Appeal No. UKEAT/0292/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 January 2014
Judgment handed down on 20 March 2014

Before

HER HONOUR JUDGE EADY QC

MR D G SMITH

MR P M SMITH

MR S M MONJI — APPELLANT

BOOTS MANAGEMENT SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS SALLY ROBERTSON (of Counsel) Free Representation Unit Ground Floor 60 Gray's Inn Road London WC1X 8LU
For the Respondent	MR SIMON HALE (of Counsel) Instructed by: Geldards LLP The Arc Enterprise Way Nottingham NG2 1EN

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Unfair dismissal. Whether Employment Tribunal adopted the correct approach in a case where the potential consequences for the employee were sufficiently grave that this was a relevant circumstance for the purpose of s.98(4) **Employment Rights Act 1996** and warranted a heightened assessment of the Respondent's investigation and decision, see **A v B** [2003] IRLR 405, EAT and **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721, CA.

Held: notwithstanding the ET's failure to make express reference to the **Roldan** line of authorities, it was entitled to reach the view that it had. The evidence taken into account by the Respondent was not dependent upon the word of one witness and the investigation and decision taken withstood the more stringent assessment required in such cases.

HER HONOUR JUDGE EADY QC

Introduction

1. This case raises questions as to the approach adopted by an Employment Tribunal on a claim of unfair dismissal where – it was common ground - the stakes were sufficiently high that this consequence was itself a relevant circumstance for **Employment Rights Act 1996** s.98(4) purposes.

2. We refer to the parties as Claimant and Respondent as they were before the ET below.

3. This is an appeal by the Claimant, against a Judgment of the Employment Tribunal, chaired by Employment Judge Bedeau sitting with members, at Watford, on 5-9 March 2012, the reserved Judgment and reasons being sent to the parties on 30 May 2012.

4. The Claimant represented himself before the ET but before us was represented by Ms Robertson, counsel. The Respondent was represented both before the ET and here by Mr Hale, counsel.

5. Before the ET, the Claimant had claimed unfair dismissal, race discrimination, wrongful dismissal, unpaid holiday, breach of contract in respect of time off in lieu, breach of contract in respect of an unpaid honorarium, and unauthorised deduction of wages in respect of non-payment of sick pay. All the claims were dismissed save for the last three. The only claim in issue on appeal, however, is that of unfair dismissal.

6. On the unfair dismissal claim, the Respondent had contended that the Claimant was dismissed for a statutorily permissible reason, i.e. for a reason related to his conduct.

Specifically, it was the Respondent's case that it dismissed the Claimant because it honestly and reasonably believed that he had stolen fragrance testers.

7. It is to be noted that, under the separate heading of the wrongful dismissal claim, the ET itself found – on the balance of probabilities – that the Claimant had indeed been guilty of the misconduct relied on by the Respondent (see para. 34). The Claimant does not appeal against this finding but contends that the ET impermissibly allowed its conclusion in respect of wrongful dismissal to influence its consideration of the unfair dismissal claim.

The issues before the Employment Tribunal

8. The issues, as defined by the Employment Tribunal in respect of the unfair dismissal claim, were as set out at paragraph 4 of the written Reasons, as follows:

> **"4. Unfair Dismissal**
> **4.1 What was the reason for the claimant's dismissal? Is that a potentially fair reason within s.98 Employment Rights Act 1996?**
> **4.2 Was a fair procedure followed in that; was there a reasonable investigation, and on the basis of that investigation did the respondent hold a reasonable belief in the guilt of the claimant.**
> **4.3 Was dismissal within the bands of reasonable responses open to the respondent?**
> **4.4 Was dismissal reasonable in all the circumstances of the case?"**

9. No challenge is made to the ET's summation of the issues in this regard.

The background facts

10. The Claimant is a pharmacist by training, was registered as such by the General Pharmaceutical Council at the time of the events in issue, and was employed by the Respondent from 26 November 1990 until his dismissal with effect from 10 November 2010. For a number of years he had been employed as a store manager; from 2005, at the Respondent's Whetstone store.

