Appeal No. UKEAT/0350/15/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 September 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR J F DYE — APPELLANT

ROYAL FREE LONDON NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTONY SENDALL (of Counsel) Instructed by: BP Collins Solicitors Collins House 32-38 Station Road Gerrards Cross Buckinghamshire SL9 8EL
For the Respondent	MS MARTINA MURPHY (of Counsel) Instructed by: Bevan Brittan LLP Fleet Place House 2 Fleet Place Holborn Viaduct London EC4M 7RF

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Reasonableness of dismissal

CONTRACT OF EMPLOYMENT - Wrongful dismissal

Unfair dismissal - reason for dismissal - section 98(1) and (2) ***Employment Rights Act 1996*** *- burden of proof and evidential basis for decision - reasonableness of dismissal for reason found - perversity*

Wrongful dismissal - perversity

Contrary to the Respondent's primary case, the ET found it had been the Appellant's employer (in circumstances in which the purpose of the contract of employment was to permit his secondment to a third party, RAFT) and had dismissed him. Finding for the Respondent on its alternative case, however, the ET concluded that the dismissal had been for a reason related to the Claimant's conduct (his termination of the secondment with RAFT without prior consultation with the Respondent) and had been fair. It had further found that the Claimant's action in terminating the secondment with RAFT without prior consultation with the Respondent had removed the purpose from his contract of employment and was inconsistent with an intention to be bound by that contract. In the circumstances, the Respondent had been entitled to summarily dismiss the Claimant and his wrongful dismissal claim failed.

The Claimant appealed on three bases: (1) the ET approached the issue of the reason for dismissal incorrectly for the purpose of section 98(1) **ERA**; and/or (2) there was no evidential basis for its conclusion; (3) its conclusions on unfair and wrongful dismissal were perverse.

Held: *allowing the appeal in part*

(1) The ET had not lost sight of the correct test under section 98(1); it had been entitled to find the Respondent had discharged the burden upon it in this regard. It had identified the

relevant decision taker and reached a permissible finding as to the real reason for terminating the Claimant's contract (**Abernethy v Mott, Hay & Anderson** [1974] IRLR 213 CA applied).

(2) Further, although the Respondent's pleaded case on reason had been put in the alternative, there was adequate evidential basis for the ET's conclusions in this respect.

(3) On the perversity challenge, the ET had reached permissible findings on the issue of reason and that this was a reason that was capable of justifying the dismissal of the Claimant in the circumstances of this case. The finding on procedural fairness had, however, disclosed a failure to properly apply the guidance laid down in **Polkey v A E Dayton Services Ltd** [1988] ICR 142 HL. There was no basis upon which the ET could find that the Respondent had concluded that some form of procedure could be dispensed with (as futile) in this case. Although that might be the ET's view, the Respondent had not expressly turned its mind to the point as (as the ET found) its decision not to proceed with a hearing was informed by its desire not to act inconsistently with it stance on the question of the identity of the Claimant's employer. The Respondent's evidence before the ET was that it would have proceeded to hold a hearing with the Claimant, albeit it considered that the outcome would ultimately have remained the same. That being so, for section 98(4) purposes, the conclusion must be that the decision was unfair. Moreover, the ET had dismissed the relevance of the **ACAS Code on Discipline and Grievance** on the basis that the **Code** was relevant only to disciplinary proceedings; yet it had found that this was a dismissal for a reason relating to the Claimant's conduct. The Claimant had discharged the high burden upon him to show that this was a perverse conclusion and the ET's decision on the unfair dismissal claim would be set aside and a finding substituted that the Claimant had been unfairly dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the First Respondent, as below. There were originally two Respondents; the Second Respondent was a research charity known as RAFT Trustees Ltd ("RAFT") but, during the course of the ET hearing, the Claimant had withdrawn his claim against RAFT, and the claim had proceeded just against the First Respondent.

2. This is the Full Hearing of the Claimant's appeal against a Judgment of the Watford Employment Tribunal (Employment Judge Southam, sitting alone on 13-16, 19 and 20 May 2014; "the ET"), sent to the parties on 1 July 2014. Save that RAFT was represented by counsel before the ET, representation then was as now. By its Judgment the ET dismissed the Claimant's claims of unfair and wrongful dismissal.

