Appeal No. UKEAT/0344/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 January 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

CRO PORTS LONDON LTD — APPELLANT

MR P F WILTSHIRE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR JAMES GOULD (Representative) Free Representation Unit Ground Floor 60 Grays Inn Road London WC1X 8LU

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Contributory fault

CONTRACT OF EMPLOYMENT - Wrongful dismissal

Unfair Dismissal

The Employment Tribunal found that the dismissal (for a reason relating to the Claimant's conduct) was unfair; the Respondent having failed to carry out a reasonable investigation.

The Respondent appealed against that Judgment, contending that the Employment Tribunal had erred in failing to apply correct legal test in light of the Claimant's admissions to the Respondent during the investigation and disciplinary process, see **RSPB v Croucher** [1984] IRLR 425.

Held: Appeal allowed on this ground. Given that the grounds relied on by the Respondent included the admissions made by the Claimant during the internal processes, the question was whether it had carried out a reasonable investigation, tested against the range of reasonable responses of the reasonable employer. Applying **Croucher**, where the employer's decision was based on admissions on the part of the employee, it was hard to see why it was not within the range of reasonable responses for it to conclude it was unnecessary to carry out further investigation. The Employment Tribunal felt further investigation would have highlighted other factors which put the Claimant's conduct in context such that a very different view of his culpability might be taken. The difficulty was that the Employment Tribunal's conclusions as to what that further investigation would have uncovered were derived from its own findings, on the evidence before it, not that before the Respondent. Adopting that approach, the Employment Tribunal failed to address the significance of the admissions made by the Claimant from the perspective of the Respondent at the time.

Given that failure to separate out the findings and approach relevant to the wrongful dismissal claim from the approach required for the unfair dismissal claim, the Judgment was unsafe. It could not be assumed that the Employment Tribunal would necessarily have reached same conclusion if it had applied the correct test and assessed question of fairness based on what was before the Respondent at the relevant time - including the admissions made by the Claimant - as tested against the range of reasonable responses of the reasonable employer.

As the Employment Appeal Tribunal could not simply substitute its view as to the fairness of the dismissal, the case would need to be remitted for fresh consideration.

Contributory Fault

The Employment Tribunal declined to make a reduction in the Claimant's compensation due to contributory fault.

The Respondent appealed on the basis that the Employment Tribunal had: (i) erred in assessing the question of contributory fault by limiting consideration to whether the Claimant was blameworthy in respect of the incident when it should properly have considered questions of contribution more generally, including the Claimant's failure to respond honestly in investigation etc; (ii) reached a perverse conclusion.

Held: It was not right to say that that the Employment Tribunal had confined its consideration only to the Claimant's conduct in respect of the incident; paragraph 78 (particularly when read together with preceding findings) made clear it did not. The Employment Tribunal plainly had in mind the question that the Claimant's responses in the internal investigation and disciplinary hearing might have contributed to the decision reached.

On the perversity challenge, however, allowing for the high test to be applied, the Employment Tribunal had lost sight of the significance of the Claimant's admissions and stance in the internal process. That went to the conclusion on liability (see above) but also raised the question as to how that did not amount to contributory fault on the part of the Claimant.

As the unfair dismissal claim was to be re-heard, this point would be for the Employment Tribunal considering this case at the remitted hearing in any event.

Wrongful dismissal

The Employment Tribunal had concluded that the Claimant had been wrongfully dismissed.

The Respondent appealed on the basis that the Employment Tribunal had failed to properly direct itself as to the correct legal test and/or failed to give adequate reasons and/or reached a perverse conclusion.

Held: It was right to say there was no self-direction as to the correct legal test. It might be said that the test was obvious and did not need re-stating but the reasons were inadequate to properly explain how the Employment Tribunal had approached this task and to demonstrate that it had taken into account all relevant factors. The conclusion was not necessarily perverse. This was also a point for the Employment Tribunal on the remitted hearing of both claims.

Disposal

Appeal allowed on all grounds. Claims of unfair and wrongful dismissal remitted to a differently constituted Employment Tribunal for re-hearing.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as below. This is the Respondent's appeal against a Judgment of the East London Employment Tribunal ("the ET") (Employment Judge Ferris sitting alone on 14 January and 3-4 April 2014), sent to the parties on 19 May 2014. The Claimant was represented below and before me by Mr Gould from the Free Representation Unit. The Respondent was represented before the ET by Mr Thomson-O'Connor, its solicitor, but before me appears by Mr Rees, Consultant.

2. The ET held that the Claimant's dismissal was unfair and wrongful and made awards of compensation for unfair dismissal of £36,923.40 and £5,460.96 for breach of contract and notice pay. The Respondent appeals against the ET's Judgment on liability both in respect of unfair and wrongful dismissal, and against its failure to make a contributory fault reduction in respect of the unfair dismissal remedy. The Grounds of Appeal were initially considered on the papers by HHJ Peter Clark, who directed that this matter should proceed to a Full Hearing.

