Appeal No. UKEAT/0165/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 January 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

KUEHNE AND NAGEL LTD — APPELLANT

MS M COSGROVE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JONATHAN NAYLOR (of Counsel) Instructed by: Shoosmiths Solicitors 7th Floor 125 Colmore Row Birmingham B3 3SH
For the Respondent	MR MICHAEL SALTER (of Counsel) Instructed by: OH Parsons & Partners 3rd Floor Sovereign House 212-224 Shaftesbury Avenue London WC2H 8PR

SUMMARY

UNFAIR DISMISSAL

Importance of clearly separating out decision on reason for dismissal and the fairness of the dismissal for that reason. Here the Employment Tribunal had fallen into error in eliding the two questions.

Further, the Employment Tribunal had wrongly fallen into the "substitution mindset" identified in **London Ambulance Services NHS Trust v Small** [2009] EWCA Civ 220.

Appeal allowed on these bases.

Obiter: before making an uplift in compensation for a breach of the ACAS Code, the Employment Tribunal first needed to find that the failure to comply had been "unreasonable", s. 207A(2)(c) **TULR(C)A 1992**.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer in this Judgment to the parties as the Claimant and the Respondent as they were before the Employment Tribunal below.

2. This is an appeal by the Respondent against the Judgment of the Employment Tribunal (Employment Judge Moore), sitting alone at Bedford on 16 July and 8 August 2012, with further consideration in chambers on 4 December 2012. A reserved Judgment was sent to the parties with Reasons on 27 December 2012. The Claimant was represented by Mr Salter of counsel both before the Employment Tribunal and here. The Respondent was represented before the Employment Tribunal by Mr Barker, its solicitor, but before me by Mr Naylor of counsel.

3. The Claimant had claimed unfair dismissal and unpaid notice. I am only concerned with the unfair dismissal claim on this appeal.

4. In defending the claim, the Respondent contended that the Claimant had been dismissed for a reason relating to her conduct, thus capable of being fair for statutory purposes, and that the dismissal was fair in all the circumstances of the case.

The facts

5. The relevant factual background is as follows. The Claimant had worked for the Respondent as a warehouse operative and had some 15 years of unblemished service with either the Respondent or its predecessors at the relevant time. She was also a trade union representative within the Respondent. In Autumn 2011 the Claimant had made a complaint about another member of staff. On 18 October 2011, the day she had been notified of that other

member of staff's suspension pending investigation of her complaint, the Claimant was asked for her consent to be tested for cannabis use following what she was told was an anonymous tip-off. She duly gave her consent, confirming that she was aware of the contents of the Respondent's substance misuse policy and signing a form that included the following statement, "I am fully aware of the policy of [the Respondent] should a positive result be detected".

6. The Respondent's substance misuse policy was introduced in or around 2009 and the Claimant also confirmed, at least at the appeal hearing stage, that she had been aware of it and the initial amnesty around the time of its introduction. It provides (so far as relevant) as follows:

> **Drug Test Results**
>
> **The following conditions are classified as gross misconduct under the Company Disciplinary Procedure.**

There then follows a series of bullet points;

- **A positive drugs screen result (from Company approved laboratory medical review of sample).**
- **The use or consumption of drugs at any time while on Company premises or on Company business (either in the UK or abroad).**
- **The refusal to give a urine sample for analysis.**
- **The failure to undertake an approved course of treatment for a drug-related problem.**
- **The failure to satisfactorily complete a course of treatment for a drug related problem.**

7. Returning to the narrative, the Claimant's result tested positive for cannabis. I should say that the Claimant has never denied that she took cannabis on a social occasion during the weekend preceding the test. It is common ground (as it was before the Employment Tribunal) that cannabis taken at the weekend might still show up in test results the following week and it

would be impossible for the test to establish whether the individual was actually intoxicated through the use of cannabis or simply had it in their system because of use in the recent past. In any event, the Claimant was suspended on allegations of gross misconduct, the reason for the suspension being said to be the positive drugs test, which had been sent away for more detailed testing. The further test result was returned to the Respondent on 21 November 2011. It confirmed the Claimant had tested positive for cannabis.

