Appeal No. UKEAT/0381/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 January 2014
Judgment handed down on 1 April 2014

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MS S E WORRELL — APPELLANT

HOOTENANNY BRIXTON LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR ROBERT MADDOX (Representative) Free Representation Unit Ground Floor 60 Gray's Inn Road London WC1X 9BN
For the Respondent	MR LUKE ASHBY (Solicitor-Advocate) Lyons Davidson Solicitors Victoria House 51 Victoria Street Bristol BS1 6AD

SUMMARY

CONTRACT OF EMPLOYMENT - Wrongful Dismissal

UNFAIR DISMISSAL

Compensation

Contributory Fault

As explained at paragraphs 111 and 112 of the judgment in **Sandwell and West Birmingham Hospitals NHS Trust v Mrs A Westwood** [2009] UKEAT 0032/09/172 gross misconduct might take one of two forms, deliberate misconduct or gross negligence: but that possible alternative does not justify an Employment Tribunal not making any factual finding as to conduct on the basis that it must be one form of gross misconduct if it is not the other, which is how the matter was approached by the Employment Tribunal in the instant case. Such an approach is erroneous.

Moreover it leaves issues relating to possible awards and the reduction of awards by reason of fault on the part of the employee without any proper factual matrix and in terms of a reasoned decision compliant with the common law requirements set out in **Meek v Birmingham City Council** [1987] IRLR 250 or with the Employment Tribunal Rules (see **Greenwood v NWF Retail Ltd** [2011] ICR 896) makes it impossible to know either why it is had been concluded that the employee's conduct was the sole cause of the dismissal (section 123(6) of the **Employment Rights Act 1996**) or why it was not "just and equitable" for the employee to receive a basic award (section 122(2) of the **Employment Rights Act 1996**) (paragraphs 32, 36, 62 and 63 of the judgment of this Tribunal in **Lemonious v Church Commissioners** UKEAT/0253/12/KN considered and applied).

The appeal was allowed on the basis of inadequacy of reasons and remitted to the same Employment Tribunal for findings of fact to be made and for re-consideration of the issues of wrongful dismissal and contributory fault.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal from the judgment of Employment Judge Campling sitting alone at London South on 26 February and 4 March 2013, the written judgment having been sent to the parties on 11 April 2013. The Respondent below, which is also the Respondent to this appeal and which I will call "the Employer", admitted that the dismissal was procedurally unfair. Even so Employment Judge Campling decided that had a fair procedure been followed the employment would have ended in any event within four weeks. She concluded that the Appellant, the Claimant below, who I will refer to as "the Claimant" had not been wrongfully dismissed and that any award of compensation should be reduced by 100% because the dismissal was solely the Claimant's fault.

2. She also dismissed the Employer's counterclaim, based on breach of contract alleged to relate to past over payments to the Claimant of wages but there is no cross appeal and I am not concerned with that.

3. The Claimant, has been represented by Mr Robert Maddox, under the auspices of the Free Representation Unit and the Employer has been represented by Mr Ashby of Lyons Davidson, Solicitors; both appeared at the Employment Tribunal.

The factual background

4. The Claimant was employed as a hostel manager by the Employer. On 21 May 2012[1] she submitted a claim for having worked 45 hours in the previous week. The co-owner of the hostel, a Ms Yates, had a conversation with the Claimant on 22 May 2012; she queried the

[1] Paragraph 12 of the judgment gives this date as 22 May but the parties are agreed this is an error; indeed, all dates at paragraph 12 have to be revised by subtracting day so 22 should read 21, 23 should read 22 and 24 should read 23.

claim for 45 hours pointing out that the Claimant had only worked three days that week because she had been absent through illness on one day and absent on unpaid leave having surgery on another day. The Claimant admitted that the claim to be paid for 45 hours was an error and apologised for it. The meeting ended with an apparent agreement as to a plan of action to prevent any recurrence.

