Appeal No. UKEAT/0505/12/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 January 2014

Before

HIS HONOUR JUDGE HAND QC

MR A HARRIS

MR G LEWIS

ROYAL FREE HAMPSTEAD NHS TRUST — APPELLANT

MR K SHAH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS H WOLSTENHOLME (of Counsel) Instructed by: Bevan Brittan LLP Kings Orchard Queen Street Bristol BS2 1HQ
For the Respondent	MR K SHAH (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Taken as a whole the Employment Tribunal's Judgment contained enough material to suggest that after starting out well by directing themselves in terms of the **BHS v Burchell** case, the Employment Tribunal has slipped into "the substitution mindset". Large parts of the Judgment consist of assertion without any explanation as to how the conclusions have been arrived at. The case was remitted to a differently constituted Employment Tribunal for a complete re-hearing.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal from the Judgment of an Employment Tribunal comprising Employment Judge Davidson, Ms Ebenezer and Mr Carroll, sitting in London (Central) on 12, 13 and 14 June 2012, the written Reasons for the Judgment having been sent to the parties on 10 September 2012. In the result, the Employer was held to have unfairly dismissed the Claimant but not to have discriminated against him. The Appellant was the Respondent at the Employment Tribunal. The Respondent before this Tribunal was the Claimant at the Employment Tribunal. We will call them "the Employer" and "the Claimant" respectively.

2. The Employer has been represented by Ms Wolstenholme of counsel. The Claimant has represented himself. This replicates the position at the Employment Tribunal.

The facts

3. The Claimant was a phlebotomist working with in-patients on the wards as well as in the Phlebotomy Department blood room at the Royal Free Hospital at Pond Street in Hampstead ("the Royal Free"). His employment had commenced in May 2008 on a part-time, fixed term contract. In 2010 he moved on to a full-time one-year contract. Throughout the period he asked repeatedly to be given permanent status. When his one-year contract expired in May 2011 he was offered, first, a two-month contract and, when this expired in July, he was given another year's contract. At this stage his line manager was Miss Rachel Anticoni. It was she who arranged these extensions.

4. The Complainant complained to her that it appeared to him others had been given a permanent contract, whereas he had not. As the Employment Tribunal put it at paragraph 3.7 of the Judgment, he was clearly unhappy. He had been to see the Human Resources Department

about the situation. They recommended to him that he consult the Occupational Health Department. He could not do so immediately, so he went to see his GP, who prescribed anti-depressants. Ms Anticoni's position was that the Claimant was complaining on the basis of a document which applied to a trainee but not to him and was misunderstanding the position. This was how she explained herself to the Human Resources Department ("the HR Department").

5. About this time there was an article in the local newspaper about the phlebotomy department at the Royal Free. It refers to the Director of Operations as "Mack Lawrence". In fact, the Director was Dr Lawrence Mack, who is not a medically qualified doctor but a doctor by virtue of having a PhD degree. The Claimant was one of those who referred to him colloquially as "Mack Lawrence", as can be seen from an e-mail which he had sent to a member of the HR Department on 8 August 2011 and which has been added to the bundle as pages 163 to 167. Apparently, according to evidence at the Employment Tribunal, this led to suspicion amongst some managers that the Claimant might have been one of the sources of the article.

6. Also in 2011 there was an inspection by the Care Quality Commission ("CQC"). As a result it criticised the policy of the Employer in respect of the lack of dignity of patients. A prime example of this was the closing of curtains around the patient's bed should a patient wish that to happen. Apparently there was an inconsistent practice so far as offering this choice to patients was concerned and after the criticism, what might be described as a management initiative to ensure a consistent policy was put in place.

7. On 4 August 2011 a patient alleged that somebody had taken blood without her consent and without offering to close the curtains around the bed. This complaint was related to Ms

Anticoni. She ascertained that the Claimant had been the phlebotomist assigned to the ward. She relayed this information to a Mr Byrne, who was the Safeguarding Officer. She also reported the matter to the police.

