Appeal No. UKEAT/0272/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 January 2014

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

EASTLAND HOMES PARTNERSHIP LTD — APPELLANT

MR JAMES CUNNINGHAM — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MS RACHEL CRASNOW
(of Counsel)
Instructed by:
EEF
Broadway House
Tothill Street
London
SW1H 9NQ

For the Respondent

MR TIM KENWARD
(of Counsel)
Instructed by:
Simpsons Solicitors
3rd Floor
Thorne House
36 Station Road
Cheadle Hulme
Cheshire
SK8 7AB

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Appellant had been dismissed allegedly for gross misconduct. The Employment Judge held the dismissal to have been unfair because no reasonable employer could have dismissed by reason of that misconduct in the case of an employee like the Claimant with long service, an exemplary record and the support of the tenants at the estate where he was the caretaker. In the context of wrongful dismissal the Employment Judge found that the conduct did not amount to gross misconduct but in the context of unfair dismissal he never explained or discussed why it was unreasonable for the Employer to have characterised the conduct as gross misconduct. Although the well known authorities (**British Home Stores v Burchell** [1980] ICR 303, **Iceland Frozen Foods v Jones** [2009] IRLR 563, **Foley v Post Office** [2009] ICR 1283, **Sainsbury v Hitt** [2003] ICR 111, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, **Graham v SSWP** [2012] IRLR 759, **Barchester Healthcare v Tayeh** [2013] IRLR 387 and **JJ Food Service v Kefil** [2013] IRLR 850) do not suggest that any finding as to the reasonableness of the characterisation of conduct as gross misconduct is called for, section 98(4) requires consideration of "all the circumstances". If the Employer's view that the misconduct is serious enough to be characterised as gross misconduct is objectively (as opposed to subjectively – see **Sandwell v West Birmingham Hospitals NHS Trust v Westwood** [2009] UKEAT/0032/09/LA) justifiable then that should be considered as one of the circumstances against which to judge the reasonableness or unreasonableness of treating the conduct as a sufficient reason for dismissal. The Employment Judge had erred by not doing that. He did not however substitute his own view for that of the Employer and his decision on contributory fault was not based on a misdirection. In the event, however, the matter was remitted for a complete re-hearing before a differently constituted Employment Tribunal.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal from the Judgment of an Employment Tribunal, comprising Employment Judge Goodman, sitting alone, at Manchester on 5 and 6 February 2013. The written Judgment was sent to the parties on 27 February 2013, and by it Employment Judge Goodman held that the Respondent, the Claimant below, who I will refer to as "the Claimant", had been dismissed by the Appellant, the Respondent, who I will refer to as "the Employer". It had contributed towards his dismissal to an extent justifying a reduction of compensation by 25% and that also he had been wrongfully dismissed. .

2. The employer has been represented today by Ms Crasnow of counsel, and the Claimant by Mr Kenward of counsel. Neither appeared at first instance.

The facts

3. As a result of the transfer of an undertaking by Manchester City Council in 2009, the Claimant's employment had been transferred to the employer. The Claimant had worked for the employer, which is a housing association, providing accommodation for the elderly, infirm and vulnerable since 2009 as a caretaker. Before then he had worked for Manchester City Council for many years. His total service amounted to some 32 years without any recorded disciplinary infraction in that period. Employment Judge Goodman described him in the Judgment as having an exemplary disciplinary record.

4. The Claimant's wife had what was described by Employment Judge Goodman as a fairly close relationship with a Mr Kelly, who resided on the estate where the Claimant and his wife lived and where the Claimant worked. Mr Kelly, probably some time in 2011, had nominated the Claimant's wife as his next of kin. At some time, it seems that he may have appointed the

Claimant also as his next of kin. He had been in hospital in 2010 and unhappily was readmitted to hospital in 2011. He died there on 14 December 2011.

5. He made a will appointing the Claimant's wife as sole executrix, and by its terms, he bequeathed the whole of his estate to the Claimant and his wife jointly. As I understand it, the value of the estate was £19,000, although I do not know whether that was a gross or net valuation or was a probate valuation or was the actual amount distributed to the beneficiaries.