5. But the following day the Claimant was summarily dismissed. The letter of dismissal, which is dated 23 May 2012 (see pages 64 and 65 of the appeal bundle) refers to Ms Yates having had a meeting with her co-owner, a Ms Kit Fraser and a fellow shareholder, a Mr Robin Yates. Apparently in the meeting the conversation of the previous day and the terms of the explanation put forward by the Claimant were discussed and it was agreed that the explanation was unsatisfactory. The letter goes on to say (see pages 64 and 65 of the appeal bundle) that:

> **"I … have come back to you today to explain that your explanations were not accepted. Today I have explained to you at our meeting the reasons for terminating your employment with us, which are as follows:**
>
> > **You falsified your hours and attempted to take £162 of pay to which you were not entitled. You claimed 45 hours for last week Monday 14 May to Sunday 20 May when in fact you took one day off sick and one day off without pay to attend an eye appointment. You in fact did 3 days work."**

The Claimant regarded this as misleading because she alleged nothing had been discussed "today" (i.e. on 23 May) between Ms Yates and the Claimant. Ms Yates then sets out some facts relating to the two days of absence and says:

> **"I think this paragraph gives evidence that it is not credible that you forgot you did not work these days."**

She then made some comments about the Claimant's job function and the importance of honesty:

> **"It is one of your responsibilities in this office to submit the office and cleaning hours to our payroll clerk George. Submitting erroneous hours is doubly bad as it is your role to submit and query correct hours. You have let down our organisation in not doing this element of your job in a trustworthy way.**
>
> **In your job for us at Hootananny honesty is the most important aspect of the job as you handle thousands of pounds in cash and credit cards and in kind in submitting hours for payment. We cannot in this job have anyone who submits false records as this is the heart of the business and the business collapses without tight money control."**

Ms Yates then goes on to introduce and discuss incidents relating to 21 May 2014 and 14 May 2014. I am not clear as to whether these had been discussed the previous day but it seems they also have formed the basis of the summary dismissal because immediately following the two paragraphs that deal with the incidents the following appears:

> **"This is not how we expect our office staff with your level responsibility to behave. We cannot allow any of these actions to happen again or give you the position of trust in our organisation that we have been giving to you. Therefore we terminate your employment with immediate effect today, Wednesday, May 23."**

The judgment

6. Employment Judge Campling reached her conclusions, which I summarised above at paragraph 1 of this judgment by reasoning to be found scattered around various parts of paragraphs 21 to 29 of her judgment; this was as follows

i. > **"… In the Tribunal's view had the Respondent carried out a fuller investigation and complied with the procedural steps required by the ACAS Code she would have dismissed the Claimant in any event. The Respondent had clearly shown that the dismissal was for the reason of conduct. In the Tribunal's judgment the Respondent would be able to show that any future dismissal was within the range of reasonable responses."**
>
> (see paragraph 21 of the judgment at page 8 of the appeal bundle).

ii. It would have taken 4 weeks for a proper disciplinary procedure to have been followed (see also paragraph 21 of the judgment at pages 8 and 9 of the appeal bundle).

iii. The degree to which the Employer had failed to follow the ACAS code merited an uplift of the maximum amount of 25% (see paragraph 22 of the judgment at page 9 of the appeal bundle).

iv. The Employer was in breach of its duty pursuant to section 1 of the **Employment Rights Act 1996** to provide a statement of particulars of terms and conditions of employment. There was no explanation for this and the appropriate award was one of 4 week's pay.

v. Despite the Claimant's assertion that she had been busy and had forgotten that she had not been working for two days of the previous week the Employment Tribunal took the view that "***there was an element of culpability or blameworthiness to this action***" (see paragraph 24 of the judgment at page 9 of the appeal bundle). The Employment Tribunal made no findings as to whether this was "***a deliberate act or grossly negligent act***"; at paragraph 24 Employment Judge Campling puts it in this way:

> **"… in either event it was blameworthy action on the part of the Claimant who should be more careful when claiming for hours of work.… In the Tribunal's judgment the Claimant was wholly to blame for dismissal by making the incorrect claim and therefore the Tribunal made a deduction of 100% contributory fault from both the basic award and the compensatory award."**

vi. The unpaid wages in respect of 20 and 21 May 2012 should be offset against the overpayment in respect of the two days in the previous week that had been over claimed.

vii. Although the Claimant was dismissed without notice she was guilty of gross misconduct either by dishonest conduct or by gross negligence (see paragraph 26 of the judgment at page 9 of the appeal bundle).

viii. The Employer also had a breach of contract claim, in effect a counterclaim; this failed because the Employer failed to prove on a balance of probabilities that the Claimant was restricted to 40 hours pay irrespective of the number of hours worked (see paragraphs 27 to 29 of the judgment at pages 9 and 10 of the appeal bundle).

