Appeal No. UKEAT/0198/14/DM

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

At the Tribunal
On 12 December 2014

Before

THE HONOURABLE MR JUSTICE SINGH

BARONESS DRAKE OF SHENE

MR T M HAYWOOD

THE CHRISTIE HOSPITAL NHS FOUNDATION TRUST APPELLANT

DR E LIAKOPOULOU RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DAVID READE QC (of Counsel) Instructed by: Law by Design Ltd Kingsley Hall 20 Bailey Lane Manchester Airport Manchester M90 4AB
For the Respondent	MR JACK MITCHELL (of Counsel) Instructed by: Slater & Gordon (UK) LLP 1st Floor, St James' House 7 Charlotte Street Manchester M1 4DZ

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

The Claimant was a consultant doctor. She was found to have been guilty of two acts of gross misconduct. The first was that she had put pressure on a patient to take part in a clinical trial. The other was that she had publicly used qualifications which she did not in fact possess. The Respondent summarily dismissed her. The Employment Tribunal found that the dismissal was unfair because the Respondent had not properly taken into consideration the mitigation that was available to the Claimant and that the sanction of dismissal was outside the range of reasonable responses available to a reasonable employer.

Held, (1) The Employment Tribunal had fallen into the error of substituting its own view for that of the Respondent. The Respondent had taken mitigation into account, at least at the appeal stage of its process. (2) Further and in any event, the Employment Tribunal's view was one to which no reasonable Tribunal could have come on the facts of this case.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. This is the unanimous Judgment of this Appeal Tribunal. This is an appeal from the Decision of the Employment Tribunal at Manchester, which was sent to the parties on 11 February 2014. The Employment Tribunal comprised an Employment Judge and two lay members. The unanimous Judgment of the Tribunal was that the Claimant's claim for unfair dismissal succeeded. Her claims for sex and race discrimination were dismissed as was her claim that her dismissal was due to making a protected disclosure. The Respondent now appeals against the finding of unfair dismissal which succeeded.

Factual Background

2. The Claimant is a doctor and began working for the Respondent as a locum in December 2003. She was appointed as substantive consultant on 6 September 2004. She was a Consultant Haematologist. She was summarily dismissed on grounds of gross misconduct on 26 May 2010. Her appeal against that dismissal was later refused on 30 January 2012.

3. So far as the unfair dismissal part of the case is concerned, there were two principal matters which arose. The first concerned clinical trials involving a patient known by the initials IC. IC was in hospital during the period 10 May to 22 May 2009. He provided a statement on 10 August 2009 to those investigating the matter stating that he had felt that he was put under pressure to give his consent to his participation in a clinical trial. In particular he stated that the Claimant had told him that signing up for the trial was a two-way thing and that his decision to opt out would perhaps make her think twice about treating him should he ever be admitted for a

transplant (see, in particular, paragraph 125 of the Employment Tribunal's Judgment and generally paragraphs 98 to 99, 105 to 110, and 123 to 128).

4. The second matter which gave rise to concern for present purposes was that the Claimant appeared to have used descriptions of her qualifications, for example on her CV on the hospital's Web profile, which were not accurate. It appeared that she was not entitled to use those qualifications (see paragraphs 142 to 150 of the Judgment). A panel was convened for a disciplinary hearing to take place. The allegations were set out as at paragraph 158 of the Judgment. There were nine allegations with a number of subparagraphs within each allegation.

5. The hearing was eventually arranged for 22 and 23 March 2010. The Claimant was represented by leading Counsel. The disciplinary hearing did not finish and was reconvened for 10 May. The panel's decision was sent to the Claimant on 26 May 2010. A number of allegations were found not to be substantiated, but others were found to be substantiated (see paragraphs 181 and 182 of the Judgment).

