Appeal No. UKEATS/0004/15/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 03 August 2015

Before

THE HONOURABLE LADY STACEY

MS V BRANNEY

MR P PAGLIARI

THE BRITISH WATERWAYS BOARD trading as SCOTTISH CANALS APPELLANT

MR DAVID SMITH RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr B Napier, QC, instructed by Morton Fraser LLP
For the Respondent	In person

SUMMARY

Unfair dismissal. The ET found that the employee had been unfairly dismissed following the employer finding his Facebook entries about drinking when on standby, and about his offensive views of colleagues. Held: appeal allowed, and a finding that dismissal was not unfair made. The ET had substituted its own views for that of the employer. On the facts found that the entries were made, that a reasonable investigation followed, that the employer lost confidence in the employee, and that a fair procedure was followed, the only decision that an ET properly directing itself could make was that dismissal was not unfair.

THE HONOURABLE LADY STACEY

1. This is a full hearing. The employer, Scottish Canals, appeals against the finding of unfair dismissal. We shall refer to the parties as claimant and respondent as they were in the Employment Tribunal (ET.) The appeal is against a decision of the ET sitting in Glasgow which was sent to parties on 23 October 2014, following a hearing over four days in August 2014. The E T comprised Employment Judge Wiseman, Mr Peter O'Hagan and Ms Martha McAllister. The claimant claimed that he had been unfairly dismissed because he had made protected disclosures and in any event that he had been unfairly dismissed even if his dismissal was not due to the protected disclosures. The ET found that he had been unfairly dismissed but did not accept that the cause was any protected disclosure.

2. This case involves the use of Facebook. We accept the submission made by Mr Napier QC for the respondent that there is no need for special rules in respect of such cases. They fall to be determined in accordance with the ordinary principles of law applied in all cases. We are in agreement with the judgment to that effect given by the EAT in the case of **Game Retail Ltd v Laws [2014] UKEAT 0188_14_0311.**

3. The respondent is responsible for inland waterways within Scotland. The British Waterways Board operates in Scotland under the name "Scottish Canals". It employs about 160 manual workers who work a seven day rota. They are also on standby for seven days one week in every five. During their standby period they are not permitted to consume alcohol.

4. The claimant began employment with the respondent on 1 April 2005 He was one of 8 operatives in a team, managed by Mr Alistair Smart with the assistance of two supervisors, Mr David McRoberts and Mr Robert McLeod as well as 2 team leaders, Mr Jimmy Bell and

Mr Alistair Gordon. The ET in their findings of fact found that the team was "not a happy team". There was a history of employees raising issues concerning health and safety, and issues regarding how they were spoken to by team leaders and supervisors.

5. The claimant raised a formal grievance on 28 March 2012 complaining of behaviour by Mr Bell . He sent his letter to Mr Smart, who could not be resolve the matter and it was subsequently passed to Mr Philip Martin to hear the claimant's grievance as part of the second stage of the grievance procedure While that was still outstanding, on 19 July 2012 the claimant raised with team leaders a complaint concerning exceeding recommended time for the use of vibrating equipment following his use of a strimmer. He made a further complaint on 25 February 2013 to Mr McRoberts, and Ms Fiona McMillan, a member of the HR Department, about a request made for him to dig a frozen towpath by hand. The claimant wanted to know if a risk assessment was in place. On 25 March 2013 the claimant met with Mr Smart and told him that he was unhappy with the work he was being asked to do. He said that he felt stressed out; that he was being singled out and threatened and that he was unhappy with the way in which matters had been dealt with. He was told that he could bring a formal grievance regarding these matters. He and other colleagues took advice from a Trade Union official. The claimant was referred to occupational health on 15 May 2013. He told the occupational health adviser that he felt he was being bullied and harassed by certain managers and supervisors. The advice from the occupational health department was that any health issues which the claimant had were entirely work-related and that the situation could be resolved. The recommendation was that the matter should go to mediation. This report was sent to Ms McMillan who arranged to meet the claimant to discuss the issues.