11. The Respondent is a large, well-known pharmacy led healthcare retailer. It employs some 60,000 people at its various shop premises in Great Britain. It has a disciplinary procedure set out in the staff handbook, that expressly identifies that "stealing, damaging or destroying property belonging to Boots, fellow employees, customers, suppliers or visitors" will constitute gross misconduct. The ET further recorded:

> **"The respondent's store employees are warned that it takes all allegations of theft or fraud very seriously and all incidents will be investigated. The procedure allows for disciplinary action to be taken and for that to be appealed. Where there has been potentially serious infringement of the respondent's rules and standards of behaviour, the employee may be suspended from work on normal pay while the matter is fully investigated. …" [para. 12.11]**

12. As already noted, the Claimant's dismissal was for gross misconduct. It was alleged that he had stolen a substantial number of fragrance testers (the bottles of perfume etc supplied so that customers can try out different fragrances in stores, with a view to potential future purchases). On the Employment Tribunal's findings, the case against him comprised the following features:

a. On 22 September 2010, he ordered a substantial number (several hundred) of fragrance testers.

b. As store manager, the Claimant had authority to place such an order, although in practice a Ms Romanczuk, beauty consultant, was responsible for placing such orders at the Whetstone store and she had placed an earlier order for 25 testers on Monday 20 September 2010.

c. The Claimant had been away from work from 16 August 2010 – 20 September 2010 (initially on annual leave, then on sick leave); ordering testers so soon after his return would not have been a priority.

d. The testers ordered by the Claimant were delivered to the store on Friday, 24 September 2010. The delivery of so large a number of testers caused another member of management, Ms Tailor, to alert the profit protection manager, Mr Henrich; Ms

Romanczuk had told Ms Tailor that these were not the testers she had ordered, some were for fragrance not stocked in that store and it was unclear why the store should need so many testers. Ms Tailor was concerned something would happen to them over the weekend.

e. Mr Henrich made arrangements to attend the Whetstone store to monitor the loading bay and car park areas that evening. Upon his initial arrival, he had noted where the Claimant's car had been parked and, returning later that evening, he then observed that it had been moved to the loading bay area.

f. Mr Henrich was continuing his surveillance of the loading bay area when, he said, he saw the Claimant walk from the rear of the store to the boot of his car holding one of the Respondent's blue trays, with a number of smaller boxes on top, and then place those items in the rear of his car. The Claimant then went out of view for a short period but again walked from the rear of the store to his car holding another blue tray, which he put into his car, before closing the boot and getting into the car as if to drive away.

g. Mr Henrich moved his own car to try to block the Claimant's exit, got out and walked towards the Claimant's car, facing the driver. Mr Henrich's evidence was that he could clearly see the Claimant and there was eye-to-eye contact between them. He – Mr Henrich - had held out his hand with his palm open to signal that the Claimant should stop but he did not do so and instead manoeuvred his car around Mr Henrich's vehicle and drove away, notwithstanding Mr Henrich's shouting and banging on the rear of the Claimant's car as he did so.

h. Mr Henrich also related how he and Ms Tailor had then carried out a cursory search of the store but were unable to locate any of the fragrance testers Ms Tailor had seen earlier. A more thorough search was carried out on Sunday 26 September, by Mr

Henrich and Mr Maloo, a team leader assisting at the Whetstone store, but still the testers could not be found.

i. On Saturday 25 September, together with Mr Miller, the profit protection manager, Mr Henrich returned to the store and took notes during an interview with the Claimant. Asked why he had not stopped the previous evening, the Claimant responded "oh, was that you? I didn't realise". He volunteered that he had in fact taken three empty trays and a yellow dolly and put these into the rear of his car.

j. Further, Mr Maloo, who knew the Claimant socially, told how the Claimant had contacted him on the evening of 24 September and, when they had spoken, had confessed to having "taken some testers" and of Mr Henrich having seen him. Mr Maloo's evidence was that the Claimant had seemed distressed and asked what he was to do. He said he later received further calls from the Claimant that evening, similarly seeming distressed and worried about what he had done. He also said that he had been contacted by one of the Claimant's sisters the following day and, on Sunday, Mr Maloo had been working at the store when he received a further call from the Claimant saying that he wanted to return the fragrance testers to the store and either he or his sister would do so. Mr Maloo had sought to curtail the discussion as he had not wanted to get involved. Later that day, however, the Claimant again contacted him, initially through his sister again, and Mr Maloo sought to dissuade him from returning the testers to the store, mentioning that Mr Henrich and other managers were present reviewing CCTV footage.

k. Meanwhile, Mr Miller was continuing to carry out interviews with staff at the store, including a Mr Chawla, a shop assistant, who referred to overhearing a conversation between the Claimant and Mr Maloo and a reference to the toilets. Mr Miller

interviewed Mr Maloo himself on 29 September and was told of the various conversations with the Claimant and his sister.

