Appeal No. UKEAT/0443/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 March 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

THE SECRETARY OF STATE FOR JUSTICE — APPELLANT

JOHN NORRIDGE AND IRIS NORRIDGE (SUING AS PERSONAL REPRESENTATIVES OF JANET NORRIDGE DECEASED) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GEORGE ROWELL (of Counsel) Instructed by: Treasury Solicitors Department Employment Group One Kemble Street London WC2B 4TS
For the Respondents	MR DANIEL HOBBS (of Counsel) Direct Public Access Scheme

SUMMARY

UNFAIR DISMISSAL

Reason for dismissal and fairness. Employment Tribunal considering question of fairness in respect of a different reason to that found to have been the reason for dismissal. That amounted to an error of law and it could not be said that the conclusion that the dismissal was unfair was plainly and unarguably right in these circumstances. Matter remitted to the same ET, if still practicable, for further consideration of the question of fairness in the light of the reason for the dismissal as found by the ET.

HER HONOUR JUDGE EADY QC

1. This is a case that has a tragic background. After the end of the disciplinary process, and after learning that her appeal against dismissal had been unsuccessful, the Claimant, a young woman, took her own life. The claim to the Employment Tribunal was subsequently brought by her parents, Mr John and Mrs Iris Norridge, as personal representatives of the deceased Claimant. As the Employment Tribunal did, I refer to Miss Janet Norridge as "the deceased" or "the Claimant" and I intend no disrespect to her or her memory in so doing.

Introduction

2. The parties are referred to in this judgment as the Claimant and the Respondent as they were below.

3. This is an appeal by the Respondent against a judgment of the Cardiff Employment Tribunal under the chairmanship of Employment Judge Cadney, sitting with members, between 22 and 26 October 2012, the reserved judgment being sent out to the parties on 26 October 2012 and the full written Reasons on 1 February 2013.

4. Before the Employment Tribunal the Claimant was represented by Ms Sleeman of counsel but, before me, by Mr Hobbs. For the Respondent, Mr Rowell has appeared both before the Employment Tribunal and before me.

5. The claims before the Employment Tribunal were of unfair dismissal and disability discrimination. They were brought by Mr and Mrs Norridge arising from the dismissal of their daughter by the Respondent. The Employment Tribunal held that the Claimant had been unfairly dismissed but that the claim of disability discrimination was not well-founded and

should be dismissed. There is no appeal against the finding on the disability discrimination complaint, and I am concerned solely with the judgment in respect of the unfair dismissal claim.

The background facts

6. The summary I provide in this judgment is taken from a fuller narrative of the factual background, as found by the Employment Tribunal and set out at paragraphs 5-16 of their Reasons.

7. The Claimant was employed by the Respondent as a Prison Officer from March 2004 until her summary dismissal on 9 February 2012. She initially worked at HMP Bullingdon, but, in October 2010, she transferred to HMP Cardiff. She experienced difficult work relationships at Cardiff, in particular with her line manager, Senior Officer Chris Impey.

8. The Claimant suffered from various traumatic events, both in her professional life when at HMP Bullingdon (which had led her to suffer a mental breakdown in 2007), and in respect of her personal life and health in 2011. This is relevant background to the events which took place in October 2011 and which ultimately led to the Claimant's dismissal. The Employment Tribunal summarize those events at paragraph 8 and 9 of their Reasons, at page 92 of the EAT bundle:

> **"8. The specific incidents which led to the claimant's dismissal began in the week of the 10th October 2011. The claimant was due to be on duty on Saturday, 15th October 2011. On Wednesday, 12th October 2011 she attended the Millennium Stadium in Cardiff and acquired tickets for the screening of the Wales v France World Cup Rugby Quarter Final which was taking place in New Zealand. That match was due to kick off in the early morning and would be screened at the Millennium Stadium. At the time the claimant was due to be on duty. The claimant subsequently explained that she intended when she acquired the tickets to give them to her partner so that the partner could take members of her family and friends, and that the claimant did not herself at that stage intend to attend the screening.**
>
> **9. On Friday, 14th October 2011 when she was due to be at work she in fact attended the Doctor. She later explained that she had hoped to be prescribed anti-depressant medication as she was feeling low, which would continue to allow [her] to work. However, when she saw the**

