant's solicitors sent a copy of the decision in **Chhabra** to the Employment Tribunal. The email gave the wrong case number and the email was not marked for the attention of the Employment Judge Etherington. I would have thought, however, that it would not have been in the least bit difficult for the Employment Tribunal staff to have determined the correct details of

the case. However, as I have already mentioned, in an email dated 20 December 2013, Treasury Solicitors sent to the Claimant's solicitors, copied in to the Employment Tribunal, it was, *inter alia*, stated:

> **"1. It is not appropriate to put these authorities before the Tribunal upon Judgment having been reserved and without any prior discussion with the Respondent."**

I do not know whether this email played any part in the failure of this authority to reach the Employment Judge. I would observe that, in my experience, advocates do send authorities to a Tribunal after judgment is reserved and both sides are invited to comment.

The Decision of the Employment Tribunal

28. The Employment Tribunal identified the issues, noted the somewhat lax procedures and absence of detailed guidance in relation to claims in relation to the use of hire cars. The majority of transactions in which the Claimant claimed reimbursement were found by the Employment Tribunal to be compliant. The Claimant did not consider it objectionable that after a long day, he made a minor detour to the shops or to a takeaway, thus offending the rules.

29. The Employment Tribunal referred to the submissions made on behalf of the Claimant about improper influence being brought to bear by Human Resources on Mr Goodchild. The Employment Judge observed that the Tribunal's view was that it was not wrong for an Investigation/Dismissing Officer to seek and receive advice and guidance from Human Resources professionals and indeed others (see quotation set out below). The question in this case is how far, if at all, such advice unfairly or improperly influenced the decision Mr Goodchild eventually made to dismiss. The Employment Tribunal correctly directed itself as to the law, although the "advice and guidance" that might be given to a Dismissing Officer would need to be qualified in the light of **Chhabra**. The Employment Tribunal also correctly directed

itself in relation to the approach to be taken following cases such as **British Home Stores v Burchell** [1978] IRLR 379. It reminded itself of the reasonable range of responses and that an Employment Tribunal should take care not to substitute its views for those of the employer, which was inadmissible. The conclusions of the Employment Tribunals are set out at paragraphs 61 and 62:

> **"61. The Claimant also found the decision to dismiss was anything other than impartial and fairly and reasonably made. It is the Claimant's case that Mr Goodchild's ultimate decision was improperly influenced by members of staff who were not involved in the actual disciplinary process. He so concluded in the light of the substantial shifts in Mr Goodchild's reports. It is convenient here to observe that the Tribunal's view is that it is not wrong for an investigation/dismissing officer to seek and receive advice and guidance from human resources professionals and indeed others. The question in this case is how far if at all such advice unfairly overbore and improperly influenced the decision Mr Goodchild eventually made to dismiss.**
>
> **62. The Respondent contended that it had an honest belief in the Claimant's misconduct based on reasonable grounds - indeed the Claimant accepted he had misused the card albeit accidentally and that he had used hire cars for personal journeys on many occasions. Mr Goodchild did not accept that the misuse was accidental i.e. inadvertent as he was entitled to find on the material before him. On the evidence he was entitled ultimately to conclude that the more likely explanation for the excessive purchase of fuel was the regular use (admitted) of hire cars for personal journeys and to find and reject the Claimant's explanations as unconvincing. Mr Goodchild was entitled to reject the claims of accident / ignorance as explaining misuse in the light of the evidence advanced."**

30. The Employment Judge then went on to consider the key question of the influence of Human Resources on Mr Goodchild's decision:

> **"63. As to the extent if any of the influence of HR and others on his decision Mr Goodchild was adamant that the ultimate decision had been his. The investigation itself was fair and thorough. The Claimant made a detailed case which was thoroughly considered. That consideration involved an investigation of his assertions some of which were accepted. For example the result of the investigation by his line manager was substantially changed. He, it was submitted, reasonably rejected the Claimant's contention on appeal that misuse had clearly been accidental and therefore not gross misconduct. He did not accept the Claimant's assertion of accidental misuse, as on the evidence he was entitled to do. He concluded in the light of the Respondent's policy … and here the Tribunal notes that the Respondent's policy on theft and fraud acknowledges the risks inherent in trusting staff to comply with procedures emphasising that guidance must be followed. The guidance states "Even if the value or nature of items stolen seem trivial (e.g. stationery or minor mis-statement of T&S) cases will be treated seriously because of the potential reputational damage to the Department. *He concluded* that the Claimant's behaviour either fell within the scope of theft or fraud (specifically identified as gross misconduct in the policy) or was comparable in terms of seriousness and thus was gross misconduct. [Tribunal's emphasis]**
>
> **…**
>
> ***Conclusions***
>
> **68. In reaching my decision I considered a number of general factors noting the cogent and well reasoned submissions of the parties. I was particularly exercised by the apparent changes of mind by Mr Goodchild who twice was on the verge of recommending action short of dismissal and twice - and ultimately - recommended and in the event effected dismissal. This was characterised by the Claimant as an unwarranted intrusion into the process rendering it**

> **unfair. Having reviewed the circumstances and considered … Mr Goodchild's evidence I concluded that the process was not rendered unfair by the involvement of those whom Mr Goodchild consulted and by whom he was given advice. Mr Goodchild was in an unfamiliar role. When he produced his first report he naturally sought indicators as to his approach. He received advice which was aimed at the integrity of the decision It drew attention to a number of cogent matters; for example he was urged to look more critically at the basis of the calculation of fuel consumption by the line manager since it appeared inadequate - as indeed it proved to be."**

31. Employment Judge Etherington rejected the suggestion that Mr Goodchild had failed to pay sufficient regard to mitigation including the Claimant's long length of service. The Employment Judge went on to find that Mr Goodchild made a decision which was reasonably open to him:

> **"71. A word about Mr Goodchild is apposite. It seemed to me that he was anxious to get his decision correct. He took advice particularly because this was the first such case he had undertaken. He put forward his various reports as drafts for scrutiny by those charged with the human resources function; he listened to what was said; he changed his proposed action - once going <u>against</u> the burden of advice he had been given; he made the decision to dismiss following receipt of advice from others. He satisfied me that although the process leading to the decision was fraught with concern at its end he made a decision which was reasonably open to him." (Tribunal's emphasis)**

32. The Employment Judge went on to find that the reason for the dismissal was misconduct, the improper use of the corporate credit card and petrol obtained therewith and of the hire car. The Employment Judge had "no doubt", on the material before him, as to the honesty of the Respondent's belief as to the Claimant's guilt and that there were reasonable grounds for sustaining that belief. Employment Judge Etherington concluded that the decision was based upon as much investigation as was reasonable in the circumstances and that the decision to dismiss was within the band of reasonable responses open to a reasonable employer. At paragraph 77 the Employment Tribunal dealt with the argument that Mr Goodchild was influenced unfairly in the process by others who had not conducted the disciplinary hearing as Mr Goodchild had:

> **"77. … so that his decision was contaminated and not properly and fairly based on the evidence and thus unreasonable. This was perhaps the Claimant's key argument, which had its attractions and indeed gave me much pause for thought. The process by which Mr Goodchild arrived at his final conclusion was somewhat circuitous and brought condemnation from the Claimant. Mr Goodchild's whole approach to the investigation, involving an initial reaction - later repeated - that a final warning would be a sufficient penalty said much that**

> **was positive about him and established him as a credible witness. Before he made his final decision he was alerted by his employers to matters which it was appropriate for him to consider, for example the seeming inadequacy of the investigation by his line manager of fuel consumption. The more robust examination on which he embarked resulted in discovery of factors considerably to the benefit of the Claimant, reducing the apparent unauthorised consumption by more than three quarters. It did not appear that he was much influenced by HR's references to the need for consistency - he does not appear to have had details of any comparable cases. Having considered the matter in the round in the light of the advice and guidance he had received Mr Goodchild came to the final conclusion that dismissal was appropriate the Claimant's misconduct being really serious, ie gross. And this decision was made against the background of the Respondent's need to deal robustly with the former laxity of which the Claimant himself complains."**

