Appeal No. UKEAT/0082/15/BA
UKEAT/0130/15/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 July 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

SECRETARY OF STATE FOR JUSTICE — APPELLANT

MR G LOWN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS CLAIRE DARWIN (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS
For the Respondent	MR JONATHAN DAVIES (of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW

SUMMARY

UNFAIR DISMISSAL

Reasonableness of dismissal

Contributory fault

Polkey deduction

The ET had not made an express finding as to the reason for the dismissal but the reasoning suggested that it had concluded that the Respondent had failed to satisfy it that it had a genuine belief in the conduct for which it had purported to dismiss the Claimant; the findings suggested that the ET considered that the Respondent had acted in bad faith and was determined to find that the Claimant had been guilty of gross misconduct (regardless of the evidence in his favour).

The suggestion of bad faith had not been put to the Respondent's witnesses and that procedural error was (given the centrality of the point to the ET's findings) rendered the decision unsafe.

Moreover, the ET's findings - in particular, its expression of its views as to the quality and weight of the evidence - demonstrated that it had fallen into the substitution mind-set. Rather than assessing the Respondent's conduct and decision-making against the range of reasonable responses, the ET was submitting it to the test of what it considered the reasonable employer would have done or decided; rather than a range, it was applying a single standard, as set by the ET's own views on the evidence and the procedure to be followed.

In the circumstances, the ET's liability Judgment could not stand.

Although unnecessary given that conclusion, the EAT would also have been minded to allow the Respondent's appeal on the question of contributory conduct (the ET having apparently restricted its consideration of the evidence to that adduced 'live' before it) and on **Polkey** (the ET having apparently taken the view that **Polkey** was not engaged given its finding that the dismissal was substantively (not merely procedurally) unfair).

Appeals allowed. Matter remitted to a different ET for re-hearing.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as below. I am hearing the Respondent's appeals against two Judgments of the London South Employment Tribunal (Employment Judge Hall-Smith sitting alone; "the ET"). The liability hearing took place on 18 and 19 September 2014, and that Judgment was sent to the parties on 8 December 2014. The second Judgment followed the ET's hearing on remedy on 9 January 2015, and was sent to the parties on 6 March 2015. Before the ET representation was as it has been before me.

2. By its Judgment on liability the ET upheld the Claimant's claims of unfair and wrongful dismissal. It further held (relevant to the unfair dismissal claim) that no reduction should be made in respect of the Claimant's conduct. At the remedy hearing, the ET considered the question of a possible **Polkey** reduction (**Polkey v A E Dayton Services Ltd** [1987] IRLR 503), but concluded that none should be made. The Respondent appeals.

3. On liability, the Respondent advances five main bases of challenge: (1) the ET impermissibly substituted its view for that of the Respondent (grounds of appeal 1 to 3); (2) the ET breached basic principles of natural justice (ground 5); (3) the ET took into account irrelevant factors (ground 6); (4) the ET erred in its approach to assessing contributory fault by not taking into account relevant evidence (ground 8); and (5) the ET's finding that the dismissal was unfair was perverse in light of its own conclusions and the undisputed evidence (ground 4) and further that the ET made a number of fundamental errors of fact (ground 7). On remedy the Respondent relied on those preceding grounds and further argued that the ET erred in

concluding it was not open to it to apply the **Polkey** doctrine in circumstances in which it had found the dismissal to be substantively unfair.

4. Both appeals were permitted to proceed to a Full Hearing after consideration on the papers (on the liability appeal by HHJ Peter Clark; on the remedy appeal by HHJ David Richardson). The Claimant resists both appeals, in each instance relying on the ET's Reasons.

The Background Facts

5. The Claimant worked for the Respondent (in the form of the National Offender Management Services; "NOMS") as a prison officer, from 28 November 2005 until his dismissal for gross misconduct on 19 August 2013.

6. On 28 January 2013, the Claimant and two other officers were involved in a planned intervention involving a prisoner, Prisoner B; a serious matter which was therefore recorded on CCTV and witnessed by a number of others. During the course of that incident, control and restraint technique was used because Prisoner B refused to follow instructions. Control and restraint technique is a compliance technique of last resort.

7. As well as the three-officer team, there were a number of others present. In the cell was Officer Phil Gridley, the officer supervising the intervention, who had trained the Claimant and others in control and restraint. Officer David Barratt was standing at the entrance of the cell taking the CCTV footage. Outside the cell, the Duty Governor on the day, Siobhan Russell, was standing behind Officer Barratt, as was Amanda Williams, Chair of the Independent Monitoring Body. There was another officer present and a nurse, Anna Tobella, who was not an employee of the Respondent but was present as Prisoner B was her patient.

