Appeal No. UKEATS/0048/13/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 18 March 2014

Before

THE HONOURABLE LADY STACEY

MR P PAGLIARI

MRS A HIBBERD

NHS FIFE HEALTH BOARD — APPELLANT

DR ALAN STOCKMAN — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR I TRUSCOTT (One of Her Majesty's Counsel) Instructed by: NHS Scotland Central Legal Office Anderson House Breadalbane Street Bonnington Road Edinburgh EH6 5JR
For the Respondent	MR B NAPIER (One of Her Majesty's Counsel) Instructed by: Messrs Campbell Smith WS LLP 21 York Place Edinburgh EH1 3HP

SUMMARY

UNFAIR DISMISSAL

Unfair dismissal. The Claimant was a doctor who was convicted of driving while under the influence of alcohol. His registration with the General Medical Council was suspended on an interim basis. He was signed off as unfit for work while undergoing a course of treatment involving attendance at a centre most of the day and part of the evening. The Respondent dismissed him on grounds of capability. The Respondent decided that if registration was necessary and was not available, unless deployment could be arranged, dismissal would ensue. The Claimant led evidence at a hearing and an appeal to the effect that he was likely to respond to treatment and that his suspension was likely to be revoked. He led evidence that most doctors in his position did recover, and that other health boards would not dismiss at an early stage of his receiving treatment. The Respondent dismissed him about 6 weeks after his suspension. The Employment Tribunal found that dismissal was unfair. The Respondent argued that the ET had substituted its own view and had wrongly admitted evidence of the supposed attitude of other health boards and opinion evidence from doctors who stated that the Claimant was likely to recover, and that other health boards would not dismiss at that stage.

Held: appeal dismissed. The ET had directed itself correctly in law and was entitled to hold that the Respondent had not carried out a reasonable investigation and had not acted fairly in all of the circumstances. The opinion evidence of the doctors was admissible.

THE HONOURABLE LADY STACEY

1. This is an appeal by NHS Fife Health Board against a decision of the Employment Tribunal (ET) sitting in Edinburgh, in which the decision was sent to parties on 27 June 2013. The decision of the ET was that the Claimant was unfairly dismissed and a direction was given that a hearing on remedies should be held. We will refer in these reasons to the parties as the Claimant and the Respondent as they were in the ET. Mr Truscott QC appeared for the Respondent and Mr Napier QC for the Claimant before us; at the ET Mrs Ewart appeared for the Respondent and Mr Warnock appeared for the Claimant.

2. The Claimant is a medically qualified doctor who was employed by the Respondent as a pathologist from December 2006 until 24 October 2012. The Respondent is a health board which employs about 9000 people. Between late 2007 and June 2009 the Claimant had a medical history of alcohol problems at work. Investigation was undertaken by the Respondent but no disciplinary action was taken. On 21 May 2012 the Claimant committed an offence of driving while under the influence of alcohol. His registration with the General Medical Council (GMC) was suspended on an interim basis for 18 months from 25 July 2012. On 30 July 2012 the Claimant enrolled on a medical programme known as the Lothian and Edinburgh Abstinence Programme (LEAP). The Respondent became aware of the situation and on 6 August 2012 decided to deal with matters under stage 3 of its capability policy. It held a hearing on 5 September 2012 at which it decided to dismiss the Claimant with effect from 24 October 2012 unless he could be redeployed. No redeployed position was available. The Claimant appealed against that decision and his appeal was dismissed on 5 February 2013.

3. The contract of employment was based on conditions of employment of the Hospitals Medical and Dental Staffs (Scotland) and the General Whitley Council. The Respondent had a

number of policies informed by the Partnership Information Network (PIN) issued by the Scottish Government, as minimum standards for health boards. The occupational sick pay scheme applicable to the Claimant provided for 6 months full pay and six months half pay. The Respondent had a Management of Capability Policy issued in August 2004. The policy provided for three stages of formal process if action was needed on a capability issue. Stage 1 involved a meeting to discuss matters and to agree an outcome whereby unsatisfactory performance would be identified, the improvement required would be set out, and an action plan including assistance in achieving improvement, with a timetable for review, would be agreed. Stage 2 applied when the desired improvement had not been achieved through the action plan set out in stage 1. That involved further discussion of the improvement needed, and of assistance to achieve it, and might involve discussion of career counselling and redeployment. The outcome would be formally recorded including a timetable for review. The employee would be advised that failure to achieve necessary improvement would result in consideration of termination of employment on grounds of capability. Stage 3 applied if the required improvement was not achieved. A meeting to consider matters would be held and consideration given to whether there was any likelihood of the employee's achieving an acceptable standard by extending the assistance offered or time scale agreed under previous proceedings. If the manager decided the performance would not become acceptable, consideration would be given to permanent redeployment. If no suitable redeployment was available then the employee would be dismissed. Lack of capability was defined by a list of circumstances, including ill health and lapse or loss of registration.