Doctor he did not believe she was well enough to attend work and signed her off from work. However, there were two particular falsehoods around this appointment. Firstly, the claimant had told Mr Impey that she had an emergency dental appointment and secondly, she asked the Doctor, Dr Carr not to reveal on the medical certificate the true reason for her being unfit to attend work, which was depression, because she believed that once that was known her colleagues would gossip about her condition. Accordingly, she persuaded Dr Carr to describe the cause of her absence from work as 'debility' which was clearly intended to and did in fact mislead Mr Impey as to the nature of the condition requiring her to be absent from work. The claimant was in fact absent for 3 weeks following this. On the morning of the 15th October 2011 she did attend the screening of the rugby match and afterwards went to a local pub where she met another Officer, Officer Henry."

9. Matters came to the attention of Senior Officer Impey. On 26 October 2011, he wrote an e-mail to one of the prison governors, relating what he had learned of the Claimant's absence from work. That e-mail was forwarded internally with another governor commenting:

"Clearly there is work we can do generally on Jan [the Claimant] because of her erratic sick history – OHP/attendance review/capability etc.

But

The case as Chris describes suggests to me there is enough to separate this off as a disciplinary issue – pre buying tickets known she was on duty etc."

10. There was then a disciplinary investigation, which concluded:

"..that there was evidence to suggest to a disciplinary hearing in respect of all four allegations, that is attending a rugby match during a period of sick absence, meeting a member of staff at the public hours during the same day, visiting friends in Oxford and playing rugby during the period of sick absence."

11. The Claimant was called to a disciplinary hearing to face charges of gross misconduct on that basis. That hearing took place on 9 February 2012. All allegations were found proven, and the decision was taken by Governor Booty to dismiss the Claimant. She appealed against that finding but the decision to dismiss was upheld.

The Tribunal proceedings and Reasons

12. The Tribunal's self-direction as to the correct legal approach is set out at paragraph 17 of its Reasons:

> **"...there are four questions that the Tribunal must answer. The first is whether the respondent has satisfied the burden of proof that the genuine reason for dismissal was a belief in the misconduct alleged. If the respondent does satisfy that burden, there are three further questions of whether there was a reasonable investigation, whether reasonable conclusions as to the misconduct were drawn from that investigation and whether dismissal was a reasonable sanction. In respect of the three further questions, the Tribunal must apply the range of reasonable responses test. That is to say we must ask whether a reasonable employer could have investigated, could have drawn the conclusions, and could have decided that dismissal was the appropriate sanction as the respondent did."**

13. The Employment Tribunal then set out its understanding of the case put on the Claimant's behalf: i.e. that belief in misconduct was not the genuine reason for her dismissal; the genuine reason was that she was held in low regard by senior management within the reason and they were looking for an excuse to get rid of her. It was argued that this ulterior motive was evidenced by the content of the e-mail of 26 October 2011, and by other remarks made during the disciplinary process.

14. Although the Employment Tribunal plainly felt that certain of the comments raised suspicions as to the Respondent's motivations, ultimately it concluded:

> **"...having heard the evidence of Governor Booty, Mr Knight and Mr Mulholland who conducted the appeal, we are satisfied that the dismissal was genuinely based on the belief that the claimant had committed serious misconduct and that this was the true reason for her dismissal. (However, for the avoidance of doubt and for the reasons set out below, whilst we are satisfied that the claimant was genuinely dismissed for misconduct, we are satisfied that a reasonable investigation into the original allegations was carried out nor that reasonable conclusions were drawn. Again for reasons set out in detail below in our judgment the true reason for her dismissal was her conduct of and during the investigatory and disciplinary process.)"**

15. So, answering the first question in its self-direction, the Employment Tribunal had found that the Respondent had met the burden upon it of establishing the reason for dismissal: i.e. its belief that the Claimant had committed serious misconduct, that being her conduct of and during the investigatory and disciplinary process.