6. It is also important to note paragraphs 184 to 185 of the Judgment. At paragraph 184 the Tribunal stated that:

> **"In respect of the other matters they found substantiated they felt that these matters met the threshold for misconduct. The panel went on to say that "the panel notes the testimonials put forward and your contribution made since 2003 and the mitigation that is suggested however the findings of gross misconduct normally warrant summary dismissal. The findings mean that the panel concluded that there has been a serious breach of trust and confidence and that this is not amenable to mitigation. Accordingly the panel's decision is to dismiss summarily in the light of a seriousness of these findings" they advised this matter would be referred to the GMC and she was advised of her right to appeal."**

7. At paragraph 185 of its Judgment the Tribunal referred to the fact that a witness, Mr Moston, had given evidence on behalf of the Respondent. His evidence was that the panel had considered mitigation. However, the Tribunal took the view that it was clear from the letter

from a Yoni Ejo that it did not. The Tribunal went on to state that Mr Moston had said in his witness statement:

> **"the panel felt that there was such a serious breach of trust and confidence that it was not amenable to mitigation and that summary dismissal was the only possible sanction."**

The Tribunal said that "It cannot be said that Mr Moston resiled from this in evidence at the Tribunal".

8. The letter of 26 May 2010 contained the following passage on the final page.

> **"The panel notes the testimonials put forward and your contribution made since 2003 and the mitigation that is suggested. However the findings of gross misconduct normally warrant summary dismissal. The findings mean that the panel conclude that there has been a serious breach of trust and confidence and this is not amenable to mitigation. Accordingly the panel's decision is to dismiss summarily. In light of the seriousness of these findings this matter will also be referred to the GMC [that being a reference to the General Medical Council]."**

9. The Claimant set out her Grounds of Appeal on 3 June 2010, to which we will return. Unfortunately there was an extremely long delay before her appeal was heard. This was partly as a result of a dispute over the composition of the panel since the Claimant did not want members of the Trust to be on the panel saying this compromised her rights under Article 6 of the Human Rights Convention. Between the disciplinary hearing and the appeal hearing, a hearing before the GMC took place into the Claimant's fitness to practise. In the result the GMC imposed a sanction of a three-month suspension on the Claimant.

10. As we have said the Claimant set out her grounds of appeal on 3 June 2010. Amongst those grounds summarised by the Employment Tribunal, at paragraph 186.12 of its Judgment they said, "She also stated the panel had not considered, or not considered sufficiently, mitigation."

11. As the Tribunal observed at paragraph 194, on behalf of the Claimant, Counsel also drew attention to the fact that the GMC sanction had been of a three-months suspension, which was at the lower level of severity. He also said that the GMC sanction did not view the findings as persistent and systematic. Furthermore it is clear from paragraph 210 of the Tribunal's Judgment that there were further testimonials submitted on behalf of the Claimant to the appeal panel, which would not have been before the original disciplinary panel.

12. The decision of the appeal panel was summarised by the Employment Tribunal at paragraphs 206 to 209 of the Judgment. As set out at paragraph 206, the decision of the Appeal Panel was, first, that the panel was independent and impartial, and that the findings of the conduct panel were findings that they were entitled to reach. They noted that, in respect of qualifications, these had been used since 2005 in documents signed by the Claimant as being true to the best of their knowledge and documents for which she took responsibility. None of her explanations were found to be credible. The appeal panel agreed that the explanations were not credible. The appeal panel described the findings of the panel in this respect as "damning in the extreme". Furthermore the appeal panel referred to the overwhelming weight of evidence showing that the applicant quite deliberately used qualifications to which she was not entitled and that, in accordance with the proper procedures enacted by the Trust, such breaches amounted to gross misconduct and entitled the Trust to dismiss the Applicant for gross misconduct.