The Claimant's case on appeal

7. The Claimant made the following criticisms of that reasoning:

a. The judgment was inadequately reasoned both in terms of the approach of the Court of Appeal to the common law as to adequacy of reasoning in a judgment in **Meek v Birmingham City Council** [1987] IRLR 250 and in terms of the Employment Tribunal Rules and **Greenwood v NWF Retail Ltd** [2011] ICR 896.

b. Employment Judge Campling erred at paragraph 18 of the judgment when giving herself the following direction on wrongful:

> **"The legal issues in respect of a wrongful dismissal case are different to those issues in an unfair dismissal case. The role of the Tribunal in an unfair dismissal case is to consider the actions of the dismissing employer whereas in a wrongful dismissal case the task of the Tribunal is to determine for itself whether or not an employee has actually committed a repudiatory breach of contract. The employee's conduct must exhibit a deliberate intention to disregard the essential requirements of that contract. It must constitute gross misconduct. If it does the employer is entitled to dismiss without notice."**

The argument is that this was an incomplete direction and that in any event Employment Judge Camping did not follow that direction at paragraph 26 when she adopted this approach:

> **"In the Tribunal's view the Claimant's action claiming for the two days that she was not at work was one of gross misconduct as it was, at least, grossly negligent and therefore the Claimant's wrongful dismissal fails and is dismissed."**

According to her own direction Employment Judge Campling had to reach a conclusion as to what had probably happened. Anyway the Employer never gave any consideration to gross negligence; the Employer's conclusion was not that the Claimant had been very careless but that she had been dishonest. Therefore it followed that the alternative postulated by the Employment Judge was not actually available to her as a solution to the problem.

c. Thirdly it is argued that 100% reduction on account of the Claimant's conduct was wrong in principle. Such an award can only be made where the Employer is in no way at fault. (See **Gibson v British Transport Docks Board** [1982] IRLR 228). At paragraph 28 of the judgment Employment Judge Campling had criticised the employer for a lack of organisation. This indicated some degree of fault on the part of the employer. Moreover a simple solution to the problem of over claiming had been found in the discussion on 23 May 2012; this was further evidence of lack of systems on the part of the Employer.

d. Fourthly the Employment Tribunal misdirected itself by approaching the basic award and the compensatory award on the same basis. Sections 122(2) and 123(6) of the **Employment Rights Act 1996** are differently worded.

e. Employment Judge Campling erred by making a reduction in respect of an award under section 38 of the **Employment Act 2002** but this point was subsequently withdrawn by letter and e-mail, both dated 20 December 2013, and I need not consider it further.

Discussion and conclusions

8. As to the inadequacy of reasons the oral submissions of Mr Maddox were that paragraph 21 of the judgment, which in essence addresses the "**Polkey**" issue, raised more questions than it answered. Employment Judge Campling had accepted at paragraph 21 that the reason for dismissal was conduct but had failed to identify the facts constituting the conduct. I think this criticism is unsustainable. In my view it is clear that the conduct consisted of seeking payment for two days which had not been worked.

9. Of course, at that stage of the analysis the Employment Tribunal was concerned with considering how the case raised by the Employer, which had been admitted to have been procedurally unfair, might have developed in the future, if a proper procedure had been followed. This involves carrying a known and established set of facts into the future. Doing so is, adopting Lord Prosser's memorable phraseology, to "*reconstruct the world as it might have been*" and "*to embark on a sea of speculation*" (see paragraphs 19 to 21 of the judgment of Lord Prosser in **King and others v Eaton [No. 2]** [1998] IRLR 686). This is what Employment Judge Campling had undertaken at paragraph 21, albeit with only the briefest discussion.