The Employment Judge went on to remind himself that he should not substitute what the Employment Tribunal might have done for what the Respondent did:

> **"78. … The Respondent had on reasonable grounds found that the Claimant had conducted himself in a way verging on the criminal and done so on more than one occasion. He was in a position of trust not only as to his personal conduct but also regarding his daily inspection duties. Integrity and honesty were key requirements of his job. …"**

33. The Employment Tribunal then went on to find that the procedure followed was both fair and reasonable but had the Tribunal found procedural unfairness, Employment Judge Etherington concluded that there was a 100% chance, i.e. a certainty, that the Claimant would in any event have been fairly dismissed. He added that it had to be said that the Claimant was 100% at fault for his dismissal.

34. I would note at this point that I have some difficulty with the finding that Mr Goodchild did not appear to be "much influenced" by the references by Human Resources to the need for consistency and did not appear to have had details of any comparable cases. I have already drawn attention to the evidence that he was told that the consistent practice of the Respondent was to summarily dismiss in all cases of gross misconduct.

The Notice of Appeal and Submissions in Support

35. There are over 14 grounds of appeal, but the principal point is that the Employment Judge failed to apply the principles set out in **Chhabra**. Mr Von Berg drew attention to the

process leading to dismissal and reshaping of Mr Goodchild's views from there having been no gross misconduct recommending a written warning to an eventual finding of gross misconduct and recommendation for summary dismissal which was implemented. He suggested that the Employment Judge had failed to consider adequately the effect and culpability of the intervention of Human Resources, which went beyond permissible assistance and had actively expressed views and on his own findings had invited changes to both his assessment of Mr Ramphal's credibility and culpability, and the appropriate penalty. Mr Batten, in his witness statement (see pages 198 and 199), has clearly gone beyond confining himself to advice and guidance on process and procedures, as he insisted in paragraph 8 of his witness statement; for example the suggestion that Mr Ramphal being mistaken as to his use of the corporate card should be measured against the fact that his personal cards were of different colours, inviting Mr Goodchild to review his view in his draft that it could not be established there had been a deliberate and premeditated attempt to defraud the department and that Mr Ramphal was guilty only of misconduct rather than gross misconduct and should be issued with a final written warning. Although not present at the meeting in January, Mr Batten's understanding was that the main concern was the balance of probabilities test not having been applied and that Mr Goodchild's reasoning in assessing the value of the evidence did not tie in with his conclusion that both the corporate card and the hire car had been inappropriately used. As I have said, it seems to me that the advice given by Human Resources went significantly beyond advice limited to process and procedures (witness statement, paragraph 8). The Employment Tribunal has failed to explain what it was, if not on the basis of advice from Human Resources, that led Mr Goodchild to change his views from there having been no sufficient evidence of dishonesty, the advice apparently having been limited to the standard of culpability required for gross misconduct. No new evidence had come to light that might explain Mr Goodchild's change of heart. Mr Von Berg submitted that dismissal was outside the range of reasonable responses

because of the improper intervention of Human Resources. The procedure was tainted by their intervention.

36. So far as contributory fault and **Polkey** findings were concerned, the Employment Judge must have relied upon findings of fact by Mr Goodchild that were similarly tainted.

Respondent's Submissions

37. Mr Mitchell submitted that the decision in **Chhabra** was not in point for reasons I shall come to when I have referred to the decision.

38. Mr Mitchell went on to submit that the Employment Tribunal had dismissed the submission there had been inappropriate interference in Mr Goodchild's decision and referred to paragraphs in the Decision, to which I have already referred, in which the Employment Tribunal found he had approached his task thoroughly and with an open mind, having actively pursued exculpatory lines of investigation and was "adamant" that the ultimate decision had been his.

39. Further, Employment Judge Etherington had found that Human Resources' role did not stray beyond providing proper advice and guidance and that the statement of law at paragraph 61 that it is not wrong for an Investigation/Dismissing Officer to seek and receive advice and guidance from Human Resources professionals was in accordance with the law as explained in **Chhabra**.