8. Subsequently the police took no action but Mr Byrne suspended the Claimant by a letter written that very morning, and the Claimant was escorted from the premises, according to the Employment Tribunal Judgment, by Ms Anticoni, who then conducted an investigation by going to the ward by speaking to the patient, the patient's daughter and to another patient who occupied an adjacent bed. She also spoke to nursing staff. Later that day she took a formal statement from the Claimant and the patient who occupied the adjacent bed.

9. On 12 August 2011 she interviewed the Claimant again. She then prepared a report, which she presented to Dr Mack. He decided to hold a disciplinary hearing, and this took place on 15 September 2011. Before the hearing the Claimant sent, via the HR Department, an e-mail to Dr Mack. As the Employment Tribunal put it at paragraph 3.16, this "predominantly complains about his contract status." It also contained a denial of any misconduct on his part and an allegation that the Claimant had been threatened with suspension by Ms Anticoni because he had complained about the way he had been treated in relation to permanent status.

10. At the disciplinary hearing, no witnesses were called and the Claimant was not represented. Dr Lawrence decided to dismiss the Claimant for carrying out a procedure without the patient's consent and for failing to close the curtain, which is standard operating procedure. A letter of dismissal dated 28 September 2011 was sent to the Claimant and the Employment Tribunal found that it arrived on 1 October 2011. The dismissal was on notice. The letter is at pages 136 and 137 of the appeal bundle, and it is helpful to consider part of it.

11. Dr Mack said this:

> **"After careful consideration it was my decision that you should be dismissed from your post.**
>
> **...**
>
> **My decision was reached because there was sufficient evidence to support the allegations even though you stated that you do not recall the incident...You were confirmed as working on the ward that day...**
>
> **...**
>
> **By your own admission you failed to follow your department's standard operating procedures. I can [not] find reason for the patient and the witness to make these allegations other than the fact that it happened as you were clearly identified as the individual who committed these actions. Additionally, you [failed] to also follow the Trust's policy on patient's privacy and dignity. You have made no attempts to understand the serious nature of your actions but rather made excuses for your actions, none of which were reasonable, to circumvent standard operating procedures."**

The letter goes on to give four weeks' notice of dismissal and states the date when employment will end.

12. The Claimant appealed, as he was entitled to do. His appeal was heard by a Mr Smart and was turned down.

The Employment Tribunal decision

13. At paragraph 5.1 of the Judgment, the Employment Tribunal direct themselves as to the law and reach conclusions as to the law in these terms:

> **"5.1 As the reason put forward for the dismissal is misconduct, we consider the test in BHS v Burchell reminding ourselves that we must not substitute our view for that of the respondent.**
>
> **5.1.1 Did the Respondent genuinely believe that the Claimant had committed the misconduct? We find that the decision was taken by Dr Mack, after discussion with Ms Tear, but the decision was his. He did not attend to give evidence at the hearing and we therefore make this assessment on the basis of Ms Tear's evidence and the written documentation. Having considered the evidence, we find that on the balance of probability, Dr Mack genuinely believed that the Claimant had committed the misconduct.**
>
> **5.1.2 Did he have reasonable grounds for that belief? We find that he did have such grounds on the basis of the information available to him at the time.**
>
> **5.1.3 Had he carried out as much investigation as was reasonable in the circumstances? We find that he had not for the following reasons:"**

14. The Employment Tribunal then made a series of findings at paragraphs 5.1.3.1 to paragraph 5.1.3.7, which can be summarised as follows. Firstly, Dr Mack paid no attention to the e-mail setting out "the previous history with Ms Anticoni", ruling it to be irrelevant. Secondly, although the patient had expressed herself willing to be contacted again, the Claimant had no opportunity to challenge or test the factual evidence set out in Ms Anticoni's report. Therefore the result was that he was condemned by the untested material in the report, which Dr Mack had obviously preferred to the Claimant's "live" evidence. Thirdly, the investigation comprised only what Ms Anticoni had discovered on the ward that morning. There was no reference to any record made by the Claimant and therefore no investigation as to whether there appeared in the record occasions when patients had refused to have blood taken. Fourthly, the Claimant had not had his memory jogged by being supplied with further details such as the patients' names or their descriptions. Fifthly, despite the fact that the Claimant's description did not completely match that given by the patient, although he was of Asian origin he did not have grey hair, which was how the person taking the blood had been described, the investigation had never considered the issue of identity. This is perhaps not surprising because, sixthly, the description of the person taking the blood as being of Asian origin with grey hair had not been included in Ms Anticoni's report. It was revealed for the first time at the Tribunal hearing. Seventhly, there was no consideration of the apparently irrational behaviour of the Claimant in taking blood from one patient without consent and accepting a refusal to consent from the other patient. Moreover the Claimant had an excellent record.