10. Mr Ashby has pointed to his own notes of evidence (see pages 52 to 54 of the appeal bundle). The procedure by which they arrived before me can be gathered from pages 55 to 63

of the appeal bundle. Mr Ashby submitted that they demonstrated definitively that the Claimant had accepted at the hearing that she had no real explanation for claiming for the time not worked. If, which Mr Ashby did not accept, the judgment required any elucidation then consideration of the notes made everything clear.

11. Mr Maddox submitted that the notes did not help me to see anything more clearly unless it was accepted that they represented an accurate and substantially complete record of the evidence and were self-explanatory. Neither was the case. His position was that the notes were incomplete and did not record the Claimant's explanation as to how her error had come about.

12. Mr Ashby believed that because he had followed the directions made by His Honour Judge Shanks that the note must, therefore be regarded as definitive. I do not accept that. Although the Deputy Registrar had directed, failing agreement, that the Employer's note should be included in the bundle, to my mind that does not imply any decision by this Tribunal that the note is to stand as an accurate record. All the more so when the procedure by which the note comes before me has not involved submitting the contentious matter to the Employment Tribunal in order to procure the learned judge's own note and/or her recollection and comments to assist me.

13. Therefore, the notes were by no means an agreed record of the course of evidence. Nor did they strike me as so clear as to require no further comment or explanation from the Employment Tribunal. Contrary to Mr Ashby's submission, they are by no means the cipher which unlocks the cryptic text of the judgment.

14. Consequently I accept the submission of Mr Maddox that the notes do not help me in relation to the first ground of appeal and I do not think they have any bearing on the other

grounds. Whether the difficulty here is characterised as inadequacy of reasons or a failure by the Employment Tribunal to reach factual conclusions about the evidence, it seems to me tolerably clear from the terms of the dismissal letter, taken as a whole, that the Employer concluded the Claimant had acted dishonestly in submitting the erroneous claim. Whilst I agree with Mr Maddox that paragraph 21 of the judgment does not present much by way of a reasoned conclusion, the question is whether it fulfils the basic function, which any judgment should discharge, namely of enabling the reader to understand how and why the conclusion has been reached. Set in the context of the judgment as a whole and, having regard to the terms of the letter of dismissal, I understand Employment Judge Campling to have decided that the Employer had reasonable grounds for concluding the Claimant had behaved dishonestly, that even if the matter had been investigated further the position was unlikely to change and that there would be nothing unreasonable in the Employer maintaining that position. The notes do not help me with any of that.

15. The issue on the first ground of appeal is whether paragraph 21 provides adequate reasoning explaining why the Claimant has not succeeded on what might be described as the "**Polkey**" issue. I have reached the conclusion that paragraph 21 of the judgment is just about adequate to convey that reasoning to the reader and, as Sedley LJ once put it, the judgment at paragraph 21 is "**Meek** compliant". Accordingly, I reject the first point raised by Mr Maddox that paragraph 21 is inadequately reasoned.

16. The second point canvassed by Mr Maddox rested on the contention that paragraph 18 of the judgment contained a misdirection. In his oral submissions he developed this by referring me to the judgment of Lord Jauncey of Tullichettle sitting as Special Commissioner appointed by Her Majesty the Queen in her capacity as Visitor to Westminster Abbey in **Neary and Neary v Dean of Westminster** [1999] IRLR 288 where at paragraphs 20 to 22 there is

discussion of gross misconduct and its relationship to dishonesty. Mr Maddox emphasised the reference by Lord Jauncey at paragraph 20 to the judgment of the Court of Appeal in the case of **Sinclair v Neighbour** [1967] 2 QB 279.

17. I am not sure how that assists Mr Maddox. The passage quoted by Lord Jauncey from the judgment of Sellers LJ in **Sinclair v Neighbour** supported the conclusion reached by Lord Jauncey in **Neary** that even if dishonesty cannot be demonstrated the innocent party is still entitled to prove repudiatory breach of contract arising out of the conduct of the employee. Lord Jauncey did not accept the proposition advanced by Mr Elias QC, as he then was, that gross misconduct requires a finding of deliberate dishonesty or deceit in order to sustain it. Although I accept that in the instant appeal there is an element of ambiguity in the letter of dismissal, on balance, when read as a whole, it amounts to a rejection of forgetfulness. In my view on the facts of this case that leaves only the alternative of deliberate dishonesty.