6. That meeting took place on 20 May 2013. The claimant explained to Ms McMillan that a further incident had happened concerning a machine which had caught fire. He told

Ms McMillan that he would provide full details of his grievance in writing on 23 May.

7. The ET found that Ms McMillan had noted the occupational health recommendation for mediation. She was keen to put that in place but the claimant told her that he did not want to go to mediation. Nevertheless Ms McMillan arranged a mediation meeting for 23 May 2013.

8. Immediately following her meeting with the claimant on 20 May 2013,, Ms McMillan met with Mr McRoberts and Mr McLeod, the team leaders about whom the claimant had complained, and told them of the allegations and that a mediation meeting was to be arranged on 23 May to try to resolve the claimant's issues with them. She also told the Trade Union representative of this.

9. The claimant, accompanied by his Trade Union representative, went to the meeting of 23 May taking with him a letter setting out his grievance. Ms McMillan advised them that a mediation meeting was not to take place. Instead the claimant was suspended from work pending an investigation into comments which had been recovered from the claimant's Facebook.

10. The investigation concerning Facebook had arisen because Mr McRoberts had emailed Ms McMillan on 22 May 2013 attaching copies of pages which he had copied from the claimant's Facebook. These pages included comments made by the claimant and two other employees referring to supervisors in derogatory terms. On receipt of these Ms McMillan asked her assistant, Ms Fiona McIntosh, to see if she could find the Facebook accounts. Ms McIntosh did so and responded to Ms McMillan saying that she had copied anything which concerned work. One of the things which she copied was described by her in the following terms:

> "One thing goes back to 2011 but was quite interesting – being drunk while on standby – so I thought I would include it".

11. Mr Martin was asked to conduct an investigation into the three employees whose Facebook accounts had been examined. He met with the claimant on 29 May 2013 to investigate the matter. The comments found by the ET to have been made by the claimant were as follows:

> "(i) chipper training today and supposed to go home after it wanker supervisor told the trainer to keep us as long as he could the fuckers don't even pay u for this shit;
> (ii) hard to sleep when the joys of another week at work are looming NOT
> (iii) ha what joy, 2 sleeps til back to my beloved work NOT
> (iv) good old bw cant wait to see all my friends again lol
> (v) going to be a long day I hate my work
> (vi) that's why I hate my work for those reasons its not the work it's the people who ruin it nasty horrible human beings
> (vii) why are gaffers such pricks, is there some kind of book teaching them to be total wankers
> (viii) on standby tonight so only going to get half pissed lol
> (ix) im on vodka and apple juice first time ive tried it no to shabby and
> (x) in response to the latter comments someone had noted the claimant was on 'floor alert' and asked if the claimant was going to let everyone drown, to which the claimant had responded 'just the cunts from Braid Square lol'".

The entry at paragraph (x) seems to be a narration of a response being made to the claimant's entry, and he in turn responding to it.

12. The claimant admitted making the statements on Facebook but told Mr Martin that he had not intended to offend anyone and had been indulging in banter. He explained that it was common practice amongst the men to "slag off" the person who was on standby and that he had not in fact been drinking. He also stated that his Facebook page must have been hacked and produced a screenshot dated 16 May 2011 showing that his security settings had been switched from private to public. He said that he did not know that and he would certainly not have deliberately set his Facebook at public because he had on it photographs of his children. The claimant said that he had been bullied and harassed for eight years and he felt it was convenient that he had been suspended on the day that a meeting had been planned to investigate his complaints. The ET noted that the claimant asked Mr Martin where British waterways were identified in his entries. Mr Martin told him the entry containing the reference 'bw' was on one

of the other employees' entries. Any apparent confusion about what the respondent found that the claimant did does not in the end matter. The ET were not satisfied that the reference "bw" was enough to identify British waterways. The claimant made nothing of this point and we can proceed on the basis that he admitted the other entries.