The Background Facts

3. The Respondent provides stevedoring services. The Claimant, who was 64 by the time of the ET hearing, started working for the Respondent in April 1991. At the material time he was employed by the Respondent as a Supervisor - Heavy Lift (Southern UK), had a clean disciplinary record and was considered to be a loyal employee with no incidents regarding his employment prior to the events of January 2013.

4. Within the Respondent's premises there are various lifting machines to move large ship containers. One method of moving the containers utilises a large steel frame dangling from a crane, each corner being secured to the top corners of a container by a locking mechanism enabling the frame and the container to be lifted and moved together. It would be essential that each of the locking points on the top of the container were securely fastened to the frame before it was lifted. The locking process could be interrupted by a sensor sensing that the steel pin (in truth, a fairly massive bit of steel) within the corner pocket of a container was worn down or out of true. The sensor could in fact be triggered by a fairly fractional deviation in terms of the fit of the steel pin within the corner pocket of a container. To override that, operatives would put a small piece of rubber or wood in place on the pin, which the sensor would then read as satisfying its requirements and thus enable the lock to be engaged and the container to be lifted. Operatives working on the ground could hear the lock twist in place and the crane driver could see a green light come on indicating it was safe to lift. There were other ways of dealing with an oversensitive sensor, but they would require additional workers and time, and the ET found that the practice described above had been operated for many years without incident.

5. On the morning of 21 January 2013, the Claimant was called to deal with a problem lifting a container. As he went to deal with the incident one of the managers (Mr Saunders) suggested that he should first go to the fitters or engineers to pick up heavy duty twist locks. That was the first time the Claimant had been aware that the Respondent had such equipment, which could be used to get round the problem of a "non-locker". In any event, the Claimant decided to first go and see what was actually happening with the container. When he got there he saw his team leader (Mr Lee Metcalf), who had been with the Respondent for a few months, was already up a ladder placing a small piece of wood on top of the pin in the container; thus adopting the usual procedure. The green light went on. The lock was heard to twist into place,

and the crane driver did a preliminary lift to check it was locked. As it appeared to be so, the Claimant said the driver should continue but, when the container was around 20 feet off the ground, it fell from the crane. The weight of the container and the height it fell damaged it very badly; it could have caused a fatal injury if it had fallen on to anyone.

6. The Claimant and Mr Metcalf were immediately suspended. Whilst appreciating the seriousness of the event (he was certainly shocked by what had happened), the Claimant considered the practice that had been used had been long condoned by the Respondent, and that, given his 22 years' of blameless service, he might be reprimanded but would not face dismissal. Accordingly he took full responsibility for the incident, although the ET accepted his evidence that in fact, on 21 January, he had not initiated the use of this particular method and he had not himself informed Mr Metcalf of the packing method of working round a marginally shortened pin. The letter confirming the suspension from Mr Saunders (who was the manager who had spoken with the Claimant on the morning of the incident) set out the Respondent's view as to the seriousness of the matter and recorded the Claimant's admission that he had previously supervised similar practice, knowing it was dangerous and in breach of the health and safety rules. He also noted that the Claimant had been told that morning to go to the workshop to correct the correct equipment but had failed to do so.

7. A Mr O'Flaherty, the Respondent's UK Security Manager, carried out an investigation. He took evidence from the Operations Manager, Mr Phillips, who said he had not known that the practice in question was common and was unable to explain why it should be used given the safety implications. That said, he accepted that the operatives were under a lot of pressure and the practice would speed things up. Mr O'Flaherty also spoke to Mr Saunders, who confirmed he had told the Claimant to get the twist locks and the Claimant had said he would go down to

look at the container and then get the locks (which, in a sense, he did, albeit that, when he went down to look at the container, it seemed that the crane could lift it so he did not bother go on to get the twist locks). Mr Saunders also confirmed the time pressure under which operatives worked and surmised that might be why they would try to bypass the safety systems. Mr O'Flaherty also interviewed the crane driver who said he had not understood what Mr Metcalf meant when he talked of packing the pin. Although he had heard of the packing procedure he had not lifted a container when it had been used before and would not knowingly have done so.

8. The ET considered the crane driver had not been entirely frank in his evidence to the investigation and there was a climate of fear after the incident. The Claimant had not dealt with the investigation honestly. Although he admitted being aware of the packing practice, he denied he had ever instructed a member of staff to undertake "such a dangerous act". Accepting that the practice was in serious breach of the health and safety rules, the Claimant explained that the main motivation for it would be the time pressure under which the operatives worked. Some others interviewed by Mr O'Flaherty admitted knowing of the practice albeit stating it would be dangerous if done by non-engineering staff. The Respondent's management also admitted that the written safety procedures did not expressly cover this issue, albeit stating that, if a machine was not working 100%, the operative concerned should seek advice.

9. Although the record of Mr Metcalf's interview was not before the ET, it was apparent from Mr O'Flaherty's report that Mr Metcalf had said that this was common practice and carried out by all the team leaders. He seems to have said that the heavy lift supervisors knew of this and, by omitting to stop it, had effectively sanctioned it.