18. In any event, I fail to see any misdirection at all at paragraph 18 of Employment Judge Campling's judgment. To my mind it contains a perfectly correct and unexceptionable direction as to the law. I think Mr Maddox's quarrel with the judgment lies not in paragraph 18 but in relation to paragraph 26 and I agree with the submissions developed by him at the hearing that paragraph 26, quoted above at paragraph 7 b. of this judgment, is a very abbreviated analysis of the wrongful dismissal issue as well as a somewhat troubling one. I think the problem with this passage of the judgment is that it is both too compressed and not clearly enough expressed.

19. Mr Ashby referred me to paragraphs 111 and 112 of the judgment of the division of this tribunal presided over by myself in **Sandwell and West Birmingham Hospitals NHS Trust v Mrs A Westwood** [2009] UKEAT 0032/09/172, which he suggested, without a hint of flattery,

represented an accurate synopsis of the law relating to wrongful dismissal. Whatever the accuracy of the passage, it was never intended by me that the synopsis be used as a justification for not making findings of fact and I do not regard it as providing support for the way in which Employment Judge Campling has addressed (or, perhaps, not addressed) the issue of wrongful dismissal.

20. The argument, made on paper in both the grounds of appeal and in the Claimant's skeleton argument, albeit it not much developed in the oral submissions, that because the Employer appeared to have emphasised deliberate dishonest conduct the Employment Tribunal could not consider carelessness seem to me misconceived. In the context of wrongful dismissal the Tribunal has to decide what actually happened not what the Employer might have believed. It would have been open to Employment Judge Campling to conclude that the Claimant had probably been negligent as opposed to dishonest, irrespective of the views of the Employer. Employment Judge Campling was not tied to the Employer's view on the issue of either wrongful dismissal or deduction on account of the Claimant's conduct and this part of the argument put forward by Mr Maddox cannot succeed. His more substantial point is that Employment Judge Campling has failed to make any decision.

21. At paragraph 18 of her judgment she had correctly identified the need to make a factual decision as to what had happened and, thereafter, consequent on her findings of fact, she had to decide whether or not the conduct she found proved amounted to gross misconduct such as to justify summary dismissal. What, in my judgment, she could not do was to avoid making findings of fact as to what had actually happened (as she makes clear she is doing at paragraph 24 in the context of contributory fault) and saying, as it seems to me paragraph 26 can be read as saying, that it must be either dishonesty or gross negligence and therefore it is not necessary to make any factual finding because either way summary dismissal without notice was

justifiable. If, as Mr Maddox suggests, but which only Employment Judge Campling can herself confirm, paragraph 26 amounts to her having accepted the Claimant's evidence that she had been forgetful rather than dishonest, then that ought to have been clearly articulated in the judgment. But I cannot find within paragraph 26 any indication of such a factual finding although I am bound to say, absent such a finding, I cannot understand why Employment Judge Campling found it necessary to adopt an alternative analysis. Accordingly, it seems to me that there has been an error of law in that the necessary findings of fact have not been made or explained.

22. At paragraph 24 of the judgment Employment Judge Campling concluded that even if the Claimant had made "an honest mistake" there was "an element of culpability or blameworthiness to this action" on the part of the Claimant "who should have been more careful when claiming for hours of work." Employment Judge Campling then assessed the degree of contribution at the highest possible level of 100%.

23. Mr Maddox submitted such a finding ran contrary to the approach taken by a division of this tribunal presided over by Browne-Wilkinson J in **Gibson** (citation above at paragraph 7 c. of this judgment). There two women attempted to cross a ten strong picket line and one woman was physically assaulted to the extent of requiring hospital treatment. All of the ten employees were dismissed, it having been concluded that all of them were lying about the incident. Five were prosecuted by the police and five were not and the latter claimed that they had been unfairly dismissed. Although the statements made in the internal investigation by the two women exonerated the five claimants of actual involvement in any physical assault, the Employer had determined to make no distinction between those directly involved and those who were not. Nevertheless the Industrial Tribunal concluded that their dismissals were fair, alternatively that they had made 100% contribution to their dismissals. The Employment

Appeal Tribunal concluded that both those decisions were wrong in law. The dismissals were unfair because the individual cases had not been considered on an individual basis; the decisions on contribution were unjustifiable because the Employer had been to some extent at fault by not considering the cases individually and a 90% contribution was substituted by the Employment Appeal Tribunal.