13. Mr Martin produced a disciplinary investigation report in the following terms:

> "There is evidence that the trust between his employer and those managing him has been broken by remarks directed towards them and made public through his Facebook pages. DS claims the public status of his remarks was unknown, however this does not change the fact that they were made and were available to his employer to read. The remarks made were available for public viewing and therefore are likely to damage the reputation of his employer and manager. By publically making remarks about being under the influence of alcohol whilst on standby duty, he has declared this to be the case, which would be a risk to public health. The remarks are the only evidence available and he states this to be only banter and not the reality. There is an ongoing investigation into allegations by DS of bullying and intimidation which forms no part of this investigation, however this is noted. I recommend this is brought before a disciplinary hearing".

The wording of the first line is not clear but the ET, the parties and this tribunal has proceeded on the basis that the finding was that the employer lost confidence in the employee.

14. Mr Martin's recommendation was accepted and a disciplinary hearing was fixed for 3 June 2013. The respondent's disciplinary policy had a range of disciplinary sanctions including dismissal, suspension without pay for up to two weeks and a temporary or permanent transfer to another position or workplace. It listed examples of gross misconduct which included serious breaches of the respondent's policies and procedures. The policy concerning email and internet use referred to workers being entitled to use the internet and email provided at work for personal use subject to it being kept to a reasonable level and in accordance with policy. The policy also included the following:

> "The following activities may expose BW and its employees, agents and contractors to unwarranted risks and are therefore disallowed:-
>
> - Any action on the internet which might embarrass or discredit BW (including defamation of third parties for example, by posting comments on bulletin boards or chat rooms)….".

15. Before the ET and before us it was accepted that the posting of entries on Facebook by the claimant on his own personal computer could be a matter which resulted in disciplinary

action against him by his employers if the employers were referred to or if his work was referred to.

16. The ET accepted Mr McRoberts' evidence, that he was unsure when he had first seen the claimant's Facebook page, but thought that it was prior to Christmas 2012. He told Ms McMillan and other members of the HR department on two or three occasions about the comments on Facebook but he did not provide screenshots. Ms McMillan accepted she had been told by Mr McRoberts but had not investigated it because she was too busy. Mr McRoberts accepted that he had known of these comments for some time but had not raised the matter with the claimant. He copied the information to Ms McMillan because he had been told that a mediation meeting had been arranged and he wanted to demonstrate that the issue raised by the claimant about Mr McRoberts' behaviour was not as he put it "all one sided". He accepted in evidence that the claimant had been a good employee and that there were no issues with his work and that his performance reviews were always good.

17. The disciplinary hearing was chaired by Mr David Lamont, director of operations. Mr Martin attended to present the investigation report. At the hearing the claimant told Mr Lamont that despite what he had said on Facebook about drinking he had not ever been drunk whilst on standby. He repeated his contention that there was a running joke, made on Facebook as well is in person amongst the men, about not being able to drink when on standby. He explained that the other things that he had said were also in jest. The people in Braid Square were his friends. He also explained to Mr Lamont that he considered the timing of the allegations to be a convenient way to prevent his grievance being investigated. He explained that he thought someone had been stalking him online and that his Facebook had been hacked and the security settings changed.

18. At paragraph 47 the ET made the following finding:

> "Mr Lamont noted these points but considered they did not impact on the fact the comments on Facebook had been made and that was the only matter before him".

19. Mr Lamont found that the comments made regarding the claimant's supervisors and team leaders were highly offensive and inflammatory. The claimant apologised for these comments. With regards the comments regarding alcohol, Mr Lamont considered that these were specific and elaborate, and that they were a matter of public record which could be seen by members of the public. He felt that anyone reading them, whether engineers, members of the public or other employees, could lack confidence in the claimant's capability and make a decision not to call him out when on standby. He regarded being on standby as a position of trust.

20. Mr Lamont decided that as the comments, whether true or not, had the potential to undermine confidence that other employees and the public could have in the claimant's ability to react to an emergency situation He found that the claimant had by his actions undermined the confidence that his employers required to have in him. He accepted that whilst there had been no emergency on the night in question, the claimant's comments on Facebook would have left the respondent open to public condemnation. He decided that being under the influence of alcohol and making offensive remarks in Facebook were unacceptable and a clear breach of the respondent's policy and amounted to gross misconduct. He summarily dismissed the claimant by letter of 4 June 2013.