16. Turning to the remaining questions, the Employment Tribunal concluded (see paragraph 22):

> **"Save for one matter we will come to, in our judgment the investigation cannot in general be faulted...at least by the conclusion of the investigatory stage it was not in dispute that as a matter of fact the claimant had purchased tickets for the rugby screening on Wednesday, 12 October 2011, she had attended the match on Saturday, 15th October 2011, she had gone to the pub after the match and she had played rugby whilst off sick."**

17. On that basis, the Employment Tribunal considered that the key question was (paragraph 23):

> **"...whether participation in those activities was or was not consistent with the sickness absence and therefore was or was not an abuse of those sickness absence policies. Clearly in order [to] establish whether particular activities which unquestionably did occur during the course of the sickness absence were or were not an abuse of that sickness absence, requires an understanding of what the condition was which led to the individual being absent and what activities might reasonably be thought to be consistent or inconsistent with that absence."**

18. Although the Employment Tribunal concluded that the Claimant had originally lied about the reason for her absence, it equally found that, at the first investigatory meeting, she had come clean to the extent disclosed to Governor Morris:

> **"Initially I phoned in to say that I had an appointment to see the Doctor. I wanted to get some sleeping tablets and anti-depressants. He wanted to sign me off for a month initially and I didn't want him to do that, so he signed me off for a week on stress and anxiety. I didn't want him to put that on the sick note because I did not want people to talk, so he picked debility.**
>
> **She went on when asked: 'Would you like to tell me why you were off?', to say: 'With thoughts of killing myself and I thought if I could sort that out and go to work and pretend everything is okay, it would be alright but he signed me off for a week."**

19. Further, during the disciplinary process, the Respondent had obtained a letter from the Claimant's doctor, dated 13 January 2012, which read:

> **"Janet was seen on 14/10/11. She was depressed and started on anti-depressants. She was also encouraged to keep physically active and to structure her day."**

20. The Employment Tribunal therefore framed the question that the Respondent would have needed to answer as follows:

> **"On what basis therefore did Governor Booty resolve the central issue of whether those activities were or were not consistent with the stated reason for absence? The explanation from Doctor Carr which Governor Booty said in evidence he accepted was that the claimant had been encouraged to structure her day and be physically active. If that is correct, then the activities of attending a rugby screening, going to the pub, swimming and going to the gym, and playing rugby are not only not inconsistent with the condition, but are actually consistent with doctor's advice."**

21. Notwithstanding the further clarificatory evidence before it, by the disciplinary hearing stage the Respondent had concluded (Governor Booty's witness statement at paragraph 15; Employment Tribunal's Reasons at paragraph 30):

> **"At the time she went off sick, Miss Norridge had provided a sick note from her GP which said she was suffering from 'debility' and not depression. As an employer we can only go on what we are provided by a Doctor; it is not for us to look beyond the reasons stated in the sick note. ... I admit to finding it puzzling that a Doctor would omit the correct reason for a sickness absence on a sick note, when employers rely on the reasons given by a health professional as to the cause of ill health and indeed will in all likelihood take certain steps in reliance of those reasons."**

22. The Employment Tribunal held that the Respondent had failed to engage with the facts as known to it by the time of its decision and failed to engage with the real question relating to which the original disciplinary allegations gave rise. Moreover the Employment Tribunal recorded the evidence given by the dismissing officer, Governor Booty, as follows:

> **"I believed that her repeated attempts to cover up her behaviour through lies and distortions had destroyed the bond of trust and confidence that is an essential feature of the relationship between prison officers and HMPS."**

23. The Tribunal concluded (paragraph 34):

> **"This on the face of it appears to suggest that the true reason for her dismissal was not in fact the underlying allegations themselves, but her reaction to them and her conduct during the investigation and disciplinary hearing This impression is bolstered by evidence that Governor Booty gave when asked by the Tribunal specifically what the claimant had done wrong, which amounted to gross misconduct."**