8. Following the incident Ms Russell emailed her line manager, saying she had seen a member of the team strike Prisoner B on his back with a clenched fist three times in quick succession. The Claimant was subsequently suspended and an investigation carried out by the Acting Prison Service Manager and Head of Security at Brixton, Mr David Lewis. Mr Lewis had access to the CCTV recording and also obtained a number of statements from witnesses to the incident. The ET found that, through Mr Lewis, the Respondent had undertaken a reasonable investigation (paragraph 82). Mr Lewis concluded that the allegation of assault should be tested at a disciplinary hearing, and that subsequently took place before Governor Hawkings, the Governor of another prison, over two days, 17 and 18 June 2013, when the Claimant attended accompanied by a colleague.

9. Prior to the disciplinary hearing the CCTV footage was shown to a Mr Jonathan Collier, an experienced NOMS expert on the use of force. Mr Collier had not been interviewed as part of the initial investigation but produced a report in email form sent to the Claimant prior to the disciplinary hearing. That report, the CCTV footage and the evidence of Mr Collier, Mr Lewis and all the other witnesses interviewed as part of the disciplinary investigation were all before Governor Hawkings, albeit that neither Nurse Tobella nor Prisoner B were actually called to give evidence at the disciplinary hearing. The decision as to which witnesses would be called was taken by the Governor of HMP Brixton rather than Governor Hawkings himself.

10. Having itself seen the CCTV evidence, the ET recorded what it showed as follows:

> **"38. The DVD footage was available at the Tribunal hearing and it revealed the Claimant using measured language throughout the Control and Restraint incident involving the Claimant, the other two Prison Officers and the Prisoner. The prisoner was violently resisting the planned intervention to remove him. The Claimant could be clearly heard informing the prisoner in calm and friendly terms such as using the phrase 'look son' about the nature of the intervention and what the three Officers intended to do in order to secure his removal from the cell. At an early stage during the incident, the Claimant's arm could be seen descending down in a quick movement in at least two occasions [sic] in a direction of the Prisoner who was struggling on a bed in the Cell. The Claimant's hand could not be seen, nor where his arm landed."**

11. Governor Hawkings found the Claimant used unnecessary force during the incident and had assaulted Prisoner B. Taking the view this amounted to gross misconduct, he concluded that the Claimant should be dismissed. The ET recorded Governor Hawkings' evidence (as contained within his witness statement at paragraphs 24 to 26) as follows:

> **"I did not accept that that evidence from Officer Gridley, who was responsible for supervising the Control and Restraint on 28 January 2013 who suggested that the Claimant's strike was defensive [sic]. This was Mr Gridley's view, and was not one I agreed with. I preferred the evidence of Mr Collier, an expert witness, on this central issue. I had the first day's hearing transcript typed, gave copies to both Mr Collier and Mrs Lown [sic] and [Officer Michael] Bayliss [the Claimant's McKenzie friend and representative], and at some stage asked Mr Collier about the evidence of Officer Gridley. Mr Collier was very clear and specific that the Local Instructor was wrong in his assertions the strikes were defensive.**
>
> **I concluded, on the basis of Mr Collier's response, the PSO 160 Use of Force Policy and the other evidence that I had heard, that the weight of the evidence, in fact, suggested that the Claimant's strikes were offensive and not justified in the particular circumstances. I am satisfied that it was not necessarily for the Claimant to use strikes to deal with kicks or legs thrashing at him and it was more appropriate for him to use his forearm to deflect any blows and therefore by using a downward strike he went beyond what was reasonable and proportional. I also concluded that the evidence by Mr Gridley was wrong, and had sufficient concerns about his competence that I separately wrote to the Governor of HMP Brixton. …"**

12. The Claimant appealed against that decision but was unsuccessful.

The ET's Reasoning

13. On the unfair dismissal claim, the ET first reminded itself that its role was to consider whether the Respondent had acted reasonably; it was not for the ET to itself analyse the facts and reach its own determination. Finding that the Respondent had conducted a reasonable investigation, the ET was critical of the later stages of the disciplinary process, in particular:

> **"59. I found Governor Hawkings' replies in cross-examination to be unconvincing and I considered that there was some force in the thrust of Mr Davis' cross-examination and subsequent submissions to the Tribunal that he failed to give any or any sufficient weight to those witnesses who accounts [sic] were more favourable to the Claimant.**
>
> **60. I found that the approach of Governor Hawkings at the hearing was to down play or to fail to adopt the approach of a reasonable Disciplinary Hearing Officer to have any or any sufficient regard to place appropriate weight on the evidence of those witnesses who appeared from their interviews to be supportive of the Claimant. Governor Hawkings accepted in cross-examination that he had not relied upon the statement of the Prisoner who made no complaint of being punched in the back as alleged by Siobhan Russell and who displayed no injury consistent with an assault of such a nature."**

14. The ET was also concerned about the failure to call Nurse Tobella as a witness before the disciplinary hearing, finding this was because her evidence was helpful to the Claimant (paragraphs 82 and 89). The ET was further concerned about the absence of any explanation for the involvement of Mr Collier when he was not an eyewitness to the incident but was relied on as an expert; finding that there was considerable force in the Claimant's submission that:

> **"84. … it was inappropriate to call an 'expert witness' in circumstances where there were eye witnesses to the event …"**

15. The ET again concluded that the only justification for calling Mr Collier was to support a contention that the Claimant's arm movements had involved an assault (paragraph 83). It further expressed concern that Officer Gridley's evidence - which diverged from Mr Collier's opinion - led Governor Hawkings to report him to the Prison Governor (paragraph 86). Generally the ET did not accept that it was right for the Respondent to have placed so much weight on Mr Collier's evidence in contrast to that of Officer Gridley:

> **"86. … In my judgment a reasonable employer would have placed more weight on the evidence of an eye witness who trained control and restraint techniques before rejecting so dismissively the evidence of such a witness."**

16. Linked to this point was the ET's concern that Mr Collier had been able to comment on Officer Gridley's evidence in transcript form when Officer Gridley was not afforded the opportunity to comment on Mr Collier's evidence (paragraph 93). The ET was further concerned that reliance was placed on Ms Russell's evidence when she had been outside the cell during the incident, was the only person to describe the Claimant's actions as punches and had not been asked to reconsider her evidence in the light of the medical and other material (paragraphs 61 to 62). More generally, the ET was concerned that:

> **"88. Although Governor Hawkings relied heavily on the evidence of Mr Collier, Mr Collier himself accepted that there are times when techniques have to be adapted and improvised of a maximum protection. Again, I considered that a reasonable employer would have factored in to its decision making process the particular circumstances, which confronted the Claimant and the other two Officers at the material time namely, the fact that the Prisoner concerned**

> **was behaving very violently and that it needed three Trained Officers to control and restraint [sic] him. Throughout the incident; the language and instructions voiced by the Claimant were very measured and he used terms such 'look son' [sic], which in my judgment a reasonable employer might have concluded were inconsistent with an approach that was aggressive or hostile to the Prisoner."**

17. Overall the ET concluded that Governor Hawkings unfairly failed to have proper regard for evidence exculpatory of the Claimant but accepted, without reasonable analysis, evidence hostile to him (paragraphs 90 to 91) and finding that:

> **"93. … this was a case where the only acceptable outcome for the Respondent was a conclusion that the Claimant had assaulted the prisoner."**

18. On the question of sanction the ET took account of what it found to be the failure of Governor Hawkings to make reference to the Claimant's long service, blemish-free record and other positive aspects of his employment (paragraph 95), and concluded that no consideration was given to any alternative penalty either at the disciplinary or appeal stages (paragraph 100).

19. Turning to the question of contributory fault, the ET noted it was required to make findings of fact as to the Claimant's actual conduct. Observing that the only eyewitness to the incident to give evidence at the ET was the Claimant himself and accepting his account, the ET found his actions had been defensive and did not amount to conduct relevant for the purposes of section 123(6) of the **Employment Rights Act 1996** ("ERA").