4. Appendix 2 of that policy deals with lapse or loss of registration and states as follows: –

> **"4.1 Lapse of Registration**
>
> **Several staff groups in NHS Fife are required to be registered with Medical or Dental councils…before being able to practice in the NHS… As registration is imperative for certain**

staff groups it is suggested that all relevant NHS Fife employment contracts contain an express term regarding registration with the relevant body….

4.2 Loss of Registration.

If a member of staff becomes ineligible for registration with the relevant body, then he can no longer be employed in a post requiring registration. Employers are expected to deal with such a situation, which is not associated with conduct issues, in the same way as any other capability issue. However it is also recognised that the circumstances leading to the loss of registration may have arisen due to issues of conduct in which case referral to the Management of Employee Conduct Policy would be appropriate

There is no legal requirement for an employer to create a post for an employee who can no longer carry out the job they were employed to do."

5. The Respondent had a Management of Employee Conduct Policy dated January 2005, which stated that 'the broad heading of capability can be broken down into the main factors which can affect performance'. Lapse or loss of registration was included in the list following that statement. The PIN guideline was updated in April 2012. The effect of the update was amongst other things to remove loss of registration from the list of matters to be dealt with under the heading 'capability'.

6. The ET noted that the government issued the various updates to the PIN policies as a suite and they arrived with the Respondent in July 2012. At paragraph 33 the Tribunal found that the HR policy subgroup drafted new policies based on the suite. Consultation followed and the work was done in two tranches. The capability policy was in the second tranche. Therefore, while a new capability policy had been drafted based on the updated guidelines that policy had not been implemented at the time when concerns regarding the Claimant's capability were considered by the Respondent. The Tribunal therefore found at paragraph 36 the following: –

"Thus the relevant policy in place in NHS Fife at the time was the capability policy produced in August 2004 and based on the previous PIN guidelines."

7. On 24 July the Claimant was referred by the Respondent to Dr Leckie, a consultant occupational health physician. He reported on 26 July that the Claimant was unfit for work, but

was fit to attend management meetings. Dr Leckie stated that as the Claimant was going to attend a semi residential training course for 12 weeks, [LEAP], he would not be fit for work during that period. Dr Leckie thought it more likely than not that the Claimant 'will successfully rehabilitate'. He concluded by stating he thought it appropriate to review the Claimant in 4 weeks' time, when he hoped that a report from his GP would be available, to enable him to update the Respondent.

8. On 25 July 2012 a meeting of the Medical Practitioners' Tribunal Service was convened. It suspended the Claimant's registration on an interim basis for 18 months. The Tribunal advised the Respondent of this decision and stated that the order would be kept under periodic review. The Claimant consulted his GP and Dr David McCartney and was admitted to a programme known as LEAP which is a partially residential course designed to support complete abstinence. Attendance between 0845 and 2200 is required. Dr McCartney signed the Claimant off as unfit for work in order to attend the course. The GMC deferred two medical assessments of the Claimant when he was on the programme to allow him to complete the treatment before obtaining reports.

9. The Respondent, having been advised of the GMC decision to suspend the Claimant in the interim, decided that he could not perform the role of a doctor for the period of suspension and the correct course, therefore, was to have a stage 3 capability hearing in line with the capability policy. The Claimant was told that his hearing under the capability policy was to take place on 16 August 2012. Dr McCartney wrote on his behalf stating that the hearing should be the postponed as it would be detrimental to the Claimant's health to attend the hearing so early in his treatment program. He also offered his opinion that

> **"The evidence base for treatment of addictive disorders in medical professionals is strong. The vast majority respond well to treatment and are able to return to work to give reliable**

performance. Dr Stockman has started that process and is following all of the treatment suggestions. Based on my experience of treating other doctors, I should say that if Dr Stockman completes treatment here it is likely that the period of suspension will turn out to be considerably less than 18 months."

A representative of the British Medical Association (BMA) also sought a postponement of any hearing, on the grounds of the Claimant's health. The Respondent agreed to postpone the hearing until 5 September, stating that it did not intend to postpone further beyond that date.

10. The hearing on 5 September 2012 was chaired by George Cunningham and the Claimant was present and represented by Joyce Davison. She raised concerns about the use of the capability policy, submitting that it was being run in a different way from capability hearings elsewhere, and was more like a disciplinary hearing than a capability hearing. She argued that the Respondent was ignoring the advice of the Central Legal Office of the NHS, that loss of registration should not be dealt with under capability. She stated that Dr Fernie of the Medical Protection Society believed that the Claimant would not have been suspended had it been considered after his start on the LEAP programme, and that his suspension might be reduced to 6 months on review, and in any event was not likely to last for more than 9 months. She argued it was unreasonable for the Respondent to proceed with dismissal. She was concerned that there had been a failure to obtain up-to-date advice about the Claimant's progress with LEAP. She suggested that his post could be held open until suspension was lifted, as would have been done if he had been off sick, which she said "arguably he was". She also asked about redeployment.