24. Mr Maddox relies upon the passage at paragraph 30 of the judgment which reads:

> **"We put to Mr Jenkins the proposition that the possible causes of this dismissal were threefold: … and, thirdly, the failure of the employer to treat the case of each of them individually. Whilst Mr Jenkins did not, of course, accept that the third factor was a failure by the employers, he did accept that if the employers were at fault in dismissing without considering the individual cases, then that analysis of the causes of the dismissal was correct. If that is so, then at least part of the cause for the dismissal was not conduct attributable to these complaints. Therefore, a finding of 100% as their contribution cannot be justified since their conduct cannot have been the sole cause of the dismissal. We think that that finding of 100% cannot be justified for those reasons."**

From that passage he distilled this proposition: unless the conduct of the employee is the sole cause of the dismissal it must be erroneous in law to make an assessment of the contribution, which deprives the employee of all compensation. Here, irrespective as to whether there was a finding of dishonesty or a finding of careless forgetfulness, given the procedural failures on the part of the Employer, the Claimant's conduct could not be said to be the sole cause of the dismissal.

25. Mr Maddox developed his submission by arguing that on the facts the Employer had contributed to a significant extent to the dismissal in this case, particularly if the Claimant's conduct had been carelessness as opposed to dishonest. He submitted that there had been evidence before the Employment Tribunal demonstrating that the Employer had inadequate accounting systems, which had made a significant contribution to the likelihood of error.

26. I accept the submission made by Mr Maddox to the extent that, in principle, the deduction of 100% might not have been appropriate in the circumstances. My reservation as to accepting the submission in full is that it does not seem to me in the **Gibson** case the Employment Appeal Tribunal was attempting to lay down a universal rule. No doubt, as always, the logic of the analysis of the judge presiding in **Gibson** is impeccable but the universality of that logic as applied in that case as an immutable principle might be open to further debate. For example, whether Browne-Wilkinson J would have wished his reasoning to be understood as precluding an Employment Tribunal from regarding dishonesty as being the sole cause of dismissal even where there had been procedural irregularities on the employer's part is by no means clear to me. Clearly the current President did not think so (see paragraph 32 of the judgment of this Tribunal on 27 March 2013 in **Lemonious v Church Commissioners** UKEAT/0253/12/KN).

27. This aspect of the case is also further complicated by the fact that Employment Judge Campling made no finding as to the nature of the Claimant's conduct. For the present it suffices to say that I regard paragraph 24 of the judgment as betraying an error of law in that it seems to me the learned judge failed to make adequate findings and failed to consider the issue of contribution in the light of those findings but I will need to return to this topic when discussing the opposing submissions on disposal.

28. Finally, Mr Maddox complained that in the last sentence of paragraph 24 the same deduction had been made in respect of both the basic award and the compensatory award. He submitted that to take the same approach was erroneous because it ignored the difference in language in the relevant sections of the **Employment Rights Act 1996** ("the Act"). Mr Maddox relied upon the case of **Lemonious** and in particular on paragraph 36, which reads:

> **"Although, in our view, and subject to the second Ground of Appeal, it was open to the Tribunal to conclude that the claimant's conduct was such as to extinguish the claim for a basic award in its entirety, the reasoning is so succinct at paragraph 33 that the Claimant must be unsure why precisely his conduct is so bad that he should receive nothing despite his employer being at fault. We, for our part, cannot see whether there was – as there might have been – an error of law in the decision – such as an assumption that the basic award and compensatory award were necessarily to be subject to precisely the same reduction, or that the question of how far to reduce an award in both cases was to be answered by the question of causation, ignoring that the only statutory consideration in applying section 122(2) is what is "just and equitable". On this basis, therefore, we uphold the ground of appeal."**

I agree with his submission; indeed, precisely the same criticism as was expressed by the President in the passage cited above falls to be made of paragraph 24 of the judgment in the instant appeal.