13. In respect of the issue surrounding the patient IC, the panel were satisfied that the incident was not a misunderstanding and that there was agreement that the fact that the Claimant was contending she was tired and her car had been stolen did suggest she had something to explain. They were satisfied that the conclusion that the Claimant

> **"… was guilty of mistreatment of IC in fact it was described, the panel made a finding of gross misconduct against the appellant against the threat made against patient IC and that his treatment would be withdrawn if he withdrew from the clinical studies …"**

They found, again, the disciplinary panel were entitled to make that finding.

14. At paragraphs 207 to 209 the Tribunal set out pertinent passages from the appeal panel's decision, to which we now turn. In its conclusions at pages 13 to 14, the appeal panel, which was chaired by D N Harris, first addressed the question of gross misconduct and found that the conduct panel had been entitled to reach the findings that it did in relation to the two matters that were found to be gross misconduct for relevant purposes. In that context they stated:

> **"The fact that the [Claimant] may well be a capable employee is not a factor that would or should affect their decision."**

15. The appeal panel then turn to the question of mitigation. This passage needs to be set out in full:

> **"it is only proper for us to address whether mitigation was an appropriate remedy for the appellant and whether proper weight had been given to that mitigation. It is the contention within the grounds of appeal that the panel failed to take account adequately or at all appropriate mitigation. This is a case of trust and confidence in an experienced member of staff and one that has been broken we are agreeable that it cannot properly be repaired and that on balance mitigation does not provide remedy to the appellant.**
>
> **…**
>
> **We are satisfied that in their reaching their decision the panel carried out a proper analysis of the evidence and classified the failings of the applicant as being gross misconduct for those areas where such findings were made and conduct for others. Having done so they applied the sanction and then gave weight to what mitigation would be appropriate. They found that no mitigation in this matter was sufficient to preserve the appellant's job bearing in mind the finding of gross misconduct."**

We are satisfied that they carried out a proper procedural exercise and that they reached conclusions that they were entitled to do.

16. Before leaving the decision of the appeal panel, we should make reference to what the Tribunal said about the evidence of Mr Harris. At paragraph 17 of its Judgment the Tribunal said:

> **"We did find Mr Harris's evidence of limited value as he could not now recall events. However we relied mainly on the appeal outcome letter."**

17. On behalf of the Respondent before us Mr Reade QC submits that it is clear, therefore, that the Tribunal did not have any oral evidence, for example by way of answers in cross-examination, by which it was rejecting or could properly reject any part of Mr Harris' evidence. He further submits that the Employment Tribunal was in no better position than this Appeal Tribunal is in that the main piece of evidence upon which it relied, so far as the Appeal Panel decision was concerned, was the appeal outcome letter itself from which we have already quoted.

The Employment Tribunal's Judgment

18. So far as relevant to this aspect of the case before it, the Claimant's argument, as summarised by the Tribunal at paragraph 3, was that her dismissal was unfair in that it was not reasonable in all the circumstances of the case. In particular she relied on a failure to consider mitigation.

19. After setting out its findings of fact from paragraphs 18 to 214 of its Judgment the Tribunal set out its understanding of the relevant law from paragraphs 215 to 235. It had a number of different matters to address, only some of which are relevant to the issue of unfair dismissal. It addressed the legal principles applicable to unfair dismissal between paragraphs 215 and 219. In particular the Tribunal reminded itself at paragraph 217 that it should not

substitute its own decision for that of the employer. It reminded itself that the test is whether the dismissal was within the range of reasonable responses of the reasonable employer.

20. At paragraph 218 it reminded itself of the need to comply with the well-known test in **British Home Stores v Burchell** [1980] ICR 303 when dismissal takes place in respect of misconduct. Finally, it reminded itself at paragraph 219 that the overall fairness of the procedure has to be considered including any appeal. Towards the end of its Judgment, at paragraph 450 the Tribunal again stated that it was mindful not to substitute its own decision for that of the Respondent.

21. The reasoning of the Tribunal, so far as the complaint of unfair dismissal is concerned, can be found at paragraphs 448 to 453.