40. Mr Mitchell submitted that the appeal was in effect a perversity appeal, attempting to reargue matters of evidence and referred to the well-known dicta of Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634.

41. Mr Mitchell further submitted that the Employment Judge had not failed to properly evaluate the Respondent's assessment of the Claimant's culpability because Mr Goodchild had been advised by Human Resources that it was not necessary to find a deliberate intent to defraud on Mr Ramphal's part in order to make a finding of gross misconduct and the Claimant's dismissal did not require a finding of intent to defraud in order to be compliant with section 98(4) **Employment Rights Act**. This was accepted by the Employment Judge. Further, it was not the role of the Employment Tribunal to decide on the relative seriousness of offences of gross misconduct.

42. Essentially there was material that justified the conclusions the Employment Judge had come to in finding the dismissal was in the band of reasonable responses and its decisions in relation to contributory fault under section 122(2) **Employment Rights Act** and in relation to the **Polkey** reduction.

43. In relation to **Chhabra**, among Mr Mitchell's submissions was a suggestion that the Claimant should have gone back to the Employment Tribunal, when it was apparent that the **Chhabra** decision had not been referred to, seeking reconsideration; I can see some force in this point but it does not avail the Respondent so far as the appeal is concerned.

44. I now turn to consider the law.

The Law

45. The only authority I need refer to is that of **Chhabra**. The facts of that case were that the Claimant was a Psychiatric Consultant employed by the Respondent. She was investigated under the Respondent's disciplinary procedure and, in response to concerns expressed on behalf of the Claimant about the involvement of a consultant, W, from another Trust being appointed to investigate the Respondent, it was agreed and indeed undertaken by the Respondent that W would play no further part in the investigation. He did in fact become involved in the disciplinary process. The disciplinary process in Chhabra's case required an investigator to be appointed to report on the facts. The relevant passage is to be found in the Judgment of Lord Hodge JSC at paragraph 37:

> **"Thirdly, I consider that the trust breached its contract with Dr Chhabra when [W] continued to take part in the investigatory process in breach of the undertaking which the trust's solicitors gave in their letter of 24 February 2011 … In particular, when [W] proposed extensive amendments to Dr Taylor's draft report and Dr Taylor accepted some of them, which strengthened her criticism of Dr Chhabra, the trust went outside the agreed procedures which had contractual effect. Policies D4 and D4A established a procedure by which the report was to be the work of the case investigator. There would generally be no impropriety in a case investigator seeking advice from an employer's human resources department, for example on questions of procedure. I do not think that it is illegitimate for an employer, through its human resources department or a similar function, to assist a case investigator in the presentation of a report, for example to ensure that all necessary matters have been addressed and achieve clarity. But, in this case, Dr Taylor's report was altered in ways which went beyond clarifying its conclusions. The amendment of the draft report by a member of the employer's management which occurred in this case is not within the agreed procedure. The report had to be the product of the case investigator. It was not. Further, the disregard for the undertaking amounted to a breach of the obligation of good faith in the contract of employment. It was also contrary to paragraph 3.1 of policy D4 as it was behaviour which the objective observer would not consider reasonable: Dr Chhabra had an implied contractual right to a fair process and [W's] involvement undermined the fairness of the disciplinary process."**

46. The decision was relied upon by Mr Von Berg, but Mr Mitchell sought to distinguish the decision on the grounds that it was limited to the facts of the case and the fact that there had been a breach of undertaking not to involve W as well as to the terms of the disciplinary policy of the Respondent.

47. I am unable to accept that submission because it was a decision in the Supreme Court of a Justice of the Supreme Court in carefully chosen words that it was an implied term that the report of an Investigating Officer for a disciplinary enquiry must be the product of the case investigator; I would say *a priori* when the investigator, as in this case, had the dual role as dismissing officer.

48. The **Burchell** principles are clearly set out by the Employment Judge. The principles are so well-known I need not repeat them. But I would observe for the purpose of these proceedings, that for the dismissal to be fair there has to be a fair investigation and dismissal procedure. If the integrity of the final decision to dismiss has been influenced by persons outside the procedure it, in my opinion, will be unfair, all the more so if the Claimant has no knowledge of it.

