Appeal No. UKEAT/0137/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 March 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

GENERAL VENDING SERVICES LTD T/A GVS ASSIST — APPELLANT

MR CHRISTOPHER SCHOFIELD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR R OULTON (of Counsel) Instructed by: ASB Solicitors Innovis House 108 High Street Crawley RH10 1AS
For the Respondent	MR H DAVIES (of Counsel) Instructed by: Bell Lax Litigation Solicitors New Bank House 21 Maney Corner Sutton Coldfield Birmingham B72 1QL

SUMMARY

UNFAIR DISMISSAL – Reason for dismissal including substantial other reason

TRANSFER OF UNDERTAKINGS – Varying terms of employment

The Claimant was dismissed when the Respondent sought to introduce new terms and conditions to his contract of employment. His pay would be reduced by approximately £5000; his holiday pay may be reduced, and sick pay was to be paid on a different basis. Overtime was to become available during the week instead of only every sixth weekend. The Claimant had been subject to a TUPE transfer some 2 years before the changes were proposed. The Employment Tribunal found that the dismissal was for a reason connected with the transfer, which conclusion was accepted. The ET found the dismissal was unfair. The Respondent argued that the ET had substituted its view of the proposed changes for that of the Respondent. **Held**: the ET did substitute its own view and further did not in its reasons explain sufficiently its decision. Appeal allowed and remitted to a fresh Tribunal to decide if in terms of section 98(4) of **ERA 1996** the dismissal was fair or unfair.

THE HONOURABLE LADY STACEY

Introduction

1. This is a case about unfair dismissal in the context of the TUPE Regulations. I will refer to the parties as "the Claimant" and "the Respondent" as they were in the Employment Tribunal.

2. It is an appeal by the Respondent in those proceedings, that is by the employer, against a Judgment of an Employment Tribunal consisting of Employment Judge Downs, sitting alone at London (South) in which the Reasons were sent to parties on 11 December 2012.

3. The Claimant, that is the employee, was represented there and here by Mr Davies, counsel, and the Respondent was represented there and here by Mr Oulton, also counsel.

4. The Claimant claimed unfair dismissal in the context of the TUPE Regulations. At the Employment Tribunal, there were four Claimants, all of whom had been employed by the Respondent. The outcome of the case was that the Employment Tribunal found that three of those Claimants had not been unfairly dismissed, but found that one, Mr Schofield, who is the Claimant before me, had been unfairly dismissed.

5. The essential issues were defined by the Employment Judge in his Reasons. He set them out in paragraphs 1-5 of his Reasons as follows:

> **"1. The parties agreed a list of issues between them at the outset which was then amended/reduced as the hearing progressed. The issues for determination are set out below.**
>
> **2. What was the sole or principal reason for the Claimant's dismissals? In particular, was the reason:**
>
> > **(a) The transfer of the undertaking in which the Claimants were employed from Kraft to the Respondents in May 2008; or**
> >
> > **(b) A reason connected with that transfer?**

3. If so, were the Claimants' dismissals automatically unfair under Regulation 7(1) of the 2006 Regulations?

4. If the reason for the Claimant's dismissals was connected with the transfer, was it an economic, technical or organisational reason entailing changes in the workforce, under Regulation 7(2) of the 2006 Regulations?

5. Alternatively, was there a substantial reason for the dismissal of the Claimants of a kind such as to justify in each case the dismissal of an employee holding the position which that employee held under Regulation 7(3) of the 2006 Regulations. If so and in either event, were the dismissals...fair in all the circumstances, applying the test of reasonableness set out in [the Employment Rights Act], s.98(4)?"

6. The Employment Tribunal decided that the Claimant had been unfairly dismissed and assessed compensation in his case in the sum of £43,452.00. The Respondent appeals against that Judgment.