21. In evidence before the ET, Mr Lamont stated that he had been aware of some of the issues about which the claimant had complained before the disciplinary hearing. He also knew that there was unrest in the claimant's department. He denied the suggestion that his decision to dismiss had been caused by the claimant having made these complaints.

22. The other two employees who had made Facebook entries were also subject to disciplinary hearings. The result for one was a final written warning in respect of highly offensive comments posted on Facebook. The second was given an oral warning for his postings on Facebook which were not offensive. The difference that Mr Lamont saw between the claimant and the other two, was that the claimant had made comments about drinking while on standby. Mr Lamont found he had been drinking..

23. The claimant appealed against the decision to dismiss. He considered the decision to dismiss was too harsh; he did not accept that his comments could damage the reputation of Scottish Canals because they were not mentioned by name; he had not been under the influence of alcohol, and he claimed he had further evidence to strengthen his case. The further evidence consisted of information from another worker that he had not been on duty on the standby rota on the date in question.

24. The appeal was heard on 19 June 2013 and was taken by Ms Hurst, director of finance. The claimant was accompanied by Mr Mulhearn, a retired union official. Mr Mulhearn described the comments made by the claimant as "immature, childish and very stupid" and submitted that the penalty of dismissal was too harsh. He suggested a final written warning instead. He produced the rota showing that the claimant was not on standby duty on the night in question. He submitted that the claimant could not actually remember if he was on duty or not but explained that the rota indicated he was not. He took issue with the identification of the respondent, by the initials 'bw' and also on the basis that the claimant was not the author of that entry, and he referred to the history of bullying and what he described as the "apparent lack of concern" by the HR department.

25. Ms Hurst investigated the standby rota produced by the claimant and established that although he had not been on the rota he had in fact covered the standby duty of another worker and had claimed and been paid the allowance for being on call. She decided to refuse his appeal and a letter dated 24 June 2013 was sent to him explaining her decision. In that letter, Ms Hurst stated that she had read through the appeal letter and outlined the grounds of appeal as follows:

> - "You do not feel your actions could damage the reputation of Scottish Canals
> - You were not under the influence of alcohol on 13 August 2011 while on standby or ever in your ten years service".

26. It is not obvious from that that Ms Hurst identified that the claimant was arguing that the penalty of dismissal was excessive. She did however state that she had considered all the circumstances and we find that by so stating she showed that she included the points made on behalf of the claimant at the disciplinary hearing. Ms Hurst identified the claimant's allegations of bullying as a separate issue. She was satisfied that there was no causal link between those issues and the discovery of the comments on Facebook. She found that the comments were such as to identify the employer. She explained that she had investigated the rota and had found that the claimant had been paid for the standby duty on the relevant date. She dealt with the question of the comments about alcohol as follows:

> "Whether the announcements you had posted were true or not the issue is that by declaring that you would be drinking alcohol whilst on Standby undermines the confidence that we can have in you, as your employer. In addition, it undermines the confidence that other employees and customers can have in you. Indeed anyone who reads this comment on your open Facebook site might have a reduced level of confidence in the service that Scottish Canals provides to members of the public. You were in a position of trust while on standby and with the postings on Facebook you have abused that trust and confidence".

27. Ms Hurst's decision was as follows:

> "I can confirm that after much deliberation, I must uphold the original decision to dismiss you. I have taken into account your acknowledgement that it was a stupid thing to have done, but also have to balance that against the fact that you have raised other mitigatory points at least one of which has turned out to be untrue. Given that this matter involves an issue of trust, I consider that that trust has been breached and the original decision must stand".

28. The respondent submitted before the ET that this was not a case in which protected disclosures had led to dismissal. That was accepted by the ET and there is no cross-appeal. We therefore say no more about it.