> **"448. Our findings are:**
>
> **(1) Firstly we find that the respondents have met the *BHS -v- Burchell* test. We accept the respondents had sufficient evidence to conclude that IC's version of events was correct and that the claimant had been unprofessional and plain nasty to him. IC's version of events was graphic and compelling. The claimant's comments were gratuitous as IC was by then off the trial and could not go back on it. The claimant did not put forward at the disciplinary hearing a clear case that it was a misunderstanding; in the light of IC's letter that could not be established in any event. This was sufficient to escalate to a disciplinary hearing.**
>
> **(2) In relation to the qualifications issue the respondent had sufficient evidence to conclude that the claimant was guilty of knowingly misstating her qualifications on the abstracts, [on] research forms and on the respondents [sic] website. In relation to all these matters she would have seen how she was described and she made no effort to correct them. She herself had dictated the website entry. It is clearly implausible that she would do this with a view to later correcting it. It was reasonable of the respondent not to accept the claimant's explanation for this save in relation to the senior honorary [lectureship] at Manchester University.**
>
> **In relation to the lectureship her explanation was more likely i.e. that she assumed this was the level of the role on the basis of past history and because failing to read the correspondence correctly.**
>
> **(3) We are satisfied both matters are gross misconduct including the qualification issue. The respondent had sufficient evidence to conclude the use of the qualifications was persistent and was done knowingly.**
>
> **(4) The use of MHPS rather than the research procedure was fair. The matters complained of were not just research matters but matters of professional conduct. Miss O'Dwyer's reference to it in the report was simply a mistake.**
>
> **(5) The delay in hearing the appeal was entirely caused by the claimant's objections to the hearing panel and of the Article 6 matter. We do not criticise the respondent for that.**

(6) The appeal was conducted properly. The panel members could not ask the claimant or her representative any questions as she/they did not attend. The claimant did not refer in her evidence or pleadings to her husband being unable to attend as she raised in submissions.

We find that the claimant was dismissed unfairly because:-

(a) the respondent did not properly consider mitigation. We rely on the disciplinary outcome letter which clearly says the gross misconduct is not amenable to mitigation.

(b) in relation to Ian Moston's witness statement, he said that this was a serious breach of trust and confidence and it was not amenable to mitigation and that summary dismissal was the only possible sanction. Although he was questioned about this by his counsel and stated that mitigation was considered to some extent we do not accept this evidence as it was clear in the outcome letter and his witness statement that it was not.

(c) in relation to the appeal outcome letter stated that "the fact that the appellant may well be a capable employee it is not a factor that would or should affect their decision (referring to the disciplinary panel"). They went on further "this is a case of trust and confidence in an experienced member of staff and one that has been broken. We are agreeable that it cannot possibly be repaired and that on balance mitigation does not provide remedy to the appellant".

(d) later on the letter states that the appeal panel considered what mitigation would be appropriate but they have no evidence that any mitigation had been considered and the appeal panel went on to agree. They found that "no mitigation in this matter was sufficient to preserve the appellant's job bearing in mind the finding of gross misconduct".

(e) It is not clear from that sentence whether or not they found that some mitigation had been considered but it was found wanting or whether in fact mitigation was not considered because gross misconduct was not amenable to mitigation.

449. We find this is an incorrect approach to the issue of mitigation and that it had to be considered and the claimant had relatively good mitigation with a reasonable length of service, a good record as a professional and was clearly very committed.

450. The sanction of dismissal was too harsh. We are mindful not to substitute our own decision for that of the respondent but even so taking into consideration the claimant did not use the overstated qualification to obtain her post, she did not use them to obtain any research grants, and she did have the Greek equivalent of the qualifications. It was simply a matter of kudos; she gained no other advantage from it.

451. In respect of the patient there was only one incident in the years of her service and had no practical effect. It was a very serious episode but yet again for one incident dismissal was too harsh a sanction even with the qualification issue.