11. The Claimant was advised that the decision of the hearing was to terminate his employment on the grounds of capability due to the interim suspension of registration for the following reasons: –

> **"The period of time that you will be unable to perform the job for which you are employed is indeterminate but on an interim basis is at worst 18 months. NHS Fife has to therefore plan on this basis.**
>
> **You are not entitled to your current remuneration because of the interim suspension of your registration, enabling you to work as any grade of doctor.…**
>
> **As a result of NHS Fife terminating your employment, you are entitled to payment of 12 weeks' pay in lieu of notice with effect from 5 September 2012. However, it was agreed that during the equivalent period of statutory notice i.e. 5 weeks you should explore with management a vacancy that is suitable for your redeployment… any such redeployment has to be assumed to be permanent because we as an organisation need to provide continuity of service and advertise and recruit to the post that your interim suspension of registration has created. If no such vacancy is identified and agreed with management before the end of this 5 week period plus 11 days annual leave due i.e. 24 October 2012, then your termination of contract will stand and your terminated date will be 24 October 2012.…**
>
> **During the course of the hearing, Ms Davison agreed that the extant NHS Fife Capability Policy does include "lapse or loss of registration" within paragraph 2 "definition". I also confirmed that the procedure outlined at the start of the hearing was that followed in other capability hearings and you were not therefore being treated any differently to other staff."**

12. The Claimant was prepared to consider being deployed to an audit post. Further, he would consider any senior administrative post. Vacancy bulletins were sent to him. No suitable post was found.

13. An appeal was lodged by the Claimant. A hearing was held on 23 January 2013. It was conducted by John Wilson, Chief Executive. The Management case was presented by George Cunningham and the Claimant was represented by Joyce Davison. She called Dr McCartney as a witness. The panel was told that following a review by the GMC on 8 January 2013 the suspension had not been lifted. The outcome of the appeal was that the decision to dismiss was upheld. The Claimant was told this by letter dated 5 February 2013, which stated that: –

> **"[Y]ou had your registration with the GMC suspended on an interim basis for a period of 18 months with effect from 25 July 2012 and that this suspension remains in place, despite the view of your representative that there was an expectation it would have been removed after 6 months. The GMC states clearly that the suspension means that 'this person has been suspended from the medical register and may not practice as a doctor in the UK.'**
>
> **I note your representative's view that NHS Fife's management capability policy should no longer include loss of registration as part of its remit as this has been removed from the new P I N policies for NHS Scotland. I am, however, content that as the employment policies for NHS Fife are agreed in partnership through the Area Partnership Forum, it was entirely appropriate to use the extant policy."**

The ET decision

14. At paragraphs 81 to 83 the ET set out the law, noting that the relevant statute is the **Employment Rights Act 1996** [ERA]. They made reference to section 98 and noted that capability or qualifications are potentially fair reasons for dismissal. They noted that where an employer dismisses for a fair reason and fulfils the requirements of section 98(1), the question of the fairness of the dismissal has to be determined; they quote accurately the provisions of the subsection. The ET directs itself correctly in terms of the case of **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439, to the effect that the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses, being careful to remember that one reasonable employer may take a different decision from another.

15. The submissions for the Respondent are set out, and may be put broadly as stating that the facts speak for themselves in that the Claimant required to be registered, and was not registered. It was accepted that he could be seen as being off sick, but it was pointed out that the Respondent did not dismiss him for ill-health. Therefore the Respondent did not require to be informed of the Claimant's medical position at the time of dismissal because this would have had no bearing on his ability to practice as a doctor at that time. It was argued that the Respondent did not require to wait until an employee's sick pay is exhausted before making a decision about whether his employment should be terminated. The Claimant could not carry out the job he had been employed to do. The attempt at redeployment was not successful. It was argued that health boards are separate legal entities and that there is no obligation on different health boards within Scotland to act consistently. It was also argued that Dr Fernie and Dr McCartney knew only of some cases and their knowledge was anecdotal. Finally, it was submitted that the Respondent had to plan on the basis that the Claimant's registration was suspended for 18 months. It was subject to review, but could be lengthened.