20. The question of any **Polkey** reduction had been included in the original list of issues (paragraph 3.6 of the Liability Judgment) but was in fact considered by the ET at the subsequent remedies hearing. It had earlier found in its Liability Judgment:

> **"100. I concluded that no consideration was given to any alternative penalty either at the stage of the disciplinary hearing or at the appeal stage. Had such consideration been given, of course a reasonable employer might have concluded that the sanction of dismissal was within the range of reasonable responses."**

21. At the remedy stage, the ET clarified this reasoning:

> **"11. My observations in paragraph 100 of the reasons were unhappily phrased. I should have made it clear that had the disciplinary process been conducted reasonably by the Respondent and that in the circumstances, the Respondent had acted reasonably in concluding that the Claimant was guilty of misconduct, then the observations in paragraph 100 might have had some force.**
>
> **12. However I had concluded that the Respondent had acted unreasonably in the disciplinary process. Accordingly the Respondent was not in the position of considering the appropriateness of a sanction against the background of a fair process leading to a conclusion on reasonable grounds that the Claimant was responsible for the misconduct alleged."**

22. And then went on to rule:

> **"16. However, in the circumstances of this case, having concluded that the process was substantively unreasonable, far removed from a situation involving procedural flaws, I concluded that there were no grounds justifying the involvement of *Polkey*."**

The Relevant Legal Principles

23. The starting point in a claim of unfair dismissal has to be section 98 of the **ERA 1996**, which relevantly provides:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
>
> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> >
> > **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it -**
>
> > **…**
> >
> > **(b) relates to the conduct of the employee,**
> >
> > **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

24. The structure of the statutory right thus requires that the ET first make a finding as to whether the employer has established the reason for the dismissal. That requires a finding as to the collection of facts subjectively operating on the employer's mind at the relevant time, and as to whether that it falls within one of the statutory permissible reasons. It will be having regard to that reason that the ET will go on to determine whether the dismissal was fair or unfair (on which the burden of proof is neutral as between the parties). At this stage, the test to be applied is that of the range of reasonable responses of the reasonable employer in the relevant circumstances, including the size and administrative resources of the employer. That question is to be determined in accordance with equity and the substantial merits of the case.

25. Where the reason for dismissal relates to the employee's conduct, the ET's task is as laid down (with necessary changes to reflect the amendment to the burden of proof) in **British Home Stores v Burchell** [1978] IRLR 379 EAT. That guidance has since been fleshed out by the Court of Appeal, see per Aikens LJ in **Graham v Secretary of State for Work and Pensions (Jobcentre Plus)** [2012] IRLR 759, in particular at paragraphs 35 and 36:

> **"35. … once it is established that employer's reason for dismissing the employee was a 'valid' reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.**
>
> **36. If the answer to each of those questions is 'yes', the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'. An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see s.21(1) of the Employment Tribunals Act 1996."**

26. That was a passage subsequently endorsed by a different division of the Court of Appeal in **Teyeh v Barchester Healthcare** [2013] IRLR 387 (paragraph 47).

27. The potential danger of an ET substituting its view for that of the reasonable employer was recognised by the Court of Appeal in **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, in particular at paragraph 43:

> **"43. It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question - whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."**

28. An example of such substitution was held to be disclosed by the ET's expression of its own views on the quality and weight of the evidence in **Foley v Post Office and HSBC Bank Plc v Madden** [2000] ICR 1283; specifically, see the Judgment of Mummery LJ in the **Madden** case at page 1295A-B.

29. On the question of remedy an ET might reduce an award of compensation pursuant to section 123(6) of the **ERA 1996**:

> **"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

30. In considering the question of contributory conduct, it is for an ET to have regard to the conduct of the employee not that of the employer; see per Langstaff P, at paragraph 19, in **Steen v ASP Packaging Ltd** [2014] ICR 56.

31. More generally, however, the compensatory award in an unfair dismissal case shall be such amount as the ET considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer (section 123(1) of the **ERA**). It is in carrying out that exercise that the ET may have regard to the potential **Polkey** limitation to or reduction in any award (see **Polkey**, HL). In so doing, the case law has made clear that it is unhelpful to distinguish between those cases where the unfairness was procedural and those where it was found to be substantive; see, for example, **Lambe v 186K Ltd** [2005] ICR 307 CA.

32. On any of these issues where the challenge on appeal is one of perversity the high test to be applied is that laid down in **Yeboah v Crofton** [2002] IRLR 634. The decision in question must be almost certainly wrong, and the approach of the appellate court has to be that as laid down in **Biogen Inc v Medeva Plc** [1997] RPC 1 HL per Hoffmann LJ at page 45:

> **"… The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* [*v Austin Motor Co Ltd* [1955] AC 370] as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."**

Submissions

The Respondent's Case

33. On the unfair dismissal case the Respondent relied on the approach laid down by the Court of Appeal in **Graham**, submitting that in respect of each stage of its decision-making on these issues the ET fell into the error of substitution recognised by the Court of Appeal in **Small**. The ET's error was evidenced in the same way as had been apparent in **Madden**. In the

present case the ET's criticisms of Governor Hawkings really came down to preferring its own assessment of the evidence to his (see, for example, paragraphs 59, 61 to 62, 65, 81 to 94, and 101). As for the question of reasonable belief the closest the ET came to making any such finding was at paragraph 101, but that still did not actually engage with the question. Similar criticism could be made as to whether the Respondent had acted within the range of reasonable responses. Again, the ET failed to properly engage with the question.

