Appeal No. UKEAT/0025/15/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 July 2015

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR D PHIRI APPELLANT

SURREY & BORDERS PARTNERSHIP NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR TETEVI DAVI (of Counsel) Free Representation Unit 60 Gray’s Inn Road London WC1X 8LU
For the Respondent	MS REHANA AZIB (of Counsel) Instructed by: Bevan Brittan LLP Kings Orchard 1 Queen Street Bristol BS2 0HQ

SUMMARY

CONTRACT OF EMPLOYMENT - Wrongful dismissal

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

PRACTICE AND PROCEDURE - Disposal of appeal including remission

An Employment Tribunal dismissed an employee's claims for unfair, and for wrongful dismissal. The issue was whether the Employment Tribunal had directed itself correctly, and/or made any, or adequately reasoned, findings of fact in support of its conclusion that an employee was not wrongfully dismissed. The appeal was allowed. The Employment Appeal Tribunal held, in the light of the Employment Tribunal's express Reasons, and in the light of an express misdirection in those Reasons, that the Employment Tribunal had either, not in terms found that the employee had committed the gross misconduct alleged against him, or if it had done so by implication, had not explained how and why, given that it heard no evidence from anyone for the employer who had witnessed the alleged misconduct.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from a Decision of the Employment Tribunal which was sent to the parties and entered on the register on 8 September 2014. The Employment Tribunal ("the ET") held that the Claimant had been fairly dismissed and that his complaint of unfair dismissal failed, and also held that his complaint of breach of contract in respect of unpaid notice monies failed.

2. The Reasons of the Tribunal started with a list of the complaints, and of issues which the Tribunal had to decide. In relation to unfair dismissal those issues were described as follows:

> **"2.1. Was the Claimant dismissed for a fair reason …?**
>
> **2.2. Did the Respondent follow a fair procedure in dismissing the Claimant? In particular was there a breach of the ACAS Code?**
>
> **2.3. Had the Respondent carried out as much investigation as was reasonable in all the circumstances?**
>
> **2.4. Was the dismissal within the reasonable band of responses available to the Respondent and was the dismissal fair in all the circumstances?"**

3. Under the heading "Wrongful Dismissal" the issue was said to be:

> **"2.5. Was the Claimant entitled to notice pay in the circumstances and if so, did the Respondent in fact fail to pay the Claimant's notice as alleged?"**

The ET's Reasons

4. Under the heading "Evidence", at paragraph 3, the ET recorded that it had a witness statement and had heard oral evidence from the Claimant and also had a witness statement and heard oral evidence from Hilary Reive, Mandy Dunn and Clive Field on behalf of the

Respondent. Under the heading "Relevant Facts and Conclusions", at paragraph 6, the Employment Judge ("the EJ") said this:

> **"6. I have come to the following findings of fact and reached the following conclusions having heard the evidence and considered the documents referred to by the parties. I have not recited all the evidence heard, but have set out the evidence which is relevant and necessary to explain my decision."**

In the paragraphs which followed, that is paragraphs 7 to 33, the EJ set out the findings that he had made about the case.

The Background Facts

5. The background to the case is set out in the paragraphs 7 to 11 of the Decision, and I summarise them briefly as follows. The Respondent is an NHS Foundation Trust which specialises, among other things, in providing mental health services. The Claimant was an employee of the Respondent from August 2004 until he was dismissed for gross misconduct. The Claimant was employed as a healthcare assistant in the Mid-Surrey Assessment and Treatment Unit. On 24 October 2012 there was a serious incident involving a female inpatient of the unit to whom the EJ referred to as XX. The incident involved several members of staff and led to a number of separate investigations, which focused on different things that had happened that day.