29. As regards "ordinary" unfair dismissal, it was submitted that the respondents were entitled to find that the claimant had made offensive comments which were such as to identify his employers. The ET found that the identification of the employer, by initials, "bw" was not made out. They did however find that the comments were offensive.

30. At paragraph 84 of the ET judgment the following submission is noted:

> "Ms Davis[solicitor for the respondent] invited the Tribunal to find Mr Lamont had stated in his evidence that he 'could not' consider any sanction other than summary dismissal due to the severity of the misconduct and its impact on the relationship of trust and confidence, rather than he did not consider any other sanction".

31. That matter was of importance before us. It was not clear in our opinion from the judgment of the Employment Tribunal what their finding was on that matter. In paragraph 108 the ET note that Mr Smith argued that Mr Lamont had not considered his length of service or his unblemished record or the fact that his Facebook account had been hacked into and the settings changed. He submitted that Mr Lamont did not have regard to mitigation which included in his submission the bullying and harassment and that he did not consider any option other than dismissal. We deal with this below.

32. Under the heading "credibility and notes on the evidence" the ET found that there were no real issues of credibility in the case except for a point concerning Mr Lamont. He told the Tribunal he checked the rota to ensure the claimant was on standby on the night in question. The Tribunal did not accept his evidence on that point. They preferred the claimant's evidence that he had raised the issue of being on standby at the appeal hearing and had produced the rota

which showed that he was not scheduled to be on. The ET accepted Ms Hurst's investigation which showed that the claimant had swapped duties with another worker and had been paid to be on standby on the night in question. Ms Hurst found this reflected badly on the claimant. There may be an element of unfairness in that as the claimant explained that he had no memory of working that weekend, but a colleague came to him saying he was not on the rota. He accepted that he had swapped with someone else, but said he did not remember doing so. Given the passage of time that is not unlikely. We do not find that it was a matter which weighed heavily in the respondent's decision making.

33. The ET at paragraph 124 directed itself on section 98 of the Employment Rights Act 1996 (ERA). It noted that there are two stages: first, it is for the employer to show the reason for the dismissal and to show that it is one of the potentially fair reasons set out in section 98(1) or (2). If the employer is successful at that first stage then the Tribunal requires to determine whether the dismissal was fair or unfair under section 98(4). As the ET put it "this requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given". The ET came to the conclusion, at paragraph 126, that the respondent dismissed the claimant for reasons of misconduct relating to comments on Facebook. Having found misconduct, which is a potentially fair reason, the Tribunal directed itself that it must now consider the fairness of the dismissal for that reason. The ET then proceeded to direct itself on the case of **British Home Stores Limited v Burchell 1980 ICR 303**, **Sainsbury's Supermarket Ltd v Hitt 2003 IRLR 23** in full terms. They concluded that the investigation carried out by the respondents was a reasonable investigation and they concluded that the respondents had a genuine belief, held on reasonable grounds that the claimant had made the comments on Facebook. They noted at paragraph 143 the following:

> "We accepted the claimant's points did not impact on Mr Lamont's conclusions that the claimant had done what was alleged. The points go to mitigation and are considered below".

34. The ET found that the identification of the respondent as the employer could not be made from the comments. As regards the question of alcohol, the ET made the following finding at paragraph 146 and 147:

> "We next considered Mr Lamont's conclusion that the claimant was under the influence of alcohol on the 13 August 2011. Mr Lamont based that conclusion on the comments in the claimant's Facebook. Mr Lamont considered the fact the claimant had referred to an actual drink ('vodka and apple juice') and said that it was 'no too shabby' meant the claimant had actually had that drink at that time.
>
> Mr Lamont attached no weight to the claimant's explanation that he had not in fact been drinking and the comments were no more than 'banter'. The claimant explained to Mr Lamont that banter regarding /not drinking whilst on a 7 day standby period, was common place amongst the men. Mr Lamont disregarded the claimant's explanation and proceeded on the basis that because the claimant said it on Facebook, he must have done it".

35. It can be seen therefore that the ET stated that Mr Lamont "attached no weight" to the claimant's explanation and stated in the same paragraph, that Mr Lamont "disregarded the claimant's explanation". The question of what was disregarded and the explanation for that is of importance which we will discuss below.