The Factual Background

3. The relevant background goes back to November 1989, when Hillingdon Health Authority entered into an agreement with RAFT (the "Restoration of Appearance and Function Trust") whereby the Authority would employ such persons as RAFT required. The individuals in question would be employed and paid by the Authority although RAFT would reimburse their salary costs and they would work under the supervision of RAFT trustees, which included a number of Plastic Surgeons also employed by the Authority at RAFT's research facility at Mount Vernon Hospital.

4. At some stage prior to the Claimant's appointment, pursuant to NHS reforms, Hillingdon Health Authority's responsibilities for Mount Vernon passed to West Hertfordshire Hospitals NHS Trust ("the Trust").

5. The Claimant is a research scientist with particular expertise in biochemistry, cell biology and angiogenesis. In 2001, he successfully applied to RAFT for a position as a post-doctoral research fellow scientist in tissue repair and vascular biology. Although his selection had been carried out by RAFT and he was to work within its research centre at Mount Vernon, he was employed (as the ET found) by the Trust pursuant to the agreement with RAFT.

6. Subsequently, the Trust decided it could no longer sustain its plastic and burns services unit at Mount Vernon and, in 2006, the management of that service was transferred to the First Respondent. The identity of the Claimant's employer was a major issue before the ET, but, having found that he had initially been employed by the Trust, it equally found his employment then transferred to the First Respondent, albeit he continued to be seconded to RAFT.

7. In 2013, issues arose between the Claimant and RAFT. He was suspended, and various allegations of misconduct were made against him. The Claimant did not consider it was open to RAFT to take disciplinary proceedings against him, the First Respondent being his employer. RAFT agreed the First Respondent was the Claimant's employer and would need to undertake any disciplinary proceedings; on the other hand, it considered it was entitled at any time to simply terminate the Claimant's secondment without consultation with him or the First Respondent. Meanwhile, the First Respondent was unable to identify any positions in its organisation into which the Claimant could be redeployed and continued to decline to accept that it was his employer.

8. Concerned by the length of time he had been suspended - he had been suspended from working in any capacity since 17 June 2013 - and by the potential damage to his reputation and career, the Claimant felt he had no alternative but to terminate his secondment with RAFT, which he did by letter of 11 October 2013. RAFT responded on 15 October, making clear it did not accept the Claimant was entitled to terminate the secondment arrangements between RAFT and the First Respondent, but also acknowledging that his letter had clearly indicated he no longer intended to work at RAFT, and it therefore confirmed that the secondment was terminated. That was duly communicated to the First Respondent.

9. The First Respondent responded to RAFT, stating that it considered that RAFT, not it, was the Claimant's employer and seeking an indemnity for any claim he might bring.

10. On 17 October 2013, the Claimant emailed the First Respondent to make clear that whilst he had terminated his secondment to RAFT with immediate effect he had not resigned his employment with the First Respondent. On 1 November 2013 he submitted a formal grievance to the First Respondent concerning his position.

11. By letter of 6 November 2013, Mrs Patel (interim Assistant Director of Workforce for the First Respondent) responded to the Claimant in similar terms to the earlier response to RAFT: the First Respondent did not consider that it was the Claimant's employer; RAFT was. In any event, the Claimant's decision to terminate his secondment also terminated any contractual relationship he had with the First Respondent.

12. That position was reiterated in Mrs Patel's subsequent letter of 21 November 2013 to the Claimant's solicitors:

> **"In any event, whatever the status of any actual contract between your client and the Trust, the sole purpose of that contract was to facilitate his work at RAFT. The Trust does not have any alternative role for your client; nor can it be expected to simply redeploy individuals it has engaged to perform a role (whether employees or otherwise) simply because they no longer wish to perform that role. As a result, your client's decision set out in his letter of 11 October 2013 was either:**
>
> **- An effective immediate termination of his contract with the Trust; or alternatively**
>
> **- A fundamental breach of contract, or an act which wholly frustrated the performance of that contract, entitling the Trust to cease to make any payments to him and/or to terminate his contract with immediate effect. For the avoidance of doubt, in case his contract was not already terminated, we confirm that our letter of 6 November and/or this letter should be taken as having the effect of terminating that contract for these reasons."**