7. Directions in sending this case to a full hearing were given in chambers by the President, Langstaff J. He noted that there was an apparent disagreement between parties about the evidence at the Employment Tribunal and stated that the evidence would either have to be agreed or, if that proved to be impossible, the Judge's notes would have to be produced. I was advised by Mr Oulton, when I asked him as he started to open his argument, that there had been discussion between parties and that it was not entirely clear that matters had been agreed. The Judge's notes had been produced very shortly before the hearing took place and were available both for the parties and for me. In the event, while it no doubt seemed on paper that there was a disagreement, not a great deal has turned on it, and parties have simply had to proceed with the notes that they and their solicitors took at the time, together with the notes from the Judge. It does not seem to me that a great deal has turned on the matter.

<u>The law</u>

8. The legislation with which this case is concerned is the **Employment Rights Act 1996**, section 94, 98 and 98(4), and the **Transfer of Undertakings (Protection of Employment) Regulations 2006**, Regulation 7.

9. The Employment Judge directed himself by reference to the relevant provisions of the Act and the Regulations and in the course of his written Reasons he made reference to the following cases, which can correctly be described as the leading authorities relevant to the question before him. They are as follows: **London Metropolitan University v Sackur** [2006] UKEAT/0286/06, **Taylor v Connex South Eastern Ltd** EAT/1243/99, **Crawford v Swinton Insurance Brokers Ltd** [1990] ICR 85, **Berriman v Delabole Slate** [1985] ICR 546, **Green v Elan Care Ltd** EAT 18/01, **Garside and Laycock Ltd v Booth** [2011] ICR 735, **Catamaran Cruises Ltd v Williams and Others** [1994] IRLR 386, **Hollister v National Farmers Union** [1979] ICR 542, **Banerjee v City and East London Area Health Authority** [1979] IRLR 147 and **Ladbroke Courage Holiday Ltd v Asten** [1981] IRLR 59.

The Employment Tribunal's findings of fact

10. The Employment Tribunal made findings of fact, which I can summarize as follows. The Respondent is a company which amongst other things services coffee machines used by large supermarkets and other businesses who run cafe-type operations. It is a medium-sized concern, having grown in its 15-year lifetime by taking on employees from several other companies with whom it has merged. The Claimant was employed by the Respondent as a technician at a salary of £29,176 under a contract which included holiday pay and sickness pay provisions, as well as a company car which he could use for personal use. He transferred in May 2008 from a previous employer under a transfer to which the Regulations applied. He had begun work with that employer in 1988. There is a typing error in the Judgment when 1998 is stated as the date he started used, but it is plainly simply an error of the pen.

11. The Claimant's employment ended by dismissal in June 2011. The Respondent had, at the time of the transfer (that is 2008) given an assurance, but not a guarantee, that there would

be no changes to terms and conditions of service to people such as the Claimant, who came from the company for which he had worked. However, between two and three years later, in September 2010, the Respondent began consultation about a proposed re-organisation of the company. They wanted to maintain their position and also to win new business in the sector known in the trade as "roast and grind", which was a description, apparently, of the business required by large companies who serve coffee to customers in their cafes and who require speedy and efficient repairs if there is any problem with their machinery. The Respondent proposed the creation of groups of specialist technicians or engineers who would have with them in company vans all the tools that were likely to be needed for any job on which they were sent.

12. As was found by the Employment Tribunal, there was open consultation with the workforce, but while the workforce was generally supportive, as it was put "things started to get difficult" when the Respondent sought to change certain terms and conditions. In furtherance of its scheme of specialisation, it decided to grade all employees on the basis of their skills. Management had to fill out questionnaires about each engineer and they had to answer questions about the motivation of the employee, which of course introduced a degree of subjectivity to their judgments.

13. The four Claimants were all found by the Employment Tribunal to be less than enthusiastic about this process, and the Claimant with whom I am concerned, in particular, may have been marked down because he did not particularly engage with the process.