15. The Employment Tribunal regarded the above as being sufficient to find that the investigation was not reasonable (see paragraph 5.1.4 of the Judgment at page 32 of the appeal bundle). It then turned to consider whether a fair process had been followed. It rejected the contention that the Claimant had been disadvantaged by not being able to question witnesses.

Nor did it accept there should have been a person with a clinical background on the panel (see paragraphs 5.1.5.1 and 5.1.5.5 of the Judgment at page 32 of the appeal bundle). On the other hand, the Employment Tribunal concluded that Dr Mack should not have been the disciplinary tribunal because it was suspected that the newspaper article had been written following a disclosure by the Claimant (see paragraph 5.1.5.2 of the Judgment), that there had been inconsistent labelling because the internal appeal characterised the conduct as a breach of health and safety and that was a description which had not been applied previously (see paragraph 5.1.5.3 of the Judgment) and that the procedure at the disciplinary hearing had been overly formal particularly for an unrepresented employee unfamiliar with such procedure (see paragraph 5.1.5.4 of the Judgment). The conclusion on procedure was summarised at paragraph 5.1.6 in these terms:

> **"We find that there were flaws with the procedure, in particular that the dismissing manager was influenced by extraneous issues such as the newspaper article and the CQC investigation."**

16. Then, in accordance with the self-direction that the Tribunal had given to itself, it turned to consider whether dismissal had been an appropriate sanction. At paragraph 5.17 the Employment Tribunal said this:

> **"Was dismissal an appropriate sanction? We find that, in the light of the Claimant's record and the isolated incident (on their own case) consideration should have been given to imposing a warning instead of dismissal. The Respondent accepts that a warning should be the appropriate sanction if the allegation had related only to the breach of standard operating procedures. The Respondent's evidence is that they took the view that a warning was inappropriate for the allegation [he] carried out the procedure against the client's will because of the lack of remorse shown by the Claimant. We note that it would undermine an employee's denial of the allegations to then show remorse for something he claims not to have done. We find that the offence was not regarded as gross misconduct at the time, or in the contemporaneous documentation and, if this is right and the offence was not a gross misconduct issue, it would be unfair to dismiss for a first offence. We find that the Respondent has, after the event, recategorised the incident as gross misconduct."**

The Claimant's case

17. In respect of that Judgment Ms Wolstenholme takes issue with these conclusions on the basis that they disclose essentially two errors of law: firstly that there has been a misapplication to the facts of the case of the self-direction as to law, which the Employment Tribunal had given to itself at of paragraph 5.1 as set above at paragraph 13 of this judgment, and further, or in the alternative, that this was a decision that no reasonable Tribunal properly directing itself, on the evidence, could have reached, that is to say it was a perverse decision.

18. The correct self-direction, submitted Ms Wolstenholme, is now to be found at paragraphs 47 to 50 of the Judgment of the Court of Appeal in **Taveh v Barchester Healthcare Limited** [2013] IRLR 387. Since it is the latest word by the Court of Appeal on this subject, which has generated a large number of authorities, we make no apology for quoting the paragraphs in a full:

> "**47. The manner in which the ET should approach the determination of the fairness or otherwise of a dismissal on conduct grounds was re-stated by this court in *Graham v. Secretary of State for Work and Pensions (Jobcentre Plus)*[2012] EWCA Civ 903; [2012] IRLR 759. Aikens LJ, in a judgment with which Rafferty and Pill LJJ agreed (with Pill LJ adding a substantive judgment of his own), said:**
>
> > **'35. … once it is established that the employer's reason for dismissing the employee was a '*valid*' reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.**
> >
> > **36. If the answer to each of those questions is '*yes*', the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a '*band or range of reasonable responses*' to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which '*a reasonable employer might have adopted*'. An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see s.21(1) of the Employment Tribunals Act 1996.'**

