Appeal No. UKEAT/0067/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 June 2014

Before

THE HONOURABLE MR JUSTICE SINGH

(SITTING ALONE)

MR A HENSMAN — APPELLANT

MINISTRY OF DEFENCE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES TUNLEY (of Counsel) Instructed by: The Treasury Solicitor One Kemble Street London WC2B 4TS
For the Respondent	MR SAMUEL NICHOLLS (of Counsel) Instructed by: Law4U 60 Priory Road Anfield Liverpool L4 2RZ

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

DISABILITY DISCRIMINATION - Disability related discrimination

The Appellant was employed in a civilian capacity by the Ministry of Defence and lived in shared accommodation provided by the Respondent. He was found to be in possession of video and still images of anther employee which had been taken by covert filming while he was in the shower. The Appellant pleaded guilty to an offence of outraging public decency and was sentenced to a three year Community Order by the Crown Court. The Court accepted his mitigation that he suffered from Asperger's syndrome and a number of other mental disorders. As a result of disciplinary proceedings the Appellant was then dismissed by the Respondent for gross misconduct. The Employment Tribunal found that the dismissal was unfair because it was outside the range of reasonable responses. It also found that the dismissal was related to his disability, namely Asperger's syndrome and breached section 15 of the **Equality Act 2010**. The Respondent appealed.

Held, (1) that the Employment Tribunal had erred in law because it substituted its own view in assessing the reasonableness of the dismissal; (2) that the Employment Tribunal erred in law in its assessment of proportionality under section 15 of the **Equality Act**, as it failed to have regard to relevant considerations and focused entirely on what the Crown Court had said when sentencing the Appellant in the criminal proceedings.

The case would therefore be remitted to a differently constituted Employment Tribunal.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. This is an appeal by the Ministry of Defence (MOD) against the decision of the Employment Tribunal on liability, which was sent to the parties on 19 November 2013. So far as material, by that decision the Tribunal found that the Claimant was unfairly dismissed, that he contributed to his dismissal by his own blameworthy conduct to the extent of 25% and, thirdly, that in dismissing the Claimant, the Respondent subjected him to discrimination arising from his disability contrary to section 15 of the **Equality Act 2010**. I am informed that there is currently a Remedies Hearing listed before the Employment Tribunal for 18 July 2014.

2. For convenience I will refer to the parties as they were in the Tribunal below, namely as Claimant and Respondent, although it is the appeal of the Respondent below to this Appeal Tribunal.

Factual Background

3. The Claimant was employed as a civilian in the Ministry of Defence. He commenced his employment as an apprentice on 14 August 1989. In 2004 he moved into MoD shared accommodation. The particular circumstances which gave rise to the present issues arose from the fact that in February/March 2006 the Claimant committed an offence of outraging public decency, although this was not discovered for some years.

4. In 2007 the Claimant moved into single accommodation which he had been seeking to achieve for a number of years.

5. In September 2008, when the Claimant's accommodation was searched in relation to another matter, there were found video footage and still images in his possession. They showed moving and still images of a naked man in or close to the shower area in the shared accommodation where the Claimant had lived on the base between 2004 and 2007. The man in the video was also an employee with the MoD.

6. In consequence, on 1 October 2008, the Claimant was suspended on full pay. He appeared before the Chelmsford Magistrates Court on 29 April 2009, but that court regarded the matter as sufficiently serious to transfer it to the Crown Court at Chelmsford. It should be noted that at one time the Claimant faced charges of sexual offences under the relevant legislation. If convicted of those, it would appear that it would have had the consequence that he would have to be placed on the Sex Offenders Register. In any event, the offence to which the Claimant eventually pleaded guilty at the Crown Court was not one of those statutory offences, but rather was the common law offence of outraging public decency. It would appear that this would not have the consequence of required registration on the Sex Offenders Register.

7. The Claimant was sentenced at the Crown Court on 16 July 2010 to a community order, to last for three years. On 11 August 2010 the Respondent informed the Claimant that it would proceed with disciplinary proceedings in the light of the criminal conviction and sentence. The Claimant was invited to attend a disciplinary hearing, which eventually took place on 15 November 2011. The Claimant was informed of the decision to dismiss him, that decision having been taken by a Mr King by letter dated 31 May 2012. So far as material, that letter read:

> **"All aspects of the case including the representation you made at the disciplinary hearing with me on 15 November 2011 have been given very careful consideration. I have decided that your conduct has fallen well short of the standards expected in a civil servant and that you can**

no longer be trusted as an employee. You are therefore dismissed with effect from 31 May 2012."