36. The ET then turned its attention to the case of **Iceland Frozen Foods Ltd v Jones 1982 ICR 17** and directed itself that in considering fairness of the dismissal it had to have regard to the procedure followed by the respondent when dismissing the claimant. It found at paragraph 153 the following:

> "We were satisfied the respondent followed a fair procedure when it dismissed the claimant".

37. The ET then considered the question of comparative justice between the claimant and the other two workers and found that there was proper basis for the differential made and that it could not be said that these were parallel cases which had been dealt with differently.

38. The ET set out in paragraph 159 the submission made by the solicitor for the respondents, to the effect that the decision to dismiss fell within the band of reasonable

responses which a reasonable employer might have adopted in the circumstances. The ET dealt with that submission between paragraphs 160 and 169. They found that the decision to dismiss fell outside the band of reasonable responses which a reasonable employer might have adopted and that the dismissal was therefore unfair.

39. The reasons for coming to that conclusion was that as stated firstly in paragraph 160, that Mr Lamont did not consider any of the mitigation put forward by the claimant. They then listed the things put forward by the claimant in mitigation as follows:

> "(a) his Facebook account had been hacked and the security settings changed without his knowledge. The claimant accepted this did not alter the fact he had made the comments, but he considered the impact of those comments should be mitigated by the fact he did not understand his comments to the public.
>
> (b) Mr McRoberts had had sight of, if not possession of, the comments for some considerable time. The claimant again accepted this did not alter the fact he had made the comments, but considered the fact Mr McRoberts had known of the comments and taken no action, mitigated against the offence said to have been caused by the comments.
>
> (c) The claimant invited Mr Lamont to have regard to the fact Mr McRoberts had only come forward with the Facebook comments when he was told the claimant had raised issues of bullying and harassment against his supervisors. Mr Lamont accepted he had been aware of the unhappiness in the claimant's team, but had not taken this into account.
>
> (d) The claimant had 8 years service and an unblemished record.
>
> (e) The claimant had consistently had good performance reviews.
>
> (f) The claimant explained to Mr Lamont that the comments regarding drinking were 'banter' and that this was common practice amongst the men when someone was working standby.
>
> (g) The nature of Facebook and the fact it is a social media site used for chat, and frequently involves people making claims which are either exaggerated or simply not in fact true and
>
> (h) The claimant apologised for the comments made".

40. The ET then found, "in addition to the above points" that Mr Lamont gave no consideration to the fact that the comments were historic. Mr Lamont failed to have regard to the fact that there was no emergency on the night in question and that there was no risk. In paragraph 162 they found that there was no evidence before the Tribunal of the respondent having difficulty with the employees drinking whilst on standby. They stated "we inferred

from this that there was no such difficulty". At the end of that paragraph the ET stated as follows:

> "He knew the claimant had, in the three years since the comments had been made, carried out his duties as required and imposed no risk to the respondent or others. Mr Lamont must have been aware of these facts, or ought to have been so, but he failed to take these facts into account or to attach any weight to them".

41. We had some difficulty with paragraphs 164 and 165 which are in the following terms:

> "Mr Lamont appeared to have adopted a very narrow approach to this matter: he repeatedly told the tribunal that he had not had regard to points of mitigation because they were either not relevant or did not mitigate the fact the comments had been made. The claimant did not ever deny making the comments, and did not raise points of mitigation to endeavour to argue he had not made the comments. The claimant apologised for his conduct and raised points of mitigation, thereby inviting Mr Lamont to consider a less severe sanction. Mr Lamont failed to have regard to any points of mitigation.
>
> We concluded that in the circumstances of this case, no other reasonable employer would have failed to have regard to mitigation."

42. We found these paragraphs ambiguous. Before us, Mr Smith submitted that he had asked Mr Lamont three times at the ET, whether he had considered his points in mitigation and three times Mr Lamont said he had not. We cannot tell from the way that that paragraph is drafted whether the ET found that Mr Lamont refused to consider any matter said to be mitigatory or whether he considered matters but found that they did not in all the circumstances amount to mitigation.

