Appeal No. UKEAT/0243/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 November 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MEARS LIMITED APPELLANT

MR T BROCKMAN RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2015

APPEARANCES

For the Appellant	MR CHRISTOPHER EDWARDS (of Counsel) Instructed by: Mears Group PLC Legal Department 26-28 Hyde Way Welwyn Garden City Hertfordshire AL7 3UQ
For the Respondent	MR NICHOLAS HARRISON (of Counsel) Nicholas Frimond Solicitors Alexandra House 1 Waverley Lane Farnham Surrey GU9 8BB

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

Having made findings of fact relevant to the wrongful dismissal case before her, the Employment Judge drew on those findings in determining the unfair dismissal claim. In so doing, she substituted her own view as to whether the Claimant was guilty of the alleged misconduct for which he was dismissed rather than considering whether the Respondent had reasonable grounds for such belief. She further substituted her view as to the appropriate sanction when she found that dismissal fell outside the range of reasonable responses and that a written or final written warning would have been an appropriate sanction. In the circumstances, the conclusion that the Claimant had been unfairly dismissed was unsafe.

Appeal allowed; unfair dismissal claim remitted to a differently constituted Employment Tribunal.

On the Respondent's application for costs under Rule 34A(2)(a) **Employment Appeal Tribunal Rules 1993** (as amended), allowing that the Employment Appeal Tribunal was given a broad discretion whether to make such an award, here it was relevant that the Notice of Appeal had included a challenge on the ground of perversity that was not pursued at the hearing. Further, whilst the Respondent had succeeded on the grounds pursued, the Claimant was of limited means and might have been eligible for fee remission had he been the Appellant. In the circumstances, no costs order made.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent as they were below. This is the Respondent's appeal against a Judgment of the Reading Employment Tribunal (Employment Judge Hawskworth sitting alone on 24 February 2014) - "the ET", which was sent to the parties on 18 March 2014. The Respondent was represented before the ET by Mrs Fry, its HR legal manager, but today is represented before me by Mr Edwards of Counsel. The Claimant was represented by Mr Feeny of Counsel below, but by Mr Harrison, Counsel, before me, acting on a pro bono basis. By that Judgment the ET upheld the Claimant's claims of unfair dismissal and wrongful dismissal. It went on to determine remedy, but there is no appeal in respect of that.

2. The Respondent's appeal is against the finding that the Claimant was unfairly dismissed. The proposed Grounds of Appeal were initially considered on the papers, by HHJ Peter Clark, to disclose reasonable grounds on the basis that there was a reasonable argument of substitution by the Employment Judge (1) as to the Respondent's grounds of belief and (2) as to sanction.

The Facts

3. The Respondent provides maintenance services. The Claimant worked for the Respondent as a multi-trade operative from 1 February 2013 to 30 July 2013, when he was summarily dismissed for entering property containing asbestos. It is useful to note the relevant background facts found by the Employment Judge (paragraphs 11 to 15 of the Judgment):

> **"11. On 12 July 2013 the Claimant was on out of hours duty and received a call out to attend a property, Flat 1, Lady Cross in Milford where there had been a total loss of water to the flat. Notification of the job was sent to the Claimant's 'personal digital assistant' (PDA). It included a note that the block of flats in question had been checked for asbestos and asbestos was 'presumed'. This note was a general warning which had applied to all flats in the block**

for some time. It was common for a note on these lines to be included with job notifications for local authority properties.

12. Unbeknown to the Claimant, on the same day, other operatives working for the Respondent in the same block, had discovered disturbed asbestos known as AIB in the bathroom of Flat 2, an unoccupied flat below Flat 1. In the light of the serious risk to health and safety the bathroom had been sealed with a polythene sheet using two types of tape, black duct tape round the outside of the door frame, and, within the black tape, yellow tape marked 'Danger - Hazard - Asbestos'. A warning sign had been placed on the sheet which said 'No access for unauthorised persons/respiratory equipment must be worn/safety overalls must be worn/smoking is prohibited in this area.' The code of the flat's external key safe was changed to prevent access to the flat.

13. The Claimant attended Flat 1 at about 11.30pm. He had worked for about 16 hours by this point. He spoke to the tenant who told him that the total loss of water was caused by the stopcock, which was located in the bathroom of Flat 2, being turned off. She said that the same thing had happened two days previously, and had been remedied by another employee of the Respondent entering Flat 2 and turning the stopcock to put the water supply to Flat 1 back on.