6. The Claimant was alleged to have made a threatening comment to XX while she was being restrained by two other members of staff in a room. Those two other members of staff were Jennifer Marillat and Tracy-Anne Munn. Ms Marillat alleged that the Claimant said words to the effect of, "If you think you're in pain now, wait until I've got hold of you". Ms Munn alleged that the Claimant said words to the effect of, "If you think she's hurting you, you don't want me on your arm". That incident was reported by Ms Marillat and Ms Munn and

their report included the Claimant's alleged comment. It was reported on 24 October 2012 and again on 25 October 2012. Ms Marillat also recorded the incident on the Respondent's electronic incident recording system but did not, in that record, mention the Claimant's alleged comment.

7. Ms Marillat went on sick leave after the incident. When she returned to the unit on 15 November she found that the incident had not been escalated and reported it again. She made a written statement about the incident in which she included her allegation about the comment alleged to have been made by the Claimant. The Claimant was suspended and was given a letter which said that the reason for the suspension was that there were concerns about patient welfare and that these had been referred to safeguarding.

8. The incident was also reported to the police who investigated. They spoke to Ms Marillat and to Ms Munn, who repeated their allegations about what the Claimant had said. The police interviewed the Claimant and told him about the allegation which had been made. He denied making the comment and said that Ms Marillat and Ms Munn were lying. The police also spoke to two other members of staff, Nick (or John) Hollis and Theresa Greig. They did not see the Claimant making the alleged comment. The police also spoke to XX herself and she could not remember these events. The police report noted that she said that when she calms down after losing her temper she often cannot remember what has happened.

9. The police finished their investigation and provided the Respondent with a report. The report concluded that apart from the Claimant, Ms Marillat and Ms Munn, there were no other witnesses. It said that no further police action would be taken and that it was felt the matter could be dealt with internally rather than through criminal proceedings.

10. There was then an internal disciplinary investigation of the Claimant. An investigator was appointed and the investigator interviewed the Claimant on 29 April 2013. He was accompanied by his trade union representative, Mr Barker. At the meeting the Claimant denied making the comment. The investigator also interviewed Ms Marillat and Ms Munn. The investigator concluded that her investigation had found evidence from Ms Marillat and Ms Munn that the Claimant had made a threatening remark to XX. The Claimant was then told by letter that the matter would be referred to a disciplinary panel and he was asked to attend a disciplinary meeting.

11. That disciplinary meeting or hearing took place on 27 September 2012. The Claimant attended the hearing. The panel heard from the investigator and also from Ms Marillat and Ms Munn, who repeated their allegations about what the Claimant had said. The Claimant and Mr Barker were given the opportunity to ask questions of the investigator, Ms Marillat and Ms Munn and they did so. The Claimant again denied making the comment and accused Ms Marillat and Ms Munn of lying, but did not give any reason why they should lie. Mr Barker suggested that the Claimant had made some sort of comment but that it might have been misinterpreted. As the EJ interjected, this was not a proposition that had been put forward before that date, since the Claimant had up until then denied making the alleged comment.

12. There was an adjournment at the disciplinary meeting in order to put questions to Mr Jeffries, who, the Claimant had suggested, had been present with him throughout. Mr Jeffries responded by email to say he did not remember being in the room where the incident had occurred and did not hear the comment alleged to have been made by the Claimant. There was a further hearing on 24 October 2013. The panel adjourned after that to decide what to do. They told the Claimant in a letter dated 25 October 2013 that they had decided that the

Claimant had made the alleged comment to XX and that they, therefore, upheld the allegation against him.

13. The panel were persuaded that Ms Marillat and Ms Munn were credible witnesses who told the truth and had no reason to lie. They concluded that unlike the Claimant's evidence, their evidence had been consistent throughout. The Claimant's actions were, the panel decided, gross misconduct. He was therefore summarily dismissed without notice. The Claimant appealed against that decision. His appeal was dismissed by the appeal panel. The Claimant then brought his claim in the ET.

14. So those, in summary, were the EJ's findings of fact. I observe that there is no finding of fact in this section of the EJ's Reasons that the Claimant made the comment which he was alleged to have made. By contrast, the EJ studiously avoided making any finding that the Claimant made the comment he was alleged to have made. Instead, he used the formulae "alleged comment", "allegation" and "alleged" some 23 times in that section of his Reasons.