48. The statements of principle in those paragraphs are derived from well-established authority, which is referred to by Aikens LJ in footnotes to his judgment and their accompanying comments. The tripartite approach referred to in paragraph 35 derives from *British Home Stores v. Burchell* [1980] IRLR 379, at 379, 380, per Sir John Donaldson. The statements in paragraph 36 as to the need for the ET to assess the reasonableness of the employer's response to the misconduct by reference to the *'band of reasonable responses'* derive from *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17, at 24F to 25D, per Browne-Wilkinson J; and from this court's decision in *Foley v. Post Office* [2000] ICR 1283. *Foley's* case contains, at 1291 and 1292, the following passages in Mummery LJ's judgment, with which Rix and Nourse LJJ agreed:

> **'*Range of reasonable responses point***
>
> **The employment tribunal then followed, as it was bound by authority to do, the approach in *Iceland Frozen Foods Ltd. v. Jones* [1983] 1CR 17 and held that, although it was of the view that the decision to dismiss was '*harsh*', it was not entitled to substitute itself for the employer and impose its '*decision upon that of a reasoned on the spot management decision*' (paragraph 23). Instead it asked, as required by authority, whether the dismissal was '*within the range of reasonable responses for the employer to have dismissed the employee.*' It found that it was. That finding is not erroneous in law unless it can be characterised by an appellate body as one which no reasonable tribunal could have reached. …**
>
> ***Perversity point***
>
> **It was made clear in *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17, 25B – D, that [what is now section 98(4) of the 1996 Act] did not require '*such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section.*' The tribunals were advised to follow the formulation of the band of reasonable responses approach instead. If an employment tribunal in any particular case misinterprets or misapplies that approach, so as to amount to a requirement of a perverse decision to dismiss, that would be an error of law with which an appellate body could interfere.**
>
> **The range of reasonable responses approach does not, however, become one of perversity nor is it rendered '*unhelpful*' by the fact that there may be extremes and that (as observed in *Haddon v. Van den Bergh Foods Ltd* [1999] ICR 1150, 1160D) 'Dismissal *is the ultimate sanction.*' Further, that approach is not in practice required in every case. There will be cases in which there is no band or range to consider. If, for example, an employee, without good cause, deliberately sets fire to his employer's factory and it is burnt to the ground, dismissal is the only reasonable response. If an employee is dismissed for politely saying '*Good morning*' to his line manager, that would be an unreasonable response. But in between those extreme cases there will be cases where there is room for reasonable disagreement among reasonable employers as to whether dismissal for the particular misconduct is a reasonable or an unreasonable response. In those cases it is helpful for the tribunal to consider '*the range of reasonable responses.*'**
>
> ***Substitution point***
>
> **It was also made clear in *Iceland Frozen Foods Ltd,* at pp. 24G-25B, that the members of the tribunal must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the employer. Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses '*which a reasonable employer might have adopted.*'**
>
> **In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory reference to '*reasonably or unreasonably*' and not by reference to their subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their *decision* for that of the employer, that decision must not be reached by a process of substituting *themselves* for the employer and forming an opinion of what they would have done had they been the employer, which they were not.'**