14. The Claimant went to Flat 2. There was a standard sign on the front door which the Claimant recognised as indicating that it was unoccupied and being worked on. The Claimant sought to access Flat 2 by calling the Respondent's out of hours call centre (OOHC) to obtain the code for the external key safe. The OOHC told the Claimant that they were unable to give him the code or any other information. They did not tell him about the discovery of AIB in Flat 2 earlier that day. The OOHC tried twice to contact the relevant supervisor, Doug Buckle, but he was unavailable.

15. The Claimant found a small open window at the back of Flat 2, used this to open a larger window and gained access to Flat 2. He notified the OOHC that he was doing so. The OOHC did not tell the Claimant not to enter Flat 2. Using a torch and following the instructions of the tenant in Flat 1 the Claimant located the bathroom which was sealed with a polythene sheet. The Claimant's evidence, which the tribunal accepts, was that he did not see the warning sign on the sheet and that he did not see the yellow tape. He concentrated on the black duct tape, which he peeled back. He leant into the bathroom and adjusted the stopcock. He then stuck the sheet back in place and left Flat 2. As he did so, the Claimant said he thought 'Should I have done that?' by which he meant should he have accessed Flat 2 in the way he did."

4. For the claim of breach of contract/wrongful dismissal, the Employment Judge had to form a view as to whether the Claimant had acted as the Respondent contended. For the unfair dismissal claim, however, the focus had to be on what was in the Respondent's mind; whether it had reasonable grounds for its belief and whether it had carried out a reasonable investigation. The findings of fact I have cited above are those of the Employment Judge as to what happened.

5. After an initial investigatory meeting the Claimant attended a disciplinary hearing on 30 July 2013. It was conducted by Mr Biddlecombe, the Respondent's Project Manager. He concluded that the Claimant's actions amounted to gross negligence of his duties and a serious

infringement of health and safety rules and procedures. The Claimant was summarily dismissed. Somewhat differently to the Employment Judge, Mr Biddlecombe concluded:

> **"… that the Claimant knew there were warnings of asbestos but chose to enter the bathroom in any event."**

He allowed, however, that it would not amount to gross misconduct if entering the bathroom had been a genuine accident.

6. The Claimant appealed that decision but was unsuccessful. The Regional Director, Mr Stone, who heard the appeal shared Mr Biddlecombe's view of events, albeit acknowledging that, whilst the Claimant's method of entering the flat was potentially an act of misconduct, it would not - by itself - have constituted gross misconduct meriting summary dismissal.

The ET's Conclusions and Reasoning

7. The Employment Judge found the Claimant was dismissed for a reason related to his conduct; a potentially fair reason for dismissal. She considered the three-stage test laid down in **BHS v Burchell** [1980] ICR 303. She concluded that the Respondent believed the Claimant to be guilty of misconduct; knowingly entering a sealed room which was marked as hazardous by reason of asbestos. She turned to the question whether the Respondent had reasonable grounds for its belief. She concluded it did not. Her reasoning was as follows:

> **"… the Claimant's evidence, which the tribunal accepts, was that he did not see the sign or the words on the tape on the bathroom door in the dark flat. The Claimant thought the room might have been sealed for another purpose such as to keep dust or dirt from getting into a room which was finished. The Claimant's evidence was that had he been aware of the risk of disturbed asbestos, he would not have unsealed and leaned into the bathroom in Flat 2 to restore the water supply to Flat 1. Bearing in mind the considerable risk to the Claimant's health of doing so and the evidence which was available to the Respondent, the tribunal does not find there to be reasonable grounds for the belief that the Claimant unsealed and leaned into the bathroom knowing of the risk." (paragraph 30)**

8. On the other hand, the Employment Judge accepted the Respondent had carried out as much investigation as was reasonable in the circumstances. She then considered if, contrary to her primary finding, there had been reasonable grounds for the Respondent's belief in the Claimant's gross misconduct, whether dismissal was a fair sanction in the circumstances; whether it was within the range of reasonable responses. At this stage the Employment Judge reminded herself that she should not substitute her view for that of the reasonable employer. She did not, however, consider that the Respondent had taken into account what she called the:

> **"… strong mitigating circumstances … including the responsibility which the Respondent itself had to take steps to ensure that its employees or others did not enter Flat 2 and the sealed bathroom." (paragraph 33)**

9. The Employment Judge made further criticisms of the Respondent's conduct before returning to what she considered to be mitigating factors arising from the fact the window had been left open in the flat and the Claimant had had an overriding concern to restore the water supply for Flat 1. Had the Respondent taken account of the mitigating factors, its conclusion would have been that this first offence should have been dealt with by written warning of some kind, potentially a final written warning; dismissal was not within the range (see paragraph 37).