13. It was against that background that the Claimant submitted his claim to the ET on 23 December 2013.

The ET Proceedings, Decision and Reasoning

14. In responding to the Claimant's claims of unfair and wrongful dismissal, the First Respondent put its case in various alternative forms. First and foremost, it continued to deny it was the Claimant's employer. In the alternative, it argued his contract of employment had been frustrated; alternatively, he had resigned in circumstances in which there was no constructive dismissal. In the further alternative, the First Respondent argued that, if it were to be found that it, as his employer, had dismissed the Claimant, that would have been by its letters of 6 or 21 November 2013 and for some other substantial reason, namely that the sole purpose of his employment was to work at RAFT, that was no longer possible and there was no alternative employment available; alternatively, for a reason related to the Claimant's conduct, the Claimant having committed an act of gross misconduct by unilaterally terminating his work at RAFT and thus refusing to perform the work for which he had been employed. Even if the ET had found that the Claimant had been unfairly dismissed by the First Respondent, it also contended he should be entitled to no award, either under **Polkey v A E Dayton Services Ltd** [1988] ICR 142 HL or as he had contributed to his own dismissal.

15. For its part, the ET did not consider that the Claimant had had the right to terminate his secondment with RAFT; that had been a decision to be made as between the First Respondent and RAFT. That said, his letter of 11 October 2013 had not determined his employment with the First Respondent, albeit it made clear that the secondment with RAFT could not continue. As RAFT was entitled to terminate the secondment at any time, it had duly come to an end as a result of the Claimant's action. Given the purpose of the Claimant's contract of employment was so he could work for RAFT, this meant there was no longer any purpose to that contract.

16. The ET considered whether that could be said to have amounted to a frustration of the contract. It referred to the way in which the doctrine of frustration had been defined by Lord Radcliffe in **Davis Contractors Ltd v Fareham Urban District Council** [1956] AC 696 (as cited by Lord Johnston in **G F Sharp & Co Ltd v McMillan** [1998] IRLR 632 EAT):

> **"… frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. …"**

17. The ET asked itself whether it could be said that the position that had arisen had done so without default of either party. It did not think this was the case: the Claimant was at fault in purporting to terminate the secondment; he had no right to do that and should first have consulted the First Respondent. That meant that there was no frustration of the contract. Looking at this from the perspective of the First Respondent, the ET concluded:

> **"54. … If the secondment was terminated, then, even if the first respondent was minded not to blame the claimant for his part in the matters which led to the termination of the secondment, they would still have been entitled to take the view that the purpose of the employment contract had come to an end and that it would have to be terminated. Alternatively, they might have said that the claimant brought his situation upon himself by his own conduct and then decided to dismiss him because of that.**
>
> **55. My conclusion is that the first respondent, the Royal Free, terminated the claimant's employment. They did so by adopting, in Mrs Patel's letter of 21 November the alternative position described above. …"**

18. Having thus concluded that the First Respondent had dismissed the Claimant, the ET turned to the question of reason. On this issue, the First Respondent had the burden of proof. That presented certain evidential difficulties for it, given its primary position was that the Claimant was not its employee and much of its defence in the ET proceedings assumed it had made no decision to dismiss him. Indeed, Mrs Patel's witness statement (see paragraph 56 of that document) had only addressed the question of any potential dismissal by the First Respondent on a hypothetical basis: *if* the Claimant had been treated as its employee. In those circumstances, however, she contended there would have been no prospect of the First Respondent continuing to employ the Claimant, because: (1) there was no alternative role; (2) the Claimant had taken a unilateral decision not to carry out the only role for which he was engaged and, if that had been a secondment, his failure to consult the First Respondent was unacceptable; and (3) there were allegations against the Claimant (raised by RAFT) which would have amounted to gross misconduct for an employee in the NHS.