Therefore, no one knew if and when he would be able to come back. It was not reasonable for the Respondent to have to pay for two consultants at once. The Respondent had not treated the Claimant's contract as frustrated due to the loss of registration. Rather it had made attempts at redeployment, and it had held a full hearing to consider the circumstances. The Respondent submitted under reference to case law that the ET had to consider whether the decision to dismiss was within the band of reasonable responses, and had to guard against substituting its own view.

16. The submissions on behalf of the Claimant were firstly that the Respondent failed to undertake a reasonable investigation process, and secondly that it did not act reasonably in dismissing the Claimant. It was argued that the case of **Sainsbury v Hitt** [2003] IRLR 23 shows that the range of reasonable responses test applies to the investigation as well as to the decision to dismiss. The Claimant's representative argued that holding the capability hearing only 5 weeks into the rehabilitation programme was unreasonable. It was argued that it was unreasonable not to look at the new policy. He argued that ACAS guidelines had not been followed. He argued that proper investigation would involve in depth consideration of the medical aspects of the case but there had in fact been no attempt to get updated information from the occupational health doctor. Dr Fernie had given as his opinion that the interim suspension would probably last for 6 to 9 months. In fact the Claimant's name had been restored to the register on 25 April 2013. Further, Dr Fernie had given evidence that dismissal in the circumstances of this case was unique in his experience.

17. Mr Warnock, on behalf of the Claimant, submitted that the wrong policy was being adopted by the Respondent. His position was that new policy was available on the government website in May and that there could be no reasonable excuse why it was not available at the appeal hearing some 9 months after the publication date. He argued that it was an act of serious

maladministration that the Respondent was still using the old policy. Mr Warnock submitted that temporary suspension of the Claimant's license should have been dealt with under the heading 'some other substantial reason' as stated in the new policy.

18. Mr Warnock criticised the management report relied on at the capability hearing because it was prepared weeks prior to the hearing and was completed by two employees with no medical knowledge of the illness of alcohol addiction, and there was no reference to medical evidence. There were no references to the Claimant's attempts to rehabilitate himself and the report did not explain that the interim suspension was for a period not exceeding 18 months, and was subject to review at 6 months and at regular intervals after that. There was no up-to-date report from occupational health, from a psychiatrist or from the Claimant's GP about his progress on the LEAP program. He criticised the Respondent for acting with haste. He stated that suspension should be viewed as a neutral act not a punishment. If the Claimant had broken his leg or had had a heart attack, which required an extensive period of treatment and rehabilitation, it would be wrong to dismiss once he was well enough to return to work. He criticised the Respondent's failure to consider that the suspension might not last 18 months. He argued that the Respondent should have consulted other health boards. He argued that the Claimant could have been on sick leave until his registration was restored in April 2013. Mr Warnock relied on opinion evidence from Dr Fernie and Dr McCartney that the health board had acted as a law unto itself, and therefore had acted unreasonably.

19. The Tribunal found that there was little or no dispute on the facts, and that all of the witnesses were helpful. The ET found at paragraph 126 that there was no question that the reason put forward by the Respondent for dismissal, that is capability and qualifications, was the genuine reason for the dismissal. The Respondent's position had been that although suspension was on an interim basis and was to be reviewed, they had to operate on the footing

that the Claimant's registration would be suspended for at least 18 months. Because of the suspension of registration he could not practice as a doctor and therefore could not fulfil the conditions of the contract. In paragraph 129 the ET stated the following: –

> **"In such circumstances, it was clear that the reason for dismissal was the suspension of registration. The Tribunal therefore accepted that the Respondent had shown that the dismissal was for reasons of capability and qualifications which is a potentially fair reason for dismissal."**

20. The ET at paragraph 130 stated that: –

> **"[…the sole question for this Tribunal to determine is whether or not the Respondent acted within the range of reasonable responses open to them."**

21. The ET reminded itself at paragraph 132 that when considering this question, they had to be aware that there is a band of reasonable responses open to an employer, that one employer may act in one way, which is reasonable, and another employer may act in another way, which also is reasonable. It is not for the Tribunal to substitute its own view. It is not a matter of the Tribunal asking itself whether or not they would have dismissed the Claimant.

22. At paragraph 136 the ET noted that Mr Warnock submitted that the Respondent failed to carry out a reasonable investigation and that dismissal was unreasonable in the circumstances. It noted the Respondent's response as being that they had carried out a reasonable investigation because when the Claimant had been suspended, there was no further investigation needed. It was argued that the Respondent could have said that the Claimant's contract was frustrated, but they did not take that line. They recognised the importance of fair procedure and the requirement to conduct a capability hearing. They decided to deal with the matter under the capability policy. They considered that was the appropriate policy under which to deal with the issue because it specifically stated that it covered loss or lapse of registration. At paragraph 143 the ET accepted that it was not in itself illegitimate for the Respondent to use that policy

because there was no specific date for implementation of the new policy. They also say in the same paragraph, "We queried however, whether to use that policy in the particular circumstances of this case was reasonable and appropriate". They heard evidence that there had been concerns about dealing with an issue relating to the lapse of registration under the capability policy. Ms Davison gave evidence that she raised these concerns, prior to the hearing, as well as at the hearing itself. At paragraph 145 the ET noted that the new guideline on capability policy specifically stated that the policy was not appropriate in cases of loss of registration. The ET found at paragraph 146 the following: –