l. The testers were found on Monday, 27 September 2010, when the premises were opened, in the disabled toilet. CCTV footage showed that the previous day, shortly before closing time, a female in a large raincoat, with the hood pulled over her head so as to obscure her face, had pulled a large, dark suitcase straight into the toilet and had then exited some five minutes later. About an hour earlier, the contract cleaner had cleaned that toilet and provided a statement saying that she had not seen any testers at that time. The Tribunal also stated that, some ten minutes before the unidentified female had entered the toilet, another staff member's mother had been seen entering it but she was carrying nothing with her. This was, however, inaccurate: the employee's mother had entered after the unidentified female (see submissions on appeal below).

m. The Claimant was again interviewed on 30 September 2010, by a Mr Millam, of the Respondent, with Mr Miller as note-taker. He volunteered that Mr Maloo had met him to collect a sim card for a mobile phone and that they had spoken on the Saturday but not the Sunday. He suggested that it might have been Mr Maloo who was responsible for the theft of the testers but it was observed that that was not possible as Mr Maloo had been working at a different store at the time when the testers were taken. There was a further interview with the Claimant on 4 October, when he said that he recalled contacting Mr Maloo on Sunday 26 September to discuss customer care figures. When Mr Maloo's account was put to the Claimant, he denied it was true although was unable to suggest why Mr Maloo should lie.

13. The Claimant attended a disciplinary hearing, conducted by Ms Sloper, a Regional Manager of the Respondent, on 28 October 2010 and acknowledged that he had placed the

order for the fragrance testers and these had been delivered on Friday 24 September. He accepted that he had moved his car during that evening, saying it would get lots of "knocks" on it, albeit that it was not in dispute that there were fewer cars in the car park at that time in the evening. He questioned Mr Henrich's account of events and denied the various calls to/from Mr Maloo, saying that the records showing calls received from/made to his number in fact related to the sim card he had given to Mr Maloo.

14. Ms Sloper then carried out further investigations, including interviewing Mr Henrich, who maintained his account, and Mr Maloo, who equally held to his earlier statement and denied that he had received a sim card from the Claimant. Others were also interviewed and Ms Sloper visited the car park with Mr Henrich and satisfied herself that there had been no obstruction in Mr Henrich's line of vision.

15. The disciplinary hearing with the Claimant resumed on 9 November 2010. He contended he had been targeted and disputed the accounts given by the various witnesses, including Mr Henrich, and suggested that Ms Tailor might have been the culprit.

16. On 10 November 2010, Ms Sloper informed the Claimant that she had decided that he should be dismissed summarily for gross misconduct. She took into account that he would not normally order fragrance testers, particularly so soon after a period of absence, that the order had included fragrances not sold in that store, the disappearance of the testers from the store and the evidence of Mr Henrich about the Claimant's movements in the car park and loading area on the Friday evening, including his failing to stop when Mr Henrich made clear his request that he did so. Whilst she could not rule out that other staff members had been involved in stealing fragrance testers, this did not absolve the Claimant and she believed that he had

been guilty of this theft. She had regard to his length of service but considered this was gross misconduct and warranted his dismissal.

17. The Claimant exercised his right of appeal to Mr Iley, the regional manager. He requested and was provided with some further evidence, including some CCTV footage, prior to the appeal hearing. He also prepared his own DVD reconstruction of the scene in the car park, together with a prepared report prepared by an independent witness. Mr Iley conducted some further investigations himself, including a visit to the car park, along with Mr Henrich, and made his own observations, having regard to what he had seen on the Claimant's DVD. The Claimant was made aware of Mr Iley's further investigations but it proved difficult to arrange a further meeting and ultimately Mr Iley concluded the appeal process without further input from the Claimant.

18. Mr Iley rejected the appeal. He provided a detailed written decision, observing how surprising it was that the Claimant should have put in an order for so many fragrance testers, when this would have been the function of the beauty consultant and would not have been the Claimant's priority on returning from leave. He found Claimant's explanation about moving his car to have been implausible and accepted Mr Henrich's evidence and Mr Maloo's account of his phone conversations with the Claimant. He also noted that, since the Claimant's dismissal, there had been a number of customers asking for him in the store, stating that the Claimant had previously sold them fragrance testers for cash at discounted prices.

19. The above narrative is taken from the ET's findings of fact (at paras. 12.1-12.75), made after hearing from the Claimant and from six witnesses for the Respondent and by reference to over 1,000 pages of documents in the jointly produced bundle.