24. The Tribunal continued (paragraphs 36 to 39):

> **"36. However, the fact that the claimant was less than frank in the course of the investigatory and disciplinary procedure does not make her guilty of the underlying offences. In order to make her guilty of the underlying offences the sickness absence would need itself to be a sham, which is not a conclusion that Governor Booty or Mr Mulholland ever drew. Both specifically disavowed having drawn any conclusion that the claimant had specifically bought the rugby tickets on Wednesday with the full intention of attending, despite the fact that she was rostered for duty.**
>
> **37. In the absence of such findings, in our judgment it was incumbent upon the respondent to make very specific findings about whether the activities that were undoubtedly carried out were or were not consistent with the reason for sickness absence. It would have then been open to them, if they had wished to, to have charged her with offences arising out of the failure to be honest during the course of the investigation and disciplinary hearing.**
>
> **38. It follows that, in our judgment, the respondent committed two fundamental errors. In our judgment, no reasonable employer could have concluded the allegations were proven without obtaining very specific medical evidence as to the nature of the underlying condition and whether the activities were consistent or inconsistent with it. That failure to investigate prevents there being any rational conclusions drawn as to that issue. Alternatively, if as Governor Booty said to us in evidence, he had in fact accepted the evidence of Dr Carr as being accurate, there was in fact no evidential basis for him concluding that those activities were incompatible with the reason for absence.**
>
> **39. However, for the reasons set out above in our judgment in truth what happened was that Governor Booty came to the conclusion, not unreasonably, that the claimant was not telling him the truth about a number of aspects of the history of the matter and that in reality she was dismissed for being untruthful in the course of the disciplinary hearing, rather than for her guilt as to the underlying matters with which she was charged."**

The legal principles

25. The relevant legislative provisions are set out at section 98 of the **Employment Rights Act**. Section 98(1) provides:

> **"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show --**
>
> **(a) the reason...for the dismissal; and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **2. A reason falls within this subsection if it**
>
> **..**
>
> **(b) relates to the conduct of the employee.**
>
> **...**
>
> **4. ...where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) --**

(a) depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

26. This being a misconduct case, it is common ground that the Employment Tribunal was to be guided by the well-known principles laid down in the case of **BHS v Burchell** [1978] IRLR 379 EAT (albeit subject to the amendment on the burden of proof to reflect the terms of s 98). The problem was that the Employment Tribunal had considered the question of fairness in respect of a reason for the dismissal other than that which it found to be the reason for the Respondent's decision.

27. The issue before me was, therefore, whether that amounted to an error of law and, if so, whether the Employment Tribunal's judgment could still be upheld.

28. Where there was a misdirection on the part of the Employment Tribunal, it was common ground that the question for me was whether the Tribunal's conclusion could still be upheld as plainly and unarguably right: if the conclusion was wrong or might have been wrong, then it would be for the appellate court to remit the case back to the fact-finding Tribunal, see **Dobie v Burns International Security Services (UK) Ltd** [1984] IRLR 329 CA.

29. Determining the reason for the dismissal in an unfair dismissal case, the question is whether the Respondent has satisfied the Employment Tribunal as to the genuine reason it had in its mind at the time; a subjective test. It is also for the Respondent to show that this was a reason capable of being fair for section 98 purposes.

30. Where the reason in fact relied on by the Respondent is not that put to the employee, there may be issues of natural justice that will render the dismissal unfair, notwithstanding any

basis for the employer's belief in the conduct in question, see **Clarke v Trimoco Group Ltd and Anr** [1993] IRLR 148, in particular at para 43:

> **"In our view the Industrial Tribunal, in finding that the Company acted within the range of reasonable responses of an employer concentrated unduly upon the employer's belief and the basis upon which it was founded and, apart from equating the availability to an employee of a grievance procedure with the giving by the employer of an opportunity to state the employee's explanation, which for the reasons already given we consider to be wrong in law, there was no consideration given to the adequacy of the procedure adopted of relying solely on a police investigation. That there can be adequate grounds for an employer's belief in the employee's misconduct and yet an unfair dismissal is clear beyond argument. *W. Weddel & Co. Ltd v. Tepper* [1980] I.C.R.286"**

31. When an Employment Tribunal finds that the real reason for the dismissal was one that had not been pleaded or argued, the question arises as to whether the dismissal could still be held to be fair for that reason. In this regard, the question is whether the difference between the reason relied on and the real reason is one of substance or merely of labelling, see **Hannan v TNT-IPEC Ltd (UK) Ltd** [1986] IRLR 165 EAT, in particular para. 22 of that judgment:

> **"It seems to us that one can summarise the distinction between the two lines of authority to which we have referred in this way, that where the different grounds are really different labels and nothing more then there is no basis for saying that the late introduction, even without pleading or without argument, is a ground for interference on appeal; but that where the difference goes to facts and substance and there would or might have been some substantial or significant difference in the way the case is conducted, then of course an appeal will succeed if the Tribunal rely on a different ground without affording an opportunity for argument."**