14. During the two-year period between 2008 and 2010 the Respondent was interested in a merger with another company and required to have its employees trained to carry out the work in the way in which it wanted to do it. The terms and conditions which required to be changed

related to wages, firstly, which the Respondent wanted to reduce by varying amounts and, in the Claimant's case, wanted to reduce his basic pay by a sum in excess of £5,000 per annum. The Respondent also wanted to make changes to sickness pay, and there is a degree of confusion as to whether it wanted to make changes to holiday pay or not. It also wanted to make a change in overtime in that the previous regime regarding this Claimant had been that he could start to get overtime only when doing weekend working, which happened one weekend in six, and the proposal was that overtime would be payable during the week, presumably when a certain number of hours had been reached. There would be further weekend working required as part of the Respondent's desire to have a quick response seven days a week for its customers. The Employment Tribunal did find that the workforce would need to do more work to keep the same money. It found that six out of approximately 30 engineers were, during the consultation, very reluctant to sign up for the changes proposed. It is clear from the findings that there was a degree of negotiation and that the Respondent moved its position in respect of some of the changes.

15. The Claimant produced a Schedule, showing what he calculated would be the loss that he would incur if he signed up for the changes.

16. I have said that there was a lack of clarity about holiday pay. Before me, it was conceded very frankly by Mr Oulton that the Respondent wrote a letter to the Claimant, which indicated that he would have 28 days' holiday inclusive of statutory days, but that that was a mistake. Mr Oulton also accepted that there was produced an employment contract, which said the same thing, but he explained that that was a mistake also. He said that the employee handbook set out the correct position, which was that the statutory days, which are eight in number, were in addition to the 28 days rather than being included in the 28 days.

17. It was found by the Tribunal that eventually five people out of 30 refused to take up the new contracts, obviously the Claimant being one of them.

The Employment Tribunal's discussion of the law

18. In relation to the law, as opposed to the facts, the Employment Tribunal found that there was no set time by which a matter could be said to be no longer related to the Regulations and found, at paragraph 37, that before a requirement for change can be an economic, technical or organisational reason entailing changes in the workforce, the employer must prove that he plans to achieve changes in the workforce. The Employment Tribunal Judge set out his thinking and he found, as was accepted by the parties before me, that the Claimant was dismissed because of his refusal to accept the changes to his terms and conditions. There is a typing error, I think, in paragraph 51 of the Judgment, in line 1 of that paragraph, where the word "transfer" should read the word "dismissal", and it seems that the Employment Tribunal found that the Respondent wanted to created a cohort of engineers who were specialised, who were flexible and, due to incentives which the company would provide, would increase productivity.

19. At paragraph 52 the Employment Judge found that the reason for the dismissal was not the transfer itself, but the reason was connected to the transfer. He then went on to consider whether there were economic, technical and organisational reasons entailing changes to the workforce and he firstly decided that there were economic, technical and organisational reasons and he paused to consider whether they entailed changes to the workforce. He concluded that they did, as the company required people to work in a different way, over seven days per week, being specialised, and generally more sensitive to customer needs. He therefore decided, at paragraph 55, that the dismissal was a potentially fair dismissal. None of this was in contention before me.

20. The Employment Judge then correctly directed himself at paragraph 56 that he had to consider whether the dismissal was fair in terms of section 98(4) of the **Employment Rights Act 1996**. It is convenient to quote that section here. It is in the following terms:

> **"98**
>
> **...**
>
> **(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."**

21. The Employment Judge stated in terms, in paragraph 56, that it was not for him to substitute his own view for that of the Respondent. He found at paragraph 59 that the Respondent had considered the employee's point of view. At paragraph 60 the Employment Judge made findings about management in connection with the question as to whether management were being asked to take any cut in the way in which engineers were. His finding was that management were not being asked to take a cut in their remuneration. The Employment Judge found that there were problems about disparity in pay, and at paragraph 62 he accepted that the decision to dismiss was within the band of reasonable responses that an employer might make. He described it however as a displaceable presumption and noted that "what matters is the effect on individuals." He then went on to consider each of the four claimants before him. When he came to the Claimant, at paragraph 66 and 67, he found that two particular factors that made it unfair (or at least outwith the band of reasonable responses if he was in fact applying that test) were, firstly, the question of holiday pay and, secondly, the reduction in sick pay which he said mattered a great deal to the particular Claimant because he had a poor sickness record.