19. In such circumstances, Mrs Patel had further stated:

> **"57. The Royal Free would have been forced to invite [the Claimant] to a hearing and dismiss him, either because:**
>
> > **57.1. his relationship with RAFT had completely broken down and he was not willing to perform the only role for which he was engaged; and, insofar as there was any obligation to consider redeploying him in such circumstances, there was nothing else available for him anyway; or**
> >
> > **57.2. because of gross misconduct.**
>
> **58. Realistically, I suspect it would have taken 3 weeks to convene a hearing, although given that [the Claimant] was refusing to work, his pay would probably have been stopped in the interim anyway."**

20. In thus reaching its conclusion as to reason, the ET stated:

> **"57. … My view is that the reason was because of the breakdown in the relationship between the claimant and the second respondent, and the claimant's purported termination of the secondment. That is not a reason that is connected with the claimant's redundancy but it is a finding that the employment contract was terminated because of the claimant's conduct, in purporting to terminate the secondment which, as between himself and the second respondent, might well have been justified. As between the claimant and the Royal Free, that action was precipitate and not justified."**

21. It expressly rejected (see paragraph 58) that the Claimant was dismissed in respect of the allegations that had been made by RAFT. It continued:

> **"59. Properly regarded, the reason for any termination of the claimant's employment was concerned with the claimant's conduct."**

22. That (see paragraph 60) was a potentially fair reason.

23. As to whether the decision to dismiss for that reason had been fair, the ET did not consider that the termination of the Claimant's employment was necessarily unfair due to the failure of the First Respondent to become involved in his issues with RAFT: it was inevitable that any disciplinary process would have been led by RAFT, and the ET did not consider the First Respondent could be criticised in that respect. The Claimant's relationship with RAFT had irretrievably broken down, and there was no other work for him to do. As such, there was nothing that the First Respondent could reasonably do. Whilst having regard to the **ACAS Code**, the ET considered that its provisions were concerned with disciplinary situations and grievances. The Claimant's situation was unique, and there was no procedure for the First Respondent to follow in those circumstances. No investigation was required, and, whilst the First Respondent might have held a meeting, it would inevitably have decided to dismiss the Claimant. Having regard to all of the circumstances, dismissal was a reasonable sanction, and the ET considered the unfair dismissal claim was not made out.

24. Neither, it concluded, was this a wrongful dismissal. The Claimant's action in relation to the secondment amounted to a rejection of his contract with the First Respondent, its purpose having been so that he could work for RAFT. Having rejected the fundamental purpose of the contract, the Claimant had committed a fundamental breach, and the First Respondent had been entitled to dismiss him summarily.

The Appeal

25. The proposed appeal is put on three main grounds: (1) the ET applied the wrong test to determining the reason for the dismissal, substituting its view rather than finding that which had led the First Respondent to take the decision it did; alternatively, (2) there was no evidence that the reason found by the ET had been the First Respondent's reason for dismissal; and, alternatively, (3) the ET's findings in respect of unfair and wrongful dismissal were perverse. The First Respondent resists the appeal, essentially relying on the ET's reasoning.

The Parties' Submissions

The Claimant's Case

26. Mr Sendall submits the ET failed to apply the correct test under section 98(1) of the **Employment Rights Act 1996** ("ERA"); in particular, it failed to apply the requirement that it was for the First Respondent to prove the reason or principal reason for the dismissal and that it was a reason that was capable of being fair for the purposes of section 98(1) or (2).

27. The First Respondent's primary case before the ET was that it was not the Claimant's employer and accordingly had not dismissed him. It was implicit in that contention - as it was in the First Respondent's alternative cases of frustration and resignation - that no one within the First Respondent had taken a decision to dismiss. Having rejected those arguments, the ET was required to hold the First Respondent to proof as to the reason for the dismissal it had denied. It failed to do so. First, it failed to identify the person who was responsible for any decision to dismiss, the essential starting point in order to determine the "*set of facts known to the employer, or … beliefs held by him which cause him to dismiss*" per Cairns LJ in **Abernethy v Mott, Hay & Anderson** [1974] IRLR 213 CA, approved in the House of Lords per Viscount Dilhorne in **W Devis & Sons Ltd v Atkins** [1977] ICR 662. The ET had, instead, effectively

constructed a reason from its own view as to what should have been the reason for the termination of the Claimant's employment, hence the language used at paragraph 57:

> **"… My view is that the reason was … [as] between the claimant and the [First Respondent], that action was precipitate and not justified." (emphasis added)**

28. That disclosed an error of substitution: the ET was substituting its conclusion as to what the reason was, as opposed to finding what the First Respondent's reason was. See also the expression "*Properly regarded, the reason for any termination*" at the start of paragraph 59, which revealed this was the ET's construction of events.