10. The Employment Judge then turned to the wrongful dismissal claim. She concluded the Claimant had not knowingly unsealed and entered a hazardous area. Accidental entry did not constitute gross misconduct; his dismissal without notice was thus in breach of contract.

<u>The Appeal</u>

11. The Grounds of Appeal are twofold: (1) whether the Employment Judge substituted her own view as to whether the Claimant was guilty of the alleged misconduct for which he was dismissed rather than considering whether the Respondent had reasonable grounds for such belief; (2) whether the Employment Judge substituted her view as to the appropriate sanction

when she found that dismissal fell outside the range of reasonable responses and that a written or final written warning would have been an appropriate sanction.

12. There was previously a third ground of appeal, seeking to challenge the conclusion reached on sanction as being perverse. That has not been pursued before me.

The Relevant Legal Principles

13. The starting point is section 98(4) of the **Employment Rights Act**, which provides:

> **"(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."**

14. In conduct dismissal cases, the approach (with appropriate amendment to allow for the way the burden of proof has changed under the statute) is that laid down in **BHS v Burchell** [1980] ICR 303. The ET will first ask, what was the reason for dismissal? It is for the Respondent to establish the reason and that it is a reason capable of being fair for section 98 purposes. Second, did the Respondent have reasonable grounds for its belief in the Claimant's misconduct? Thirdly, was there a reasonable investigation? On those last two questions the burden of proof is neutral as between the parties.

15. When assessing questions of reasonableness the test is whether the Respondent's conduct and decision making fell within the band or range of reasonable responses of a reasonable employer in the circumstances of the case, **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17. Those are questions for the ET. It is a specialist Tribunal - albeit that unfair dismissal cases

generally no longer have the benefit of lay member participation - and it is right that the EAT, itself a specialist appellate court, pays proper respect to the decision of the ET, remembering that Parliament has entrusted the ET with the responsibility for making decisions, which may be difficult and borderline in some cases, as to the fairness of the dismissal (see per Longmore LJ at paragraph 19 of **Bowater v North West London Hospitals NHS Trust** [2011] EWCA Civ 62). That said, in assessing reasonableness an ET must not lose sight of the fact that it is not *its* view as to what would have been fair or reasonable that is the question. The employer's conduct and decision making must always be tested against the range of reasonable responses of the reasonable employer. See, for example, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 where it was held that the ET had allowed its otherwise entirely proper findings of fact relevant to the issue of contributory fault to seep in and support its conclusions as to the reasonableness of the dismissal. That amounted to a substitution of the ET's view for that of the reasonable employer and led to the decision being overturned in that case.

16. There is, however, equally a danger on an appeal against a decision of an ET of this court being too ready to determine such a challenge by reading into an ET's proper discharge of its function an error of substitution, see the guidance of Langstaff J in **JJ Foods Services v Kefil** UKEAT/0320/12/SM at paragraph 18.

17. Moreover, when assessing the ET's decision, Mr Harrison (for the Claimant) also relies on the Supreme Court's guidance in **MA (Somalia) v SSHD** [2010] UKSC 49, where the Court of Appeal was held to have erred in overturning a decision of the Immigration and Asylum Tribunal, and where the Supreme Court warned (paragraph 46):

> **"… If, as occurred in this case, a tribunal [particularly, as here, a specialist Tribunal] articulates a self-direction and does so correctly, the reviewing court should be slow to find that it has failed to apply the direction in accordance with its terms. All the more so where the effect of the failure to apply the direction is that the tribunal will be found to have done precisely the opposite of what it said it was going to do. …"**

Submissions

The Respondent's Case

18. First, on the question whether the ET fell into the substitution mind-set in terms of its conclusion as to the Respondent's grounds for its belief, Mr Edwards argued that the Employment Judge's focus was on whether the Claimant had in fact seen the asbestos warning signage affixed to the polythene covering over the bathroom door. The substitution error was apparent from the Employment Judge's statements as to what "the Tribunal accepts", see paragraph 15 (findings of fact) and paragraph 30 (conclusions). The danger of this focus was evidenced by the conclusions being apparently influenced by what the Judge had found in terms of the Claimant having notified the Respondent's out-of-hours call centre ("the OOHC") that he was going to enter the property through the small window. In fact, the evidence was that he had notified the OOCH after the event. That was an unnecessary finding of fact on the question of reasonable grounds of belief. The fact that the Employment Judge incorporated it into her conclusions on that question was further evidence of her substitution mindset.