The Respondent's case

22. Before me, Mr Oulton, counsel for the Respondent submitted, in his grounds of appeal, that the Employment Judge had erred in law in holding that in general the decisions were within the band of reasonable responses but fell outwith that band in relation to the Claimant due to the holiday pay and sick pay. Counsel argued that the Claimant had not regarded holiday pay and sick pay as especially important matters. He had certainly mentioned them in his statement and he had put them in very clearly in his Schedule of Loss, which was produced before me at page 131 of the bundle, but there was no evidence that he had seen them as being particularly important. Nevertheless counsel argued that the Employment Tribunal had found, in paragraphs 67 and 68, the following:

> **"67. However, there are two particular factors, which I think push this case outside the boundaries of reasonable responses. The first of which was that at the time of his dismissal he was clearly led to believe, in a very direct letter by Mr Wallis, that he was going to lose 8 days paid holiday on top of all the other losses. Secondly, for him his loss of his sick pay entitlement was very important. The Claimant's sick pay entitlement of 24 weeks was to be reduced to 8 weeks at full pay and 8 weeks at half pay.**
>
> **68. Here is a man who had already a very unfortunate sick record, nobody was saying anything other than he had acquired this because he was genuinely ill. For him it was obviously exceptionally important to have absolute clarity about what sickness entitlement he was likely to have. Mr Wallis very frankly set out for him the proposed position. Although it wasn't perhaps as bad as he thought it still represented a very significant reduction in protection, that he was to be afforded in circumstances in which he was returning to work after a very significant illness. I would say that to decide to dismiss him for not accepting these new terms and conditions was outwith the band of reasonable responses."**

23. Counsel argued that the Employment Tribunal had fallen into error because it had decided what was particularly important to the Claimant despite there being no evidence to that effect and it had then gone on and decided what it (that is, the Employment Tribunal) thought about these matters, that it had decided were particularly important, rather than properly considering what it was reasonable for this employer to think of the matters which were before the employer. Counsel said that the ET should have considered what the employer knew at the time of making its decision: that is June 2011. It should have considered all that was before the employer. Counsel accepted that the employer did write a confusing letter about holiday pay.

But counsel argued that the company handbook which was available for the employee made the correct position plain. So far as sick pay was concerned, counsel submitted that it was far from clear that sick pay was being reduced. The employer, by the time of dismissal, was offering the Claimant 40 days' sick pay followed by 40 days' half pay in a 12-month period, with discretionary sick pay thereafter. The Claimant himself had referred to six month's statutory sick pay in his witness statement. Thus it was not clear that there was to be any reduction. The Employment Tribunal had decided for itself, said counsel, that these two matters were such as to render the decision to dismiss unreasonable. In doing so, they gave them far too much prominence. Even the submissions made by counsel for the Claimant at the hearing did not give these matters such prominence.

24. Mr Oulton made reference to the submissions which were produced before me and had been made to the Employment Tribunal and he argued that the question of sick pay and holiday pay were merely part of the whole picture. Mr Oulton also pointed out that the Employment Tribunal had found that the Claimant was the only one of four for whom these matters made the vital difference, which was, he said, illogical because one of the others, Mr Robinson, was under a similar misapprehension about his holiday entitlement, but the Employment Tribunal had not found that that made a vital difference for him.

25. Counsel went on to argue that the Employment Tribunal had erred in law in the way in which it had approached its task under section 98(4). He drew my attention to paragraph 58 of the Reasons, which is in the following terms:

> **"With one exception, it is not clear whether those that accepted the revised terms and conditions would suffer losses or at least losses which were as significant as many of the Claimants in this individual case."**

26. Counsel said that the Employment Judge never referred again to the one exception, which as counsel put it, was left hanging. Counsel reminded me that the terms of the section are such that the Employment Tribunal has to consider what a reasonable employer would do. This was correctly set out, counsel argued, in *Harvey* and he argued that, while the reaction of employees was a relevant matter which an employer would take into account, it could not be decisive. Counsel argued that an employee might regard a pay cut, to take an example, as unreasonable from his point of view, whereas an employer might regard the same pay cut as reasonable from his point of view. What any Tribunal had to decide was set out in the section and it was whether or not the employer acted reasonably. Counsel argued that the comment in *Harvey* was correct when it said that a balance had to be struck but that the cases tended to show that "the scales will ultimately tend to come down on the employer's side".