8. As was his right, the Claimant appealed against that dismissal. That appeal was heard by a Mr Love, who was the Chief Constable with the Royal Military Police, and was dismissed after a hearing on 16 August 2012. The Claimant then presented his claim to the Employment Tribunal.

9. It is necessary now to refer to the facts in a little more detail by reference to the findings of fact and summary of the evidence made by the Employment Tribunal in this case.

10. At paragraphs 9-19 of its Judgment the Tribunal summarised the evidence before it in relation to the Claimant's disabilities. In particular, he suffers from Asperger's syndrome. That was definitively diagnosed in 2005. At paragraphs 20-27 of its Judgment the Tribunal set out the history of the Claimant's employment. At paragraphs 28-34 the Tribunal set out its findings of fact in relation to the Claimant's arrest and suspension in 2008. In particular, it is worth noting that at paragraph 32 the Tribunal stated that the Claimant was on leave in the second half of September 2008. On 25 September 2008 Mr Stenning and his line manager, Andrew Wallbank, discovered a security breach affecting secure telecommunications equipment; this breach comprised an additional cable and two boxes with antennae attached connected to the equipment. They were told that this breach had to be and was reported at the highest level immediately. The Claimant was not due back to work until 30 September but in fact visited his office on 29 September during which time he was called into a meeting with Mr Wallbank and Mr Lansbury. He was accompanied by Mrs Rowe at their request. He was asked about the cable and boxes that had been found and explained that the equipment was wireless broadband which he had set up for the benefit of the accommodation blocks. He said

that this had been done on the suggestion of the Deputy Chief Constable. It was this which led to the Claimant's arrest on 30 September.

11. No criminal charges were in fact pursued in respect of that alleged security breach. However, as part of the investigation, the Claimant's accommodation was searched and, as the Tribunal noted in paragraph 34 of its Judgment, this was the search during which the video footage and still images to which I have made reference were discovered.

12. From paragraph 35 to paragraph 42 the Tribunal summarised its findings of fact in respect of the criminal proceedings which were undertaken in this case. A note was taken of the sentencing hearing on 16 July 2010 by an employee of the Respondent. Although it is not an agreed note, nevertheless, so far as I am aware, no issue has been taken in relation to its contents, and it is worth stressing that it was a note compiled on behalf of the Respondent not the Claimant.

13. Sentence was passed by HHJ Goldstaub QC. As the Tribunal observed at paragraph 40 of its Judgment, key passages of the note of the hearing were as follows:

> **"The Judge confirmed that Mr Hensman was still content to plead guilty to one charge of outraging public decency and acknowledged that Mr Hensman was also concerned that the courts in general did not treat individuals with autism very well due to a lack of understanding of the disorder.**
>
> **The prosecution gave details of the case, reminding the Judge that matters came to a head in September 2008, when during a Ministry of Defence Police led enquiry Mr Hensman was questioned. As a result, Mr Hensman's accommodation was entered and searched and images were found of a semi naked adult male in the shower. A tape recording was also found with moving images of this nature of an adult male, who was part of the Ministry of Defence Police. The victim was shown this recording of himself and has stated that he feels violated. The recordings, taken during February 2006, show the victim in various states of undress, in some images completely naked with his private area exposed. Evidence shows that Mr Hensman concealed the video recorder in a towel and visited the recorder on various occasions...**
>
> **The Judge stated that, following a psychiatric evaluation and the report, the court was satisfied that Mr Hensman does suffer from the abnormality of the mind, Asperger's syndrome, and various features of hyper-corrective syndrome [sic] and obsessive-compulsive disorder.**
>
> **...**

The Judge then summarised that Mr Hensman had originally been prosecuted for sexual offences, however due to the link to his various disorders these have been dropped and Mr Hensman has pleaded guilty to the offence of 'Outraging Public Decency'.

The Judge stated that in February 2006 Mr Hensman had set up recording equipment in the shower room of an accommodation block at MDPGA at Wethersfield and some of the images taken were of an adult male's private parts. However, it had been found that it was not for sexual gratification, but due to his conditions Mr Hensman had a fascination with this.