34. Separately, the Respondent complained that the ET took into account irrelevant factors; specifically, Governor Hawkings' view of Officer Gridley's evidence and his decision to report his concerns to the Prison Governor, and also whether Officer Gridley had had the opportunity to comment on Mr Collier's evidence. Officer Gridley was not the subject of the disciplinary hearing; there was no obligation on the Respondent to provide him with that opportunity. These points might not have mattered, but it was apparent that the ET took them into account when determining whether or not the dismissal was fair.

35. The next ground of appeal raised the question of natural justice. In this regard the Respondent relied on the Judgment of the EAT, HHJ David Richardson, in the case of **King v Royal Bank of Canada** [2012] IRLR 280 and specifically at paragraph 77:

> **"77. … it may be unfair … to reach an adverse conclusion on an issue that has not been raised in cross-examination. If so, the tribunal ought not to reach a conclusion adverse to the opposite party without raising the matter, hearing submissions and if necessary recalling the relevant witness. …"**

36. In this case the ET had reached specific findings adverse to the Respondent; that it acted in bad faith (paragraphs 65, 83 and 93). Whilst the failure to put matters to a witness might not always give rise to an unfairness, here it was sufficiently serious as to have required these matters to be put. It was a sufficiently serious procedural failing to amount to an error of law,

thus giving rise to the EAT's jurisdiction under section 21 of the **Employment Tribunals Act 1996**, and the EAT was obliged to consider whether a fair procedure was applied (see **R (Osborn) v Parole Board** [2013] UKSC 61, [2013] 3 WLR 1020, at paragraph 65).

37. On contributory fault the ET's relevant findings were at paragraphs 102 and 103. Accepting that the focus had to be on the Claimant's conduct not the Respondent's, the ET had unduly limited its consideration of the evidence to solely that which was adduced before it from the only eyewitness to the incident, namely the Claimant. It apparently failed to consider all of the other evidence that was before it.

38. On **Polkey** the key paragraph in the Remedy Judgment was paragraph 16, where the ET apparently made a distinction between substantive and procedural fairness, taking the view that **Polkey** was not engaged as the dismissal was found to be substantively - not merely procedurally - unfair. That was an incorrect approach. Such a distinction has been held to be unhelpful, see, for example, **O'Dea v ISC Chemicals Ltd** [1996] ICR 222 CA per Peter Gibson LJ at page 235B, and, on the rejection of the submission that **Polkey** only arose in procedurally unfair cases, see **O'Donoghue v Redcar & Cleveland Borough Council** [2001] IRLR 615, **Lambe**, and the EAT in **WM Morrisons Supermarket Plc v Kessab** UKEAT/0034/13 at paragraph 42. Given the case law it was apparent that the ET's finding on **Polkey** could not stand.

39. Finally, turning to the perversity challenge, the Respondent made the general observation that the conclusion reached by the ET was perverse. Specifically, it was incorrect at paragraph 94 to suggest that there was no documentary evidence as to why Mr Collier was called to give evidence. Further, as to how much time had been given to the Claimant's

evidence (see paragraph 56), it had been perverse for the ET to conclude he was asked very few questions when his questioning lasted over an hour. As for the findings of bad faith at paragraphs 65, 83, 89 and 93, these matters had not been put to the Respondent, and there was simply no evidence to support the conclusions reached. As for paragraph 88 this had to be a perverse conclusion, given that the entirety of the Respondent's investigation was rooted in the particular circumstances of the incident. As the explanation for not calling Nurse Tobella (paragraph 89), it had been accepted by the Claimant that Nurse Tobella was not employed by the Respondent; further, he had not objected to her non-inclusion on the list of witnesses and the ET had been told that the decision regarding witnesses had been taken by Governor Tullett and not Governor Hawkings. Governor Hawkings had further explained in evidence that Nurse Tobella had no training in control and restraint and was also outside the cell at the relevant time, thus raising some question as to the relevance of her evidence. At paragraph 91 it was perverse to say there was no evidence that the Respondent had taken account of Nurse Tobella's evidence, given it was part of the disciplinary investigation report. Paragraph 95 was simply factually wrong; Mr Collier's emailed report had plainly been provided to the Claimant in advance of the disciplinary hearing. As to paragraphs 95 and 100, in finding that no consideration had been given to the Claimant's past record or to alternative penalties, both findings were perverse given the evidence from the transcript of the disciplinary hearing and also the decision letters both for the original decision and on the appeal.