15. The next section of the Reasons is headed "The Law". In that section, at paragraphs 34 to 43, the EJ uncontroversially summarised the law on unfair dismissal. In paragraph 36 he summarised the test in **British Home Stores Ltd v Burchell** [1980] ICR 303. He said that the Respondent had to show that it believed the Claimant was guilty of misconduct at the time of dismissal, had in mind reasonable grounds on which to sustain that belief, and at the stage at which the belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

16. At paragraphs 44 to 45 the EJ turned to the law about wrongful dismissal. At paragraph 44 he said that in relation to wrongful dismissal:

> **"44. … the test to be applied is the common law test as to whether the terms of the contract of employment between the Claimant and the Respondent were breached."**

That is not a complete statement of the relevant test because, of course, it is not sufficient for a contract to have been breached. The breach must have been a repudiatory breach. At paragraph 45 of the Reasons the EJ made that good. He said this:

> **"45. It is for the Tribunal to decide whether the Claimant committed a repudiatory breach of the contract of employment, justifying the Respondent's decision to summary [I think the EJ must mean summarily] dismiss him without notice or payment of notice pay. …"**

The EJ then cited the decision of Lord Jauncey of Tullichettle, sitting as a special commissioner in **Neary v Dean of Westminster** [1999] IRLR 288.

17. The next section of the EJ's Reasons was headed "Determination". In paragraph 46 the EJ summarised his conclusions in this way:

> **"46. The conclusion of the Tribunal, having considered all of the evidence placed before it and the parties' submissions is that the Respondent's decision to dismiss the Claimant, and to uphold this decision on appeal, was within the range of reasonable responses of a reasonable employer. …"**

18. He stated his conclusion on the wrongful dismissal claim in this way:

> **"46. … The Claimant's conduct amounted to gross misconduct, entitling the Respondent to dismiss him without notice."**

19. The EJ then analysed the unfair dismissal claim between paragraphs 47 and 64. He gave detailed reasons for the conclusion which he had stated in the first sentence at paragraph 46. I should refer to paragraph 55. He said:

> **"55. At the heart of this case is the issue as to what the Claimant did or did not say to XX in the room on 24 October 2012. The Claimant denied making the alleged comment and therefore it was understandable that the investigation and subsequent disciplinary process should focus on that issue. The Claimant accepted in cross-examination before the Tribunal**

> **that the case boiled down to his word against those of Ms Marillat and Ms Munn. It was therefore reasonable and proper for the disciplinary panel to focus on the question of credibility."**

20. At paragraph 56 the EJ recorded that Ms Marillat and Ms Munn had given their evidence to the disciplinary panel and that the panel, along with the Claimant and Mr Barker, had had an opportunity to question and test the veracity of their evidence. He said:

> **"56. … They were considered by the disciplinary panel to be reliable witnesses who provided consistent and credible accounts throughout the course of the events described above. By contrast, the Claimant's account of the events of 24 October 2012 was found to have altered at various times, in the recounting of the incident to the police, to Ms Reive and to the disciplinary panel. Whilst some degree of tolerance needs to be afforded when asking individuals to recount events that have occurred some time ago, particularly when the event was a tense and fraught one, the Claimant did have a long period of time over which to reflect on the events of 24 October 2012 and ensure that, to the best of his recollection, his account was accurate."**

21. In paragraph 58 the EJ said:

> **"58. In their evidence to this Tribunal, the Respondent's witnesses emphasised on several occasions that the panel and appeal panel had considered the nature of the relationship between Ms Marillat and Ms Munn and could not find anything to suggest that they might have a reason for conspiring together against the Claimant. I consider that this was a reasonable conclusion to reach and to take into account when considering this matter. It is not one that has been subject to any material challenge by the Claimant, whether during the course of the disciplinary process or these proceedings, other than to suggest that Ms Marillat and Ms Munn were lying."**