The Judge explained to Mr Hensman that when sentencing him he would take into account that he did have various disorders and therefore was not at fault for the offence.

The Judge commented that the community had a responsibility to accommodate individuals with disorders such at Mr Hensman's and therefore must be tolerant of the differences that they will face. He explained that this is the situation Mr Hensman faces."

14. At paragraph 41 of its Judgment the Tribunal noted that the Judge had followed the recommendations of a pre-sentence report in the criminal case and imposed a three-year community order under which the Claimant was to be monitored and helped with his disorders.

15. From paragraph 43 the Tribunal recorded in its Judgment its findings in relation to the disciplinary proceedings which then ensued. It is unnecessary for present purposes to rehearse that section of its Judgment in detail. However, it is important to note that at paragraph 63 of its Judgment the Tribunal stated that there is no contemporary written record of why Mr King decided dismissal was the appropriate sanction or why it had taken from January to the end of May 2012 to have a meeting, which was originally promised within ten working days of agreeing the minutes of a previous meeting.

16. At paragraph 67, in respect of the appeal before Mr Love, the Tribunal noted that in his evidence before the Tribunal Mr Love confirmed that he did not conduct a re-hearing but considered whether it could be said that Mr King's decision was in some way unreasonable.

17. At paragraph 69, reference was made to the fact that Mr Love asked for research to be done on the issue of comparators, and details were provided to him of two recent cases. One

concerned an employee convicted of making indecent images of children, who was sentenced to a three-year community order and put on the Sex Offenders Register. That employee was dismissed in 2012, although it seems that he or she may have been given a penalty short of dismissal initially. The second employee had been convicted of sexual assault and of an act outraging public decency and had been dismissed in 2011. Finally, in this context, at paragraph 70 of its Judgment the Tribunal noted that Mr Love acknowledged the Crown Court Judge's comments but said that he did not read this as requiring all acts to be tolerated.

Material Legislation

18. Much of the legislation which applies to this case is well-known. However, one particular provision should be set out more fully. That is section 15 of the **Equality Act 2010**, which so far as material provides:

> **"(1) A person (A) discriminates against a disabled person (B) if --**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability;**
>
> **(b) and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability."**

The Employment Tribunal's Conclusions

19. The Employment Tribunal set out its conclusions on the claims which it had to consider from paragraph 106. Part of the claim before it concerned alleged failures by the Respondent to make reasonable adjustments in various respects. That part of the claim was considered and rejected by the Tribunal at paragraphs 107-111. There was also a claim for direct discrimination on grounds of disability, which the Tribunal rejected at paragraph 118 of its Judgment. The Tribunal there held that the Claimant was not treated less favourably than a

non-disabled comparator, who had been convicted of an offence of outraging public decency, would have been.

20. At paragraphs 112-113 the Tribunal set out its finding in respect of the reason for the Claimant's dismissal, which was relevant to the claims of unfair dismissal and discrimination arising from disability as well as the claim for direct discrimination. The Tribunal was satisfied that the reason for dismissal was misconduct evidenced by the Claimant's conviction on his guilty plea to an offence of outraging public decency. Furthermore the Tribunal accepted the Respondent's evidence that it was entitled to accept the Claimant's conviction at face value as proof of the misconduct. At paragraphs 114-117 the Tribunal addressed the complaint of discrimination arising from disability under section 15 of the **Equality Act**. At paragraph 114 the Tribunal stated:

> **"The question for us in this respect is whether the claimant was treated unfavourably because of something arising as a consequence of his disability? The unfavourable treatment in this case is dismissal. The Respondent relies on the medical evidence which says that those with Asperger's syndrome have no greater propensity to criminal acts than members of society in general in support of its case that the conviction did not arise from the Claimant's disability, but this is to ignore the sentencing remarks of HHJ Goldstaub as recorded by the Respondent's observer which we find to form part of his judgment. The Judge held expressly that the Claimant's conduct which led to his conviction was because of his condition. Furthermore, he described the Claimant as not being at fault for the offence...We find that these findings establish that the Claimant's conduct was because of his condition and that, therefore, his dismissal was because of something arising from his disability. This finding would establish discrimination arising from disability subject to the defence of justification to which we now turn."**

21. At paragraph 115 the Tribunal reminded itself that unfavourable treatment will be justified if the act is a proportionate means of achieving a legitimate aims. Means are likely to be proportionate if they correspond with a real need of the Respondent, are appropriate and are reasonably necessary. The Tribunal also reminded itself that as a matter of law "reasonable" in this context means more than within the band of reasonable responses, but something less than a requirement that the employer establish absolute necessity.