The Claimant's Case

40. By way of introduction Mr Davies made three broad points. First, there was a specific finding by the ET that Governor Hawkings was unreliable as a witness. There could be and was no appeal from that finding; specifically, see paragraphs 59 and 60. Secondly, the appellate court's approach had to be as laid down in **Medeva**. Thirdly, the ET was entitled to

make findings on the evidence as it was given by the witnesses; it was not required to search through the documents itself. Here the ET had reminded itself of the requirement not to substitute its view for that of the reasonable employer (paragraphs 75 to 77). Moreover, at each paragraph where the ET made findings of which the Respondent now complained, it had been careful to expressly remind itself of the test of reasonableness (see, for example, paragraphs 82, 84 to 86, 88 and 90 to 91). An appellate court should be slow to conclude that the ET, having had express regard to the appropriate test, had then ignored that test in reaching its conclusions.

41. On the question of natural justice the Respondent was aware of the case against it. It was aware that it had to establish the reason for the dismissal and that it bore the burden. As for the specific matters of which the Respondent complained these were plainly inferential findings made by the ET. They did not have to expressly be put to the Respondent's witnesses. The Claimant had probed Governor Hawkings' reasoning and approach in cross-examination, and the effect of the findings was that Governor Hawkings did not have a genuine belief. The ET plainly found Governor Hawkings' responses in cross-examination unconvincing.

42. As for ground 6 and the irrelevant factors, the finding that Mr Collier was allowed to comment on Mr Gridley's account but not the other way round was something the ET was entitled to have regard to; given that it plainly felt something fishy was going on, it was a relevant fact, a detail that went to support the wider picture.

43. Turning then to the remaining issues of perversity, the finding as to whether the Governor had asked the Claimant many questions was for the ET to assess given the evidence and submissions before it. Similarly, as for the finding whether the Respondent had had regard to the particular circumstances, there had been a lot of cross-examination on this point; again, it

was a matter of assessment for the ET. The same point could be made on the decision not to call Nurse Tobella. There had been cross-examination and questions from the Employment Judge on this issue, and Governor Hawkings' answers could legitimately be found to have been inconsistent and to have provided no - or no plausible - explanation for the failure to call her as a witness before him. As for whether the ET was entitled to make a finding that the Respondent had failed to properly consider the Claimant's service record and the question of alternative penalty: even if there were references in the disciplinary hearing transcript and/or the dismissal and appeal decision letters as the Respondent contended, it remained open to the ET to conclude that the Respondent had not considered these issues in fact. There was certainly cross-examination on these points, and there were particular submissions by the Claimant to Governor Hawkings as to his past service, the detail of which was apparently ignored when the applicable disciplinary code made these matters that he was obliged to take into account.

44. On contributory fault, this was really a perversity challenge; the Respondent did not agree with the conclusion reached, but that was plainly a matter for the ET. On the **Polkey** appeal a similar point arose; that was ultimately for the ET.

The Respondent in Reply

45. Simply because the ET had expressly referred to the correct test did not mean it had then applied it; see **Small**. As for what the ET had found, reading the Judgment as a whole, it was apparent that it had found the Respondent had acted in bad faith, hence Mr Davies' submissions that the ET had seen something "fishy" going on. As for the consideration of alternative penalty, the cross-examination and re-examination of Governor Hawkings showed that he did have regard to the Claimant's past service and to the possibility of alternative penalties.