> **49. Those passages make clear that, in applying the band of reasonable responses approach, it will not be a condition of an ET's decision that the employer's decision fell outside such band that the ET must conclude that the employer's decision was perverse. The task of the ET, sitting as an industrial jury, is simply to assess the reasonableness of the decision to dismiss against the objective standards of the hypothetical reasonable employer, measured by reference to the band of reasonable responses. In *Foley's* case, the tribunal found that the dismissal decision was within such band; and the court held that such finding could not regarded as erroneous in law, and so vulnerable to an appeal, unless it could be characterised as one that no reasonable tribunal could have reached – that is, that it was perverse.**
>
> **50. Whilst the guidance in *Foley* excludes any need for a tribunal to find that an employer's decision to dismiss was perverse before it can conclude that dismissal was unreasonable, I admit to some difficulty in understanding the nature of that guidance. If the tribunal's application of the band of reasonable responses approach informs it that dismissal in the particular case fell outside the band of reasonable responses that might be adopted by the hypothetical reasonable employer, that would appear to be equivalent to a conclusion that dismissal was a decision that, on the facts, no reasonable employer could have made. That would be akin to a finding of perversity. That said, I accept that the guidance in *Foley*, binding upon this court, is to the effect that appeals to concepts of perversity are out of place in the consideration of the reasonableness or otherwise of the dismissal: the approach that has to be applied is simply that of the 'band of reasonable responses.'"**

19. There have been shorter distillations of the principles; see, for example, the Judgment of Mummery LJ in **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, and **JJ Foods Services Ltd v Kefil** [2013] UKEAT/0320/12/SM, a decision of a division of this Tribunal presided over by the current President. Simple though dividing this matter into a three-stage or four-stage analysis might seem, history shows that the topic has always created difficulties for Employment Tribunals. Tracing the line of authority from **BHS v Burchell** [1980] IRLR 379 via **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17 through **Midland Bank plc v Madden/Foley v Post Office** [2000] ICR 1283, **J Sainsbury plc v Hitt** [2003] ICR 111, **Fuller v London Borough of Brent** [2011] IRLR 414, and, perhaps as a corollary to that case, the judgment of a division this Tribunal presided over by HHJ McMullen QC in **Circle Anglia Limited v Simons** UKEAT/0183/12/ZT and ending up with the **Barchester Healthcare** case to which we have just referred, two problems become apparent. The first problem is what Mummery LJ called, at paragraph 43 of the Judgment in **Small**, "the substitution mindset". This frequently beguiles the Employment Tribunal and leads it into error. The second problem is differentiating between that substitution, on the one hand, and identifying an error of law on the one hand because in a sense both involve the supplanting

of one opinion by another. This is the problem referred to by HHJ McMullen in **Circle Anglia Ltd v Simons**.

20. Ms Wolstenholme submits that here the Employment Tribunal has fallen into the substitution mindset. What we should do about that if we accept her submission, she says, is exercise our powers under section 35 of the **Employment Tribunals Act 1996** for the purposes of disposing of the appeal by actually deciding the issues ourselves.

21. She seeks to make good her submissions by analysing a number of errors which she identifies as having been made by the Employment Tribunal and which she submits reveals the substitution mindset. Firstly, there is the problem of the characterisation of the e-mail from the Claimant to Human Resources, which was forwarded to Dr Mack (see pages 163 to 167 of the bundle). The Employment Tribunal regarded it as making representations about the Claimant's previous history with Ms Anticoni (see paragraph 5.1.3.1) and therefore something which should not have been considered irrelevant. This, submits Ms Wolstenholme, overstates or mis-states the significance of the document because, firstly, Dr Mack had said at the disciplinary hearing that it raised issues that had to be dealt with elsewhere, that the hearing was concentrating on the issues as to what had happened to the patient and that it was an irrelevant document for present purposes. In her submission that was a rational approach to the e-mail. Secondly, there was no evidence that the investigation had been affected by the relationship between the Claimant and Dr Anticoni. Thirdly, in her skeleton argument, although not advanced in her oral submissions, she submitted that, in the Respondent's Answer, the Claimant appeared to accept that Dr Mack knew that there were issues between him and Ms Anticoni.

22. It seems to us that the latter is not really a point that bears upon what the Employment Tribunal decided. We can see nowhere in the decision that the

Employment Tribunal deal with this apparent knowledge on the part of the Claimant. Ms Wolstenholme submits that the reliance upon these representations is a substitution mindset. Here the Employment Tribunal has created a factual controversy where none existed either at the disciplinary hearing or at the appeal hearing. It should have considered instead whether the Employer had adopted a reasonable approach to this issue.