22. The Tribunal then stated at paragraph 116:

> **"We are satisfied that the Respondent had the legitimate aims of maintaining standards of conduct in the workplace, and having regard to the effect of misconduct on other employees in disciplining and dismissing the Claimant but our difficulty with its defence of justification is proportionality. We do not find on the evidence that it was reasonably necessary to dismiss to achieve these aims for the following reasons. Firstly, the conduct for which the claimant was convicted occurred more than six years before dismissal and the claimant had been excluded from the workplace for four years; it is improbable, therefore, that there was a pressing concern at the time of dismissal about the welfare of the Claimant's victim. Furthermore, Mr King confirmed that the Respondent is a large organisation and the transfer of the Claimant would have been possible, though he did not consider this in any detail – a transfer is likely to have protected the victim insofar as this was necessary. Secondly, the Respondent's dismissal policy states that a finding of gross misconduct may not be the right outcome where there is 'diminished mental competence', thereby acknowledging that this may render dismissal disproportionate. In this case, Mr King and Mr Love had a clear and unequivocal record of the Judge's sentencing remarks to the effect that the Claimant's conduct was due to his condition which was 'an abnormality of the mind' and that he was not at fault. Thirdly, the medical evidence which Mr King requested from Dr Lindsay stated expressly that the Claimant had learned from his mistake and the chance of recurrence was low. Dr Lindsay also suggested that allocating single accommodation to the Claimant would be an additional safeguard. Given the specific difficulties caused by the Claimant's condition, the fact that he had spent his whole adult life working for the MoD, the low risk of recurrence and the steps that could be taken short of dismissal to impose a sanction for his behaviour, a warning and, if necessary to protect that the [sic] victim, a transfer were all that were required in this case to achieve the Respondent's aims. We do not find that dismissal was reasonably necessary for the purposes of the justification defence and accordingly it fails."**

23. In the light of that conclusion the Tribunal found at paragraph 117 of its Judgment that the Respondent discriminated against the Claimant contrary to section 15 of the **Equality Act**. At paragraphs 119-123 the Tribunal considered the claim for unfair dismissal. It did so at paragraph 119 and following under the heading of delay. At paragraph 122 and following there was the heading of "substantive fairness". This indicates, in my judgment, that the Tribunal was alive to that distinction and was careful to make it in the structure of its own reasoning.

24. In relation to delay, the Tribunal had specific regard only to the period from July 2010 when considering whether delay affected fairness. At paragraph 120 the Tribunal found that the delay in this case did render the dismissal unfair. They said, "It is simply shocking that the dismissal process itself took almost 2 years."

25. They accepted that the appeal was dealt with with reasonable speed, but the process overall was one which they found to be unfair on the ground of delay, as I have already said.

26. Turning to the issue of substantive fairness, which the Tribunal itself did at paragraphs 122-123, it stated:

> **"We turn then to the question whether this dismissal was otherwise unfair apart from delay. We are conscious of the principle that we must not substitute our view for that of the employer and we have borne this in mind at all times: our task is to determine the parameters of the band of reasonable responses of an employer and to decide whether this employer's decision fell within or outside that band.**
>
> **123. In this case, we find that the decision to dismiss fell outside of the band of reasonable responses of an employer firstly because of the delay to which we have referred and secondly because of the sentencing remarks to which we have also already referred. In our judgment employers acting reasonably are entitled to rely on a conviction as conclusive evidence of an offence but where there is a record of the Judge's sentencing remarks no employer acting reasonably can ignore them. In this case the record is as stated above, namely that the offence was disability related and did not involve fault. Employers acting within the band of reasonable responses at the time when the Respondent dismissed the Claimant would have dismissed an employee with his length of service and difficulties and vulnerability in the labour market and society in general. Accordingly, we find this dismissal to have been unfair for these reasons too."**

27. Finally, so far as material, the Tribunal turned to the question of contributory fault at paragraphs 124-125. This only arose, as the Tribunal observed, in relation to the finding of unfair dismissal, not the finding of disability discrimination. At paragraph 125 of its Judgment the Tribunal stated:

> **"We are satisfied on the evidence that a finding of contributory fault is appropriate in respect of unfair dismissal. We find it inappropriate in the unusual circumstances of this case to make a finding of blameworthy conduct on the basis of the Claimant's conviction notwithstanding that it was the principal reason for his dismissal; this is because of HHJ Goldstaub's finding that there was no fault on the Claimant's part. We do find, however, that the Claimant gave a confused and confusing account of his conduct in his disciplinary and appeal hearings; the claimant suggested to us that he is incapable of lying but we find that he has the ability to be manipulate in his account of events. We have no doubt that this contributed to his dismissal. We assessed the level of his contribution at 25%."**

28. It will be observed that although in its summary of its decisions at the beginning of its Judgment the Tribunal had concluded that the Claimant had contributed to his dismissal by his own blameworthy conduct to the extent of 25%, that must clearly have been a reference only to

his conduct during the disciplinary process. In terms at paragraph 125, as I have noted, the Tribunal found that the criminal conduct of the Claimant was not in the circumstances of this case, to be regarded as blameworthy.

The Respondent's Appeal

29. Before this Appeal Tribunal the Respondent appeals on four grounds. The first ground relates to the finding in respect of discrimination arising from the Claimant's disability and has become known in this appeal as the causation point. In essence, the Respondent criticises the reasoning of the Tribunal, in particular at paragraph 114 of its Judgment in relation to whether the Claimant was treated unfavourably because of something arising as a consequence of his disability.

30. The second ground also relates to the finding of discrimination arising from disability, but criticises the reasoning of the Tribunal, particularly at paragraph 116 of its Judgment, and relates to what has become known in the appeal as "the proportionality point".

31. The third ground criticises the finding of substantive unfairness in the context of the unfair dismissal claim at paragraphs 122-123 of the Judgment.

32. The fourth ground relates to the finding of contributory fault at paragraph 125 of the Judgment. In particular the Respondent criticises the reasoning of the Tribunal for failing to find that the Claimant's criminal conduct in this case was to be regarded as blameworthy conduct for the purpose of contributory fault in the context of employment law.

Ground 1

33. The first criticism that Mr Tunley makes on behalf of the Respondent in this context is that the Employment Tribunal was wrong to refer to the sentencing remarks of HHJ Goldstaub as "his Judgment", as it did at paragraph 114. The implication, it would appear, on the Respondent's submission, was that this was in some way a Judgment which would be binding upon the Employment Tribunal.

34. I do not accept this criticism of the Tribunal's reasoning. First, it seems to me that there is no reason to believe when the Judgment is read as a whole that the Employment Tribunal was under any mistaken impression that somehow the sentencing remarks of Judge Goldstaub were binding upon it. Secondly, it is important, as always, to read the Judgment of an Employment Tribunal fairly and as a whole and not to take one word out of context. In a number of passages, some of which I have already quoted, the Tribunal clearly referred to the "sentencing remarks" of Judge Goldstaub in those terms. Indeed, it did so in the very same sentence of which criticism is now made, just a line above the reference to "his Judgment" in the middle of paragraph 114.

35. The second criticism for present purposes which is made of this aspect of the Tribunal's reasoning is that when Judge Goldstaub referred to the Claimant's mental disorders, it is clear from the note of the sentencing remarks that he had in mind a number of disorders including various features of hypercorrective syndrome and obsessive compulsive disorder. However, again, I do not accept this criticism of the Tribunal's reasoning. I accept the submission made by Mr Nicholls, who has appeared in this Appeal Tribunal pro bono on behalf of the Claimant, although he did not appear below, that when read in context, the sentencing remarks made clear that Judge Goldstaub regarded the primary mental disorder as being Asperger's syndrome. He

referred to that as the "abnormality of mind" in the notes of his sentencing remarks. As was common ground, at the material time this Respondent was aware of the fact that the Claimant suffered from Asperger's syndrome. That, in my judgment, accepting Mr Nicholls' submission, is what is material for present purposes.