Discussion and Conclusions

46. The starting point in any unfair dismissal claim has to be the question whether the Respondent has made good its reason for the dismissal for section 98(1) purposes. In this case the reason relied on by the Respondent was conduct. There is no express finding by the ET on this question. I had initially thought that this might be because the point was not really in issue: the Claimant was not putting a positive case as to a particular alternative reason; he was entitled to put the Respondent to proof. The difficulty is, however, that the ET makes a number of findings suggestive of having arrived at the conclusion that the Respondent's assertion as to a genuine belief in the Claimant having misconducted himself was not to be accepted, e.g.:

> **"65. … I have been driven to the conclusion that Governor Hawkings' approach was motivated towards a conclusion on his part that the Claimant had in fact assaulted the Prisoner.**
>
> **…**
>
> **83. … Mr Collier was called to support a contention that the arm movements of the Claimant at the material time had involved an assault.**
>
> **…**
>
> **93. … I have concluded that this was a case where the only acceptable outcome for the Respondent was a conclusion that the Claimant had assaulted the prisoner.**

47. I thought it might still be possible to read these as findings of simply a closed management mind (rather than actual bad faith). I have been persuaded by both advocates, however, that the ET was indeed intending to go further and to make clear its finding that the Respondent, through Governor Hawkings, was acting in bad faith and the ET did not accept that he had a genuine belief in the Claimant's misconduct in the way he said he had found; in Mr Davies' words, that "there was something fishy going on".

48. If that was the ET's finding - and the parties seem to concur that it was - then I have some difficulty in understanding why the apparent rejection of the Respondent's case on the

reason was not made explicit. As Mr Davies has noted, however, this appeal is not pursued on the basis of inadequate reasons.

49. Mr Davies further says I need not be troubled by the fact that the case of having some improper motive, of acting in bad faith, was not expressly put to Governor Hawkings; that was not expressly the Claimant's case, as such. Governor Hawkings' approach and reasoning was, however, certainly explored in cross-examination; the ET was entitled to draw the inferences it did from those exchanges and conclude that Governor Hawkings was not a reliable witness.

50. I am not persuaded that is correct. It seems to me that this is a case where, as HHJ Richardson allowed in **King**, the Respondent should have been given the proper opportunity to deal with this case; it should have been put. The question is then whether that apparent procedural error vitiates the ET's Judgment?

51. The difficulty is that this finding of bad faith - the apparent rejection of the Respondent's assertion of an honest belief - was central to the reasoning. In my judgment, it does indeed render the conclusion unsafe.

52. Even if I were persuaded to take a different view and see this, in the round, as all part of the broad assessment of credibility that the ET was entitled to make, I consider this is a case where the ET fell into the substitution mindset, thus tainting its decision.

53. In saying this, I recognise the difficulties for ETs facing both claims of unfair and wrongful dismissal. The latter requires that the ET make its own assessment of the evidence; the former requires it to assess the approach adopted by others. Here, therefore, the ET was

right to look at the CCTV evidence in reaching its decision as to the Claimant's conduct for the purposes of the wrongful-dismissal claim and also the contributory-conduct issue. To take account of its assessment of that evidence - the tone and the manner of the Claimant's verbal exchange with Prisoner B - on the unfair dismissal case, could only be a substitution of the ET's view of that evidence for that of the reasonable employer.

54. And I do not accept that the ET's conclusion on this and other points is rescued by the references made to what a "reasonable employer" might or might not have done. First, because simply making reference to the touchstone of reasonableness does not avoid the substitution in fact. Second, because that is still not the test. The band of reasonable responses is not limited to that which a reasonable employer might have done. The question was whether what this employer did fell within the range of reasonable responses. In this case I consider the ET has seen itself not simply as the assessor of the band of reasonable responses (its role) but as laying down the only permissible standard of the reasonable employer.

55. Thus, on the issue of Nurse Tobella's evidence (see paragraphs 82 and 89), the question for the ET was whether the decision not to call Nurse Tobella at the disciplinary hearing was within the range of reasonable responses of the reasonable employer in these circumstances; whether to proceed with the disciplinary hearing in the absence of her live evidence fell within that range. Given that the ET had found there was no proper explanation for taking this course and given the high stakes for the Claimant and the appropriateness of making sure all possible evidence was fully considered at the disciplinary hearing, I can see that an ET might take the view that it fell outside the range. The ET here did not, however, ask itself the question as I have set it out. Rather it apparently relied on its own assessment of the evidence to reach a conclusion as to what should have been before the disciplinary hearing (see paragraph 89).