29. That brought into play the second basis of the appeal, the absence of evidence for the ET's finding. Mrs Patel, the author of the letters of 6 and 21 November 2013, did not give evidence to the effect that she had made the decision to dismiss. Indeed, her statement made clear that neither she nor anyone else at the First Respondent had taken any decision to dismiss (see paragraph 56 of her statement, which speaks in hypothetical terms as to what the First Respondent might have done had the Claimant been treated as one of its employees). At paragraph 57, Mrs Patel explained what *would have* taken place had the First Respondent accepted that the Claimant was its employee: it would have been forced to invite the Claimant to a hearing and only then would have dismissed him. That suggested that the First Respondent would in fact have followed some kind of procedure even if ultimately the decision would have been that his employment had to be terminated before making a decision on dismissal. As it did not hold such a meeting, it could not have made such a decision. In the further alternative, the ET's conclusion in this regard was perverse.

30. The perversity ground of appeal was also relied on, in the further alternative, in respect of the ET's finding that the Claimant's letter of 11 October 2013 to RAFT (purporting to

terminate his secondment without prior discussion with the First Respondent) was a repudiatory breach of contract entitling the First Respondent to summarily dismiss him without any formal process. That was perverse, given the First Respondent's evidence, as recorded in Mrs Patel's witness statement, that it would have followed a procedure. It was further perverse for the ET, having concluded the First Respondent was the Claimant's employer, to fail to acknowledge or take account of its legal responsibilities in terms of the obligation to maintain trust and confidence, which might require it to take active steps to seek to resolve the issues between the Claimant and RAFT against a background where, the Claimant said, the First Respondent had failed to intervene appropriately at any earlier stage. That provided mitigating circumstances to explain why the Claimant felt he had to write the letter of 11 October 2013.

31. Further, it was perverse of the ET to find on the wrongful dismissal claim, that the Claimant was rejecting his contract with the First Respondent when he expressly stated he still considered himself employed by it, and the ET had found (paragraphs 43 and 44) that he had not terminated his contract with the First Respondent by means of his 11 October letter.

The First Respondent's Case

32. The ET had found the reason for dismissal was related to the Claimant's conduct; section 98(1) made clear the conduct did not have to be of any particular character.

33. The classic statement of what the reason for a dismissal is was as per Cairns LJ in **Abernethy**:

> **"13. … A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. …"**

34. In the present case, the decision to dismiss (as held by the ET) was communicated to the Claimant by letter of 21 November 2013. That was the starting point for the analysis of the First Respondent's reason for the dismissal: it set out a set of facts known to it, or the beliefs held by it, that caused it to dismiss the Claimant. Whilst an ET had to first determine the identity of the actual decision maker, it could be inferred that this is what this ET had done. Its decision was premised on the finding that Mrs Patel had been the relevant decision maker even if others had been involved in discussions leading to that decision (see its finding that Mrs Patel replied on behalf of the First Respondent on 21 November 2013 (paragraph 25.98), its reference to Mrs Patel's analysis of the effect of the purported termination of the secondment (paragraph 51) and its finding that the First Respondent dismissed the Claimant by "*adopting, in Mrs Patel's letter of 21 November the alternative position*" (that is, that the Claimant's employment should be terminated due to his conduct; see paragraph 55).

35. The ET demonstrably analysed the First Respondent's reason for the dismissal and concluded that, properly regarded, the reason was the Claimant's conduct in purporting to terminate the secondment with RAFT, which was not justified in terms of his relationship with the First Respondent (see paragraphs 57 to 59). As for the evidential basis for the ET's decision: the relevant decision taker was evidently Mrs Patel, given she was the author of the letter of dismissal (see paragraph 30 of her witness statement, which confirmed this was her response); this was not a case of constructing a case on dismissal absent contemporaneous evidence: that existed in the form of Mrs Patel's evidence both in her statement and in cross-examination and in her letter of 21 November 2013. The ET's decision was not perverse.