The Employment Tribunal Judgment

20. No issue is taken with the Employment Tribunal's self-direction as to the relevant legal principles. In seeking to apply those principles to the facts as found, the ET concluded that the Respondent had shown that the reason for the Claimant's dismissal was indeed that he had stolen its fragrance testers, a reason that fell within the conduct provision at s.98(2)(b) **Employment Rights Act 1996**, and was a potentially fair reason for dismissal.

21. The ET expressly applied the guidance set out in **BHS v Burchell** [1980] ICR 303, EAT and concluded that, although not without deficiencies, the Respondent's investigation fell within the "band of reasonableness" (para. 29) and that it had formed "a genuine belief in the claimant's guilt", which was founded upon the evidence available to Ms Sloper, in particular (see para. 30):

> **"There was evidence before her that [the claimant] had ordered testers within three days following his long period of absence. The evidence of Mr Henrich tied in with the evidence given by Mr Maloo. Shortly after Mr Maloo's discussions with the claimant came to an end on Sunday 26 September, an unidentified female enters the store and made her way to the disabled toilet. The reasonable conclusion was that she returned the testers after the claimant's conversations with Mr Maloo. The claimant's reason for moving his car one hour prior to his departure was not accepted."**

22. The ET then had regard to the appeal process and was satisfied that there was a reasonable investigation at that stage and that the Claimant had been given the opportunity to put forward his grounds of appeal.

23. In considering whether it was reasonable to dismiss the Claimant for the reason in the Respondent's mind in this case, the ET directed itself that it was not to put itself in the position of the reasonable employer; its role was "simply to review what was in the possession of the

respondent at the time". Applying that test, the ET concluded that, in the circumstances of this case, the Claimant's dismissal "fell within the range of reasonable responses" [para. 32].

The appeal

24. The Claimant appeals against that Judgment.

25. The original Notice of Appeal was rejected on the papers by His Honour Judge Peter Clark. His reasons were sent to the Claimant on 15 August 2012, and he opined:

> **"Theft by a store manager is a fundamental breach of trust. The evidence against the Claimant including his admission to Mr Maloo, which the Respondent accepted (as did the Employment Tribunal in relation to the wrongful dismissal claim) was compelling. At the very least the *Burchell* test, was, the Employment Tribunal permissibly found, 'satisfied'. As the Court of Appeal have said repeatedly in the last year it is not for the Employment Appeal Tribunal to substitute its view for that of the Employment Tribunal (see, most recently, *Graham v DWP* (2012) EWCA Civ 903."**

26. A fresh Notice of Appeal was submitted by the Claimant but also rejected on the papers by the Honourable Mrs Justice Cox, reasoning:

> **"The Claimant has submitted a fresh Notice of Appeal, which is both lengthy and detailed but the issues raised are clearly factual and seek essentially to revisit the evidence. Describing findings of the employment tribunal as errors of law does not make them so.**
>
> **In this case I can identify no arguable error of law in the judgment. In particular I do not consider it arguable that the tribunal misapplied the '*Burchell*' test as alleged. They properly identified and addressed the issues, directly themselves correctly as to the relevant law, made findings of fact adverse to the Claimant's case and arrived at properly reasoned conclusions."**

27. Having sought an oral hearing - as was his entitlement pursuant to r.3(10) of the EAT Rules 1993 – the Claimant persuaded His Honour Judge David Richardson that there were arguable points that should be permitted – in part – to proceed for full hearing. In particular: (1) whether the ET erred in regarding Ms Sloper as having taken account of Mr Maloo's evidence when she did not in fact do so; (2) whether the ET failed to follow the guidance laid down in cases such as **A v B** [2003] IRLR 405, EAT and **Salford Royal NHS Foundation**

Trust v Roldan [2010] IRLR 721, CA; (3) whether the ET gave proper regard to the apparent unfairness in the roles played by Mr Henrich in the disciplinary process; and (4) whether the ET failed to have regard to an earlier order placed by Ms Romanczuk using the Claimant's initial, the total number of testers delivered having included both this and the order actually placed by the Claimant himself.

Claimant's submissions

28. Before us, at the oral hearing of this appeal, Ms Robertson made the general observation that, although para. 32 of the ET's Judgment was a correct statement of the law, it also reflected the Tribunal's passive approach in this case and that was wrong as this was a potentially career-threatening dismissal (see the **Roldan** line of authorities). Not substituting the Tribunal's view for that of the reasonable employer did not mean failing to carry out a heightened assessment in such cases.