452. We take into account as we are entitled to do so that dismissal in this case had a career changing effect, possibly more drastic in this particular case than would be the norm (and the reasons for what will be considered at a Remedy Hearing) but nevertheless the dismissal of a Doctor will always have some serious effects or effect on their career.

453. Accordingly we find therefore was not within the range of responses of the reasonable employer."

22. The crux of the Tribunal's reasoning as to why it concluded that the Claimant's dismissal was unfair can be found in the middle of paragraph 448 where the Tribunal said "We find that the claimant was dismissed unfairly because" and then set out its reasons in subparagraphs (a) to (e). It then went on to find that there was an incorrect approach to the issue of mitigation and

that it had to be considered. The Tribunal was of the view that the Claimant had relatively good mitigation with a reasonable length of service and a good record as a professional and she was clearly committed. At paragraph 450 the Tribunal stated that the sanction of dismissal was too harsh. It was mindful not to substitute its own decision for that of the Respondent but even so, taking into consideration that the Claimant did use the overstated qualification to obtain her post, she did not use them to obtain any research grants, and she did have the Greek equivalent of those qualifications. The Tribunal was of the view that it was simply a matter of kudos and she gained no other advantage from it. So far as the patient IC was concerned, at paragraph 451 the Tribunal stated that this was only one incident in the years of the Claimant's service and had no practical effect. It acknowledged that it was a very serious episode but yet again, for one incident, dismissal was too harsh a sanction even with the qualification issue.

23. At paragraph 452 the Tribunal said that it took into account that dismissal in this case had a career-changing effect, possibly more drastic in this particular case than would be the norm but nevertheless the dismissal of a doctor will always have some serious effects on their career. At paragraph 453 the Tribunal concluded:

> **"453. Accordingly we find therefore was not within the range of responses of the reasonable employer."**

We take that to be a reference to dismissal although that word is not used as such in that sentence.

The Respondent's Appeal

24. On this appeal the Respondent's primary submission is that the Employment Tribunal fell into the trap of substituting its own decision for that of the employer on the question of the reasonableness of dismissal. It is well established that an Employment Tribunal is not entitled

to substitute its own view for that of the employer in deciding whether it was reasonable to dismiss an employee (see **Foley v Post Office** [2000] ICR 1283 at 1291-3 in the Judgment of Mummery LJ, **Orr v Milton Keynes Council** [2011] ICR 704 at paragraph 78 in the Judgment of Aikens LJ and **Graham v SSWP** [2012] IRLR 759 at paragraph 45 in the Judgment of Aikens LJ).

25. The Respondent emphasises that the Claimant had been found to have been guilty of gross misconduct in relation to two separate matters. The Tribunal had found that the Respondent had met the test in **British Home Stores Ltd v Burchell**. It found, further, that both matters were indeed gross misconduct. The Respondent emphasises that this finding by the Tribunal is not the subject of any cross-appeal. Despite those matters the Respondent complains that the Tribunal concluded that the sanction of dismissal was "too harsh" in the circumstances of this case. The Respondent submits that that was to go beyond the proper task of an Employment Tribunal pursuant to section 98(4) of the **Employment Rights Act 1996**. The Respondent submits that, looking at the process of the disciplinary panel and the appeal as a whole, it is clear that the Claimant's case on mitigation was indeed considered but that it was not considered to be sufficient to outweigh the sanction of dismissal where the gross misconduct went to the relationship of trust with the employee. This was particularly so in the case of such a senior doctor as this Claimant.