6. At paragraph 23 of the Judgment, Employment Judge Goodman found as a fact that the Claimant was aware by the end of 2011 that Mr Kelly had bequeathed his estate to him and his wife. He did not, however, disclose that information to the employer until 1 March 2012, some time after Mr Kelly had died and, indeed, even after part of the estate had been distributed. It is clear, however, that the employer was aware that a bequest had been made. During the course of the internal investigation into these matters the Claimant prevaricated about the extent of his knowledge of the terms of the will; he asserted that he had not been aware of the bequest until notified of it by the estate's solicitors. It is clear from paragraph 12 of the Judgment that Employment Judge Goodman rejected that evidence and instead found that the Claimant had known of the bequest by the end of 2011.

7. At some time in early 2012, the employer became aware that the Claimant and his wife were beneficiaries under the will and, as I have already said, started an investigation. There were investigative meetings on 6 February 2012 and 1 March 2012 (see paragraphs 12 and 13 of the Judgment). The Respondent was suspended by a letter dated 6 February 2012 pending investigation of an alleged failure by him:

> **"...to comply with the Code of Conduct, Property Policy and Declaration of Interest by failing to inform the business that you and a close relative have received a personal benefit from a**

> **tenant of Eastlands Homes and this failure, if proven, could bring the business into distribute."**

8. That is a quotation of exactly what appears at paragraph 13 of the Judgment at page 4 of the appeal bundle. Obviously, the word "distribute" is a typographical error for the word "disrepute". It has also crossed my mind that the word "Property" might be a typographical error for "Probity", a term which is referred to elsewhere in the material. None of that matters a great deal.

9. In the Judgment, Employment Judge Goodman does not set out the conclusion of the investigation. There is, however, at paragraph 5.22 of the Grounds of Resistance at page 45 of the hearing bundle, six lettered subparagraphs stating the conclusions reached by the investigating manager, Mr Coram. These were as follows:

> **"(a) There was evidence to suggest that the Claimant had read and understood the Code of Conduct.**
>
> **(b) The Claimant had failed to comply with the reasonable instruction to keep [the manager] informed of events.**
>
> **(c) The Claimant had failed to comply with the Code of Conduct and disclose that a close family member was next of kin and executor to a tenant and that they may financially gain from the relationship.**
>
> **(d) There was evidence that the Claimant had been named as a beneficiary under the will and this was not disclosed.**
>
> **(e) There was ambiguity as to when the Claimant and [his wife] were named as next of kin.**
>
> **(f) There evidence that the Claimant and his wife had financially gained from the sale of Mr Kelly' belongings to the value of £8,500. The Claimant had refused to provide details of the goods sold. No inventory was taken of the property."**

10. It is not clear to me whether these conclusions, set out in the Grounds of Resistance, had taken the form of a written report and, if there was a written report, whether the Claimant or his trade union representative had ever been given a copy of the findings. In any event, when the Claimant was summoned to attend a disciplinary hearing, it seems that the allegations were not set out in terms of those six separate findings, but more or less reiterated what had already been

said in the suspension letter. Employment Judge Goodman, at paragraph 14 of his Judgment, said that the letter requiring the Claimant's attendance at a disciplinary hearing was "in almost identical language as the suspension letter." I should make it clear that neither of the two letters I have just referred to have been included in the appeal bundle.

11. There was some further delay, but a disciplinary hearing took place on 1 June 2012 and, as a result, the Claimant was dismissed without notice for gross misconduct. The letter of dismissal has been added to the appeal bundle as pages 84 and 85 at the start of the hearing today. It is referred to in the Judgment at paragraph 15 where Employment Judge Goodman said that, as well as the original allegation, which appears in somewhat compressed form as the first bullet point, there are three other allegations, which had not been formally set out prior to the disciplinary hearing. In the event, the addition of these extra matters was something in respect of which the employer was criticised by the learned Employment Judge.