Conclusions

49. It is perhaps worth observing that the Employment Tribunal appears to have found that the Claimant was dismissed for "dishonest use of the corporate credit card". It is apparent that Mr Batten believed there had been fraud. The Employment Tribunal, at paragraph 43, remarked that he was anxious to know whether or not and, if so, by how much the department had been "defrauded" as a result of the excessive fuel purchases. I also note that the disciplinary code (see page 169) in its examples of gross misconduct refers to both theft and fraud or very serious negligence. I would have thought it axiomatic that a dishonest intention is a necessary ingredient of both theft and fraud, although not of gross negligence. This does not appear to have figured in the advice given by Human Resources to Mr Goodchild. Having originally found there was no dishonesty, in his final report Mr Goodchild concluded that he could not accept the Claimant's explanations of accidental misuse of the credit card or

explanations for the level of fuel consumption and was therefore guilty of gross misconduct with a recommendation for dismissal.

50. Had the Employment Judge been aware of the decision in **Chhabra** (as I accept he probably was not), he would have wanted to investigate carefully the influence of Human Resources on Mr Goodchild and to explain the reasoning behind Mr Goodchild's dramatic changes of view after representations from Human Resources, which clearly went beyond giving advice on procedure and clarification and appear to have led to the reshaping of Mr Goodchild's views, carrying him on a journey from a conclusion that there had been no gross misconduct, with an appropriate sanction of a written warning, to one of gross misconduct and a recommendation for, and then a decision of, summary dismissal. As I have pointed out, Human Resources' advice, so far as we have known what it is, invited changes to Mr Goodchild's findings relating to both culpability and credibility, in particular in relation to car expenses, and whether the misuse of the credit card could be said to have been mistaken.

51. I am not clear as to the precise disciplinary charge, which is not in my papers, but I note that the Employment Tribunal appears to have accepted that the charge was simply one of gross misconduct. I have already drawn attention to the principle that dishonesty is an element of both theft and fraud and the Employment Tribunal appear to have accepted the Respondent's case that the Claimant's use of the credit card was dishonest.

52. In my opinion, it is disturbing to note the dramatic change in Mr Goodchild's approach after intervention by Human Resources. A number of proposed findings favourable to the Claimant or exculpatory as to his conduct are replaced by critical findings. A proposed finding of misconduct is replaced by a finding of gross misconduct and a proposal to impose a final

written warning is replaced by a proposal, and then decision, to summarily dismiss the Claimant after Mr Goodchild had been informed that dishonesty was not a necessary ingredient of gross misconduct. This is clearly not the case if the finding is one of theft or fraud. The Employment Judge has not explained what it was that caused Mr Goodchild to take a more critical view of the Claimant's conduct if it were not the influence of advice from Human Resources.

53. It seems to me that Human Resources clearly involved themselves in issues of culpability, which should have been reserved for Mr Goodchild. Mr Goodchild clearly went beyond discussing issues of procedure and law. He accepts that he discussed his emerging findings.

54. The changes were so striking that they give rise to an inference of improper influence and the Employment Judge should have given clear and cogent reasons for accepting that there was no such influence.

55. In my opinion, an Investigating Officer is entitled to call for advice from Human Resources; but Human Resources must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction as to appropriate findings of fact in relation to culpability insofar as the advice went beyond addressing issues of consistency. It was not for Human Resources to advise whether the finding should be one of simple misconduct or gross misconduct. I accept the submission that the finding by Employment Judge Etherington that Mr Goodchild had simply reassessed the situation in the light of advice from Human Resources, and was entitled to conclude as he did, was not permissible on the evidence because it does not explain the impact of the advice that went beyond what was permissible, nor does it explain

why he changed his position from believing there was no evidence of dishonesty, when the advice he received from Human Resources appeared to be limited to the standard of culpability for the purposes of gross misconduct. There does not appear to have been any fresh evidence to justify his change of heart. A further example of an attempt to influence views on culpability is in the letter of 25 September 2012, in which Mr Goodchild is being invited to take a more critical view of the alleged breaches of the five-mile rule and of the fact that, while a single mistake might be understandable, a mistake at least three times "seems at best careless and again merits comment at the decision". There is also the suggestion that Mr Ramphal's statement, that he had not appreciated that he should not use a hire car for personal use, demonstrated a question about integrity and trust, which again might be regarded as an attempt to influence Mr Goodchild's views on culpability.