22. At paragraph 59 he referred to a criticism which had been made by the Claimant of the Respondent's case and to the fact that the matter had not been escalated immediately following the initial reports by Ms Marillat and Ms Munn. He said that while that appeared to indicate a failing in the Respondent's procedures, that failing in and of itself was not a matter that was within the ET's remit. He then said:

> **"59. … Of more relevance to this Tribunal is the fact that the apparent failing does not undermine the credibility that the disciplinary panel reasonably ascribed to Ms Marillat and Ms Munn's evidence."**

23. In paragraph 61 he said that the disciplinary panel had reviewed the evidence before it and considered the Claimant's account of events but had genuine and reasonable misgivings

about the Claimant's conduct. A critical part of the Claimant's role was to provide appropriate care to the Respondent's service users. The alleged comment made by the Claimant demonstrated a serious failing in that respect. Having considered the evidence presented to the disciplinary panel they formed a reasonable belief that the Claimant had made the alleged comment and the decision that followed, to terminate the Claimant's employment, was reasonable in the circumstances.

24. At paragraphs 65 to 67 the EJ stated his reasons for holding that the wrongful dismissal claim failed. He said:

> **"65. On the balance of probabilities the Respondent was entitled to believe the Claimant guilty of misconduct and to consider the Claimant's action to be sufficiently serious to constitute gross misconduct, i.e. misconduct which went to the heart of the trust and confidence in the relationship between employer and employee.**
>
> **66. The job performed by the Claimant and his colleagues is a difficult one and they are to be commended for the care they give to some of the most sick and vulnerable people in our society. However, precisely because of the nature of the patients cared for by the Respondent and the services provided to the Respondent's service users, the standards to which they are held are rigorous and exacting. All of the witnesses heard by the Tribunal, including the Claimant, were very clear that comments of the type made by the Claimant could not be excused; and, if made to a service user, would justify dismissal. Such conduct also falls within the examples in the Respondent's Disciplinary Policy of the types of behaviour which could lead to summary dismissal.**
>
> **67. The Claimant's actions in making such a comment fundamentally undermined the trust and confidence placed in him, entitling the Respondent to summarily dismiss him. Accordingly, the Claimant's complaint of breach of contract in the respect of unpaid notice monies fails."**

<u>This Appeal</u>

25. On the paper sift, carried out under Rule 3, HHJ Eady QC allowed this case to go to a Full Hearing. Her reasons for doing so, which are dated 29 December 2014, are as follows:

> **"I have permitted this matter to proceed to a Full Hearing solely on the wrongful dismissal claim - para 8 of the Grounds of Appeal. For the reasons I have given separately, I do not consider that the other proposed Grounds (which go to the unfair dismissal claim) disclose errors of law on which the Appellant has reasonable prospects of succeeding. On the wrongful dismissal claim, however, I can see that it is arguable that the ET failed to make its own findings of fact as to whether or not the Appellant was guilty of the conduct in issue. The question arises as to whether the ET simply based its conclusion in this regard on its finding as to the reasonableness of the Respondent's belief for unfair dismissal purposes and failed to determine the relevant issue for itself."**

26. On this appeal, Mr Tetevi Davi from the Free Representation Unit represented the Appellant. I am grateful to him and to the Free Representation Unit for representing the Appellant in that way. Ms Azib represented the Respondent.