The letter of dismissal

12. It is useful, however, to consider the actual terms of the letter of dismissal now that I have it before me. The first sentence reads as follows:

> **"I refer to the disciplinary hearing you attended on 1 June 2012 at which you were represented by Simon Walsh, GMB union representative. I now write to confirm that the conclusion of the hearing is that the allegation of gross misconduct has been founded, and therefore you are to be dismissed from your employment as residential caretaker at Blackpool Rush Home."**

13. The next sentence informs the reader that the dismissal is summary and is therefore taking effect as at the date of the letter. The third paragraph sets out the four bullet points to which I have just referred, but preceding them is this sentence:

> **"As hearing officer, I give the following reasons for reaching this decision, that on the balance of probability, you have failed to comply with Eastlands Home's Code of Conduct Probity Policy and declaration of interest in that..."**

and the bullet points I have already mentioned are set out below. They read:

> **"You failed to inform the business that you and a close relative have received a personal benefit from a tenant of Eastlands Homes.**
>
> **You failed to inform the business that you and a close relative had become the de facto next of kin of a tenant of Eastlands Homes.**
>
> **You failed to comply with your manager's reasonable instruction to keep him informed.**
>
> **You showed poor judgement in disposing of goods for a monetary value despite your suspension pending investigation."**

The letter also goes on to record some of the points that had been made on behalf of the Claimant during the course of the hearing. It had been accepted on behalf of the Claimant that he was "technically in breach of the policy". His case was that technical breach was due to ignorance and that there had been no intention to deceive or be dishonest. The letter records that apologies were proffered for not following a management instruction and the case had obviously been advanced that the Claimant, being dyslexic, had difficulty in reading and understanding.

14. The internal disciplinary tribunal, however, had not taken account of those difficulties. It thought the Claimant had opportunities to seek help in relation to literacy, had signed the Code of Conduct on four separate occasions and could have had recourse to support from managers. The author of the letter, a Ms Joy Kumar, then says this in the second paragraph on page 85:

> **"The view of the hearing is that you are in a position of trust and one that requires you to set an exemplary standard given that you come into direct contact with tenants who may be vulnerable. It is felt that it is your responsibility to ensure that you fully understand the Code of Conduct and if not to seek assistance that is provided by the organisation."**

The rest of the letter deals with formalities.

15. The Claimant appealed unsuccessfully against that summary dismissal. The appeal appears to have been based, according to paragraph 17 of the Judgment:

> **"...entirely on the severity of the penalty and that having regard to the claimant's prior exemplary disciplinary record, combined with a significant number of written character reference letters from various residents of the respondent, a sanction short of dismissal would have been a more appropriate way of dealing with the claimant."**

The Code of Conduct

16. The Code of Conduct has not been included in the appeal bundle. This also is something of a disadvantage. At paragraph 5.15 of the Grounds of Resistance the "key sections" of the Code of Conduct are said to be sections 1.2, 2.2, 3.2, 3.3 and 3.5 (see pages 43-44 of the appeal bundle). In the Grounds of Resistance part of section 1.2 is quoted in these terms:

> **"...to show that staff do not get improper personal benefits from Eastlands activities, staff must sign a declaration of interest form detailing any personal contact they have with those who benefit in any way from Eastlands services"**

Also part of section 2.2 is quoted in these terms:

> **"...giving and receiving gifts creates a relationship that can be seen to influence Eastlands judgements. Therefore, staff should always avoid gifts except in the very limited circumstances set out in this code and probity policy".**

17. At paragraph 9 of his Judgment, Employment Judge Goodman says this about section 3.1:

> **"Section 3.1 of the respondent's Code of Conduct deals with 'Disclosure of Interests' in circumstances where an employee or a close relative of an employee might receive some benefit** '*as a consequence of any Eastlands activity*' **(EJ Goodman's emphasis)."**

18. Finally, at paragraph 10 of the Judgment, he says this about section 3.2:

> **"Section 3.2 of the Code of Conduct contains provisions to ensure that employees of the Respondent do not put themselves in a position where their integrity may be seen to be**

> **compromised as a result of their relationship with residents. This section specifies that employees '***must not invite or influence a resident to make a will or trust under which any member of staff [or] any member is named as executor, trustee or beneficiary'* ***(EJ Goodman's emphasis).*** **The same section specifies that in any such circumstances an employee must sign a 'Declaration of Interest Form' detailing any such relationship."**

19. At paragraph 11 of the Judgment, there is a fragment of section 3.3, which apparently warns employees against receiving gifts from "customers, consultants or contractors" and states that gifts exceeding £50 in value should not be accepted.