36. As for perversity more broadly, on the question of fairness, the ET had to look at the facts before it - what actually happened - and apply the range of reasonable responses test in

those circumstances. Mrs Patel's evidence was on a hypothetical basis, and the ET was entitled to look at the actual facts. It had been entitled to find that this was a unique situation, to which the **ACAS Code** did not apply, and that this was one of the exceptional cases (see **Polkey**) where it was fair, notwithstanding the Respondent's failure to follow any process.

37. On the wrongful dismissal claim the ET had been obliged to apply a different test. Here, it had been the primary fact finder, and there was a high burden on the Claimant to show perversity, which he had failed to discharge.

Discussion and Conclusions

38. The ET was faced in this case with an unusual factual matrix. Moreover, its conclusion that the First Respondent was the Claimant's employer posed certain difficulties for that party, given how its dealings with the Claimant had been premised on the basis that RAFT was his employer. Its position was made all the more difficult given that the ET then went on to reject the First Respondent's various alternative arguments, which would have excused it from showing the reason for the Claimant's dismissal. That did not, however, mean that, once it was found that the First Respondent was the Claimant's employer and had dismissed him, it could not meet the burden upon it (see section 98(1) **ERA 1996**) of showing a reason for the dismissal that was capable of being fair for section 98 purposes. Evidentially, that posed a challenge for the First Respondent, but the ET had found that it had dismissed the Claimant, and, as is common ground before me, the question was then what was the set of facts known to the First Respondent, or beliefs held by it, that had caused it to dismiss the Claimant (see **Abernethy**).

39. Given that the First Respondent was an organisation and not a single individual, it is common ground before me that the ET needed first to determine who the relevant decision

taker was (albeit that a decision may be made by more than one person acting in concert). It would then need to assess the subjective reason operative upon the mind of that individual that caused the First Respondent to dismiss the Claimant. So far as the unfair dismissal case was concerned, it was not for the ET to decide what might have led *it* (that is, the ET itself) to dismiss. That said, if the First Respondent had attached a particular label to the set of facts it had relied on at the time, the ET would not be bound to find that was the operative reason for the dismissal; it would be entitled to make a finding as to the correct label, objectively speaking (see the passage cited from Cairns LJ's judgment in **Abernethy** set out above).

40. Although the ET did not expressly state it had found Mrs Patel was the relevant decision taker in this case, I consider the First Respondent is correct to say that so much can be inferred from the Reasons. In reaching this judgment, I bear in mind that the focus of the case before the ET was very much on issues of employment status (which explains why the detailed stages of the determination in respect of the reason for dismissal were not more fully spelled out). That said, I am satisfied that the ET's Reasons show that it was ultimately clear as to who the relevant decision maker was. The ET had found that the decision to dismiss was reached by adopting the alternative set out in Mrs Patel's letter of 21 November. It was, further, apparent from the earlier findings of fact in respect of the preceding history that the ET considered Mrs Patel had taken the lead on issues relating to the Claimant and that she was the relevant person to whom he should have turned and whose agreement he should have sought (see paragraph 52) before purporting to terminate the secondment with RAFT. Mrs Patel might have consulted with the HR business partner who dealt with RAFT (Mr Widdowson) and with her own manager (Ms Payne), but she was the person who took on the responsibility of communicating with the Claimant in her letters of 6 and 21 November, and ultimately the ET had found it was Mrs Patel's analysis that was the key (see paragraph 51).

41. It is against those background findings, which I accept identify Mrs Patel as the relevant decision maker in respect of the Claimant's dismissal, that the ET went on to reach its conclusions as to the operative reason for that dismissal. In so doing, I am satisfied that it was not falling into an error of substitution. The reference to "My view" at paragraph 57 is no more than stating what the ET found as a matter of judgment on the evidence before it, and the subsequent conclusion stated at the end of that paragraph represents the ET's rejection of the Claimant's case that this could not be characterised as an act of misconduct on his part.