29. Turning to the individual grounds of appeal, first the Claimant complained that the ET had substituted its view for that of the employer in adding in a reference to Mr Maloo's evidence when that had not featured in Ms Sloper's dismissal letter or witness statement but reflected the ET's view of the importance of this evidence in its decision on the wrongful dismissal claim.

30. Second, the ET made a number of errors in its findings of fact, all of which evidenced its failure to take a proactive approach, contrary to the guidance in **Roldan**. In particular: (a) although the ET found that no-one entered the disabled toilet after the unidentified female (para. 12.40), the agreed note of the evidence recorded that in fact the mother of the member of staff who entered that toilet did so *after* the unidentified female and yet apparently saw no

fragrance testers, (b) the ET failed to have regard to a number of the points raised by the Claimant in his grievance letter, including that other witnesses were present in the car park on Friday 24 September 2010 (the ET were simply wrong to state that there were no other witnesses), yet were not approached by Mr Henrich; and (c) no regard was had to the failure to invite the Claimant to participate in the car park re-enactment. These were substantive points that may have made a real difference; once a narrative starts to unravel, it is very often shown to be open to question in its entirety.

31. The third point was a continuation of the second, with the focus on the ET's failure to properly consider where its (legitimate) criticisms of Mr Henrich's roles inevitably led. There was no indication that the ET considered whether evidence had been contaminated by his presence in the Claimant's and others (including Mr Maloo's) interviews.

32. There was an additional point relating to the introduction of new evidence at the appeal stage, (a) as to the greater emphasis placed on Mr Maloo's evidence and (b) as regards the note about customers referring to the Claimant's previous selling of fragrance testers – there being no opportunity provided for the Claimant to address this point.

33. Finally, there was some confusion as to whether Ms Romanczuk had placed her order for the fragrance testers on 20 or 22 September 2010.

34. Stepping back from these points, the question that needed to be asked – per Sir John Donaldson in **Dobie v Burns International Security Services (UK) Ltd** [1984] ICR 812, EAT – was not whether the conclusion of the ET was plainly wrong but whether it was plainly and unarguably right, notwithstanding the misdirections identified.

Respondent's submissions

35. Also by way of general observation, Mr Hale contended that the appeal was really an attempt to re-argue a number of issues of fact. There was a large measure of agreement as to the legal principles to be applied and the Respondent took no issue with the **Roldan** line of authorities. This appeal was, however, seeking to invite the EAT to substitute its view for that of the ET, contrary to the warning of Mummery LJ in **Brent LBC v Fuller** [2011] ICR 806, CA, and the EAT should be astute to avoid doing that. Here the key was to read the ET's Reasons in the right way: to look at what was in the Judgment and not at what was not. The ET in this case correctly directed itself with regard to s.98(4) and the **Burchell** guidelines. It had proper regard to **Roldan** and **A v B**, indeed it was apparent that some parts of its self-direction were taken from those authorities.

36. On the specific grounds of appeal, the first criticism ignored the oral evidence given by Ms Sloper, which attested to the fact that she had had regard to Mr Maloo's evidence: "I had considered his account and it formed part of my belief", albeit that she had not referred to this matter in the dismissal letter, having "only put down key ones".

37. As for the evidential points made under the general criticism of the ET's alleged failure to adopt a proactive approach: (a) that another woman entered the disabled toilet after the unidentified female went nowhere: the CCTV footage showed she was carrying nothing with her, she could not have left the testers there and there was no evidence of anyone else (but the woman with the suitcase) doing so; (b) equally, the presence or otherwise of others in the car park went nowhere, given that Ms Sloper tested Mr Henrich's evidence and had determined to accept it: to the extent that the ET had made a factual error in this regard, it was of no

consequence; and (c) the Claimant had provided his 'reconstruction' and this was taken into account alongside Mr Iley's own view of the car park and the ET was entitled to view the disciplinary process (including the appeal) in the round.

38. As for the third ground: the ET made an express finding about Mr Henrich's role and concluded that – notwithstanding the criticism made – this did not take the dismissal outside the range of reasonable responses. It was not open for the EAT to go behind that and to substitute its view for that of the ET.

39. Fourth, the only new point at the appeal outcome stage was the reference to the customer enquiries. The Respondent accepted that this should not have been referred to by Mr Iley as it had not been put to the Claimant but it was plainly an after-thought and not a foundation of the decision. This was, in truth, a very small point.