20. Going back to paragraph 5.15 of the Grounds of Resistance, it is possible to recover section 3.5 or at least to know the gist of it, because it is stated there that it deals with the receipts of benefits, saying that they must be declared and approved by the Chief Executive and Chairman of the Board. It is unfortunate that this code has had to be pieced together in this way, but my understanding is that this patchwork assembly does not account for the apparent inconsistencies within the Code. On the one hand, it prohibits gifts in excess of £50, whilst on the other hand it suggests that benefits have to be declared and approved.

21. It is not, however, a statute or a commercial contract. Employment Judge Goodman's approach to it seems to have veered between regarding it as falling within the category of a professionally drawn document requiring strict construction and at other times adopting what might be considered a common sense approach to it. He found that there had been no breach of section 3.1, and I quote from paragraph 9 of the Judgment, because:

> **"...there is no evidence to indicate the alleged benefit which the claimant received was in any way 'as a consequence' of the respondent's activities."**

22. At paragraph 10 of the Judgment, he found in relation to section 3.2 that:

> **"...the claimant's own personal relationship with the resident who had left part of his estate to the claimant had been extremely tenuous and I further find as a fact that the claimant had**

neither invited nor influenced that resident in relation to the preparation of that resident's will."

23. By way of preface to the remark which follows, I should say that there is no actual appeal against that analysis. Nevertheless, I feel bound to say, however, that I regard both constructions as more appropriate to a commercial document, on the one hand, and, to use the Employment Judge Goodman's own word used in a different context, "tenuous" on the other hand. Indeed, it seems to me reminiscent of the kind of approach that used to be seen in the cases where construction invoking the *contra proferentem* rule has been adopted. By contrast, Employment Judge Goodman also concluded, at paragraph 11 of his Judgment, that the word "customers" in section 3.3 of the Code was wide enough to include residents and their respective families. That seems to me to represent a common sense approach to what is a Code of Conduct regulating the relationship between an employer, an employee and the residents of an estate and is not a commercial contract. Moreover, whatever the ebb and flow of Employment Judge Goodman's approach to the construction of the Code of Conduct, in the end he concluded that the Claimant's failure to disclose that he been made a beneficiary under the terms of Mr Kelly's will until the investigation had started was inappropriate and that it justified disciplinary action having been taken against him. At paragraph 23 he says this, about sections 3.2 and 3.3:

"In reaching this conclusion I have taken into account the provision of section 3.2 and 3.3 of the respondent's Code of Conduct. Although it is arguable whether the claimant was technically in breach of the 'letter' of those sections, the claimant did concede in the course of his evidence that he was aware of his obligation to report to the respondent any gifts from residents and to that extent, the claimant was remiss in delaying his notification to the respondent of the bequest to himself under Mr Kelly's will."

24. In the course of her submissions, Ms Crasnow has made something of the choice of language adopted by Employment Judge Goodman. It seems to me, however, that his use of the word "remiss", whether it is intended in some way to soften the language or not, is clearly

an acceptance that the Claimant had failed to notify the employer within a reasonable time that he had become a beneficiary under the will of a tenant of the employer.

25. Although he did not regard the introduction of the three additional allegations in the three further bullet points to which I have referred above in the letter of dismissal favourably, it is clear from paragraph 24 of his Judgment that he considered them on their merits. Clearly he did not think that they amounted to much. He said this:

> **"I do not regard any of the other three allegations specified in the dismissal letter dated 11 June 2012 as sustainable on the basis of the information presented to the respondent and the documentation on which the respondent seeks to rely. There is no requirement in the relevant sections of the Code of Conduct that an employee must notify the respondent in the event of that employee becoming a 'next-of-kin'. Nor was there any contractual obligation on the part of the claimant to keep his Line Manager notified of the administration of Mr Kelly's estate, particularly as the respondent accepted that the claimant was not an executor of that estate. Finally, the evidence in relation to the disposal of Mr Kelly's collection of coins indicated that it was the claimant's wife rather than the claimant himself who disposed of those coins, there being unchallenged evidence that the proceeds were paid into a bank account in the name of the claimant's wife."**

At this point it seems to me that he has reverted to what I might describe as a "black letter" approach to the construction of the Code. But once again I must make it clear that there is no appeal against that aspect of the Judgment.