8. On 2 December 2011 Mr McGuirk, the Warehouse Operations Manager, wrote to the Claimant requiring her to attend a disciplinary hearing the following Monday. That was the same day as the Claimant's grievance hearing as a result of her complaint about the other employee. Because she had been upset after that hearing, the disciplinary hearing was re-scheduled for 9 December 2011. Mr McGuirk's letter had been, relevantly, in the following terms:

> **"Dear Marion**
>
> **Disciplinary Hearing**
>
> **Further to our conversation I confirm that you are required to attend a disciplinary hearing, regarding your alleged Gross Misconduct (Code of Conduct section 24 Alcohol/Drugs). This has been arranged to take place in Brinklow meeting room 2 at 14.30 on Monday 5th December 2011.**
>
> **I must inform you that your future employment with the company will be subject to the outcome of this hearing."**

9. Section 24 of the Respondent's Code of Conduct provides as follows:

> **"Alcohol/Drugs**
>
> **Employees must not report to, or be at, work under the influence of alcohol or other drugs or substances except for those supplied under a prescription.**
>
> **Intoxication, or where there is a reasonable suspicion that someone is under the influence, whilst at work will result immediate suspension and may be treated a gross misconduct offence in accordance with the Company's Disciplinary Policy. Any employee suspected of being at work or carrying out work activities whilst under the influence of drugs or alcohol may be asked to take a drugs/alcohol test. An employee may refuse such a test but should be aware that their refusal will mean that the Company has to make a decision about their conduct and/or capability to work based on such information as is available, which could be to the individual's detriment. A refusal may also be regarded as misconduct resulting in disciplinary action up to and including dismissal."**

10. After the disciplinary hearing Mr McGuirk took the decision to dismiss the Claimant summarily. In his letter of 9 December 2011, confirming that decision, Mr McGuirk stated that the reason for the Claimant's dismissal was that:

> **"You were for cause tested on the 18th October 2011, the initial testing showed that Cannabis was present in your blood system; further laboratory testing also confirmed Cannabis to [be] present in your blood system."**

11. The Claimant appealed against that decision, and there was an appeal hearing in January 2012, but that upheld that original decision to dismiss.

The Issues

12. Although the Employment Judge's Judgment does not expressly set out the issues to be determined, I am informed by Mr Salter (who represented the Claimant at the Tribunal) that at the outset of the hearing, the Employment Judge had asked the Respondent's representative to explain how it put its case and the Respondent's representative had said that it was an "under the influence and intoxication case". That said, as Mr Naylor, now acting for the Respondent before me observes, the Respondent's substance misuse policy was before the Employment Tribunal and was clearly referred to and relied upon by Mr McGuirk in his witness statement. It is perhaps unfortunate that the Employment Judge's written Reasons do not expressly set out the way in which it was understood that the case was put and the issues thus arising.

13. In the "Conclusions" section of the Reasons, however, Employment Judge Moore refers to the relevant statutory provision, s. 98 **Employment Rights Act 1996**, and to the lead guideline case in conduct dismissal cases, **BHS v Burchell** [1980] ICR 303. The Reasons then cite the tests that Employment Judge Moore directed himself need to be applied: first, whether the Respondent had shown the reason for the dismissal and that it was one of the potentially fair

reasons specified in s. 98 ERA; second, whether it acted reasonably in treating that reason as a sufficient reason for the dismissal. The Judge went on to remind himself that, if the Respondent had satisfied him that it had a genuine and reasonable belief that the Claimant was guilty, then it would not be a matter for him to be satisfied whether or not the Claimant was in fact guilty or innocent. He further directed himself as follows:

> **"A genuine belief has its ordinary meaning but, in order to be reasonable, the belief must be based on reasonable grounds following as much investigation as was reasonable in the circumstances."**

The ET Judgment

14. On hearing the Claimant's claims of unfair and wrongful dismissal the Employment Judge decided that the Claimant had been unfairly dismissed and ordered that the Respondent was to pay her the sum of £7,865. The Employment Judge further held that the claim for notice pay was subsumed within the award for unfair dismissal and there was no cross-appeal against that latter finding.