56. I note that in the email (page 104a) of 12 October, Mr Goodchild thanks Mr Batten for his "previous, helpful, advice" suggesting that he had a chance to revisit his earlier draft as a result. I do not know what this previous advice was or when it was given. The finding that Mr Goodchild was adamant that the ultimate decision was his, did not adequately address the issue as to the extent to which he may have been influenced as to the merits of his decision on both culpability and sanction. In the absence of knowledge of what advice had been given, only limited evidence was available. I consider that an employee facing disciplinary charges and a dismissal procedure is entitled to assume that the decision will be taken by the appropriate officer, without having been lobbied by other parties as to the findings he should make as to culpability, and that he should be given notice of any changes in the case he has to meet so that he can deal with them, and also given notice of representations made by others to the Dismissing Officer that go beyond legal advice, and advice on matter of process and procedure.

It is far from clear to what extent Mr Ramphal was aware of changes made to the case against him as a result of interventions from Human Resources.

57. In relation to the findings on **Polkey** and for contributory fault, I accept that the decision is based on findings of fact from Mr Goodchild's investigation that might have to be treated as tainted.

58. This is not a perversity appeal. In my opinion, the Employment Judge had failed to adequately explain or identify the "advice" that led Mr Goodchild to his ultimate conclusion and what effect this may have had on the views of Mr Goodchild.

59. I do not need to consider whether the dismissal was within the range of reasonable responses because I am satisfied the decision on unfair dismissal cannot stand.

60. Although the matter has not been raised by the parties, so does not form part of the reasons for my conclusions, I have noticed that there is no evidence that at the final disciplinary hearing the Claimant had been provided with a final draft of Mr Goodchild's recommendations, and indeed he was only sent Mr Goodchild's report with his dismissal letter, which was sent on 5 March 2013. It will be recalled that the disciplinary hearing had taken place on 13 August 2012 and there had been a further meeting on 16 November 2012. This point was not raised by the parties and therefore forms no part of the reasons for my conclusion.

61. In the circumstances I consider that the appeal must be allowed. I have to come to the conclusion it would be right to refer this matter back to Employment Judge Etherington.

62. The Employment Tribunal will have to decide on the basis of this Judgment whether the influence of Human Resources was improper and if so whether it had a material effect on the ultimate decision of Mr Goodchild, both in relation to Mr Ramphal's culpability and whether there was such influence on the decision that he had been guilty of gross negligence and should be summarily dismissed. This is the task that the Employment Appeal Tribunal perform so the case must be remitted to the Employment Tribunal.

63. I would finally like to express my very great regret at the time it has taken for this Judgment to be handed down; unfortunately I have been indisposed and have been unable to deal with the matter earlier.

Note

64. Mr Von Berg in his notes on the draft Judgment has asked me to revisit my judgment and remove the direction for a rehearing and substitute a finding of unfair dismissal.

65. I do not consider it appropriate to accede to this request. It is for the Employment Tribunal to decide, on the basis of this Judgment, what the influence was and whether the such might be established as improper and if so whether it had a material effect on the ultimate decision of Mr Goodchild both in relation to Mr Ramphal's culpability and whether there was such influence on the decision that he had been guilty of gross negligence and should be summarily dismissed. Although I consider that there is material to suggest that there was improper influence which had a material effect, the responsibility of making findings of fact is not for the Employment Appeal Tribunal and I must therefore remit the matter to the Employment Tribunal for further consideration.

66. I have considered the guidance on remission given in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 and have concluded that the matter should be remitted to Employment Judge Etherington as I am confident he will go about the tasks set on remission in a professional way, paying careful attention to the guidance given in this Judgment.