36. Turning to the thrust of Mr Tunley's criticism of this part of the Tribunal's reasoning, it is important to recall that the Tribunal had already earlier in its Judgment set out the relevant law, in particular after setting out the terms of section 15 of the **Equality Act**, the Tribunal then at paragraph 91 stated:

> **"In order to establish discrimination arising from disability a Claimant must produce evidence consistent with him being treated unfavourably because of something arising in consequence of his disability. If he does so the Respondent may still be able to defeat the claim by showing that the reason for the relevant treatment was wholly unconnected with disability or that it was not known that the claimant was disabled at the time or by establishing the defence of justification."**

37. No criticism, as I understand it, has been made on this appeal by Mr Tunley of that self-direction of law.

38. I was reminded by Mr Nicholls of the Judgment of this Appeal Tribunal in **IPC Media Ltd v Millar** [2013] IRLR 707. The Judgment was given by Underhill J. The Tribunal also included two lay members.

39. At paragraph 17 Underhill J stated:

> **"Section 15 has no precise predecessor in the Disability Discrimination Act 1995, but it does much the same job as was done by section 3A (1) of that Act, which proscribed 'disability-related' discrimination, prior to the decision of the House of Lords in** *London Borough of Lewisham v Malcolm* **[2008] 1 AC 1339. We cannot see any difficulties about its meaning and effect. We would only mention, because it is apposite to the issues on this appeal, that, as with other species of discrimination, an act or omission can occur 'because of' a proscribed factor as long as that factor operates on the mind of the putative discriminator (consciously or subconsciously) to a significant extent: see** *Nagarajan v London Regional Transport* **[1999] ICR 877,** ***per*** **Lord Nicholls at p. 886 D-G..."**

40. Mr Nicholls submits that against the background of that legislation and those legal principles the question of causation in this context is then essentially one of fact. I accept that submission. It seems to me that the Employment Tribunal in the present case correctly directed itself on the relevant law and then proceeded to apply its understanding of the law to the facts as it found them to be in this case. That finding of fact was one to which, in my judgment, it was entitled to come. There is no error of law, therefore, as suggested by the Respondent, and I accordingly reject ground 1 in this appeal.

Ground 2

41. As I have already mentioned, this relates to the reasoning on the proportionality point, particularly at paragraph 116 of the Judgment. Mr Tunley criticises the reasoning in that passage for a number of reasons. He submits that the Tribunal simply did not engage at all with the reasons for the dismissal which the Respondent in this particular case in fact had. Those were succinctly put in the letter of dismissal dated 3 May 2012 from Mr King, which I have already quoted. In particular, Mr Tunley complains that nowhere in the Tribunal's reasoning anywhere is to be found any acknowledgment of the Respondent's legitimate concern in this case that the Claimant had committed a breach of trust and furthermore that he engaged in covert recording. Mr Tunley reminded me of the decision of the Court of Appeal in **Hardy and Hansons Plc v Lax** [2005] ICR 1565 in which the main Judgment was given by Pill LJ. In particular, my attention was drawn to paragraphs 31-33 of that Judgment, which set out the correct approach to be adopted by the Employment Tribunal when assessing questions of proportionality. At paragraph 31 Pill LJ stated:

> **"It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate."**

42. At paragraph 32 Pill LJ said:

> **"I accept that the word 'necessary' .... has to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject [the employer's] submission ... that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."**

43. Accordingly it is clear, first, that the role of the Employment Tribunal in assessing proportionality, in contexts such as the present, is not the same as its role when considering unfair dismissal. In particular, it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the Tribunal itself.

44. However, secondly, I accept Mr Tunley's submission that the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer. This is particularly reinforced in a case such as the present where the Employment Tribunal had already found at the beginning of paragraph 106 that the Respondent had legitimate aims to be served. Furthermore, in this context I accept Mr Tunley's submission, based upon paragraph 33 of Pill LJ's Judgment, which I will now quote, so far as material:

> **"This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* and in *Cadman*, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal."**

As Pill LJ then said towards the end of the same paragraph:

> **"...the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether**

> **the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification."**

It is important to remind oneself, as I was reminded by Mr Nicholls, that in the intervening passage in paragraph 33 there is this important statement by Pill LJ:

> **"In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind...the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation."**

45. Mr Nicholls also reminded me that the burden of proof in respect of showing justification in this context lies upon a Respondent. Nevertheless I accept Mr Tunley's criticisms of paragraph 116 of the Tribunal's Judgment. In particular, it does seem to me that the Tribunal failed to assess, in the balancing exercise which it had to perform, the particular considerations which were weighing upon the Respondent's mind in the present case. Those considerations were not simply confined to the fact of a criminal conviction having been admitted by the Claimant. They related, in particular, to questions of breach of trust and covert conduct on the part of the Claimant. Although the Tribunal was entitled to, and had to, come to its own objective assessment of proportionality, as it sought to do at paragraph 116 of its Judgment, it does seem to me that it erred in its approach because it simply did not refer, let alone analyse in the balancing exercise, those business needs of the employer in this context.