23. An alternative approach was that the Employment Tribunal had not reached an adequately reasoned decision on this part of the Judgment. It had not been explained why Dr Mack was unreasonable not to regard the material as relevant, nor has it been explained how it was relevant and how it made an impact on the dismissal.

24. The duty of the Employment Tribunal to give a fully reasoned decision is now set out in the Employment Tribunal Rules. At the time of the Judgment of this Tribunal in **Greenwood v NWF Retail Limited** [2011] ICR 896, one of the familiar authorities, the relevant rule was rule 30(6) of the Employment Tribunal Rules of Procedure 2004. In the 2013 Rules there is a parallel provision. As was explained in the Judgment of this Tribunal in **Greenwood v NWF Retail Limited**, the Employment Tribunal must comply with the requirements of the Rule. Sufficient compliance may well be articulating the factors identified by the Court of Appeal some considerable time ago in the case of **Meek v City of Birmingham DC** [1987] IRLR 250 and in the later case of **Balfour Beatty Power Networks Ltd v Wilcocks** [2007] IRLR 63. We accept Ms Wolstenholme's submission that the Employment Tribunal does not fully explain its conclusion that Dr Mack had been unreasonable in ruling the e-mail to be irrelevant.

25. She also made the point that analytically this matter belongs to an examination as to the reasonableness of the decision to dismiss, rather than the scope of the investigation. This is a

troubles us a good deal less. It is true that for the purpose of logical analysis the authorities have divided the approach into a number of stages, but we do not think that it necessarily matters if a good point is wrongly assigned to one stage as opposed to another. That, of course, begs the question as to whether this is a good or a bad point. We are not so sure that it amounts to an example of the substitution mindset. Now that we have seen the e-mail, which was not originally included in the bundle, it does look to us as though this raises a number of pertinent questions. It is true that the Claimant never raised this issue at the disciplinary hearing and never suggested to Dr Mack that this matter was being prosecuted by Ms Anticoni as a result of the difficulty that had grown up between them over making his position permanent. But this was a matter which should have been followed through by the Employment Tribunal; it was unsatisfactory to leave it hanging in the air.

26. The second matter advanced by Ms Wolstenholme in support of her contention that the Employment Tribunal has fallen into the substitution mindset seems to us much clearer. It arises out of paragraph 5.1.3.2 and rests on the premise that the investigative report was accepted without challenge and without an opportunity to test the evidence. The Employment Tribunal concluded that this resulted in an unacceptable preference by Dr Mack for untested evidence. It might well be, as Ms Wolstenholme says, that this belongs analytically to the first stage, namely deciding whether there is a genuine belief in misconduct, but it does seem to us that it is predicated on the basis there is some imbalance in the employee facing written statements without an opportunity to test the evidence. In one sense, there is. But the Employment Tribunal's decision does not address the reasonableness of that. One can quite see that the prospect of elderly patients being called before a disciplinary hearing is one that an employer might wish to avoid. There may be other ways of tackling the difficulty; perhaps the employee could address some questions in written form to the patients. But none of that has been explored by the Employment Tribunal, which regards the acceptance of untested

evidence as unreasonable and, in the broad way in which it is stated in the Judgment, it does seems to us that it betrays the substitution mindset. There is no explanation as to why it was unreasonable of Dr Mack to accept the report. The Employment Tribunal do not appear at other parts of the Judgment to criticise the management policy of not calling patients, nor did the Claimant ask for the patients to be called. In our Judgment, the Employment Tribunal did not ask themselves the right question about that issue, namely whether it would be unreasonable not to call the patients as witnesses or not to devise some alternative method of allowing the evidence to be tested.

27. Thirdly, the Employment Tribunal point out at paragraph 5.1.3.3 that the investigation was brief and did not extend to checking the Claimant's written records. That appears to be factually incorrect in a limited sense, namely that the investigation had looked into the Claimant's training. Moreover the investigation had not been concluded on the morning of the incident. It continued for some time. Indeed, in his submissions to us today, Mr Shah has complained that the nurse was not interviewed until a week later. He himself was interviewed on 12 August, eight days later.