The appeal and the submissions

32. The grounds of appeal in this case were essentially two-fold. First, that the Employment Tribunal misdirected itself as to the requirements of section 98(4) **Employment Rights Act 1996** by failing to apply the test set out in that subsection to the matters it had found to be the employer's real reason for dismissing the Claimant. Second, (in the alternative) the Employment Tribunal's conclusion that the dismissal decision was vitiated by two fundamental errors was the result of the Tribunal misdirecting itself as to the requirements of section 98(4) and/or reaching conclusions that were not properly open to it on the evidence. The alternative

ground of appeal would only arise if I were to find that the real reason found by the Tribunal for the Claimant's dismissal related to the original or underlying allegations.

33. On behalf of the Claimant, that course was urged upon me. It was submitted that there was a fundamental misunderstanding as to the reason found for the dismissal by the Employment Tribunal. It was argued that this might have been due to unfortunate references in the Employment Tribunal's Reasons, but it was urged that I should find the real reason for the dismissal found by the Employment Tribunal was the Respondent's view of the underlying offences. As its findings on fairness related to that point, there would then be no difficulty with the judgment and the appeal should be dismissed.

34. At the outset of the oral hearing, I expressed concern as to how the Claimant's case was put as it seemed clear that the Employment Tribunal's finding as to the reason for dismissal was the Respondent's view of the Claimant's conduct during the course of the investigatory and disciplinary process. That was apparent from paragraphs 20, 34 and 39 of the judgment. Indeed the Employment Tribunal appeared to expressly distinguish between the true reason for the dismissal and the original allegations.

35. That said, I also expressed my concern as to the approach urged on me by the Respondent, to the effect that I should simply conclude that (relying on paragraphs 35 and 39 of the judgment) - on the reason for dismissal as found by the Employment Tribunal - the Tribunal's conclusion must have been that it was a fair dismissal.

36. Given my initial expressions of concern on these points, it was agreed that it was appropriate for Mr Hobbs, acting for the Claimant, to address me first, in particular as to what was the proper finding as to the reason for dismissal. In expanding on the

Respondent's Answer, Mr Hobbs urged that the Employment Tribunal had in reality found that the underlying allegations relating to the Claimant's absence on sick leave were those in the mind of the Respondent and the judgment could be upheld on this basis. In particular, he referred to how the Respondent had put its case to the Claimant in the internal process and to how it had also put its case in the Tribunal proceedings (in particular, in the ET3). That served to put the focus solely on the underlying allegations. Moreover, the fact that the Employment Tribunal focussed on those underlying allegations when concerning itself with the question of fairness suggested that this was really considered to be the reason for the dismissal.

37. If the Tribunal had found that the genuine reason for dismissal was the Claimant's conduct during the disciplinary process, Mr Hobbs accepted that the decision would have to be held to be unsafe. In such circumstances, however, he urged that I should exercise my discretion and find that the Employment Tribunal would have to find the dismissal unfair for that reason. He did not accept that paragraphs 35 and 39 of the Reasons demonstrated that the Tribunal had found that there were reasonable grounds for the Respondent's belief. Tracing back into the evidence in respect of each of the matters set out at paragraph 35, it could be shown there was actually no real basis for the conclusion that there were reasonable grounds for the belief in dishonesty. Moreover, this was a shifting of the goalposts, and that being so, the Employment Tribunal could not have found the dismissal to be other than unfair: see **Hannan v TNT-IPEC**. Finally, it would be a breach of natural justice to have found the dismissal fair when that was not how the case had been put until the closing submissions before the Employment Tribunal (see **Clarke v Trimoco Group**).

38. As for the internal process, whilst Mr Hobbs could not put it as high as to say that the Respondent was bound to have gone through a separate process in respect of the disciplinary process allegations, fairness would have dictated some opportunity for the Claimant to respond

to Governor Booty's concerns. Moreover that alternative case would have needed to have been put squarely in the Employment Tribunal proceedings so the Claimant could fairly deal with the point.