40. Lastly, on the ordering of the fragrance testers, it had never been part of the Claimant's case in the disciplinary process that there was any confusion: he had ordered the testers that had been delivered and then gone missing. Indeed, the evidence before the ET was that he had admitted placing the crucial order (an admission corroborated by other evidence) and the ET had properly made a finding of fact in that regard (see para. 12.30).

<u>The relevant legal principles</u>

41. Section 98(1) and (2) of the **Employment Rights Act 1996** provide that misconduct is a potentially fair reason for dismissal. The touch-stone in this case (for the ET and for us) is, however, s.98(4) **Employment Rights Act 1996**, which provides as follows:

> **"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."**

42. In a misconduct dismissal case, the standards, laid down by Arnold J, giving judgment for the EAT in the seminal case of **British Home Stores Ltd v Burchell** [1980] ICR 303, provide useful guidance for all Tribunals charged with determining such an unfair dismissal claim:

> **"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further.**
>
> **It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure" as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt". The test, and the test all the way through, is reasonableness, and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion."**

43. It was not the Claimant's case in the present appeal that by its self-direction at para. 32, the ET failed to direct itself in accordance with the **Burchell** guidance; the ET correctly identified that its role was to review the employer's decision, not to put itself in the position of the reasonable employer, see **Davies v Sandwell MBC** [2013] IRLR 374, per Lewison LJ at para. 33. Furthermore, when considering the investigation carried out by the employer, the test

remained whether the Respondent's behaviour fell within the range of reasonable responses, see per Mummery LJ in **J Sainsbury plc v Hitt** [2003] ICR 111.

44. That said, in **A v B** [2003] IRLR 405, the EAT noted that the relevant circumstances for s.98(4) purposes will include the gravity of the charge and the potential effect upon the employee. Where disputed, serious allegations of criminal misbehaviour (particularly where these might have an impact upon the employee's future career) must be the subject of the most careful investigation, albeit usually conducted by laymen and not lawyers. The requirement is not that the employer adopts the safeguards of a criminal trial but that a careful and conscientious investigation of the facts is carried out and inquiries should focus no less on any potential evidence that may exculpate or point towards the employee's innocence as the evidence that might prove the charges in question.

45. A similar approach was adopted by the Court of Appeal in **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721, in which Elias LJ emphasised:

> **"… it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where ... the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite."**

46. Further, where there is an allegation of misconduct and the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, evidence to provide corroboration one way or the other, Elias LJ observed that an employer is not obliged to simply believe one account and to disbelieve the other. In that case, the ET had been entitled to find the dismissal unfair where the employer had failed to test the evidence of the accuser where it had been possible to do so: "It is common experience that if part of a story begins to unravel, other aspects may do so also. Doubts begin to emerge, and the interpretation of actions changes."

47. See, to similar effect, **William Hill Organisation Ltd v Steele and anor** UKEAT/154/08, **Crawford v Suffolk Mental Health Partnership NHS Trust** [2012] IRLR 402, CA and the decision of the Court of Session in **Sneddon v Carr-Gomm Scotland Ltd** [2012] IRLR 820. We further note the Court of Appeal's acknowledgement in **Turner v East Midlands Trains Ltd** [2013] ICR 525, that it is the fact that the band of reasonable responses test allows for a heightened standard to be adopted in cases where the consequences for the employee are particularly grave, that can ensure compliance with Article 8 **ECHR** (albeit that Article 8 would not be applicable where the employee had brought those consequences upon herself by her own wrongdoing).

48. In **Roldan**, the Court of Appeal observed that, where it was not disputed that the ET had properly directed itself in accordance with the **Burchell** principles (as further explained in **A v B**), unless there was a proper basis for saying that the ET had simply failed to follow its own self-direction, the EAT should not interfere with the decision unless there was no proper evidential basis for it or unless the conclusion was perverse (a very high hurdle, see **Yeboah v Crofton** [2002] IRLR 634, CA).

49. Certainly it is not for the EAT to substitute its view for that of the ET, and we bear in mind the observations of Mummery LJ in **Brent LBC v Fuller** [2011] ICR 806, CA:

> **"28. The appellate body, whether the Employment Appeal Tribunal or this court, must be on its guard against making the very same legal error as the tribunal stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the tribunal without committing error of law or reaching a perverse decision on that point."**

And:

> **"30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

50. In a similar vein, we note that small errors of fact on the part of the ET will not necessarily be fatal, see **London Ambulance Service v Small** [2009] IRLR 563, CA. Moreover, in addressing the questions it has to determine, an ET is not obliged to resolve (or address in its Judgment) every issue of fact or law put before it by a party, see **High Table Ltd v Horst** [1998] ICR 409, 420 E-F, per Peter Gibson LJ.