15. In finding that the Claimant had been unfairly dismissed, the Employment Judge characterised the Respondent's case as one where the reason for the dismissal was the Respondent's belief that the Claimant was at work under the influence of drugs. As he put it at paragraph 13 of his Reasons, "That...is the matter proscribed by the Respondent in this case and charged by Mr McGuirk".

16. In respect of this charge, the Employment Judge held that the Respondent had wrongly asserted that the Claimant had admitted the offence. At paragraph 14 he records:

> **"All that the Claimant had admitted was use of cannabis out of work. This, of course, is not what she was charged with. The only 'evidence' he had was the positive test. He understood no more than the word positive and was not concerned to make any further enquiries."**

17. The Employment Judge considered that the Respondent had failed to carry out any adequate investigation into this offence and that the dismissing manager, Mr McGuirk, dismissed the Claimant solely because of the positive test result.

18. The Employment Judge concluded (paragraph 14) "he had neither a genuine nor reasonable belief that the Claimant was guilty of the alleged misconduct". As such, he found the dismissal to be unfair.

19. On the Respondent's argument that any award made to the Claimant should be reduced to take into account that by her conduct she had contributed to her dismissal, the Employment Judge stated his conclusion as follows:

> **"I am not satisfied that the Claimant contributed to her dismissal. There is no evidence that she committed any culpable act of legitimate concern to Mr McGuirk or his employers. As was put to Mr McGuirk for comment, the policy proscribed both drugs and alcohol and the Claimant's position is analogous to Mr McGuirk or anyone else having a pint of two or ale on a Saturday evening and going to work the following Tuesday long after the effects had worn off."**

20. Finally, the Employment Judge considered whether this was a case where it was appropriate to make an uplift to any award for breach of the ACAS Code on Discipline and Grievance. He recorded his self-direction on this issue as follows:

> **"In circumstances where there has been a disregard of the ACAS Code I am required to consider an uplift to the compensatory award."**

The appeal

21. The Respondent appeals against that Judgment, putting forward four main grounds:

(1) Whether the Employment Judge erred in his approach to the question of the Respondent's reasonable belief and, in so doing, substituted his own mindset for that of the Respondent.

(2) Whether the Employment Judge erred in his assessment of the reasonableness of the Respondent's investigation by excluding relevant matters such as the safety critical nature of the Respondent's operations and its zero tolerance approach to the issue of drugs.

(3) Whether the Employment Judge erred in failing to find any element of contributory fault on the part of the Claimant.

(4) Whether the Employment Judge misdirected himself in law in making an uplift to the Claimant's award for the Respondent's failure to comply with the ACAS Code, and, in any event, whether he had incorrectly applied the maximum uplift (25%), particularly in circumstances in which he had already verbally indicated that he saw this as a 20% uplift case.

22. Other than conceding that the Employment Judge had indeed orally stated that this was a case where a 20% uplift for failure to comply with the ACAS Code was appropriate, the Claimant resisted the appeal and argued that the Employment Judge properly applied the law to the case presented before him and to the facts he had found, and that there was no proper basis for bringing this appeal.

The EAT directions

23. The appeal had been permitted to proceed to a full hearing by HHJ Shanks after a preliminary hearing in this matter. He had been persuaded that the appeal was arguable as, in particular, it appeared that the Employment Judge might have overlooked the Respondent's drug policy, which made it clear that a positive test was, in itself, regarded as gross misconduct and arguably that the Employment Judge failed to address the issue of contributory fault.

The relevant legislative provisions.