43. The ET found at paragraph 166 that Mr Lamont did not consider any sanction other than dismissal.

44. At paragraph 168 and 169 the ET found as follows:

> "We asked ourselves whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in this case. We decided the decision to dismiss fell outside the band of reasonable responses: we were satisfied that no other reasonable employer would have dismissed in these circumstances given the historic nature of the comments, the mitigating factors and the fact the claimant had demonstrated in the three years since the comments had been made, that, in reality, he was not a risk and could be trusted in his work and whilst on standby. The respondent did not suggest there was any basis upon which to believe the claimant would reoffend: there had not been any further comments on Facebook regarding drinking on standby, and none of the supervisors on standby had raised any issues.

> We concluded the decision to dismiss in the circumstances fell outside the band of reasonable responses which a reasonable employer might have adopted. We decided the dismissal was unfair".

45. Before us Mr Napier submitted that the ET had substituted its own view for that of the employer. He referred to the case of **London Ambulance Service NHS Trust v Small 2009 IRLR 563** and to the well known *dictum* of Mummery, LJ between paragraphs 40 and 43. He stated as follows:

> "On the liability issue the ET ought to have confined its consideration to facts relating to the Trust's handling of Mr Small's dismissal: the genuineness of the Trust's belief and a reasonableness of the grounds of its belief about the conduct of Mr Small at the time of his dismissal. Instead the ET introduced its own findings of fact about the conduct of Mr Small including aspects of it that had been disputed at the disciplinary hearing. ….The ET used its findings of fact to support its conclusion that at the time of dismissal the Trust had no reasonable grounds for its belief about Mr Small's conduct and therefore no genuine belief about it. By this process of reasoning the ET found that the dismissal was unfair. In my judgment this amounted to the ET substituting itself and its findings for the Trust's decision-maker in relation to Mr Small's dismissal".

46. Mr Napier argued that the ET in this case had taken the same course. He referred to the case of **J J Food Service Limited v Kefil 2013 IRLR 850** in which Langstaff, P distilled the advice given by Mummery, LJ in the following way:

> "In other words, the very business of the Employment Tribunal is considering whether once the employer has established the reason for the dismissal the decision to dismiss for that reason was fair or unfair. In order to see if a tribunal has stepped beyond the permissible and gone outside the scope of its duty as set out in section 98(4) it is necessary to have regard to a tribunal's decision as a whole, but what one is looking for is some indication that the tribunal has, in dealing with a complaint of unfair dismissal, asked not whether what the employer did was fair but asked instead what it would have done in the light of the basic underlying facts".

Mr Napier argued that that was precisely what this Tribunal had done and that one could tell it had done so by the fact that it had made its own findings in fact. The ET referred to the Facebook entries as historic, but it made a mistake in the timing, stating that it was three years between the incident and the disciplinary hearing when it was in fact two years. It found that there was no emergency on the night, and so no call out, and from that it decided there was no impact on colleagues, and no risk to life and property. It drew an inference that the respondent had no difficulty with employees drinking when on standby. These were all finding which the ET made when it had no business to do so.

47. Further, Mr Napier submitted that the ET found that Mr Lamont did not give weight to matters which the ET regarded as mitigatory. That decision was not for the ET. It had to decide if the decision made by the respondent was within the range of reasonable decisions open to an employer in light of the investigation carried out by the employer. This employer was found to have carried out a procedurally fair, and sufficient, investigation. Therefore the ET were substituting their own view of the weight they would have put on matters had they been the employer. In any event the ET erred in giving no consideration to the appeal. Even if Mr Lamont had erred in his consideration of mitigation, it had been cured by Ms Hurst in the appeal. If the criticism was that Mr Lamont, and Ms Hurst, failed to give a final warning rather than to dismiss, Mr Napier argued under reference to **Mears Ltd v Brockman [2014] UKEAT 0243_14_2411** that

> "[I]t is moving into dangerous territory for an ET to allow that a final written warning is within the range whereas dismissal is outside. Such judgment calls might well be said to be what the range of reasonable responses are all about."