51. Should, however, we conclude that the ET misdirected itself then we are bound to uphold a challenge to it on appeal unless we take the view that, notwithstanding such misdirection, the decision is still plainly and unarguably right, per Sir John Donaldson in **Dobie v Burns International Security Services (UK) Ltd** [1984] ICR 812, EAT.

Discussion and conclusions

52. This is not a case where it was argued that the ET erred in its self-direction as to the approach it was to adopt; Ms Robertson expressly accepted that para. 32 of the ET's Judgment set out the correct legal direction. We are, moreover, informed that the Tribunal was taken to **Roldan** and **A v B**, and we can see (for instance, at para. 29) that it adopted similar language to that used in **A v B** when reaching its conclusions in this case. The question for us is whether the ET *in fact* correctly applied the law it had itself identified as applicable to its determination of the unfair dismissal claim before it.

53. In carrying out this exercise, we must ourselves be on guard against substituting our own response for that of the ET. We bear in mind that we have to approach the ET's Judgment as a whole, albeit noting that we are concerned with only one part of that Judgment; this ET had to determine a number of separate claims, applying different tests in each.

54. To fairly assess the challenge made in this appeal, it seems to us appropriate to consider both the detailed arguments and then to stand back and take stock of the Tribunal's decision as a whole.

55. The first complaint was that the ET substituted its view for that of the employer by allowing that the evidence of the Claimant's colleague, Mr Maloo, had formed part of the basis for the decision to dismiss when, in fact, it had not been referred to in the dismissal letter or in the dismissing manager's witness statement. The objection arose from the ET's observation (para. 30) that the evidence of Mr Henrich "tied in with the evidence given by Mr Maloo". In making this challenge, Ms Robertson accepted that Ms Sloper had stated in cross-examination that she had indeed considered Mr Maloo's account and confirmed that it had "formed part of my belief" but contended that this had to be seen in the light of her acknowledgement that it had not been "key" (hence, it was not included in the dismissal letter).

56. This is a classic invitation to the EAT to seek to form a view as to the relative weight to be given to the evidence before the ET. We are being asked to substitute our view as to the weight to be given to Ms Sloper's oral testimony for that of the ET. We have, of course, not had the benefit of seeing Ms Sloper giving her evidence. We note, however, that the ET's finding was that she saw Mr Maloo's account as essentially corroborative of Mr Henrich's evidence. That seems to us to be entirely consistent with her account as to why it had not been

a point of specific reference in the dismissal letter. That does not suggest that the ET's finding was perverse. It seems to us that the ET's view in this regard is tolerably clear: Ms Sloper's focus had been on other aspects of the case against the Claimant but she had been assisted in reaching her conclusion by the fact that a key part of that case (Mr Henrich's evidence) was supported by Mr Maloo's evidence. No error of law is revealed in this regard.

57. The second ground of appeal raises both points of detail (specific factual errors said to have been made by the ET) and the more general challenge, to the effect that these all evidence the Tribunal's failure to take a proactive approach to this case, contrary to the guidance in **Roldan**.

58. We can take the first aspect of this ground fairly shortly. It is acknowledged that the CCTV evidence in fact showed another person entering the disabled toilet *after* the unidentified female (contrary to the chronology set out at para. 30). It is equally accepted that, if the ET was stating that there had been no other persons present in the car park on the evening of 24 September 2010 (para. 29), that would amount to an error of fact. As for the failure to invite the Claimant to participate in the car park re-enactment; that was a matter of record. The criticism here is that the ET failed to have regard to this fact.