28. The very specific point being made by the Employment Tribunal, however, is that the record was never checked to see if the Claimant recorded refusals. But even if the record had showed that on previous occasions he had recorded refusals we do not think this would have taken the matter very far. But it does reveal an entirely different problem. In fact, it appears, as a result of submissions made to us, that the record was checked at the Employment Tribunal because an issue arose as to whether or not this was a routine taking of blood, something which would be expected to be performed by a phlebotomist. The issue arose because there was debate as to whether or not it was the Claimant who was involved. Apparently the Employment Tribunal caused the records to be checked. They had not been checked before.

They did reveal that this was a routine blood test. Whilst not of itself of great significance, this does give some insight into the fact that the Employment Tribunal appears to have got rather confused as to its function. Looking into the record to establish at the Employment Tribunal hearing what the record showed is a fact-finding exercise by the Tribunal. It was something that it should not have indulged in. The Employment Tribunal should have been concerned with the reasonableness of the fact-finding exercise that had been conducted by the employer. It is a small point but it also a clue that something has gone amiss in this case.

29. The fourth matter raised is that the Employment Tribunal criticised the conduct of the hearing in not attempting to assist the Claimant with his recollection. This is dealt with at paragraph 5.1.3.4 of the Judgment. As Ms Wolstenholme points out, this has to be considered against the background of the way in which the evidence unfolded. Mr Shah, the Claimant, is very familiar with the layout. When he was asked, he indicated that he recollected where the respective patients had been and who they were. Later, at the disciplinary hearing, he said that he did not remember that the patient had refused. We accept Ms Wolstenholme's submission that the Employment Tribunal here have failed to explain why it was unreasonable of the disciplinary panel not to prompt the Claimant at this point. It seems to us that the Employment Tribunal was imposing its own standard and not considering the reasonableness of the standard adopted by the disciplinary tribunal when considered against the facts as to what had actually happened at the disciplinary tribunal.

30. Paragraph 5.1.3.5 raises the fifth point in the Employment Tribunal's analysis of the apparent flaws in the investigation and gives rise to Ms Wolstenholme's fifth criticism. The Employment Tribunal had a witness statement from Ms Anticoni about the appearance of the person taking the blood. It described the person taking the blood as an Indian with grey hair. The Employment Tribunal was concerned that the Claimant did not have grey hair. They felt

that further inquiry ought to have been made. Ms Wolstenholme points out that this issue really merged with the sixth issue, namely that the description of the Claimant given to Ms Anticoni did not appear in the papers that went to the disciplinary hearing and so description was not an issue. This too suggests too much forensic analysis by the Employment Tribunal as opposed to considering the reasonableness of the Employer's conduct of the disciplinary process.

31. The Employment Tribunal appear to have investigated this all at the hearing. Again, this is fact-finding by the Employment Tribunal. What it needed to consider was the extent to which it was reasonable for Ms Anticoni not to have included that description in the report present to the disciplinary hearing. That is absent from the Employment Tribunal's analysis. There has been a submission addressed to us by Ms Wolstenholme that none of this matters. It was a routine blood sample. It must have been taken by a phlebotomist. The only phlebotomist assigned to this ward was the Claimant, and his appearance might have been different. This was a spirited piece of advocacy on her part, but it seems to us that it reflects the second problem that these cases raise, namely to what extent, as an appellate Tribunal, we can start looking again at the factual material that was before the Employment Tribunal. We would be in danger of ourselves indulging in the same error of substitution. We would be substituting our view for their view, a kind of "double whammy" in colloquial modern terminology.

32. Finally, it is said at paragraph 5.1.3.7 of the Judgment that insufficient consideration was given as to why the Claimant would have taken blood without the consent of the patient. This is a point that ties up with the point about the record. But on examination, without any disrespect to the Employment Tribunal, it seems us to be what might be called a jury point and it is another indication that the Employment Tribunal has started to investigate the matter itself

as opposed to deciding whether the conclusions reached by the disciplinary panel and the appeal panel were unreasonable.