26. Employment Judge Goodman's final word on the Code of Conduct is at paragraph 26 of the Judgment and is as follows:

> **"I recognise and appreciate the need for the respondent to ensure that the integrity of its employees be maintained by imposing fairly strict conditions in relation to the acceptance of gifts etc from residents with whom such employees have or may have contact. The claimant himself accepted the need for such a requirement and furthermore his representative at the Appeal Hearing did not dispute that the claimant had fallen below the standard which should be expected from an employee in such circumstances. Consequently, the crucial issue for determination is whether the decision to dismiss the claimant (with or without notice) for that reason was outside the range of responses of a reasonable employer confronted with that situation."**

27. Employment Judge Goodman had directed himself as to the issues which he had to determine at paragraphs 4 and 5 of the Judgment, and as to the relevant law at paragraphs 18-22. At paragraph 27 he reminded himself of the danger of what Mummery LJ called, in the Judgment in **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, at paragraph 43 of the Judgment", "the substitution mindset". Employment Judge Goodman said, at paragraph 27:

> **"I am, of course, very mindful of the risk of improperly substituting my own personal view rather than adopting the approach which a reasonable employer would adopt in the circumstances. I also recognise that the 'bar' is set relatively low in determining this threshold."**

28. Therefore, having accepted that there had been misconduct justifying the disciplinary process, he came to the conclusion at paragraph 27:

> **"...that no reasonable employer would have dismissed the claimant on this occasion having regard to the claimant's length of service, his exemplary disciplinary record throughout his employment, there being no allegation that the claimant sought to apply any influence on Mr Kelly and the extremely impressive character reference letters demonstrating that, so far as they were concerned, the claimant was an extremely well respected and trusted employee of the respondent. Taking all of these factors into account I do not believe that any reasonable employer would have considered a more serious sanction [than] some sort of formal warning."**

29. He had two further decisions to make: firstly, as to contributory fault, and secondly as to wrongful dismissal. In relation to the latter, he took the view that the Claimant's conduct could not properly be called gross misconduct such as to justify summary dismissal. Accordingly, the Claimant had been wrongfully dismissed (see paragraph 29 of the Judgment). There has been no appeal against that determination.

30. As to contributory fault, he took the view that the lack of transparency, as he put it, on the part of the Complainant in relation to the bequest and the Claimant's delay in notifying the Respondent was conduct which contributed towards the dismissal, so that it was just and equitable to reduce compensation by 25% (see paragraph 28 of the Judgment).

The oral submissions

31. Once again, we have had the advantage of excellently presented skeleton arguments and oral submission from both parties to this appeal. Ms Crasnow essentially takes three points. Firstly, that there has been a misdirection by Employment Judge Goodman in relation to his conclusion under section 98(4) of the **Employment Rights Act 1996** that no reasonable employer would have dismissed the Claimant in the circumstances. Secondly, that an error of law arises because, contrary to the self-direction or warning given as to the danger of a substitution mindset, essentially this is what Employment Judge Goodman had in his Judgment at paragraph 27 when he concluded it was unreasonable to dismiss the Claimant in the circumstances. Thirdly, she submits that there has been a misdirection in relation to contributory fault because Employment Judge Goodman has taken far too narrow a perspective as to what should be considered in relation to contributory fault. Her position is that, if I accept her submissions as to misdirection, then the matter ought to be remitted for at least reconsideration of the area in which I find there to have been a misdirection or an error of law if not for a complete rehearing of the case. If, however, I reject those submissions but accept that there has been a misdirection as to contributory fault, this is a case where I could, under the powers given to me by the statute, substitute my own conclusions, there being all the material necessary for me to do so.