> **"Indeed, it seemed to us that the very fact that the Respondent considered that it was appropriate to move straight to stage 3 of the capability policy in this case was an indication that this policy was not ideal for dealing with an issue such as interim suspension of registration."**

23. At paragraphs 147 and 148 the ET explained that they recognise the difficulty of updating policies, but they did consider whether, given all the information the Respondent had, it was reasonable for the Respondent to follow the old policy. They give their view in paragraph 149 to the effect that they considered that the Respondent ought at least to have paused and given some consideration to whether or not it was appropriate in the particular circumstances of this case to follow the existing capability policy, or to take account of national advice. They came to be of the view that the Respondent should at the very least have given further consideration to whether or not they were taking the right approach to this in relying on the capability policy. They found at paragraph 151 that adherence to the old policy prevented Mr Cunningham considering whether or not it would be reasonable to postpone the hearing until the Claimant had finished the treatment. At paragraph 152 they set out the evidence from the Respondent to the effect that they did not need any medical evidence because it would have made no difference, because the Claimant's registration was suspended therefore he could not fulfil his contractual duties. The ET found that if the Respondent had taken an alternative or less strict

approach to the operation of the policy, then it may well have been considered that an up-to-date medical report would have been valuable in allowing them to reflect on what would have been reasonable in the circumstances. They noted in paragraph 156 that there are clearly circumstances in which it would be reasonable to keep a doctor's position open for a year, given that the contract provided for sick pay for that period. The ET was careful not to decide that the Respondent should have done so in this case; but it did decide that a reasonable employer in the Respondent's position should have considered doing so. The ET did not accept Ms Ewart's submission that it would not be reasonable for the Respondent as a public sector body to hold the Claimant's post open indefinitely and to pay two consultants at the same time. They stated that the Respondent did not know how long they may require to keep the post open; and at a point only 6 weeks after the interim suspension of registration, the Claimant was dismissed. Further, at paragraphs 159, 160, and 161 the ET found that the Respondent did not act fairly regarding redeployment. The Respondent applied the standard procedure, which meant that had the Claimant secured a post the position would be permanent. The ET describes this as 'mechanistic' in that it failed to take into account the knowledge that the lack of registration was not likely to be permanent, and any post found under redeployment was one for which the Claimant would be over qualified if he was registered.

24. The ET then at paragraph 163 asked themselves whether these actions were the actions of a reasonable employer operating within the band of reasonable responses. They decided that while the Respondent claimed not to be treating the contract as though frustrated, the Respondent chose a route and then adhered very strictly to policies which robbed the Respondent of any discretion to deal with the case because there was an inevitable outcome. The ET decided, in paragraph 166, that they doubted that a reasonable employer would have placed themselves in a position that, following a capability hearing and an appeal hearing, the only possible outcome would be dismissal or possibly redeployment on a permanent basis to an

unsuitable post. They say that they allowed the evidence of Dr McCartney and Dr Fernie because they thought that it might be relevant to the question of reasonableness. The ET noted that the test of the actions of the reasonable employer involved looking at the actions of an employer in the same line of business or profession as the Respondent. The ET found the evidence of Dr Fernie and Dr McCartney admissible for that purpose. The ET accepted that neither of these witnesses could know the circumstances of every case in Scotland; nevertheless they found their evidence to have some weight. Dr Fernie was described as medical legal advisor at the Medical Protection society, a post he had held for seventeen years, and President of the Faculty of Forensic and Legal Medicine at the Royal College of Physicians. Thus his evidence that in circumstances such as prevailed in this case, NHS employers would always get an up to date medical report, was persuasive evidence. As for Dr McCartney, his evidence was that he had never come across a doctor being dismissed while getting treatment. He found that the vast majority succeeded in getting back to work. The ET found that his evidence was persuasive because he was an addictions specialist with experience in NHS Lothian, and he had experience of 'sharing a platform' with a leading expert in this field. The ET also found evidence from Ms Davison helpful. She had previously worked in human resources in the NHS, and had been assistant secretary at the BMA for 7 years. Her evidence was that she had never known of a doctor being dismissed in these circumstances.