46. Accordingly I conclude that there was an error of law in respect of this part of the Tribunal's reasoning and propose to allow the appeal on ground 2.

Ground 3

47. This ground relates to that part of the Judgment which relates to unfair dismissal. Mr Tunley's primary submission in this respect is that the Employment Tribunal impermissibly substituted its own view about the reasonableness of the sanction of dismissal in this case for

that of the Respondent. He acknowledges that the Tribunal reminded itself, quite apart from its general statement of relevant legal principles earlier in its Judgment, that it should not substitute its own view for that of the employer, at paragraph 122 of its Judgment. Nevertheless Mr Tunley submits that that in substance is what it then went on to do. In any event, he submits, it acted perversely because no Tribunal, directing itself correctly as to the law, could reasonably have come to the conclusion that the sanction of dismissal in the present case was outside the range of reasonable responses available to a Respondent.

48. Mr Tunley reminded me, in this context, of the decision of the Court of Appeal in **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, in which the main Judgment was given by Mummery LJ. In particular, I was reminded of paragraphs 41-43 of that Judgment where Mummery LJ strongly reminded one of the need for Tribunals to avoid substituting their own views for that of an employer and that it is all to easy, even for an experienced Employment Tribunal, to slip into the "substitution mindset". Mr Tunley submits that when one goes back to the reasoning of the Tribunal on the question of substantive fairness, there is first of all the difficulty that it incorrectly referred to delay in this context. Mr Nicholls submitted before me that that could be overlooked as simply being an infelicity of wording. He accepted that if it was intended to convey any more than that, then the reasoning, as I understood him, would be defective because no explanation as to how delay had any impact on substantive fairness as distinct from procedural fairness. As I have already indicated, the Tribunal had already found as a matter of procedural fairness, at paragraph 120 of its Judgment, that there was unfairness on the ground of delay. It then in terms and clearly by reference to the structure of its own Judgment intended to turn to a quite separate topic, namely substantive fairness, from paragraph 122. Indeed it reminded itself, in the first sentence of paragraph 122,

that it was turning to that question "apart from delay". Nevertheless, at paragraph 123, it then mentioned delay.

49. As Mr Tunley submits, if one removes that part of the reasoning in paragraph 123, all that one is left with "the sentencing remarks". I accept Mr Tunley's submission that the Tribunal again erred in its approach to this question, first because it mentioned the question of delay, which was immaterial. Secondly, and more fundamentally, it only mentioned the sentencing remarks of Judge Goldstaub in its assessment of whether the decision to dismiss fell outside the band of reasonable responses available to the Respondent. Nowhere is there any reference, in particular, to the reasons of this particular Respondent, in particular its concerns about breach of trust and covert conduct. Furthermore I accept Mr Tunley's submission that there had been a different account given by the Claimant himself of his conduct as between the plea of guilty before the Crown Court and the disciplinary proceedings in the employment context. This was alluded to at paragraph 70 of the Tribunal's Judgment when it summarised the evidence of Mr Love on the appeal. He was quoted as saying

> **"It is difficult for me to see how I can support an appeal at the centre of which is an account from yourself that is so different from the court and witness record."**

Mr Tunley makes the submission, which I accept, that insofar as the sentencing remarks of Judge Goldstaub were relevant, they could not be relevant to anything other than what was being acknowledged before the Crown Court, in other words in the context of the criminal proceedings. They could have no bearing on subsequent accounts and, in particular, other concerns that the employer legitimately had. Since there is nothing in the reasoning of the Employment Tribunal which addresses any of these points, again it seems to me, as Mr Tunley has submitted, that the Tribunal fell into error as a matter of approach.