26. In the alternative the Respondent submits that the decision of the Employment Tribunal must be regarded as perverse.

The Claimant's Response

27. On behalf of the Claimant it is submitted that the Employment Tribunal did not err in law and that it did not substitute its own decision for that of the employer in this case. It is submitted that the Tribunal correctly directed itself as to these matters in the passages which we have already cited. It is submitted that the Tribunal was entitled to reach the conclusion which it did as a matter of fact and that that conclusion was not perverse. In the course of written arguments one point was raised, which, as things have turned out in the light of the oral hearing, was in fact common ground. The Claimant relied on the Decision of this Appeal Tribunal in **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854 at paragraphs 28 to 29 and paragraphs 38 to 39 in the Judgment of Langstaff J, the President of this Tribunal. In that case, as Langstaff J described it, the Employment Tribunal's reasoning was blunt and appeared to set out an unforgiving principle, as quoted as paragraph 28 of his Judgment.

> **"Once gross misconduct is found, dismissal must always fall within the range of reasonable responses […]"**

As Langstaff J said in that case, that was to overstate the legal position. As he put it at paragraph 38:

> **"The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. …"**

28. Since the Employment Tribunal in that case had set out what Langstaff J described at paragraph 39 as a "stark proposition of law" in an argument of cause and consequence which admitted of no exception, the Employment Tribunal in that case was held to have erred in law. On behalf of the Respondent in the present case Mr Reade makes no similar submission. He accepts the decision in that case but submits that, on the facts of the present case, that is not an error which has been committed here. Rather, he submits, as we have already indicated, that

the Respondent, certainly when the process is taken as a whole including the process before the Appeal Tribunal, did take into account mitigating factors but concluded at the end of the day that the Claimant ought to be dismissed.

29. On behalf of the Claimant it is submitted that the Tribunal found as a matter of fact that the Respondent "did not properly consider mitigation" (see page 84(a)). It is further submitted that they were entitled to reach that conclusion of fact because they had heard the evidence of Mr Moston, who was a member of the disciplinary panel and did not accept his evidence that mitigation had been considered by that panel. Further, Mr Mitchell on behalf of the Claimant submits that the Tribunal was of the view - correctly, he submits - that mitigation had to be considered. The Tribunal then went on to consider what would be the consequence if mitigation had been considered, particularly at paragraphs 449 to 452 of its Judgment.

30. Although the Claimant accepts that it would not necessarily follow that mitigation would always lead to a different result, in this case the Tribunal determined that, having taken into account the Claimant's mitigation, the outcome of dismissal was too harsh. In particular Mr Mitchell reminds that at page 85, in paragraphs 449 to 452 of its Judgment, the Tribunal found that the Claimant had a relatively good mitigation. She had a reasonable length of service. She had a good record as a professional and she was clearly very committed. He submits that the Tribunal then went on to weigh in the balance the nature of the two incidents of gross misconduct in this case. He submits that any judicial inquiry will necessarily involve a determination as to whether the employer's punishment fits the employee's conduct. Provided the Tribunal consider the question of whether the sanction was within the range of reasonable responses of a reasonable employer, the Tribunal will not have erred in law and cannot be said to have substituted its own view for that of the employer. In that regard he emphasises

paragraph 453, where the Tribunal concluded that the sanction of dismissal was not within the range of responses of the reasonable employer.

Our Assessment

31. As we have said, the Employment Tribunal's reasoning, which is relevant to the present case, can be found at paragraphs 448 to 453. The crux, as we have indicated, appears from the middle of paragraphs 448 to 453 between pages 84 and 85 of the bundle. In particular the five reasons why the Tribunal found the Claimant to have been unfairly dismissed are set out in subparagraphs (a) to (e) on page 84. We have to confess that we have found at least some of those subparagraphs difficult to understand, even allowing for possible infelicity of drafting which may well be readily understandable in a Judgment which extended to 85 pages and in which the Employment Tribunal had to address a large number of issues, many of which have not concerned this Appeal Tribunal.