25. Two grounds of appeal were allowed at the sift. The first was to the effect that the ET substituted its view for that of the reasonable employer, as shown by the following: the ET did not narrate the evidence of the health board; the ET erred in law by allowing the evidence of Dr McCartney and Dr Fernie to be led and then relied on that evidence, and in doing so provided the foundation for substitution of their own view for that of the Respondent; by expressing its own concern about the policy adopted by the Respondent notwithstanding that it made findings that the policy was appropriate, and by taking into account irrelevant material

concerning a policy which was not in force; by criticising the lack of redeployment in circumstances where there was no suitable redeployment available; by relying on comparison with other health boards; by holding that the Respondent should have held the Claimant's post open for him; and that it erred in law by taking into account the period during which sick pay was paid. The second ground of appeal was that the ET erred in failing to apply the test of whether or not the decision was within the band of reasonable decisions and instead proceeded on the basis that there was only one correct answer.

Submissions for the Respondent before the EAT

26. Mr Truscott QC, for the Respondent, argued that the ET found that the policy used by the Respondent was the appropriate policy, but nevertheless entertained complaints about the policy. It considered that the possible actions taken by other health boards were relevant, which he argued was wrong in law, and in any event, the evidence which they had about other health boards was anecdotal. He referred to the case of **Taylor v Alidair Ltd** [1978] ICR 445. Counsel argued that the situation was that the Claimant could not carry out the work he was contracted to do because of his committing an offence which led to his registration being suspended. It was therefore reasonable on the part of the Respondent to dismiss the Claimant. He referred to the case of **Taylorplan v McInally** [1980] IRLR 53 for the proposition that the Respondent in such a situation had no duty to create a job specially for the Claimant.

27. He argued that any question of consistency by one employer when dealing with different employees did not apply in the present case as health boards were all separate from each other. He emphasised that in any event very few cases were to be regarded as the same as each other and he argued that there was nothing in the point raised by the Claimant to the effect that other health boards would not have dismissed him in the current situation.

28. Mr Truscott argued that the terms of section 98(4) of ERA had to be considered as a single question. He referred to the well-known summary in the case of **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17 as follows: –

> **"(1) the starting point should always be the words of section 57(3) [98 (4)] themselves;**
>
> **(2) In applying the section, an industrial [employment] Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the employment Tribunal) consider the dismissal to be fair;**
>
> **(3) In judging the reasonableness of the employer's conduct, an employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;**
>
> **(4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer may reasonably take one view, another quite reasonably take another;**
>
> **(5) The function of the industrial [employment] Tribunal as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal was fair: if the dismissal falls outside the band, it is unfair."**

Thus, he argued, the ET must not substitute its own view of the appropriate action for that of the employer. Counsel quoted the words of Phillips J in the case of **Trust Houses Forte Leisure Ltd v Aquilar** [1976] IRLR 251 as follows: –

> **"It has to be recognised that when the management is confronted with the decision to dismiss an employee in particular circumstances there may well be cases where reasonable managements might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean that if they decide to dismiss that the other acted unfairly because there are plenty of situations in which more than one view is possible."**

He referred also to the EAT case of **Strathclyde Joint Police Board v Cusick** UKEATS/0060/10 in which it was said that the Employment Tribunal

> **"… Must avoid falling into what is often referred to as the "substitution mind-set": see, for instance, *London Ambulance Service NHS Trust v Small* [2009] IRLR 563. It is not a matter of the Tribunal asking itself whether or not they would have dismissed the Claimant. Further, the Tribunal to consider the question of what a reasonable employer would have done in context; that is, by asking themselves not just what any employer, acting reasonably, would have done but what a reasonable employer whose business/activities were the same as or similar to those of the Respondent, would have done in the circumstances: see *Ladbrokes Racing Limited v Arnott* [1981] SC 159 where the Lord Justice Clerk referred to considering what 'would have been considered by a reasonable employer in this line of business in the circumstances which prevailed.'"**

Counsel also referred to the well-known case of **Sainsbury's Supermarkets Ltd v Hitt** [2003] ICR 111 in which Mummery LJ, in reviewing the law discussed the 'substitution point' as follows: –

> **"In one sense it is true that, if the application of that approach leads the members of the Tribunal to conclude that the dismissal was unfair, they are in effect substituting the judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to 'reasonably or unreasonably' and not by reference to the own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the Tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not."**

Counsel reminded us of the recent cases of **Bowater v North West London Hospital Trust** [2011] IRLR 331 and **Tayeh v Barchester Healthcare** [2013] IRLR 387. He argued that the ET required not only to carry out the exercise as described above but also to demonstrate by the written reasons that they had applied their minds to the range of reasonable responses test.