24. The touchstone in any unfair dismissal case is always s. 98 of the **Employment Rights Act 1996**, which relevantly provides as follows:

> **"(1) 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 (or, if more than one, the principal 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) In any other case 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."**

25. In this case, it is also relevant to have regard to s. 123(1), which relates to the compensation award and provides as follows:

> **"Subject to the provisions of this section...the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

And to subsection (6):

> **"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

26. Given the uplift applied in this case, it is also relevant to have regard to s. 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**, which provides:

"This section applies to proceedings before an Employment Tribunal relating to a claim by an employee under any of the jurisdictions [including unfair dismissal]

If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that –

(a) the claim to which the proceedings relate concerns a matter to which a relevant code or practice applied

(b) the employer has failed to comply with that Code in relation to that matter; and

(c) that failure was unreasonable

The Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

Relevant case law

27. In considering the correct approach to adopt in this appeal, I have been reminded of the guidance to Employment Tribunals by the Court of Appeal in **London Ambulance Services NHS Trust v Small** [2009] EWCA Civ 220, where Tribunals are warned against the danger of slipping into what is there called the substitution mindset. At the same time I have also reminded myself that it is not for the EAT to itself engage in a similar substitution of its view for that of the Employment Tribunal hearing the evidence at first instance.

28. The Respondent has also drawn my attention to past cases where employers have been allowed some latitude when it comes to the adoption of zero tolerance policies in respect of testing positive for drug or alcohol use (see, for example, **O'Flynn v Airlinks, the Airport Coach Company Ltd**, EAT/0269/01).

29. For the Claimant reliance is placed on authorities that stress that the burden is on the employer to properly and precisely frame the charge against an employee in disciplinary proceedings, e.g. **Strouthos v London Underground Ltd** [2004] IRLR 636, and to be clear as to what any "concession or admission" on the part of an employee actually related to (**McClaren v NCB** [1988] ICR 370).

Oral submissions

30. On the first ground, the Respondent accepted that there had been some confusion in the analysis of the Respondent's case caused by the terms of the disciplinary letter and the references made to its Code of Conduct rather than expressly setting out the relevant provision of the Respondent's Substance Misuse policy. That said, the Respondent contended that the case was clearly put on a dual basis. That was apparent from the ET3, from Mr McGuirk's statement and from all the evidence before the Employment Judge including the dismissal letter and the inclusion of the Substance Misuse policy in the documentation before him.

31. The Employment Judge had erred in his analysis of the Respondent's belief, in particular in excluding a relevant matter, namely the Respondent's Substance Misuse policy, under which a positive drugs screen result was expressly classified as gross misconduct. Alternatively he had substituted his own mindset for that of the employer in these circumstances, in particular by failing to allow that the Respondent might take action on a reasonable suspicion, something allowed in the Respondent's own Code of Conduct and apparently also by requiring that the Respondent should have asked for a test that would, in any event, have been inconclusive as the Employment Judge himself had understood. Merely because the Employment Judge might himself have sought further investigation does not meant that the Respondent in these circumstances acted outside the range of reasonable responses in not doing so.

32. In particular, the Respondent submitted that the Employment Judge failed to have regard to the safety critical working environment and the evidence given in respect of the Respondent's concerns and zero tolerance of positive drugs tests in that working environment. This is a case there the Employment Judge plainly fell into the trap of the Employment Tribunal in **Small**.

33. Turning to the second ground, the investigation point, the Respondent submitted that the Employment Tribunal ignored a clearly relevant factor, the safety critical nature of the Respondent's operations and its zero tolerance approach to the issue of drugs and alcohol. There was no dispute but that the Claimant's role involved her driving a vehicle around the warehouse as an order-picker involving the lifting of heavy weights. Here, the Employment Judge had applied too high a test where all concerned knew of the Respondent's substance misuse policy and the impact of it.

34. Turning to the third ground of appeal, the contribution point, the Respondent submitted that the Employment Tribunal Judge had erred in failing to find any element of contribution by the Claimant. Paragraph 17 of the Reasons was just wrong. The Judge there made a false analogy with alcohol consumption on a Saturday night, but the two circumstances are different. In particular, they are treated differently by the Respondent. This paragraph, it is submitted, shows the Employment Judge's substitution of his personal views for those of the Respondent.

35. On the fourth ground, the ACAS uplift point, the Respondent first submitted that the Employment Judge had simply applied the wrong test. S. 207A(2)(c) of **TULR(C)A 1992** makes it clear that failure to comply with the code must be unreasonable before the Employment Tribunal may even consider increasing any award of compensation to the Claimant. The Employment Judge did not direct himself that he had to find an unreasonable failure and simply stated he was required to consider an uplift where there had been a disregard of the ACAS Code.