32. It is common ground, as we have indicated, that the Respondent's procedure has to be considered as a whole including the appeal procedure. We have come to the conclusion that even if the Employment Tribunal was justified, on the evidence before it, in concluding that the disciplinary panel did not take into consideration the mitigation in this case or did not do so properly, on no view can that be said of the appeal panel. We have already set out the terms, so far as relevant, of the appeal panel's decision, which we have quoted from page 251 of the bundle. The way in which things are there put can be contrasted with the way in which the Employment Tribunal dealt with the matter at subparagraphs (c), (d) and (e) on page 84. In particular we simply cannot accept the summary of the appeal panel's decision, part of which is quoted at subparagraph (d), when it is said that the appeal panel considered what mitigation would be appropriate but they had no evidence that any mitigation had been considered and the

appeal panel went on to agree. They found that "no mitigation in this matter was sufficient to preserve the Appellant's job, bearing in mind the finding of gross misconduct". Nor, with respect, can we possibly agree with subparagraph (e) where it was stated:

> **"It is not clear from that sentence whether or not they found that some mitigation had been considered but it was found wanting or whether in fact mitigation was not considered because gross misconduct was not amenable to mitigation".**

33. In our judgment, reading the appeal panel's decision fairly and as a whole, it is clear that the appeal panel was forming its own view and concluded that, in this case, where trust and confidence in an experienced member of staff was involved, that trust had been broken and that it cannot be properly repaired and moreover "that on balance mitigation does not provide a remedy to the Appellant". Furthermore, as it happens, the appeal panel was clearly of the view that the disciplinary panel carried out a proper analysis of the evidence and gave weight to what mitigation would be appropriate but found that no mitigation in this matter "was sufficient" to preserve the Appellant's job bearing in mind the findings of gross misconduct. Whatever view might be taken about the disciplinary panel, on no view, in our judgment, can the appeal panel be criticised for not taking into account the mitigation including the further matters which had been placed before it on behalf of the Claimant. Furthermore, in our judgment, the appeal panel clearly weighed things in the balance: hence its reference to "on balance". Finally in this context, the appeal panel clearly had in mind not a matter of general or abstract principle but the facts of this particular case. Hence its reference to "mitigation does not provide a remedy to the Appellant".

34. In any event we have gone on to consider what the Employment Tribunal did in this case between paragraphs 449 and 453. The Employment Tribunal, in those paragraphs, conducted a balancing exercise. It weighed, on one side of the balance, the seriousness of the two matters of gross misconduct which it agreed had taken place in this case. On the other side

of the balance it weighed a number of mitigating factors, which we will not rehearse again. Having conducted that balancing exercise the Employment Tribunal concluded that the sanction of dismissal was "too harsh". Despite its protestations, including at paragraph 450, that it was mindful of the need not to substitute its own decision for that of the employer, in our judgment it must be concluded that that is precisely what it did as a matter of substance. Accordingly we have come to the clear conclusion that it did err, as a matter of law, in the manner alleged by the Respondent.

35. Further, and in the alternative, if it did not err as a matter of law in that regard and was applying the well-known principle of law that it should not substitute its own judgment for that of the employer, its conclusion was that dismissal was a sanction which was outside the range of reasonable responses available to a reasonable employer in the circumstances of this case. We have come to the clear conclusion, if it is necessary to do so, that that was a conclusion which no reasonable Tribunal could have come to on the facts of this case. Accordingly we accept the Respondent's alternative submission that the Decision of the Employment Tribunal was, in the circumstances of this case, perverse.

Conclusion

36. For the reasons we have given this appeal is allowed. We propose to substitute a finding that the Claimant was not unfairly dismissed subject to any submission that Counsel may now make.

37. Mr Reade, we have considered your application under Rule 34A of the **Employment Appeal Tribunal Rules 1993** as recently amended. As you have fairly submitted before us, this is a relatively recent amendment to the Rules. It confers a discretion to award costs in

relation to the appeal fees. There is no guidance in the legislation or in any decided case, so far as we are aware, and none has been brought to our attention. In the circumstances we have discussed and reached the unanimous conclusion that, in the circumstances of this case, we should not exercise our discretion to make an order for costs.