39. For the Respondent, Mr Rowell submitted that the real reason for dismissal - as found by the Employment Tribunal - was plainly the Claimant's conduct during the disciplinary process, not the underlying allegations. That being so, there was a serious error of law on the part of the Employment Tribunal. The Tribunal had been required to exercise its discretion under section 98(4) with regard to its finding as to the reason for the dismissal pursuant to section 98(1) and (2). If it undertook its section 98(4) task with regard to some other reason, it had obviously fundamentally erred in law.

40. To the extent that the Claimant sought to ask the EAT to uphold the Tribunal's finding of unfair dismissal notwithstanding this error of law, that would have to meet the very high test as set out in **Dobie v Burns**. That was particularly so here where the Employment Tribunal had found not only that the Respondent had a genuine reason in its mind but had gone on to find that there was a reasonable basis for the view it had taken (see paragraph 35). The Claimant would not be able to disturb that finding unless it could be shown to be perverse.

41. Turning to the criticism that the Tribunal had not found the matters in question - dishonesty in the course of the investigation and disciplinary process - to have been fairly put to the Claimant and that the dismissal should have been found to be unfair on that basis, the Respondent submitted that the Employment Tribunal's primary findings of fact (as supported by the investigation report and the transcripts of the disciplinary and appeals hearings), demonstrated the issues regarding the Claimant's honesty in response to the allegations were all part of the process as put to her. Although the ET3 might not have put the case clearly on that

basis, that had to be seen in the context of that background evidence, and it was plain that the question of the Claimant's credit was in issue.

Discussion and conclusions

42. It is critical for me to remember that this is a judgment of the Employment Tribunal and one cannot expect that to be drafted to highest standards of legal draftsmanship. Such a judgment may contain infelicities of awkwardness of expression, and apparent inconsistencies. Those will derive from the pressures under which Tribunals operate. It is trite that a judgment of an Employment Tribunal must be taken overall and viewed as a whole and I adopt that approach when reading this judgment.

43. Doing so, it is clear to me that the Employment Tribunal found the reason for dismissal in this case to be the Respondent's belief in the Claimant's conduct during the investigation and disciplinary process; that is, her apparent dishonesty in response to the questions she had been asked. That is apparent from paragraph 20 - which expressly differentiates between the true reason for the dismissal and the original allegations - and paragraphs 34 and 39 of the judgment.

44. On the Employment Tribunal's findings, it is further apparent to me that it concluded that the Claimant had been invited into a disciplinary process because of the issues that the Respondent believed had arisen during her absence on sick leave. Had those matters remained the real issue for the Respondent, it would (on the Tribunal's findings) have been bound to shift the focus of its inquiry to the real reason for her sickness absence and her doctor's advice to her; whether she had truly misconducted herself once those true facts were known. On the Tribunal's findings, the Respondent never did shift that focus, but took its decision to dismiss

the Claimant not on the basis of the original charges brought against her, but on the view it formed of her conduct during the disciplinary investigation; that she had not been honest.

45. The Employment Tribunal thus found that the Respondent had dismissed for the reason that was genuinely in its mind. That was a reason capable of being fair in that it related to the Claimant's conduct.

46. Having so found, however, that was not the original reason relied on by the Respondent for the dismissal and indeed it was not the way in which the case had been put by the Respondent in its ET3. In those circumstances, the Claimant contends it is inevitable that the Tribunal would then - had it asked itself the right question - have concluded that the dismissal for that reason was unfair.

47. In considering that submission, I do not think that it can be said that, where an Employment Tribunal finds that the real reason for dismissal is different to the case as pleaded by the Respondent, there can never be a fair dismissal. As I read the judgment in **Hannan** (rather than simply the headnote), that case does not go so far. It seems to me that the question will be fact-sensitive and a matter for the Employment Tribunal, on the evidence before it. A failure to consider the issues arising in those circumstances is likely to provide good grounds for an appeal but it does not, in my judgment, lead to the automatic finding that the dismissal was necessarily unfair.