59. The substantive question is whether these matters demonstrate a failure to apply the higher test required by the **Roldan** line of cases. In our judgment no such failure is evinced. The circumstances are not such that the case against the Claimant might have started to unravel if due regard had been given to these matters. It was not suggested that there was any evidence of anyone else (i.e. apart from the unidentified female with the large suitcase) taking a large number of fragrance samplers into the disabled toilet prior to their discovery. As for Mr

Henrich's account of what he had been able to see in the car park on the Friday evening, unlike **Roldan**, that testimony was not simply accepted by the employer but was tested at both the dismissal and appeal stages. In the latter case, Mr Iley also had before him the Claimant's own reconstruction and report. Moreover, Mr Henrich's statement was corroborated by Mr Maloo's evidence – something both Ms Sloper and Mr Iley took into account. And, of course, there would still remain the other matters to which the Respondent had regard: the inexplicable ordering of such a large number of testers by the Claimant at that time; the fact that these had then disappeared; his implausible explanation for moving his car to the loading area on the Friday evening; the subsequent return of the testers against the background of the damning evidence given by Mr Maloo. Unlike **Roldan**, the criticisms made of the investigation do not establish an evidential basis to suggest that another line of enquiry would have led to the unravelling of the case against the Claimant.

60. Similar considerations arise in respect of the criticism that the ET failed to properly consider where its (legitimate) criticisms of Mr Henrich's roles inevitably led. Although the ET took the view that it was inappropriate for Mr Henrich – as a witness himself – to have been present during some of the interviews as note-taker (see para. 29), it equally felt able to conclude that "he could not have influenced the evidence". Indeed, it was not positively suggested that either Mr Henrich's evidence or that of any of the witnesses had been contaminated by his presence as note-taker; a point that could have been tested before the ET as both Mr Henrich and Mr Maloo attended as witnesses. In truth, the challenge made on this point on appeal goes only as far as the ET's observation itself: it was inappropriate for Mr Henrich to be present as the note-taker in interviews but there was nothing to suggest that this had influenced any of the evidence (his or that of any other witness) that the Respondent took into account.

61. As for the challenge made in respect of the appeal stage, we have already addressed the point made as regards the suggestion that the ET had allowed the greater emphasis placed on Mr Maloo's evidence at this stage to influence its finding as to what had been taken into account by Ms Sloper when making the original decision. As for Mr Iley's additional reference to the customer enquiries, we do not understand the ET to have found this to have been a matter determinative of the appeal to any significant degree (hence the lack of any reference to it in the ET's Reasons). Given the way in which the point had been introduced into the appeal outcome letter (apparently by way of afterthought rather than as one of the reasons relied on by Mr Iley), we do not consider the ET's conclusion in this regard to have been perverse.

62. Finally, we do not accept that the Claimant's case before the ET demonstrated that there was any confusion as to whether Ms Romanczuk had placed her order for the fragrance testers on 20 or 22 September 2010. We have been taken to the evidence before the Tribunal, showing that the Claimant had admitted placing the crucial order, and we consider that the ET was entitled to accept that this was an admitted fact that the Respondent had properly been able to take into account.

63. Stepping back from the detail, we have given careful consideration to the question that really underpins this appeal. Accepting the potentially career-threatening consequences for the Claimant, did the ET subject the Respondent's investigation to the appropriate level of scrutiny, as laid down in **A v B**, **Roldan** and similar cases?

64. Although we can see that it might have been better if the Tribunal had made express reference to this line of authority and had specifically stated that it was applying the higher test

laid down therein, this alone would not be fatal to the conclusions reached. The issue has to be one of substance rather than form: as a matter of fact, did the ET subject the employer's investigation to the appropriate higher level of scrutiny?

65. In this case, the Claimant seeks to overturn the ET's decision on unfair dismissal, arguing that it did not approach the employer's case with the rigour required in these circumstances. That is notwithstanding the Claimant's lack of challenge to the ET's finding, on his wrongful dismissal claim, that "on the balance of probabilities, the Claimant had removed a large quantity of fragrance testers from the Respondent's premises during the evening of 24 September 2010" (para. 34).

66. The difficulty for the Claimant is that his criticisms only scratch at the surface of the evidence that was before the Respondent. At no stage does his case establish the kind of substantive challenge apparent in **Roldan**. The matters that spoke against him were not dependent upon the word of one other employee but arose from an evidential matrix, which included his unusual and unsatisfactorily explained ordering of a very large number of fragrance testers (some of which were simply not sold in that store); the subsequent disappearance of the testers delivered under that order, at a time when the Claimant (unlike Mr Maloo) was on duty; the entirely independent but essentially corroborative evidence of Mr Henrich and Mr Maloo; and the later discovery of the testers in circumstances consistent with the suggestion that Mr Maloo had said the Claimant had made to him about their return. Picking at the detail of one part of the evidence does not begin to undermine the whole and the ET was entitled to find that the Respondent's investigation and ultimate decision fell within the range of reasonable responses of the reasonable employer in these circumstances. That being so, we dismiss this appeal.