42. The question then arises as to whether the ET reached its finding that the First Respondent had discharged the burden upon it absent a proper evidential basis. As I have already identified, it is right to say that Mrs Patel's witness evidence before the ET did not expressly identify her as the decision taker; it dealt with the question of dismissal on a hypothetical basis. That said, her evidence on that hypothetical situation - which, of course, the ET found to be the actual case - placed her into the shoes of the decision maker. Thus she set out the reasons that would have led the First Respondent to terminate the Claimant's employment (paragraph 56 of her statement); she explained directly what would not have been acceptable from her perspective (paragraphs 56.2 and 56.3), and she confirmed her authorship of the crucial letter of 21 November with no suggestion there was any other decision maker involved. Along with this, I further accept the First Respondent's point that the ET had before it the evidence of the letters of 6 and 21 November, both authored and signed off by Mrs Patel, along with the background history that had seen her take ownership of the dealings with the Claimant. As to whether this was also evidence as to the real reason operative on the mind of the First Respondent for the Claimant's dismissal, I am satisfied that it was. Allowing for the hypothetical nature of Mrs Patel's witness evidence, the ET had the contemporaneous evidence

of the correspondence, which is what it found to have constituted the communication of the First Respondent's decision such as to bring the contract to an end.

43. Mr Sendall makes much of the reference to "reasons" in the letter of 21 November and to the alternative reasons for the Claimant's dismissal hypothesised in Mrs Patel's statement and as set out in the First Respondent's pleaded case. Ultimately, however, it was for the ET to make a finding as to the real or the principal reason for the dismissal, and I am satisfied that it did so: that was the Claimant's conduct in terminating the secondment with RAFT without consultation with the First Respondent. I am further satisfied that was founded upon a sound evidential basis. In particular, I note the ET's analysis of Mrs Patel's reasoning in her letter of 21 November at paragraphs 54 and 55 of its Reasons. In the circumstances, I consider that there was sufficient evidence to found the ET's decision as to the reason for the decision to dismiss and that it was a reason related to the Claimant's conduct.

44. I turn then to the perversity challenge on the unfair dismissal finding as to the fairness of the dismissal of the Claimant for the reason as found by the ET. I am mindful that the test that the ET was bound to apply - the range of reasonable responses of the reasonable employer - is one that an ET is peculiarly well placed to judge and I should not interfere with its conclusion unless I am satisfied that it can properly be said to have been perverse, a very high test indeed (see **Yeboah v Crofton** [2002] IRLR 634 CA).

45. In this case, the ET concluded that the decision to dismiss by reason of the Claimant's conduct was substantively fair, in particular given:

> **"61. … the circumstances were that the claimant was employed to work with RAFT, his relationship with RAFT had irretrievably broken down, he had purportedly terminated the secondment, and there was no other work for him to do (see below). Those circumstances determine the range of steps that a reasonable employer must take. Apart from looking for other employment, there was nothing that the Royal Free could reasonably do."**

46. It went on to consider the question of process in this light, holding:

> **"62. The ACAS Code and Guide apply to dismissals for conduct. They are concerned with disciplinary situations and grievances. The claimant's situation was unique. There was no procedure for the Royal Free to follow in those circumstances. No investigation was required. The Royal Free might have held a meeting, at which, inevitably, it would have decided to dismiss the claimant. Instead, it became distracted by a view (incorrect in my opinion) that the claimant was not their employee. Holding a meeting would have conflicted with the view that they held."**

47. Given the ET's earlier findings, I cannot see that it could be said that its reasoning at paragraph 61 was perverse. Substantively speaking, the Claimant had acted in a way that removed the very purpose for his employment and had failed to forewarn the First Respondent before doing so. The situation that the First Respondent faced in November 2013 was indeed as the ET had permissibly found at paragraph 61.