27. Counsel argued that the Employment Judge had lost perspective in this case. He had decided that the sick pay and holiday pay provisions were such as to distinguish the Claimant's case from the rest. He gave no indication that he had considered that 25, out of 30 people had agreed to the package proposed by the employer. He had left hanging the piece of knowledge that he had, to which I refer above, that one person was sustaining a salary cut that was significant, and counsel told me that it was not in dispute that that was in excess of £7000 as opposed to the sum in excess of £5,000 that the Claimant was being asked to sustain. Counsel argued that there was a necessity for the company to get on and train other engineers if the Claimant was not going to accept the package and that, while the Employment Tribunal had acknowledged in passing the company's need to deal with jealousy caused by difference in pay, there was no sign in the written Reasons of any proper consideration of either the reasonableness of the employer's action or indeed of the equity of the situation. Counsel pointed out that the person who had agreed the new terms and conditions but was taking a

salary reduction of £7,000 would in all probability not regard it as fair if the Claimant was entitled to maintain his position.

28. Counsel took me to various cases to illustrate his arguments. The first is the case of **St John of God (Care Services) Ltd v Brooks** [1992] IRLR 546. Counsel drew my attention to paragraphs 13 and 14 of that case. Counsel's point was the sin of substitution, as it is sometimes called, should not be committed by a Tribunal. It may be useful to look at what was said in that case at paragraph 13.

> **"There are however in the view of the majority two reasons why this so called crucial question which the Industrial Tribunal very understandably culled from *Harvey* is not the right question. The first is that if the only thing that is looked at is the offer, this necessarily excludes from consideration everything that happened between the time when the offer was made and the dismissal. That must in principle be wrong because it is to the dismissal that s.57(3) points and whether it was fair or unfair must be judged in the light of the situation when it occurred and not when an earlier step was taken."**

29. Then, turning to paragraph 14, it is in the following terms:

> **"The second reason why the majority of us consider that treating the nature of the offer of new terms and conditions as the crucial question is difficult to reconcile with the statutory provisions...is that such an approach tends to lead to giving undue importance to the factor that the employee is acting reasonably in refusing the offer. The situation may very well be one in which the employer's legitimate interests and the employee's equally legitimate interests are irreconcilable. If there is a sound good business reason for the particular reorganisation (See** *Hollister v. National Farmers' Union*...) **the unreasonableness or reasonableness of the employer's conduct has to be looked at in the context of that reorganisation. To look at the offer as the crucial question is apt to blur that aspect of the matter."**

30. The point which counsel sought to take from this was that the Tribunal has to look at whether other people in the organisation have accepted the proposals put by management, and he illustrated that by going to the case of **Catamaran Cruises** and to paragraph 28 of that. In paragraph 28(iv) that Tribunal stated:

> **"An express finding should be made as to whether the dismissal was reasonable in the light of the fact that many employees accepted it. In paragraph 5 (the first and last sentences) the Tribunal records that a large number of employees accepted: in paragraph 8, the Tribunal referred to observations in [the** *St. John of God (Care Services)* **case] where ...the Tribunal emphasised the necessity to consider how many accepted."**

31. Mr Oulton made reference to the **St John of God** case, in which there is reference made to the range being between 1% accepting and 99% accepting, and he argued that it is relevant to know how many others are prepared to accept. Counsel also took me to the more recent case of **Garside and Laycock Ltd v Booth** and, in particular, paragraphs 13 to 16 of that case. In that case, the following is stated:

> **"13. Matters however do not stop there. In paragraph 14 the Tribunal assessed the reasonableness of the decision by asking what it was reasonable for the Claimant to do; that is simply the reverse of the statutory question that ought to be asked. Section 98(4) is to be answered by asking whether in the circumstances:**
>
> > **'[...] the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee.'**
>
> **14. The focus of the Tribunal's attention is thus required to be on the reasoning and reasonableness of the employer and not upon what it is reasonable or unreasonable for the Claimant to do. It may well be, and we would generally hope and expect, that the decision of an employer, in order to be reasonable, will take account of whether the employee himself affected by the decision regards it as reasonable or unreasonable; but that is very different from saying that the decision depends upon what the employee thinks is reasonable or unreasonable. That very point is clear in the authorities. Thus, in** *Chubb Fire Security Ltd v Harper* **[1983] IRLR 311 the Employment Appeal Tribunal, Balcombe J presiding, dealt with the question that arose when an Industrial Tribunal had considered whether it was reasonable for an employee to decline the new terms of a contract. The Tribunal's judgment had said:**
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> > **'If it was reasonable for him to decline these terms then obviously it would have been unreasonable for the employers to dismiss him for such refusal.'**
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> **15. The Judgment of Balcombe J makes it clear that that was a wrong approach. He stated:**
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> > **'We must respectfully disagree with that conclusion. It may be perfectly reasonable for an employee to decline to work extra overtime having regard for his family commitments, yet from the employer's point of view having regard to his business commitments, it may be perfectly reasonable to require an employee to work overtime. [...] We agree with the comment [...] in** *Harvey* **[...] "it does not follow that if one party is acting reasonably the other is acting unreasonably."'"**

32. Counsel commended the Judgment in the case of **Garside** to me, which taken along with the other cases referred to above showed, he argued, the correct way to approach the test set out in section 98(4). He therefore argued that the appeal should be allowed and, when it came to disposal, he argued that I could dispose of the case without remitting it to an Employment Tribunal because, he said, the facts were not in dispute with one exception: being the terms of the 25 others who had accepted some variation in their terms and conditions. But

Mr Oulton argued that it was a matter that could be dealt with by me today. Were I not with him on that, he sought a remit to a different Tribunal on the basis that the new Tribunal should have a re-hearing but that the only issue for decision would be whether, some other substantial reason for the dismissal having already been established, the respondent acted reasonably in treating that reason as a sufficient reason to dismiss the Claimant in accordance with the statutory test set out in section 98(4).

The Claimant's case

33. On behalf of the Claimant, Mr Davies, counsel, contended that the Employment Tribunal did not substitute its own view for that of the employer. Reference was made to paragraphs 45, 56, and 62 where the Employment Tribunal made specific reference to the necessity to look at a reasonable range of responses, not to substitute its own view, and to make decisions in disregard of its own views about what that Tribunal might have done had the matter been for it. Counsel argued that it was quite plain from what was said on more than one occasion by the Employment Judge that he was alive to the risks of substitution, and counsel argued that, having stated that several times, it was unlikely that he would then go on to commit the sin of substitution. Counsel argued that the Tribunal's duty not to substitute its own decision for that of the employer overlapped with the duty under section 98(4) to consider reasonableness, because of course that question was whether or not the decision made came within the range of reasonable responses that a reasonable employer might make.

34. Counsel went on to argue that there was evidence before the Employment Tribunal which gave entitlement to the Tribunal to make the decision that it made concerning the importance of holiday pay and sick pay to the Claimant. He argued that the following matters were relevant. The Claimant had had 36 days' holiday inclusive of Bank Holidays under his original contract. The new proposed contract stated that he would have 28 days' inclusive of Bank Holidays.

There was a letter dated 9 June, signed by the Finance Director of the Respondents, which stated the same thing: that is, that the 28 days included Bank Holidays. This was plainly a matter, counsel argued, of importance to the Claimant because he had included it in his Schedule of Loss, which he alone out of the four Claimants had drawn up to show the effect the proposals were going to have on him. He had stated in evidence that he thought what was being done about sick pay was unfair, and the Employment Tribunal had evidence before it to show that the Claimant had been sick at or about the time of the proposals and therefore the Tribunal was entitled to hold that sick pay was plainly a matter of importance to that Claimant. Counsel argued that the Claimant had been asked by the Employment Judge what the three most important changes were and, while he had not said holiday pay and sick pay, all that that showed was that those were not the top three. It did not mean that they were not important to him. Counsel argued that taking the evidence from the Claimant together with his written Schedule made it plain that these matters were important to him and that it was within proper bounds for the Employment Judge to make the findings that he did that these matters were important and that they distinguished this Claimant from the rest.