Submissions

27. Mr Tetevi Davi submitted in a nutshell that the EJ's Reasons did not comply with the decision of the Court of Appeal in **Meek v Birmingham City Council** [1987] IRLR 250. The summary of the ET's factual conclusions was inadequate, as was the statement of why the Claimant's wrongful dismissal claim failed. The EJ, in his submission, did not deal with the Claimant's arguments of wrongful dismissal and he gave no reasons for his conclusion that the Claimant had made the comments which he was alleged to have made. When I asked him, by reference to paragraphs 66 and 67 of the Reasons, whether it was sufficient for the EJ to make an implied finding, he submitted that that was not enough. He submitted that the EJ needed to say expressly that he had found as a fact that the Claimant had made the comment, and briefly explain why he had made that finding. With some encouragement from me, he also submitted that there was no material in the Decision which showed how the EJ had evaluated the Claimant's case in the light of the fact that there was no sworn evidence which had been tested in cross-examination in support of the Respondent's defence to the wrongful dismissal claim.

28. Ms Azib made four headline submissions. Her first submission was that the Judgment should be read as a whole and that isolated passages should not be taken out of context and used as a basis for an argument that the EJ had gone wrong. Her second submission was that there was no error of law in the decision; the EJ had applied the correct legal test. He had referred to the fact that the Tribunal had to make its own findings on this conduct and that one had to look at the Reasons as a whole despite what she described as the "unfortunate wording" in paragraph

65 of the Reasons. She submitted thirdly that the correct factual questions had been addressed in the findings of fact and those were essential findings about the credibility of the Claimant in the disciplinary procedure and references to his role in the organisation and what the organisation as a whole did. Her fourth submission was that if there was any error at all to be detected in the EJ's Reasons, it was an error of form not substance and it was only an error that was made in paragraph 65 of the Reasons. That point, in and of itself, was an insufficient basis for overturning the decision of the ET.

29. She referred me to the decision in **Neary**, which I have already mentioned in the context of the ET's Reasons. I asked her whether there was any sign in the Decision that the EJ had evaluated the evidence of the witnesses for himself, especially in the light of the fact that he had had no sworn evidence from the Respondent in support of its defence to the wrongful dismissal claim. She accepted that there was none, but she relied on two sentences in paragraphs 56 and 58 of the EJ's analysis of the unfair dismissal claim to show how he had expressed his own views, to a limited extent, about the evidence. She submitted that despite the fact that Ms Marillat and Ms Munn had not given evidence to the ET, the EJ was in a position to assess their credibility and to assess the weight he should give to the documents in which their factual accounts had been recounted. She accepted "in terms of oral evidence given on oath" there was no assessment by the EJ of the credibility of Ms Marillat, Ms Munn, and the Claimant but that it was sufficient for the EJ to do what she submitted he had done, which was to assess the consistency of the written accounts given by them.

30. She accepted that, in any such assessment, oral evidence would have been desirable and that to make their best possible case the Respondents might possibly have called witnesses to give evidence before the ET. She also accepted that there was no paragraph in the Reasons

where the EJ had faced up to the task of finding the facts in relation to the wrongful dismissal claim. However, it only appeared that he had not made findings on credibility, as such findings were, in fact, made in paragraphs 66 and 67. She accepted that paragraph 65 of the Reasons was unfortunately worded and, indeed, that it should not have been in the Decision at all. However, she submitted, its effect was mitigated by the second sentence of paragraph 46, by the penultimate sentence at paragraph 66, and by the first sentence of paragraph 67. These sentences showed both, (1) that the EJ appreciated that it was for him to decide whether or not the Claimant had made the comment, and (2) that he did in fact decide that the Claimant had made the comment.

31. Finally she referred me to the decision in **Jervis & KST Investment Limited v Skinner** [2011] UKPC 2. This case shows that a first-instance decision may be upheld on appeal despite a misdirection in law if the appellate court is satisfied that, notwithstanding the misdirection, the first-instance Judge has asked and answered the right factual question or questions. It is of limited assistance to me in this case.

Discussion

32. The ET's Decision is in three relevant parts: (1) "Relevant Facts and Conclusions", (2) "The Law", and (3) "Determination". In paragraph 6, the first paragraph of the first of those three parts, the EJ said:

> **"6. I have come to the following findings of fact and reached the following conclusions having heard the evidence …"**

There is no finding of fact in that part of the Reasons that the Claimant made the comment on which this appeal turns. On the contrary, there are some 23 references to "the alleged comment" or "the allegation".