33. The Employment Tribunal identified three flaws in relation to procedure at paragraphs 5.1.5.2, 5.1.5.3 and 5.1.5.4. Ms Wolstenholme submits that these are all prime examples of substitution. The test is not whether there were flaws in the procedure but whether the procedure fell within the band of reasonable procedures that would be adopted by a reasonable employer in the circumstances.

34. We do not think there is much in Ms Wolstenholme's submission about the use of the word "appropriate". Nevertheless it does seem to us that this passage of the Employment Tribunal's Judgment calls for close scrutiny. She also submits that the findings are perverse. No allegation of bias or apparent bias was made against Dr Mack, and it was never suggested that it had been unreasonable for him to preside over the hearing. The allegation that he was influenced by extraneous issues, namely the newspaper article and the CQC investigation, is simply stated, but its origins are not all explored or reasoned out in the Judgment. It is not even clear, on the evidence, whether or not he had ever seen the article. Certainly, it is not clear how the CQC investigation could be regarded as having been an extraneous issue.

35. The so-called inconsistent labelling raised in these paragraphs was not suggested by the Employment Tribunal to have led to any confusion as to what the substance of the case was about. Ms Wolstenholme submitted, we think quite rightly, that whatever label was applied, the factual matrix was the same. Nor does it seem to us to have been explained how what the Employment Tribunal held to be an overly formal disciplinary procedure disadvantaged the Claimant. It is obvious that the Claimant was unrepresented and is a man for whom English is not his first language. But beyond that, we cannot understand how the Employment Tribunal

has reached the conclusion was the hearing was overly formal. Indeed that is not the right question. The right question is whether a reasonable employer, in the circumstances, could have adopted a similar procedure.

36. One then comes back to paragraph 5.1.7, which we have quoted above in this Judgment. Ms Wolstenholme submits that here the Employment Tribunal are imposing their own sanction and this is a classic illustration of substitution. We are not so sure. The passage seems to us to deserve to be read as a whole. Much turns on the conclusion of the Employment Tribunal that this matter started out not being regarded as in the category of gross misconduct. It seems to us it is arguable that the contemporaneous documentation does not make it explicit that it was gross misconduct. All depends on the explanation proffered by Miss Tear of the HR Department, who, in the absence of Dr Mack, was the only witness who could explain what had happened. The notes of the disciplinary hearing and the letter do not state that the Claimant was dismissed for gross misconduct, nor was he summarily dismissed.

37. The Employment Tribunal end, at paragraph 5.1.7, with the sentence:

> **"We find that the Respondent has, after the event, recategorised the incident as gross misconduct."**

Ms Wolstenholme pointed to various parts of the evidence that made that an untenable conclusion. But the fact remains that the Employment Tribunal may have rejected that evidence. We cannot be absolutely confident that here the Employment Tribunal has reached a conclusion that no reasonable Tribunal, directing itself on the evidence, could have reached. The Employment Tribunal is entitled to reject the evidence of witnesses.

Conclusion

38. Taken as a whole, however, the Employment Tribunal's decision is, in our judgment, unsatisfactory to the extent of being erroneous in law. It contains enough material to suggest that the Employment Tribunal, whilst starting out well by directing themselves in terms of the **BHS v Burchell** case, has actually slipped into what Mummery LJ called the substitution mindset as the decision has unfolded. Moreover it seems to us that large parts of the Judgment consist of assertion without any explanation as to how the conclusions have been arrived at.

39. Accordingly, we will allow the appeal. The question that we have to decide is what we are to do. We are not attracted by Ms Wolstenholme's submission that the material here is so clear that we can, under section 35 of the **Employment Tribunals Act,** in effect, substitute our own decision for that of the Tribunal. As we have endeavoured to explain during the course of this Judgment, that would be to risk substitution on substitution. It seems to us that this matter must go back to a differently constituted Employment Tribunal for a complete re-hearing. We say that with regret in a case that has already occupied three days and where the compensation awarded was about £4,000. Nevertheless, we do not think that we would be engaging in any other process except deciding a case ourselves on partial evidence without hearing the witnesses. This is not such a clear case that the proper disposal of the appeal calls for us to take on the powers of the Employment Tribunal. Accordingly, it will go back as directed.