35. Counsel said that the question of whether or not the Respondent had acted reasonably in dismissing was essentially a question of fact for the Employment Tribunal to find and he argued that I should be careful, sitting in the Employment Appeal Tribunal, not to substitute my own judgment for that of the Employment Judge. He made that submission under reference to the case of **Bowater v Northwest London Hospitals NHS Trust** [2011] EWCA 63. Counsel argued that I should refuse the appeal but, if I were not with him on that, that the matter should be remitted to a new Tribunal. He took the view, as did counsel for the Respondent, that the case had taken some time to come before me and therefore it was some time since it had before the Employment Tribunal. Counsel for the Claimant argued that the remit should be for a new Tribunal to start again, find all the facts, and apply the law to it.

Conclusion

36. I have considered carefully all that was put before me, both in the written submissions and in the helpful discussion with both counsel. It seems to me that the legal principles to be applied are set out in the extract from *Harvey* which has helpfully been produced for me and in the various cases, particularly usefully in the recent case of **Garside and Laycock v Booth**.

37. I will deal firstly with the general point of substitution. It seems to me that an Employment Tribunal has to be sure to set out reasoning from which it can be seen that it did not substitute its own view, but that it did consider whether the decision with which it was concerned was a decision that the decision-maker was entitled to take. I bear in mind that I should not lightly hold that an Employment Judge who has properly directed himself and who has narrated that proper direction in his Reasons will then go on to ignore the proper direction which he has given himself. I also bear in mind, because it seems to me that these matters can be intertwined, that the Employment Judge sitting at first instance has an advantage, which I do not have, in that he hears the witnesses and he gets the flavour of the case.

38. I have, however, come to the view that the Employment Judge did in this case substitute, in the sense that he appears to have decided what was important, although it had not been identified in that way at the time of the Respondent employer making the decision, and I have also come to the view that the Employment Judge, sitting as an Employment Tribunal, did not apply the statutory test in section 98(4) because, in considering whether the Respondent employer has acted reasonably or unreasonably and in deciding in accordance with equity and the substantial merits of the case, the Employment Tribunal should have considered the employer's actions as a whole, taking into account what the employees including the Claimant, but not limited to him, thought of all of the proposals. It seems to me that there is very clearly,

concisely and helpfully set out in the Judgment of the President, Langstaff J, in the case of **<u>Garside</u>**. I refer, in particular, to the paragraphs which I have quoted above.

39. It follows therefore that, having decided that the Employment Tribunal has substituted its own view and has not applied the statutory test set out in the section, I must allow the appeal.

40. In considering the next step, that is the disposal, I take the view that, whilst Mr Oulton has made a forceful submission that the facts are out and there is no point in remitting, it would in fact be correct for me to remit. I accept that the original Employment Tribunal heard this case some time ago and I also should make clear that, while no-one has expressed any doubt or concern about the professionalism of the Employment Tribunal and its ability to reconsider matters, it does seem to me that, given the lapse of time and given the view that the Employment Judge plainly took, justice would be seen to be done if I were to remit to a freshly constituted Employment Tribunal.

41. I am not, however, of the view that the basis should be to start again from scratch. But rather it seems to me that what that freshly constituted Tribunal should do is to decide, as was set out in Mr Oulton's argument, that accepting the reason for dismissal is some other substantial reason, in terms of the legislation, then the question is whether the employer acted reasonably in treating that as a sufficient reason to dismiss. In order to do that, the freshly constituted Tribunal should have before it evidence about the other people in the cohort of 30 and should be invited to make findings about whatever it was that those other people accepted.

42. Therefore I will allow the appeal, remit to a fresh Tribunal, but not to find all the facts again. That Tribunal is to accept the reason found for dismissal but is to consider the section 98(4) question afresh.

43. I am grateful to both counsel for the helpful submissions they have made before me today.