56. Further, on the involvement of Mr Collier, the ET apparently accepted the Claimant's case that it was inappropriate to call an expert witness when there were eyewitnesses to the event (paragraph 84). The question for the ET was, however, whether deciding to bring in expert evidence was within the band of reasonable responses of the reasonable employer. It was not whether the ET would itself have adopted that course. The ET might have considered it was inappropriate to call on expert evidence when there was eyewitness testimony from somebody with the expertise of Officer Gridley, but that was not the relevant question; the correct question was whether it was within the range of reasonable responses of the reasonable employer in these circumstances to consider it appropriate to call on expert testimony. The ET again erred in substituting its view in this regard. For completeness, in respect of the view taken of Officer's Gridley's evidence I should say that I am unable to see the relevance of Governor Hawkings' reporting of Officer Gridley. What does the ET's finding in that regard add? If it was meant to be suggestive of a finding of bad faith on the part of Governor Hawkings, there should have been a clear finding to that effect.

57. Returning to the question of substitution, in regard to Ms Russell's evidence, in my judgment, paragraphs 61 to 62 clearly disclose that the ET relied on its own assessment of her evidence and the weight it was appropriate to give to it as compared to the other evidential material. Indeed, the ET goes as far as to suggest the nature of the enquiry the Respondent should have made; in so doing, it does not test that question against the range of reasonable responses. Further, (see paragraph 88) as to what account was taken of the circumstances in which this incident occurred, the ET again sees its view as providing the only correct standard of what the reasonable employer would have done rather than asking whether what the Respondent did was within the range of reasonable responses; it fails to allow for the possibility of a range rather than only one possible response (that of the ET).

58. In reaching my conclusion on these points I am satisfied that the ET here was not performing the entirely permissible function of assessing the range of reasonable responses but was, impermissibly, setting down *one* standard as being *the* reasonable employer's response. The error in this case was in the ET substituting its view of the evidence and its own conclusions thereon for what it concluded the reasonable employer must have done and found. That error runs through all its findings and conclusions and irredeemably taints the decision.

59. Saying that, I do not find that the ET's view on all points was necessarily perverse. The Claimant is right that some of the Respondent's criticisms of the ET's findings are simply its difference with legitimate findings of fact. That does not, however, rescue the overall Judgment on liability, and I am therefore bound to allow the appeal against that Judgment.

60. Having reached that conclusion, I do not think either the Liability or the Remedy decisions can stand.

61. Although unnecessary given my view on the Liability Judgment, if I had to reach a conclusion on the contributory fault question, I would be inclined to agree with the Respondent that the ET wrongly limited the evidence it took into account to that adduced before it in terms of the eyewitness evidence. As to **Polkey**, I would also be inclined to agree that the ET wrongly limited its consideration by not allowing that **Polkey** might be engaged when there was a finding of substantive unfair dismissal.

Disposal

62. Given the view I have reached, the appropriate course is for this matter to be remitted for a fresh hearing. Having reached the conclusion that the matter must be remitted, I remind

myself of the criteria set out in **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763. This was a relatively short hearing, and the upshot of my Judgment is that it must go back to start again. That being so, I consider the more satisfactory course is that the matter should be heard afresh. Whilst I have no doubt of this Employment Judge's professionalism, I think it is a very difficult task to ask an ET to approach a case such as this again when it has fallen into, as I have found, the error of substituting the its views for that of the employer. That being so, it should go back, in my judgment, to a new ET for a re-hearing.

Costs

63. Having succeeded on its appeals, the Respondent applies for its costs limited to the fees it has incurred; that is £1,600 in respect of each appeal, £3,200 in total. Mr Davies seeks to resist that application on the basis that whilst the Respondent may have won before the EAT, there was no guarantee that it would win below. I see that point but it does not address the fact that the Respondent had to incur the fees in question in order to succeed on the appeal. The power afforded by Rule 34A(2A) **EAT Rules 1993** allows the EAT the discretion to make an award in respect of those fees where, as here, a party has succeeded in whole or in part on an appeal. The question arises as to why I should not make such an award here, the Respondent having been successful on both appeals.

64. I have heard nothing about the Claimant's means to suggest that would be unjust to make such an order in this case; I assume that either he or those supporting him will be able to meet the award. I am not aware of any attempt by the Claimant's side to avoid a Full Hearing by reaching an agreement with the Respondent or of any other step taken to avoid the necessity of incurring the fees in question. Rather, the appeals were resisted on all grounds. In those circumstances, it seems to me that the Respondent is entitled to its fees. What happens before

the ET at the remitted hearing is a matter for it. The Respondent had to bring these appeals in order to get this decision; it has succeeded, and I am unable to see why it should not recover the £3,200 it incurred in fees.