32. Ms Crasnow's first submission is that, when an Employment Tribunal is faced with a summary dismissal based on the employer's contention that the employee has been guilty of gross misconduct, then somewhere in what is now a four stage analysis that the authorities guide Employment Tribunals to adopt there should be a recognition that the employer has characterised the conduct as gross misconduct and an analysis of whether that was a reasonable position for the employer to have adopted in the circumstances of the case. Unless that is

recognised, she submits that, when one comes to the final stage of deciding whether the sanction of dismissal is within the band of reasonable responses of a reasonable employer, the Employment Tribunal is, in effect, going to be examining the conduct without the proper context. Nowhere in the Judgment, she submits, is there any reference in the context of unfair dismissal, and, therefore, in the context of section 98(4), to the fact that this was a dismissal alleged to have been caused by the gross misconduct of the employee.

33. Mr Kenward submits that nowhere in the analysis of Arnold J's division of this Tribunal in **British Home Stores v Burchell** [1980] ICR 303, which first enunciated the three stage analysis, nor in the Judgment of Browne-Wilkinson J's division of this Tribunal in **Iceland Frozen Foods v Jones** [1983] ICR 17, which adds what might be described as the fourth stage of considering whether, in the particular circumstances, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might adopt, is there any requirement for a characterisation or categorisation of the conduct as gross misconduct.

Discussion and conclusions

34. Both parties have referred me to **JJ Food Service v Kefil** [2013] IRLR 850, where the current President of this Tribunal, at paragraph 8 of the Judgment, has set out the four stages in a brief and clear series of propositions. Sometimes, perhaps, it goes unnoticed that at paragraph 3 of the Judgment of Mummery LJ in **London Ambulance Service NHS Trust v Small** there is a similar distillation. He puts in this way:

> **"The essential terms of inquiry for the ET were whether, in all the circumstances, the Trust carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that Mr Small was guilty of misconduct. If satisfied of the Trust's fair conduct of the dismissal in those respects, the ET then had to decide whether the dismissal of Mr Small was a reasonable response to the misconduct."**

35. Whether pithily and clearly expressed, as in **Small** and **Kefil,** or more extensively set out as in the original cases of **BHS v Burchell** and **Iceland Frozen Foods v Jones,** it must not be forgotten that this is guidance as to how to approach the statutory rubric of section 98(4). That statutory language has, of course, changed slightly over the 30 or so years between the two groups of cases, but essentially it is more or less the same. By it, the fundamental task in any unfair dismissal case is that of deciding:

> **"whether in the circumstances ... the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee."**

The guidance is, no doubt, a helpful gloss on that statutory rubric, and has come to be regarded as a template for Employment Tribunals to follow. Nevertheless, in a case like the present, what Employment Judge Goodman had to do was to decide whether it was reasonable or unreasonable to treat the misconduct as a sufficient reason for dismissing the employee.

36. Mr Kenward submits not only that there is no requirement to identify whether the dismissal is on account of gross misconduct, but also that in this case, even if there is such a requirement, it is clear that, when one reads the Judgment as a whole, Employment Judge Goodman had in mind that gross misconduct was how it was characterised by the employer. He could scarcely have lost sight of it because that is how the letter of dismissal starts and, when looking at the Judgment as a whole, it is apparent that Employment Judge Goodman set that allegation into the factual matrix, represented by his findings of fact, and concluded that it could not be said that it amounted to a sufficient reason for dismissing the employee.

37. In this case the Code of Conduct stated that any serious breach of it would be regarded as gross misconduct. Ms Crasnow accepts that the employer cannot simply characterise

something as gross misconduct and rely upon having a reasonable belief that it was gross misconduct and then seek the conclusion that the dismissal must be within the band of reasonable responses because summary dismissal, irrespective of mitigation, is a reasonable response to gross misconduct. Both parties have referred me to a Judgment of a division of this Tribunal in **Sandwell & West Birmingham Hospitals NHS Trust v Westwood.** There, the employer had characterised the conduct of a nurse as amounting to gross misconduct. The Employment Tribunal had taken the view in that case that gross misconduct was not a reasonable characterisation by the employer of the nurse's conduct. One of the issues in the case was whether the Employment Tribunal had correctly directed themselves as to what might amount to gross misconduct. At paragraphs 111 and 112 of the Judgment there is set out a very brief synopsis of what amounts to gross misconduct. It must either be a deliberate and wilful contradiction of contractual terms or be conduct amounting to a very considerable degree of negligence. Whilst there is no appeal against the refusal of Employment Judge Goodman at paragraph 29 of the Judgment to find gross misconduct in the wrongful dismissal context, there seems to be no analysis at all by him as to what might amount to gross misconduct in that context. Nor can I find anywhere in the Judgment any attempt by Employment Judge Goodman to analyse the conduct or the employer's approach to that conduct in terms either as to whether it was capable of amounting to gross misconduct or whether it was reasonable for the employer to believe that it amounted to gross misconduct.