19. As to the second ground of appeal, appropriate sanction, the Employment Judge had formed her own view as to what had taken place and considered the question of sanction on that basis. Hence, her focus on mitigating circumstances and the Respondent's failings. The error was made plain at paragraph 34 where the Employment Judge specifically drew on her own primary findings of fact. In particular:

> **"… The only specific warnings were the sign and the tape on the bathroom door which the Claimant did not see in the dark flat and after a very long day's work."**

20. She was there relying on a primary finding of fact she had herself made on the evidence before the ET rather than focussing on the material before the Respondent.

21. Paragraph 35 displayed a further error where the Employment Judge again drew upon her erroneous finding of fact in respect of the Claimant's contact with the OOHC.

22. Finally, it must evidence a substitution mindset for the Employment Judge to find that a final written warning would have been within the range of reasonable responses whereas the dismissal was outside that range. Those possible different outcomes, in terms of penalty, were arguably what the range of reasonable responses was all about.

The Claimant's Case

23. For the Claimant, Mr Harrison urged that the Employment Judge was entitled to set out findings of fact for both unfair liability and wrongful dismissal together. Whilst the Employment Judge's findings of fact as to whether or not the Claimant was actually guilty of gross misconduct were not necessary for her conclusion on liability for unfair dismissal purposes, she did have to make such findings for the wrongful dismissal claim. It was also necessary to bear in mind the reason for the dismissal, as the Employment Judge found (paragraph 28): knowingly entering a sealed room which had been marked as hazardous by reason of asbestos. To the extent that she referred to findings of fact which did not go precisely to that reason, they would not have informed her reasoning in any substantive way.

24. In terms of her approach to the "reasonable grounds" and "sanction", the Employment Judge had got it right. On the question of reasonable grounds for belief, she correctly directed herself as to the relevant law and the correct approach (see the self-direction at paragraphs 23.2, 29 and again at paragraph 30). Whilst the Employment Judge made reference to her own findings as to what the Claimant had done, it was unlikely - having just reminded herself of the correct tests - that she then engaged in an error of substitution. Whilst paragraph 30 might have

been better expressed, reading it as a whole it was apparent that the Employment Judge was addressing the correct question, hence the reference in the final sentence to the evidence "available" to the Respondent. Moreover, to the extent that the Employment Judge referred to the evidence of the Claimant that was before her, that was also reciting the evidence as before the Respondent; the Claimant's case had not changed.

25. On the question of sanction, the **London Ambulance Service v Small** case could be distinguished from the present. There, the ET had not been charged with making findings of fact for any wrongful dismissal claim and so it was unnecessarily incorporating findings of fact into its decision on liability for the unfair dismissal claim before it.

26. As for reasonable grounds of belief, there were again three places where the Employment Judge had reminded herself as to the correct test before reaching her conclusion on sanction (see paragraphs 24, 32 and paragraph 37). This court should be slow to infer that she had then gone on to make precisely the error against which those self-directions warned.

27. Mr Harrison allowed that the Respondent was on slightly stronger grounds on the sanction ground of appeal, given that there did seem to be some findings of fact upon which the Employment Judge had relied. That said, as the Court of Appeal had reminded the EAT in the **Bowater** case, ETs have the ability to take a broad view when applying the range of reasonable responses test, and it is important to stand back and see the entirety of the picture from the ET's decision rather than taking one part.

28. Specifically turning to the mitigating factors that the Employment Judge had found relevant to her conclusions. As the ET in **Bowater** had been entitled to have regard to what the

general population would have found humorous and so not culpable behaviour for unfair dismissal purposes, so too this ET was entitled to have regard to what the Employment Judge assessed to be relevant mitigating circumstances.

The Respondent in Reply

29. In respect of **London Ambulance Service v Small**, the reasoning, as set out at paragraphs 20 to 23, showed the ET had there also given itself a correct self-direction but had then failed to correctly apply it. As for the reference to **Bowater**, it was agreed that there would be nothing wrong in this case with the Employment Judge making her own findings of fact; indeed she needs to do so for the wrongful dismissal claim. It was important, however, that she did not then lose sight of what was before the Respondent as the relevant time.