36. Secondly, this was not a case justifying the maximum uplift of 25% nor indeed had the Employment Judge thought it was when giving his oral Judgment, when he had put it as a 20%

case. Indeed, on the Respondent's submission, this was not a case anywhere near the upper end of the relevant band, and the Employment Judge's finding was simply perverse on this point.

37. For the Claimant, Mr Salter submitted that the Employment Judge had clarified or sought to clarify with the Respondent at the outset of the hearing how it put its case, and the Respondent's representative at that stage said it was an "influence and intoxication case". That being so, the Claimant submitted that the Employment Judge was entitled to proceed to test the Respondent's case on that basis. In terms of the matters relied upon by the Respondent in coming to its belief, it was right that the Employment Judge tested those matters and held that the Respondent had been wrong to rely on the Claimant's alleged admission. That admission had to be seen as a response to how the conduct charge had been put in the disciplinary letter. It was for the Respondent to precisely frame the disciplinary charges accurately and to be clear as to what any admission made by the employee actually related to. As for the reasonable suspicion point, as the case had been put on the basis that it was an under the influence/intoxication case and as there was no evidence to suggest that the Respondent had reasonable suspicion of that, merely an anonymous tip-off, there was no evidence that raised any concerns that the Claimant had been intoxicated or under the influence.

38. On the second ground, the investigation point, the Claimant again submitted that the Employment Judge was addressing the case on the basis that the Respondent was alleging that the Claimant had been under the influence or intoxicated, not simply that she had tested positive. Taking the case as put on that basis, there were numerous points supporting the Employment Judge's findings as to the inadequacy of the investigation. Although the Respondent sought to stress its zero tolerance policy, if one looked more fully at the Substance Misuse policy it was notable that it allowed that there could be counselling of employees who

had a drug use problem, not simply if the employee themselves asked for it but also if arose under the Respondent's disciplinary policy.

39. On the third ground, the contribution point, having found that the Claimant was not guilty of the conduct in question, the Employment Judge was entitled not to make a reduction for contributory fault. Furthermore, the Respondent's own policies permitted offering rehab to those found to have been under the influence. So there could not have been a zero tolerance policy to the degree the Respondent suggested. The Employment Judge was entitled to come to the view that he did given his findings of fact.

40. On the fourth ground, the ACAS uplift, the Employment Judge's self-direction at paragraph 21 had to be seen in the context of all his preceding findings as to the inadequacy of the investigation and as to his express statement that the breaches did not flow from inexperience or error. Whilst he may not have expressly used the word "unreasonable", that could be read into his findings and there was no error of law disclosed. Whilst agreeing that the Employment Judge had said this was a case appropriate for a 20% uplift rather than a 25% uplift, there was no further concession and the matter of the proportion of the uplift was solely for the Employment Judge and disclosed no error of law.

Discussion and conclusions.

41. The troubling point at the heart of this appeal, in my judgment, is that the Employment Judge appears to have tested the Respondent's case solely on a basis that did not properly represent the reason the Respondent actually had in mind when dismissing the Claimant. I understand, accepting what Mr Salter has told me about the attempt to clarify the case at the outset of the Tribunal hearing, that the Employment Judge would not have been assisted by the references to "intoxication" and "under the influence" in the presentation of the

Respondent's case, but it seems to me that the starting point had to be for the Employment Judge to look at what was actually in Mr McGuirk's mind when he took the decision to dismiss. The best evidence of that is the reason he gave to the Claimant in the dismissal letter, i.e., that having been cause tested on 18 October 2011,:

> **"the initial testing showed that cannabis was present in your blood system. Further laboratory testing also confirmed cannabis to be present in your blood system.,"**

So, on the reason given to the Claimant at the time, it was the positive test alone that was expressed to be the reason for Mr McGuirk's decision to dismiss the Claimant.