33. The second relevant part of the EJ's Reasons is in two sections. In the first section (paragraphs 34 to 43) the EJ correctly summarised the law about unfair dismissal. As I have already said, he set out the well-known test in **British Home Stores Ltd v Burchell** and further on in his Reasons referred to the range of reasonable responses. In the second section of this part of his Reasons he summarised the law about wrongful dismissal, that is, in paragraphs 44 to 45. He said that:

> **"44. … the test to be applied is the common law test as to whether the terms of the contract of employment … were breached.**
>
> **45. It is for the Tribunal to decide whether the Claimant committed a repudiatory breach of the contract of employment, justifying the Respondent's decision to summary [sic] dismiss him without notice or payment of notice pay. …"**

34. In the third relevant part of the Reasons the EJ began, in paragraph 46, by stating his conclusions. They were that the dismissal was within the range of reasonable responses and that:

> **"46. … The Claimant's conduct amounted to gross misconduct, entitling the Respondent to dismiss him without notice."**

35. In paragraphs 47 to 64 the EJ explained why he had decided that dismissal was not unfair. Essentially, the Respondent had a reasonable belief in the Claimant's misconduct and acted reasonably in dismissing him. Mr Tetevi Davi submits that this section of the EJ's Reasons is thorough, engages with the Claimant's arguments and complies with the principles set out in the decision of **Meek v Birmingham City Council**.

36. It is clear from paragraph 55, the first sentence of paragraph 56, and the last sentence of paragraph 59 of the Reasons that the EJ appreciated that this case turned on the relative credibility of the Claimant and of Ms Marillat and Ms Munn. It is also clear that he considered that the Respondent's approach to that question was reasonable. But there is no suggestion that he appreciated that he had to make his own decision about it. He made no clear express finding

that the Claimant had made the comment in paragraphs 6 to 33, but instead referred to an allegation. In paragraph 61 the ET referred again, twice, to "the alleged comment". I have also read paragraphs 65 to 67. It is clear that the ET misstated the test for wrongful dismissal in paragraph 65, in my judgment. This undermines any confidence I might otherwise have had in the soundness of the ET's approach. Absent this misdirection, a succinct statement of the law in paragraphs 44 and 45 might well have sufficed. But, in the light of this unarguably clear misdirection, I cannot be confident that the EJ followed his correct self-direction in paragraphs 44 and 45. Nonetheless, despite the absence of a clear express finding of fact that the Claimant made a comment to XX, Ms Azib has submitted that the two passages to which I have referred in paragraph 66 and 67 both show that the ET applied the right test and that it found as a fact that the Claimant did make the comment in question.

37. I am not prepared to uphold the ET's Decision on this fragile basis. There are three reasons for this. First, and most important, the ET noted in paragraph 55 that this was a credibility case. It also noted at paragraph 45 that it had to decide whether the Claimant committed a repudiatory breach of contract, but it did not resolve for itself the conflict at the heart of this case. Neither Ms Marillat nor Ms Munn gave evidence to the ET. I accept Ms Azib's submission that the EJ referred to the written evidence and took it into account, but, in my judgment, there is no trace in his Reasons of any evaluation by him of that evidence in the context of the main issue in the wrongful dismissal claim.

38. I am not satisfied, having read the Reasons as a whole, firstly, that he appreciated that he had to assess the evidence himself, or, secondly, that he actually did assess the evidence. I do not need to decide whether or not the EJ could have upheld the Respondent's defence to the wrongful dismissal claim even though the Respondent called no live evidence to support it. But

assuming that it would have been open to the ET to uphold the defence in the absence of live evidence, it seems to me inescapable that the EJ was required, as a minimum, to explain why he felt able to give greater weight to the written material recording the various accounts given by Ms Marillat and Ms Munn, which was not contained in any witness statement, was not evidence given on oath and had not been tested in cross-examination, to the Claimant's evidence, which had been on oath at the hearing and had been tested in cross-examination. There is no trace of any such reasoning in the EJ's Reasons.