30. The Respondent also accepted that the Reasons must be read in their entirety. That said, the conclusions that were being attacked in this appeal were firmly identified by the Employment Judge as being in respect of unfair dismissal liability. Those conclusions could not be rescued as being seen as going only to the Judgment on wrongful dismissal.

Discussion and Conclusions

31. I start by reminding myself that the Employment Judge is entitled to have her Judgment read in its entirety and viewed as a whole; I am not to nitpick my way through but should stand back and see the complete picture thus presented. Although the headings and separate paragraphs in the reasoning help to signpost the direction the Employment Judge has travelled, I should not be too ready to assume that a correct self-direction at one part of the reasoning has failed to find its way into the explanation at a later stage simply because it appears in a different paragraph or section. As Mr Harrison urges, where there is a correct self-direction as to the

legal principles and approach, the EAT should not be ready to assume that an Employment Judge has managed to forget those points when reaching her final conclusions.

32. I further accept that, before concluding that there has been any error in this regard, this court needs to be satisfied that there is no other way of interpreting the Employment Judge's reasoning. I also agree that, in this case, it was no error of law for the Employment Judge to make findings as to what had actually taken place; she was obliged to do so for the purposes of the wrongful dismissal claim. She was also entitled to put all her findings of fact in one place. That might not be the best course, but it is not an error of law. That said, where all the findings of fact are in one place, the onus is then on the Employment Judge to be careful to separate out that which is actually relevant to the determination of liability in the unfair dismissal case.

33. I turn to the grounds of appeal. First, whether the Employment Judge erred in substituting her view for that of the reasonable employer as to whether there are reasonable grounds for the Respondent's belief. Here, there does seem to have been a focus on whether the Claimant was in fact culpable: whether he had actually seen the asbestos warning. The Employment Judge's focus was on her own findings of fact. Whilst she had to carry out the fact-finding exercise to determine the wrongful dismissal claim, she needed to be careful not to confuse her function in that regard with what she was required to do in respect of unfair dismissal.

34. The starting point was to ask, what was the Respondent's actual belief? Here, as found, that was that the Claimant had knowingly entered the hazardous area and put himself and others at risk. The next question was then to ask whether the Respondent had reasonable grounds for its belief that the Claimant had so acted *knowingly*. The Employment Judge herself allowed

some possibility of culpability on the Claimant's part - she would have found it appropriate for some warning to be given, possibly even a final written warning - but did not consider that he had acted in such a way as to amount to gross misconduct.

35. What the Employment Judge needed to do was not to analyse simply the Claimant's evidence before her but to consider the Respondent's evidence as to the grounds that it had relied on. That would have included Mr Biddlecombe's evidence that he did not believe the Claimant's claim not to have seen the yellow warning tape and considered it impossible that the Claimant would not have been aware of the warnings. Given that the bathroom had been taped closed with both black and yellow tape, and there was a warning of asbestos on the outside of the room, the Employment Judge needed to explain her view as to why the Respondent's belief had no reasonable basis. She apparently did not consider that it had because of what she concluded had actually happened. She needed, however, to demonstrate that she had considered whether there reasonable grounds on the basis of what the Respondent itself had relied on. From the Reasons given, I am unable to see that the she carried out this exercise. What I see - from a close analysis of the reasoning but also standing back and appreciating the complete picture given - is a focus on the Employment Judge's own conclusion as to what happened; on her findings of fact relevant to the wrongful dismissal case, taken from the Claimant's evidence, with no assessment or analysis of what the Respondent took into account, accepted or rejected.

36. Although the Employment Judge expressly set out the correct test (see, for example, at paragraph 29), paragraph 30 of her reasoning evidences the very error against which the application of the reasonable grounds test should have protected her. Rather than apply that

test, she drew upon her own findings of fact as to what had taken place, on the basis of the Claimant's evidence before her. That is underlined by the last sentence, which reads:

> **"Bearing in mind the considerable risk to the Claimant's health of doing so *and the* evidence which was available to the Respondent …" [emphasis added]**

37. I then turn to the second ground of appeal, relating to sanction. Here the findings against the Respondent were essentially twofold: mitigating circumstances and the Respondent's own failings. Again, I accept that the Employment Judge correctly directed herself as to the legal test she was required to apply (on more than one occasion). Equally, however, I cannot but come to the conclusion that, again, she then relied on her own findings of primary fact relevant to the wrongful dismissal claim in determining what were those mitigating circumstances. Those findings were derived from what she had found to the case, based on her view of the Claimant's evidence before her, rather than what the Respondent had found. That is made plain by her conclusion at paragraph 34 (cited above) and is further underlined at paragraph 35, when she repeats her erroneous finding of fact as to the Claimant's contact with the OOHC.