48. On the matter of substitution Mr Napier argued that the ET showed its substitution mind set by referring to "misconduct" where the respondent had found "gross misconduct". He submitted that any conduct which results in dismissal must be considered by the ET and a decision made as to whether looking at it objectively it amounted to gross misconduct. He argued that drinking while on standby; telling anyone who read Facebook that he had done so; and using offensive language to describe colleagues on Facebook, open to all to read, was plainly gross misconduct and should have been found to be so by the ET.

49. Mr Napier also submitted that the ET's decision was perverse. They had found at paragraph 168 that no reasonable employer would have dismissed in these circumstances. He submitted that standing the Tribunal's finding that a reasonable investigation had been carried out; that a genuine belief was held; and that there were reasons for that belief, the ET had erred

in law by then deciding that the employer had made a decision which no reasonable employer could make. The ET had found that the procedure carried out by the employer was fair. Mr Napier argued that while there was at first sight some ambiguity in the Tribunal's decision concerning whether Mr Lamont had considered mitigation but not found it to be of any weight or whether he had not considered it at all, it was clear that it must be the former. He further argued that the letter from Ms Hurst indicated that she had taken everything into account and while that letter might have certain difficulties it did not justify the suggestion that the difficulty with Mr Lamont, if any such difficulty existed, had not been cured on appeal. Therefore it was perverse for the ET to find that mitigation had been ignored.

50. Mr Smith represented himself assisted by his wife. He stated that the Tribunal had considered matters very carefully and had taken some time to make their decision. He commended the decision to us. He stated that he had asked the Tribunal on three occasions whether Mr Lamont had considered mitigation and each time he said he had not. He reminded us that the Tribunal found that Mr Lamont was not credible when he said he had checked the rota. He advised us that he was not experienced in law and was not able to address us on any legal matters but emphasised that we should not cast aside the decision of the Tribunal.

51. We have decided that we must give effect to Mr Napier's submission that the ET in this case did substitute its own view for that of the employer. We find that it made its own findings in fact about the existence or otherwise of risk and that it did carry out the exercise which the judgments from Mummery LJ and Langstaff P show quite clearly should not be done. We accept Mr Napier's submission that the ET essentially criticise the weight Mr Lamont put on mitigation, rather than finding that he refused to consider it. The ET found that the procedure was not unfair. They would not have done so if they had found that a decision maker refused to listen to part of the case. In any event, we find that Ms Hurst did take mitigation into account.

52. We find that the ET's mistake about the gap in time between the incident and the disciplinary hearing is suggestive of substitution, although we would not find it decisive were it the only factor. Similarly, the reference to misconduct as opposed to gross misconduct is also suggestive of a substitution mind-set. We find that the ET clearly substituted its own views when it made findings about the respondent's lack of problems with employees drinking when on standby, and the lack of risk to the public. The ET has not considered the respondent's views about what did happen, and asked itself if the respondent's reaction in light of those views was within the reasonable range of responses. Taking all of these matters together we are persuaded that the ET erred in law and its decision cannot stand.

53. In those circumstances we do not require to consider whether the decision was perverse.

54. We therefore have to consider disposal. Mr Napier submitted that this was a case in which all the facts had been found and it could be said that the dismissal was fair and that we should simply find that. He argued that this was one of the unusual cases in which there is no point in remitting the case. His fall back position was that the matter should be remitted to a freshly constituted Tribunal to consider only whether the matter was fair in all the circumstances which had been found by the first Tribunal.

We take the view that there is no point in remitting this case to a Tribunal. We find on the facts found by the ET that there is only one answer to the question which is that the dismissal was not unfair.

55. Lastly Mr Napier did move for payment of £1,000 in respect of a portion of the fees paid by the respondent. Mr Smith addressed us on his financial situation. He has not been able to find employment and is at the first stages of bankruptcy procedure. In those circumstances Mr Napier withdrew his motion.