38. In those circumstances I accept Ms Crasnow's submission that Employment Judge Goodman did not, at paragraph 27, nor, contrary to Mr Kenward's submission, in any other part of the Judgment, approach the issue of whether it was reasonable or unreasonable to treat the conduct as a sufficient reason for dismissing the employee because either it constituted or was capable of constituting gross misconduct or it was reasonable for the employer to believe that it was.

39. Mr Kenward tempted me to conclude that, by looking at the decision overall, I could reach the conclusion that Employment Judge Goodman had, in reality, come to the conclusion that either this could not amount to gross misconduct or could not reasonably be regarded as gross misconduct. The two things, I should make clear, do not seem to me to be the same. Tempting though it is, in a case where two days have been taken up investigating a matter at an Employment Tribunal, to come to the conclusion that it everything must have been considered, it seems to me that this aspect of the matter has simply been passed over by Employment Judge Goodman. Accordingly I accept that there has been a misdirection in relation to the relationship between gross misconduct and unfair dismissal.

40. So far as the substitution mindset is concerned, I do not accept that the learned Employment Judge, having reminded himself of the danger identified by Mummery LJ in **London Ambulance Service NHS Trust v Small**, did fall into the trap. In the case of **Foley v Post Office** [2000] ICR 1283, the Court of Appeal, again Mummery LJ at page 1293, gave Employment Tribunals guidance as to what constitutes substitution and what is an inevitable alteration by an Employment Tribunal of the Judgment made by the employer. He said this:

> **"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 references to 'reasonably or unreasonably' and not by reference to their own 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."**

I accept that at paragraph 27 of the Judgment, there seems to be a somewhat monocular view of what might be taken into account in relation to whether or not it was reasonable for the

employer to have treated the misconduct as sufficient reason to dismiss. It does not seem to me, however, that because at that point in the Judgment Employment Judge Goodman appears to have brought into account all the factors that might be regarded as favourable to the employee, that he has, in the rest of the Judgment, not taken account of the fact that this was misconduct on the part of the employer. He says so in terms at paragraph 23 of the Judgment, and although Ms Crasnow complained that if one has to start reading parts of the Judgment by reference to other parts of the Judgment, that is an indication that one is trying to piece together something which does not in fact stand up to scrutiny, I do not accept that was necessarily so in this case

41. I preferred Mr Kenward's submission on this aspect of the case. It did not seem to me that, when read as a whole, Employment Judge Goodman was taking into account only that which was favourable to the employee. He had identified the fact that there was misconduct, but at paragraph 27 he stated not only that he would have taken these matters into account but also that a reasonable employer would have taken those matters into account and in the context as a whole would not have reached the conclusion. In the event, however, because there has been a misdirection as to the characterisation or categorisation of misconduct, and a failure, as it seems to me, to take that aspect into account, the matter will have to go back to an Employment Tribunal to be reconsidered.