29. Counsel argued that in this case, the ET had taken an approach which was critical of the Respondent and in so doing had substituted its own view for that of the Respondent and had not applied the reasonable responses test. He argued that the written reasons were a classic example of substitution. He also argued that the ET had heard evidence from Dr Fernie and Dr McCartney despite the fact that their evidence was irrelevant. The dismissing panel did not hear the evidence of these doctors and he argued that the ET should not have heard it either. He analysed the written reasons of the ET in detail. In discussion with the members of the EAT, counsel submitted that the Respondent went on to the stage 3 procedure without going through stages 1 and 2 because those stages do not apply where the employee cannot carry out the work that he is employed to do. Counsel argued that the policy, which the ET had found was the appropriate policy, dealt with loss of registration and the Respondent, he argued, was correct in applying its policy to the Claimant as it did to others. Counsel agreed that the Respondent

could look at all the circumstances but argued that it should do so within the context of the policy.

30. Counsel argued that the written reasons were one-sided, in that they looked at it from the point of view of the Claimant and they did not set out what was argued on behalf of the employer. He said that that was indicative of an approach in the case which was one of sympathy towards the Claimant.

31. In looking at paragraph 132 of the written reasons, counsel accepted that that was a good direction. He also accepted that the direction given by the ET at paragraph 135 was correct. He argued however that the ET had already found that the Respondent implemented the appropriate procedure and proceeded under the correct policy. By the time the ET got to paragraphs 142 and 143, the ET acknowledged that the arguments put up at the ET by the representative of the Claimant were not correct; the ET did not accept that it was an error of law to use the existing policy. Counsel argued that when the ET referred to that policy as "not ideal" (paragraph 146) they were making a value judgment and had apparently forgotten that that was the appropriate policy which was in place. Counsel accepted that the terms of the legislation were such that there was a decision to be made by the ET as to whether the decision to dismiss, even if it was within the policy, was reasonable in all the circumstances. He argued however that that question, as set out in the cases referred to above was not "Do I think this is reasonable" but rather "Is this a decision that a reasonable employer, engaged in the same business or profession as the Respondent, could have taken?" Counsel argued that as the Claimant could not do the work he was employed to do and the Respondent had followed a policy which was in force, it was very unlikely that the decision taken was not within the range of reasonable responses. He argued that in paragraphs 148 and 149 the ET clearly considered what the Respondent ought to do. He argued that was an error; they should have considered

what a reasonable in employer in those circumstances would have done. As noted above, the ET did not actually state what the Respondent should do but rather stated what they should take into account.

32. Counsel argued that his point about substitution in the question of the dismissal was his main point, but as a subsidiary point he argued that the ET had also substituted its own view on the question of redeployment. From paragraph 166 onwards, he argued, it could be seen that the ET had taken into account irrelevant evidence and had made up its own mind about what it thought an employer should do.

33. Counsel argued that we should allow the appeal and find that the dismissal was fair. If we were not prepared to find it fair we should remit to a new Tribunal to consider the matter once again.

Submissions for the Claimant

34. Mr Napier QC, senior counsel for the Claimant argued that the ET had correctly identified its task. It found that there was a fair reason for dismissal, capability, and then went on to consider whether the employer had acted in a way that was within the range of reasonable responses for the purposes of section 98(4). He argued that the ET was correct when it said that its 'sole focus' was whether or not the Respondent had acted within the band of reasonable responses. They were correct that in reaching such a decision they required to look at all the surrounding circumstances. He described the self-direction given at paragraph 83 as impeccable. It is in the following terms: –

> **"In considering the reasonableness or on reasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses (*Iceland Frozen Foods Limited* v *Jones*). The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the Respondent's decision to dismiss, including any**

procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not the dismissal is unfair."

35. Mr Napier argued that the ET had acted as instructed by Mummery LJ as quoted above. He argued that it was obvious that the ET was aware of the danger of falling into the 'substitution trap' as it had referred to the leading case of **Strathclyde Joint Police Board v Cusick**. He made reference to the case of **Scottish Prison Service v Laing** [2013] UKEAT/0060/12/1405 from which he took the proposition that the test to be applied when the ET is assessing a decision by an employer to dismiss because of misconduct is essentially one of irrationality. He accepted that just because a Tribunal directed itself correctly, it does not follow that it carried out its own direction. He argued, however, that the ET does require to consider the reasonableness of the decision made and once it has made a decision the EAT should be careful not to substitute its own views for that of the ET. Counsel referred to the case of **Metroline Travel Ltd v Lim** (2013) UKEAT/0317/13/0711 in which the EAT looked for, and found evidence that the Employment Tribunal had properly directed itself as to the test and had shown in its written reasons a proper basis for the findings of fact for the decision it reached. Counsel commended that approach, as being taken in the light of recent guidance provided by the cases all of which are referred to above.