50. If there had not been these errors, I would not have accepted Mr Tunley's further submission, which relates to the final part of paragraph 123 of the Tribunal's Judgment. He submitted that the Tribunal erred in law in referring to the circumstances of this particular Claimant, in particular his length of service and the difficulties and vulnerability in the open labour market that he would face if dismissed. It seems to me that, read fairly and in context, what that passage indicates, as Mr Nicholls submitted, is simply that the Tribunal was alive to the question of the fact that the Respondent was proposing to dismiss this particular Claimant. Nevertheless, for the reasons which I have already given, I do accept the general thrust of Mr Tunley's submissions and accordingly propose to allow the appeal on ground 3 also.

Ground 4

51. This ground strictly only arises if I am wrong in relation to ground 3. Nevertheless, as I have heard full argument about it, I will deal with it. In this context, Mr Tunley submits that it was perverse of the Employment Tribunal to conclude that the admitted criminal conduct in this case on the part of the Claimant was not to be regarded as "blameworthy conduct" for the purpose of deciding whether the Claimant was guilty of contributory fault leading to his own dismissal. Mr Tunley referred me to the decision of this Appeal Tribunal in **Edmund Nuttall Ltd v Butterfield** [2006] ICR 77 where the Judgment was given by Judge Peter Clark, sitting with lay members. At paragraphs 39-41 of that Judgment Judge Clark considered the question of contributory conduct in that case. This Tribunal found itself in what Judge Clark referred to as the unusual position of holding that the Employment Tribunal's finding that the Claimant was not guilty of contributory conduct was "truly perverse in the legal sense": see paragraph 40. Specifically, on the facts of that case, Judge Clark concluded at paragraph 41 that even if the Crown Court's approach to the criminal offences was a relevant factor, which this Tribunal doubted, that court was sentencing the Claimant for

criminal offences to a community penalty. Judge Clark stated, "That was culpable behaviour in a criminal, let alone employment sense."

52. I was reminded by Mr Nicholls of the well-known statement of principle in **Yeboah v Crofton** [2002] IRLR 634 as to the high threshold which needs to be overcome on appeal where it is suggested that an Employment Tribunal made a finding that was perverse.

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached."**

53. I remind myself also that questions of this kind are always fact-sensitive, to be determined by reference to the particular facts of each case. In my judgment the decision in **Edmund Nuttall Ltd** does not lead to the inevitable conclusion that in every case, as a matter of law, there will be perversity. It all depends on the particular circumstances and, in particular, the evidence before an Employment Tribunal in a given case. No doubt in the vast majority of cases, as Judge Clark said in **Edmund Nuttall**, the fact that there is admitted or found to be criminal conduct should inevitably lead to the conclusion that that is blameworthy conduct for the purpose of employment law as well. However, the Employment Tribunal in the present case was well alive to the fact that this was not the normal run of case. It referred at paragraph 125 to the "unusual circumstances of this case". Furthermore, it gave as the reason for its finding in this case the sentencing remarks of Judge Goldstaub and, in particular, his statement that "there was no fault on the Claimant's part". In those circumstances, if and insofar as ground 4 had been relevant I would not have found that the Employment Tribunal erred in this respect, as suggested by Mr Tunley. I would therefore have dismissed this ground of appeal.

Conclusion

54. For the reasons that I have given this appeal will be allowed on grounds 2 and 3.

55. Turning to the question of remission I have weighed up carefully the various factors which always need to be balanced in a case of this kind, and I am grateful to Counsel for their submissions. In particular, I am very conscious of the need to avoid unnecessary cost and delay. I am also conscious that if the matter is remitted to a differently constituted Tribunal that there is a need for evidence to be presented which will not just be in the memory of the current members of the Tribunal. I also accept what Mr Nicholls has said that there are certain aspects of my Judgment today, which have left intact the reasoning of the Employment Tribunal. In particular, I rejected the Ministry of Defence's appeal on grounds 1 and 4. However, I accept Mr Tunley's submission that, relatively speaking, those were not at the core of this case. What I regard as critical at the end of the day is that, in my judgment, the Employment Tribunal did fall fundamentally into error in relation to grounds 2 and 3 on this appeal, which relate to fundamental questions both of proportionality in the discrimination context and the fairness of dismissal in the unfair dismissal context. Furthermore I also accept Mr Tunley's submission that the Employment Tribunal gave undue weight to the sentencing remarks of the Crown Court in this case.

56. So, overall, striking the balance that I must, I have decided that, in particular to avoid any risk of apparent bias (I stress there is no question of actual bias which has been raised) the fair result is that the matter will be remitted to a differently constituted Employment Tribunal.