48. On the Employment Tribunal's primary findings of fact in this case, and the conclusions set out in its Reasons, it is apparent that it did not simply stop at the finding as to the real reason for the dismissal. Although it did not complete the task, the Tribunal did start consider the

question of fairness in relation to that reason. Paragraph 35 deals in terms with what might be called the evidential basis for the Respondent's genuine reason for the dismissal, as follows:

> **"In our judgment, Governor Booty conflated what are in fact two entirely separate issues. He concluded, not unreasonably in our view, that the claimant had been less than frank in the course of the investigatory and disciplinary process. In our judgment, he was entitled to conclude that the claimant had initially told Mr Impey that she had not attended the rugby screening. He was entitled to conclude that Officer Henry was correct and that the claimant was wrong when she insisted that she had not invited him to the rugby match on the Friday night but the Saturday morning, and that therefore by the Friday night at the latest she had formed the intention of attending. He was entitled to conclude that she had been less than frank with Governor Morris in the first interview when she accepted having attended the rugby screening, but spoke of having spent most of her period of sickness in bed and making no mention at that stage of any of her other activities, and the fact that she had been advised by her Doctor to undertake physical activity. If the claimant was going, as she did, to disclose in the course of the first investigatory interview that the true reason for her absence was her mental state, why did she not give a full account at that stage of what she had and had not done while she was off sick?"**

49. On the basis of paragraphs 35 and 39 of the Reasons, it is apparent that the Tribunal concluded that there was a reasonable basis for the Respondent's belief. The Claimant says that those findings do not withstand scrutiny on the evidence, but that objection would have to meet the very high test of a perversity appeal. It is difficult for me to test the evidence on those points but, to the extent that I am able to do so, I cannot find that there was simply no evidence for the Employment Tribunal's findings.

50. On the other hand, in my judgment, what paragraph 35 does not do is to deal with the question of fairness more widely. There might have been reasonable grounds, on the Tribunal's findings, for the Respondent's belief, but was there natural justice? Did the Respondent properly give the Claimant the opportunity to address the real issue before using that as the reason for dismissal? The Respondent says that I can answer that question myself, based on the Employment Tribunal's primary findings of fact, coupled with the documentary evidence that has been put before me. I disagree.

51. It is right to say that, looking at a transcript of the disciplinary hearing, it is apparent that Governor Booty did put to the Claimant concerns regarding her honesty. Her responses are set out in the transcript, and that was part of the evidence available to the Respondent. When I look at those transcripts, however, the evidence seems to give rise to yet more questions. To some extent the Claimant was asked questions that suggested that her credit was in issue, but she gave answers that demonstrated that the situation was more complex than might at first have appeared. There were clearly issues relating to her health and the medication she was on. Just as the Employment Tribunal found that her conduct during the period of sickness absence required an investigation as to the truth of her circumstances, given her fragile health at that time, so too do her responses in respect of her return to work.

52. Can I say that the Employment Tribunal must have found that the employer's response on all of was within the range of reasonable responses? The Employment Tribunal did not deal with this point because it turned its mind to fairness on the question of the underlying allegations not the process conduct point. Both parties urged me to make a finding myself on the fairness of the dismissal. Both urged me to reach different conclusions.

53. I see why each party might urge me to bring this matter to an end by stepping into the Employment Tribunal's shoes and giving my own judgment on the basis of the Employment Tribunal's findings. Following **Dobie**, however, I cannot conclude that a finding of unfair dismissal was inevitable in this case. Equally, I cannot say that it was inevitable that the Tribunal would find that the dismissal was fair. That would depend on the view formed of Governor Booty's thought processes in considering the Claimant's responses in the disciplinary process and taking the other evidence in that process together, in the round,

54. These points, I am afraid to say, seem to me to be matters peculiarly for the Employment Tribunal as the tribunal of fact.

55. Having indicated this view, I allowed the possibility of further representation by both parties as to the correct disposal of this matter. Both were agreed that the appropriate course would be that the matter should be referred back to the same Employment Tribunal, to the extent that this is still possible. It would then be for that Tribunal to address the outstanding issues on fairness (section 98(4) ERA) in the light of its finding as to the real reason for dismissal. In following the course agreed by the parties, I have directed myself in accordance with the guideline principles in **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763 EAT. Having done so, that agreed course seemed to me appropriate, taking into account issues of cost, proportionality, and the particular considerations peculiar to this case. It will be a matter for that Tribunal as to how it approaches the further exercise it needs to undertake.