Disposal and costs

29. In the result the first ground of appeal fails and will be dismissed. The second ground succeeds on the limited basis that either the necessary findings of fact have not been made or not been adequately set out in the judgment at paragraph 26 and then considered in terms of the direction the learned judge gave herself at paragraph 18; findings must be made as to the nature of the conduct and as to whether it amounted to gross misconduct and, if so, what kind of gross misconduct. The third ground also succeeds on a limited basis. By failing to make adequate findings and failing to consider the issue of contributory fault in the light of those findings it does not seem to me that the Claimant is unable to know what the Employment Tribunal found her conduct to be and why, as a result, it justified the conclusion it was the sole cause of her dismissal. The position may be different according to whether this was found to be a case of dishonesty or of forgetfulness and in the latter case the employer's failure may not be confined to the purely procedural aspects of the process. Mr Maddox complains that the judgment contains an acknowledgment of the defects in the Employer's systems of collecting and recording hours worked and that this may have played some part; he submitted this is an issue that should be addressed. Finally, and for the same reasons as those identified by the President at paragraph 36 of the judgment in **Lemonious**, I regard the reasoning at paragraph 24 as

inadequate because it fails to explain why it was "just and equitable" to reduce the basic award to the same extent as the compensatory award.

30. Therefore the appeal will be allowed on the relatively narrow grounds of inadequacy of reasoning in the contexts I have just summarised. Mr Maddox accepted that I was not in a position to exercise my powers under section 35 of the **Employment Tribunals Act 1996** (ETA) to substitute my decision for that of the Employment Tribunal. Therefore, the case must be remitted. He submitted it should be remitted to a differently constituted Employment Tribunal for complete re-hearing. He referred me to factors to be considered on remission as set out at paragraph 46 the judgment of this Tribunal in **Sinclair, Roche, Temperley v Heard** [2004] IRLR 763. This was" a second bite of the cherry case", he argued, and, therefore, starting from scratch with a new judge was called for.

31. Mr Ashby submitted that if I was attracted by any part of the arguments raised by Mr Maddox I should ask Employment Judge Campling to provide further reasoning before concluding that there had been an error of law. In my view it is now too late to seek further clarification from the Employment Tribunal but I think that the fact this appeal has succeeded on inadequacy of reasons should be weighed in the balance. I see that was also the view of the current President in the **Lemonious** case (see paragraphs 62 and 63 of the judgment). Whilst recognising that each case needs to be dealt with by reference to its own factual matrix I think paragraphs 62 and 63 of that judgment are entirely apposite to the disposal of this case, which should be remitted to Employment Judge Campling for her to reconsider her judgment on wrongful dismissal and deduction from the basic and compensatory awards on account of the Claimant's conduct. In my view it would be disproportionate for this case to be re-heard.

32. There will be no further evidence but the parties will be at liberty to present further argument both in writing and orally. The errors identified in this judgment direct the parties and the Employment Tribunal to the decisions that need to be made on the remitted hearing and explained in any further judgment. Further case management will be a matter for the Employment Tribunal. Finally on the question of remission I commend to both parties the sound sentiments expressed by the President at paragraph 64 of the judgment in **Lemonious**; they are as applicable here as they were in that case.

33. Mr Ashby applied for the costs incurred by his client in respect of the process of attempting to agree the notes. He argued that the Claimant was at fault for not agreeing the notes. This was, he submitted, unreasonable conduct on the part of the Claimant and thus section 34A of the ETA empowered me to award costs against her. Mr Maddox submitted that the importance of the notes had been overestimated by the Employer and that his client could not be blamed for not agreeing notes, which did not include what she believed she had told the Employment Tribunal.

34. I do not agree with Mr Maddox that the fact it has turned out the notes were not decisive is an important factor in determining whether or not to award costs. At the time agreement was sought the notes might have proved decisive. But I will not award costs. The Claimant's position was entirely reasonable in my judgment. Stating disagreement is not unreasonable conduct.