39. I am left with the overwhelming impression that the EJ, in effect, delegated this part of his decision to the Respondent's investigation. This echoes the point that was made by HHJ Eady QC when she allowed this case through to a Full Hearing on the sift. If, indeed, it is right to say that the EJ found as a fact that the Claimant did make the comment, that, it seems to me, was a finding which was parasitic on the Respondent's view about who was lying about the incident. It could not, in my judgment, be a view which was independently formed by the EJ since he did not hear live evidence from Ms Marillat and Ms Munn and, in any event, there is no express reasoning in his Decision which addresses these issues.

40. Second, there is no express finding of fact about this crucial part of the case. Such a finding has to be inferred, on the Respondent's case, from the two sentences to which I have referred in paragraphs 66 and 67 of the Reasons. In my judgment, those sentences assume a finding which has not actually been expressly made. They are an insufficient basis on which to uphold the Decision. As I have already said, the part of the Decision which is headed "Relevant Facts and Conclusions", and which starts with the sentence "I have come to the following findings of fact", contains no finding that the Claimant made the comment. It

studiously avoids such a finding by repeatedly using the formula "alleged comment" and similar phrases.

41. Third, the correct self-directions in paragraphs 44 and 45 of the Reasons do not counter, in this context, the clear misdirection in paragraph 65. I am left, at best, unsure whether or not the ET were applying the right test and, at worst, suspecting that they did not do so. That suspicion is reinforced by the absence of the crucial finding of fact in the first part of the Reasons and the frequent use of the word "alleged". I therefore allow this appeal.

42. In her skeleton argument Ms Azib submitted that the case should not be remitted to the ET. She relied on a number of passages in the ET's Reasons which, she submitted, show that the result would inevitably be the same if the case were remitted to the ET. It may be that there is a powerful circumstantial case against the Claimant for the reasons which she advances, but the ET did not hear from the two people who had made the allegation against him. The ET did not evaluate their credibility against his. In that situation I cannot say that the outcome would inevitably be the same were the case to be remitted to the ET. I cannot say that this is a case in which there is only one answer. I therefore remit the case for a rehearing of the wrongful dismissal claim.

43. The next issue is whether the case should be remitted to the same ET or not. Mr Tetevi Davi, for the successful Appellant, submitted that the case should be remitted to a different ET. This was essentially on the basis that the first ET, as I have found, did not approach the case correctly. He submitted that there could be little confidence that the ET would approach it correctly on remission. Ms Azib, for the Respondent, submitted that it would be more proportionate for the case to be remitted to the same ET. To begin with, that ET had heard

evidence over two days, had made detailed findings of fact, albeit findings of fact which were not directed to the critical issue in the wrongful dismissal claim, and that the EJ would have kept a note of the evidence that was given by the Claimant so that if there are any inconsistencies between his evidence on the remitted hearing and the evidence he gave at the first hearing, the Respondent would have the benefit of the EJ's notes to make any point that could be made from any such inconsistency.

44. I have not found this an altogether easy question to decide. On the one hand there may be a modest saving in judicial time and effort if the case is remitted to the same ET. Moreover, the Respondent might gain a forensic advantage from the EJ's notes of the evidence which the Claimant gave. On the other hand, while I do not accept Mr Tetevi Davi's submission that I cannot be confident that the ET would look at this matter afresh in the light of my Judgment, I do consider that there is a point here about fairness. The EJ in this case has made at best an implied finding that the Claimant made the comment which he was alleged to have made, without hearing any live evidence from the people who said that they heard him make a comment. In that situation I do consider that there is a potential appearance of unfairness if the matter goes back to the same EJ for him to reconsider the case, in the light of live evidence given by those two people. On balance, therefore, I have decided that the case should be remitted to a different ET.