42. For the sake of completeness, I will deal with the question of contribution. I accept that if the matter is to go back, it will be entirely artificial for it to go back against a finding of a contribution of any particular percentage. I do not accept Ms Crasnow's submission that I would be in a proper position to make a determination myself. I do not propose to reach a final conclusion on the issue as to whether or not there was any misdirection on the part of Employment Judge Goodman. It is suggested that paragraph 21 amounts to a misdirection and

that the Judgment of the division of this Tribunal presided over by Lady Stacey in the case of **Nelson v Clapham Solicitors** [2012] UKEATS/0037/11/BI and, in particular, paragraphs 18 to 25 represents a paradigm self-direction as to what should be taken into account in relation to contributory fault. But I do not think I can reach a conclusion about it, even though it seems possible that paragraph 21 is at variance with her guidance albeit that it does not set it out in the same way and with the same perspective. Had I acceded to Ms Crasnow's submission that there is a misdirection in relation to contribution I would have still remitted the matter because it does not seem to me appropriate for this Tribunal to be altering discounts or amounts of contribution arrived at by Employment Tribunals, which have heard all the factual material in the case. I do not accept that I am in the same, or as good as a position as the Employment Tribunal and, if there are cases where it is appropriate for this Tribunal to interfere with a proportion of contributory fault, in my judgment this is not one of them. Accordingly, the issue of contribution will also be remitted.

The terms of the remission

43. Not surprisingly, the question of the terms of any remission in this case have generated some controversy. Mr Kenward has referred me to the familiar authority of **Sinclair, Roche and Temperley v Heard and Another** [2004] IRLR 763. In the course of the Judgment in that case, the then President, Burton J, set out at paragraph 46 a series of factors which I should take into account in deciding on the terms of the remission. Ms Crasnow submits that this is a matter that ought to go back to start again. That involves a hearing probably of the same length as the previous hearing, that is to say two days. It is a case, she submits, where although I have allowed the appeal in relation to one aspect of the case, nevertheless the case calls for further evidence.

44. There is, submits Mr Kenward, a much more economic way of disposing of the matter and that is for it to go back to Employment Judge Goodman, where it can dealt with, effectively on submissions, in half a day. This is not a case where anybody suggests anything as to the partiality of the learned Judge or that there is anything so comprehensive about the error in this case that the decision could be described as totally flawed. Nor is this a case where if the matter goes back to Employment Judge Goodman, the passage of time will have an adverse effect on the matter. Mr Kenward says that this ought not to be regarded as a "second bite of the cherry" case. This is a case of a professional Judge and, in the circumstances, he can be relied upon to reach a dispassionate decision.

45. All of that strikes me as being true, but it does seem to that Mr Kenward's submissions underestimate the extent to which this is a second bite of the cherry case. Employment Judge Goodman has made a very clear and very distinct decision in this case. In explaining this aspect of remission, Burton J said this:

> **"If the Tribunal has already made up its mind, on the face of it, in relation to all the matters before it, it may well be a difficult if not impossible task to change it: and in any event there must be the very real risk of an appearance of pre-judgment or bias if that is what a tribunal is asked to do. There must be a very real and very human desire to attempt to reach the same result if only on the basis of the natural wish to say I told you so."**

46. I am confident that Employment Judge Goodman is a sufficiently professional Tribunal that one could say, "well, he will not be a victim to any of those vicissitudes", but it seems to me, in the circumstances, that it is much better for the matter to go back to a differently constituted Tribunal so that none of those anxieties need arise. It does have a disproportionate effect in this sense, that the case will have to be heard again, but that seems to me to be a small price to pay for what should, in my judgment, should be a complete reconsideration of all the circumstances this case. Accordingly, I will remit it to a differently constituted Tribunal - that will, in the modern context, be a different Employment Judge - for a complete rehearing, on the

evidence, with the Judgment of this Tribunal, of course, available to the Tribunal to see what went wrong on the last occasion.

47. Mr Kenward apples for permission to appeal. The issue on permission to appeal is whether there is a reasonable prospect of the Court of Appeal deciding that I was wrong to interfere with the Judgment of the Employment Tribunal and wrong to say that the Employment Judge had misdirected himself. In these cases, there is in many instances a natural tendency to leave Employment Tribunal Judgments alone. I fully accept the Court of Appeal has recently emphasised that these matters are essentially issues of fact. On the other hand, in my judgment, there is a clear misdirection. It is perfectly true section 98(4), and the authorities do not refer to the need to identify gross misconduct but a failure to characterise the misconduct in terms of the belief of the employer seems to me to be a fundamental error.

48. I do not think that it reasonably arguable that I am wrong, and in the circumstances, Mr Kenward, I think you had better seek your permission from the Court of Appeal.