36. Counsel argued that the ET had found that the Respondent had applied a 'mechanistic' approach when dealing with the fact of the Claimant's suspension. He argued that the ET had explained why that was not reasonable, because they had stated that the Respondent had carried out a procedure which would lead to one result only. They paid no heed to the information presented about the possible length of the suspension. They did not get updated information from their own occupational health physician. They did not consider whether the final decision could be postponed in order to get a clear picture of important matters, that is the Claimant's

health, his progress on the course he was attending and the likely length of his suspension. No consideration was given to a temporary redeployment.

37. Mr Napier addressed the evidence given before the Tribunal by Dr McCartney and Dr Fernie. Firstly he noted that no objection was taken to that evidence being led at the ET, as it should have been if the Respondent wished to argue that it was inadmissible. In any event, he argued that the ET made it plain in the written reasons that they were well aware that the evidence given by the doctors could not be a complete survey of all that had happened in Scotland. They were also aware that each health board is a separate entity. Nevertheless the ET explained why they regarded the doctors' evidence as worthy of some weight. Both doctors were expert in their field. Both had experience of the attitude of other employers in the health service to doctors who had alcoholism. Thus their evidence was relevant to the decision required under section 98(4).

38. According to counsel the ACAS code of practice on disciplinary and grievance procedures (2009) was relevant. That provides in paragraph 1 that in relation to dismissal for capability, the basic principles of fairness set out in the code in relation to misconduct should still be followed, adapting procedures as required. Mr Napier argued that these basic principles involved the employer carrying out sufficient investigation to establish the facts of the case. He argued that this employer did not do so as it had not found out the state of health of the Claimant nor had it obtained any evidence about his compliance or otherwise with the programme (LEAP).

39. Counsel referred to the case of **Stuart v London City Airport Ltd** [2013] EWCA Civ 973 in which the Court of Appeal reminded the EAT that it should be slow to overturn a decision of the Tribunal which had asked the right questions and had come to a considered

conclusion about them (paragraph 19.) He referred also to the case of **Royal Free Hampstead NHS Trust v Shah,** unreported, UKEAT 16 January 2014. That was an example of a case in which the ET had slipped into the mind-set of substitution as it did not give reasoned analysis of its decisions. Counsel contrasted that with the current case.

40. Mr Napier summed up his case by stating that the essence of the matter was that no reasonable employer would have put itself in the position of not looking at the individual circumstances of the employee when it was considering dismissal. This employer had done that, as there was no consideration of the situation beyond the fact that registration had been temporarily suspended. He argued that the ET in this case had not only given itself proper directions, but had followed them. It was entitled to come to the view that the dismissal was unfair.

Conclusion

41. We have decided that the ET did give itself proper directions, and carried them out. The high point of the case for the Respondent is what the ET has written at paragraph 148 and we were of the view that at that paragraph that the ET may have come close to substitution. A careful reading of the written reasons however does indicate that the ET did not accept the submission from Mr Warnock that the Respondent had been wrong to rely on the policy which was in existence at the time. They did not accept his contention that the Respondent had erred in law by doing so. Rather, the ET took the view that the Respondent had not acted as a reasonable employer would act by failing to get as much information as it reasonably could in respect of the employee before taking the very serious step of dismissing him. In doing so, the ET was doing what it is required to do by section 98(4) of ERA; that is it considered whether or not a reasonable employer would have proceeded in that fashion.

42. The ET was, in our view, correct to admit the evidence of Dr Fernie and Dr McCartney. They were required to consider what a reasonable employer in the same profession as the Respondent would do and having been offered evidence about it were entitled to hear it and consider it. They were not entitled, in our opinion, to accept opinion evidence to the effect that "the Respondents were a law unto themselves". That was not the function of the evidence from the doctors. It does seem, however, from the written reasons that the ET did not accept that value judgment. Rather they accepted that the doctors and Ms Davison were not personally aware of any case in which an employer had treated a doctor in the way that the Respondent treated the Claimant. That was a matter of fact and they were entitled to have regard to it.

43. We agree with the analysis of events submitted by Mr Napier. The Respondent's policy was such that loss of registration entailed the Respondent going straight to stage 3. The Claimant and any other employee in his position did not have the benefit of the investigation and support provided by stages 1 and 2 of the policy. It was therefore essential that any decision to dismiss was taken only after consideration of all of the circumstances, which must include up to date information about the Claimant's medical treatment and progress. The likely duration of the suspension is also relevant. The ET was correct to consider these matters in deciding whether the dismissal was fair. It was entitled to decide that the Respondent applied its policy in such a way as to make its decision to dismiss inevitable. It was entitled to find that the Respondent acted unfairly in deciding to dismiss without having considered vital information. The ET carried out its function properly and did not substitute its view for that of the Respondent.

44. We do not find that there is any error of law in this judgment and therefore the appeal is refused.