38. The final point relates to the Employment Judge's finding that a final written warning would have been within the range of reasonable responses, whereas dismissal was outside that range. That might not have been fatal but it is moving into dangerous territory for an ET to allow that a final written warning is within the range whereas dismissal is outside. Such judgment calls might well be said to be what the range of reasonable responses are all about. It might be that this part of the reasoning is simply unfortunately worded; I am not sure I would have allowed the appeal solely on this point. I do, however, find that it adds to the picture of an Employment Judge who fell into the very substitution mindset that the case-law warns against.

39. Notwithstanding Mr Harrison's best efforts, I am satisfied that the Employment Judge's conclusions on reasonable grounds and sanction are vitiated as founded on her own conclusions as to what had taken place; findings relevant to wrongful dismissal (and to contributory fault) but not to liability in respect of unfair dismissal. That being so, I am bound to allow this appeal.

40. Having given my Judgment in this matter, I allowed the parties to address me further on disposal. Both were in agreement that the matter needed to be remitted; it was not for me to substitute my view, I had not reached the conclusion that there was only one answer in this case and the appropriate course was for this matter to be remitted. There was a difference of view, however, as to whether I should remit to the same Employment Judge. The Claimant urged that I should; the Respondent that it should go to a different Employment Judge.

41. I take into account the guidance laid down by this court in **Sinclair Roche Temperley & Ors v Heard and Fellows** [2004] IRLR 763. In terms of proportionality, the Claimant is of limited means and there is a modest sum at stake. This is, however, likely to remain a one-day case, regardless which course I adopt, and the same costs are likely to be incurred either way. The passage of time here is neutral: not so much time has passed since the hearing of this case but, equally, many other cases will have passed before this Employment Judge. This is not a case where it has been suggested that the Employment Judge was biased or prejudiced or in any way incapable of applying the correct test. I do, however, accept that remission to the same Employment Judge may give rise to difficulties of confidence in the outcome. Allowing for the Employment Judge's professionalism, she has expressed a view of the facts and - on my judgment - allowed that to substitute for that of the employer. In these circumstances, I am

persuaded that the appropriate course would be for this matter to be remitted to a freshly constituted ET to determine the unfair dismissal claim.

42. Finally, the Respondent has made an application for its costs, under Rule 34A(2)(a) of the **EAT Rules 1993** (as amended), to the extent that it has had to pay lodgement and hearing fees in order to pursue this appeal. That rule gives me a broad discretion to make an award of costs to reimburse a successful appellant for the fees it had to incur in order to pursue its appeal.

43. In determining this application, I accept that the starting point must remain that costs do not simply follow the event in this Court. That said, I can see that it would seem unfair for a party that has successfully pursued an appeal to have been put to expense to do so; a party that has unsuccessfully resisted an appeal cannot assume that it will avoid a costs order under this rule. There are, however, a number of different considerations that can apply when this Court exercises its discretion under Rule 34A(2)(a). In this case, it is not irrelevant that at the point of lodging its appeal, the Respondent was also pursuing perversity as a potential ground. Only at this hearing was it made clear that was no longer pursued. That might persuade me against allowing it to recover all of its fees in any event. I bear in mind, however, that it has been substantially successful and that the Claimant has participated and sought to resist the appeal. That said, I also take into account the fact that the Claimant is - I am told - of very limited means. He has been able to resist this appeal because Counsel was prepared to act pro bono and has thereby assisted the Court. The Claimant would not otherwise have been able to afford legal representation and would not have been able to actively participate in the same way.

44. Had the Claimant been seeking to appeal, it seems possible that he may have been eligible for remission; if so, he would not have had to pay any fees. It would hardly seem fair

to make a party liable to repay fees which he himself would never have had to face. I may not have a complete picture as to the Claimant's means in this case, but he was not forewarned of this application and, therefore, of the need to bring evidence of his means to this hearing.

45. Taking all those factors into account, I make no award of costs in this instance.