48. I am, however, troubled by the ET's consideration of the question of procedure. In the seminal case of **Polkey**, Lord Bridge emphasised the importance of procedural safeguards:

> **"… in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; … If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment tribunal] is *not* permitted to ask in applying the test of reasonableness posed by [section 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [section 98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [section 98(4)] may be satisfied." (pp 162G-163C)**

49. In the present case, the procedural steps that the First Respondent envisaged as applicable would have required some form of hearing (see Mrs Patel's statement). While the need for prior investigation might have been reduced or removed - given the position the First Respondent was faced with by November 2013 - this employer had not concluded that all procedural steps would be futile. That is clear, first, because Mrs Patel had effectively said so: it would have held some form of hearing; and, second, on the ET's own finding, the reason the

First Respondent did not proceed with the hearing was not because it had concluded it would be futile but because to do so would have conflicted with its erroneous stance that the Claimant was not its employee (and the ET had not found that to have been a "reasonable response").

50. I am, moreover, troubled by the ET's rejection of the relevance of the **ACAS Code**. This was apparently on the basis that the **Code** is concerned with discipline and grievance. I am, however, unable to see why a disciplinary process would not be relevant to a conduct dismissal (as the ET found this was). The position might have been different had the ET found that this was a dismissal for some other substantial reason other than conduct, but it did not do so. I can see that - given its later finding that the First Respondent was entitled to summarily dismiss the Claimant - the requirement to hold a hearing might well have seemed to the ET to have been futile, but that was not the test. If the First Respondent had gone through that thought process - and the ET had found its response was within the range of reasonable responses - that might have been a permissible finding. But it had not, and the ET could not therefore reach that conclusion under section 98(4). And the point is not a purely academic one: the ET had found the Claimant was the First Respondent's employee; it therefore had obligations towards him to at least consider a hearing. That was relevant to whether the dismissal was reasonable, and I am not satisfied it was taken into account.

51. In the circumstances, whilst upholding the ET's finding on reason, I am not persuaded that the reasoning on the question of reasonableness is safe, and, given the evidence of Mrs Patel, I consider I am bound to find that it was "almost certainly wrong". The perversity appeal is therefore upheld on that basis.

52. I then turn to the question of perversity in respect of the wrongful dismissal finding. Here, the Claimant argues the ET reached an impermissible finding that he had demonstrated he no longer intended to be employed by the First Respondent when he had expressly written to it in October 2013, stating he still considered himself its employee.

53. On this claim, the ET was bound to reach its own decision as to the impact of the Claimant's conduct, whether it amounted to a repudiatory breach of his contract with the First Respondent. It concluded that, by terminating the secondment with RAFT the Claimant was rejecting his contract of employment with the First Respondent, because there was nothing else to that contract; its whole purpose was for him to work for RAFT.

54. Given the unusual facts of this case, I do not consider that the Claimant has made good the high burden he faces to show that this was a perverse finding. I accept that his October communication stated that he still considered himself to be the First Respondent's employee, but his actions, as the ET found, evidenced precisely the opposite. He had ended the secondment for which he was employed, and he had done so without first notifying the First Respondent or seeking its agreement. One asks what was left in terms of his employment relationship with the First Respondent. The ET's answer to that was nothing. I am unable to say that it was not entitled to reach that conclusion.

55. I therefore dismiss the appeal against the finding on wrongful dismissal and allow the appeal on unfair dismissal in respect of the finding of fairness.

Disposal

56. Having given my Judgment, I heard from both parties on the question of disposal. Both agree the case will need to be remitted on the question of remedy. The Claimant says this should be to a different ET given my finding of perversity; the Respondent contends it would be proportionate to remit to the same ET, there being no reason to doubt its professionalism.

57. Applying, the guidance laid down in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT, I bear in mind that the remedy hearing is likely to be concerned with issues under **Polkey** and of contributory fault; there is a substantial advantage in terms of proportionality and expedition for those issues to be considered by the same ET. Whilst there has been some delay, the facts are sufficiently unusual that it is likely to come back to the Employment Judge's mind fairly speedily. And I do not consider my finding on perversity should change the position: there is no suggestion of bias or partiality and I have not found the ET's reasoning to be wholly flawed. Ultimately this was a well crafted decision on the major issues, most of which were not in dispute before me. What I have found is that the ET lost its way on the question of fairness, essentially importing the approach either from the wrongful dismissal claim or perhaps what might have been seen as relevant to remedy. That is not a failing so fundamental as to cause any question as to the ET's professionalism. I am therefore satisfied that I should remit to the same ET.