42. I, of course, have not had the benefit of hearing Mr McGuirk's evidence being tested on that point, but that is in any event the finding of fact made by the Employment Judge as to the reason for dismissal. It is at paragraph 14, where he concludes:

> **"He [that is referring to Mr McGuirk] dismissed the Claimant solely because of the positive test result."**

43. Having correctly there identified the reason for dismissal - the genuine belief of the Respondent at the time - the question for the Employment Judge was whether that was capable of being a reason relating to the Claimant's conduct. It is hard to seen in general terms why it was not. Certainly testing it against the Respondent's own policies, it was plainly identified as a gross misconduct issue under the Respondent's Substance Misuse policy.

44. In my judgment, the Employment Judge fell into error on this issue because he elided two separate questions: (1) the question of the employer's belief, an essentially subjective test, which does not require the belief itself to be reasonable but simply requires the Respondent to demonstrate that this was the belief that it had in mind that led it to dismiss, and (2) the

secondary question of fairness - whether the Respondent had reasonable grounds for that belief. Had the Employment Judge properly separated out these two questions, he would have correctly identified the reason operating in Mr McGuirk's mind.

45. Given that the Employment Judge did not accept that the Respondent had demonstrated a genuine or reasonable belief, the entirety of his decision on unfair dismissal becomes infected.

46. To go further, however, I am also satisfied that the Employment Judge's Reasons demonstrate that he fell into the error identified by the Court of Appeal in **Small**; that is, he substituted his own view for that of the employer. That is demonstrated by his failure to have regard to the clear evidence of the Respondent's Substance Misuse policy which identifies a positive drugs test as a gross misconduct matter, and, more generally, to the evidence relating to why the Respondent had introduced that policy, the dangers obviously posed when employees (including the Claimant) operate heavy machinery in a warehouse environment.

47. The Employment Judge further demonstrated that he was substituting his view for that of the Respondent in these circumstances by simply ignoring the second part of section 24 of the Respondent's Code of Conduct. The provision does not stop with cases where employees are proven to be under the influence of alcohol or other drugs or substances, but continues to allow its application where the Respondent has a "reasonable suspicion that someone is under the influence".

48. The Employment Judge's substitution of his own view for that of the Employer is further underlined when he went on to consider the issue of contributory fault. At paragraph 17, he speaks of the policy which deals with both drugs and alcohol as being analogous to Mr McGuirk or anyone else having a "pint or two of ale on a Saturday evening" and going to

work the following Tuesday, long after the effects had worn off. That, however, discloses a regard for his views rather than those of the Respondent. With respect to the Employment Judge, the position is not analogous. Even disregarding the fact that one example is illegal and the other not, the fact is that, as the Employment Judge himself correctly identified, intoxication through cannabis use cannot be tested in the same way as intoxication through alcohol use. Hence the Respondent's policy, treating positive testing for drugs above a *de minimis* level as an act of gross misconduct in itself.

49. Although strictly unnecessary for me to deal with, I would also accept the Respondent's argument that the Employment Judge erred in his approach to the question of the investigation.

50. Having failed to correctly identify what the Respondent was actually investigating - what it actually had in its mind at the relevant time - the whole of this part of the decision goes in any event. It was, however, in my judgment simply perverse to criticise the Respondent for failing to carry out further investigation as to whether the Claimant was under the influence of cannabis (see paragraph 14) when the Employment Judge had already himself recorded that the testing in question is not capable of proving intoxication (see paragraph 9).

51. That is not to say that the dismissal of the Claimant was necessarily fair. I do not know. That is a matter for an Employment Tribunal to consider afresh, properly distinguishing between the question of reason and reasonableness. In the circumstances I do not go on to say anything about the ground of appeal relating to contributory fault. The Employment Tribunal's Judgment cannot stand, so that will be a matter for fresh consideration and it is probably less than helpful for me to indicate any view on this.

52. Equally, I do not need to say anything about the ACAS uplift point, save that I would add that I would have found an error of law here in the Employment Judge's failure to correctly direct himself that a breach would need to be unreasonable.

53. For all those reasons, I accordingly allow this appeal.