10. Mr O'Flaherty's conclusion relevant to the Claimant was as follows:

> **"I reasonably believe that Paul knew that he was wrong in allowing this practice to continue. He had every opportunity to stop this dangerous malpractice on the day, but failed to do so. By his show of non action he therefore put others in serious danger by allowing the container to be lifted. He was the supervisor and the man in charge who had the responsibility of preventing the container box to become disengage [sic] and falling to the ground. With all the evidence gathered during my investigation I find that I cannot reach any other decision in conclusion other than that Paul has failed in his duties regarding health and safety both in his duty of care to himself and others and knowingly allowing interference or misuse of "anything provided in the interests of health safety or welfare." "**

The ET observed:

> **"That conclusion might have been different if the Claimant had stuck to his guns and insisted that the practice was common and regular and condoned by all supervisors in the company."**

11. The Claimant's disciplinary hearing was on 6 February 2013. His mother's funeral was the previous day; he was due to have major knee surgery a couple of days later. He was given the option of postponing the meeting but declined, although in hindsight felt that would have been better. He went into the hearing apparently still thinking he would not be dismissed.

12. The ET (paragraph 49) characterises the Claimant's answers at the disciplinary hearing as demonstrating contrition and remorse rather than the truth.

> **"50. The Claimant did not make accurate reference to the history of the packing practice and the fact that it had been condoned by many supervisors over a long period of time. Rather he admitted his error that it was "a dangerous act" notwithstanding his knowledge that it had been done hundreds of times over a period of years without ill effect, and explained:**
>
> > **"Because anything to do with the interruption of the system on a crane will have serious consequences. If carried out in an uncontrolled fashion it is just luck that there have not been serious consequences."**
>
> **51. I accept that that does not represent a fair indication of the history of the use of the practice and the Claimant's and others' beliefs about the practice prior to this accident."**

13. The disciplinary officer, Mr Wheather, concluded that 'packing' was a very dangerous practice. Relying on the Claimant's admission that he was aware of the practice, that it was being used, and he had condoned it, Mr Wheather concluded he had no option but to dismiss the Claimant summarily by reason of gross misconduct. Having said that, he had regard to the

Claimant's length of service and the suggestion that the practice had been going on for some years, but concluded that the Claimant was to blame by not reporting or stopping it before.

14. The Claimant appealed that decision by letter of 19 February 2013. At the appeal he referred to past custom and practice; to the fact that he had not been aware of the availability of the twist locks until that morning; and to the fact that there were no express safety procedures in place for dealing with damaged containers at the crane. He said Mr O'Flaherty had failed to interview a number of other operatives as to the common nature of the practice and observed that, unless there was some kind of amnesty, people would not admit the practice was common. His trade union representative referred to his long service and made the point that, if dismissed, the Claimant would lose everything for something that had gone on for years. On 19 March 2013 Mr Thomas, the appeal officer, wrote to the Claimant dismissing his appeal.

15. During April 2013, the Respondent carried out an investigation to establish whether dangerous practices - including packing - had been going on; offering an amnesty for staff below manager level, provided they were honest in the first interview. Only one member of staff admitted to understanding what packing involved. None admitted to witnessing this being done by a line manager; only one respondee admitted to having heard the term before the January incident. The ET considered the responses were "unreliable" but accepted the Respondent was entitled, as it did, to conclude that there was no evidence that packing was common practice.

The ET's Decision and Reasons

16. For the Claimant, the ET heard evidence from the Claimant himself, from three former employees of the Respondent and took into account witness statements from two other former

employees. For the Respondent, the ET heard evidence from Mr O'Flaherty, who investigated the incident; Mr Phillips, the Engineering Manager; Mr Wheather, who took the decision to dismiss; Mr Thomas, who heard the appeal; and Mr Clark, the Respondent's HR Manager. It would seem, although not expressly stated, that the ET accepted that the Respondent had dismissed the Claimant for a reason relating to his conduct. Having referred to the guidance in **BHS v Burchell** [1978] IRLR 379, the ET held that there was no reasonable investigation in this case. First, the Respondent should, at an early stage, have identified the considerable pressure under which operatives were working, specifically on the morning of 21 January 2013. Second, a reasonable investigator would have taken into account what Mr Metcalf and the Claimant did was in response to the considerable pressure of work and purely in the interests of the Respondent and not their own. Third, any reasonable investigator would have been aware that the tone of the investigation would impact on the honesty of the responses and would have taken steps to address that. Fourth, a reasonable investigation would have taken on board the failure to identify the pressure of work, the problems in dealing with damaged containers on a regular basis, and the absence of any specific health and safety advice in that context.

17. In the absence of a reasonable investigation, the ET took the view that the Claimant was dismissed because he was scape-goated for the Respondent's failure to identify a common practice of long standing, albeit that it had not previously caused an accident. Accepting that the Claimant had not helped himself in the internal investigation, his response was explicable given his loyalty to/trust in the Respondent. The failures of the investigation were not put right at any subsequent stage. The Claimant's dismissal was unfair. He was also wrongfully dismissed.

18. Considering the question of compensation, in particular whether there should be any reduction for contributory fault, the ET expressed itself thus:

> **"78. I am torn in this case between my own judgment which informs me that the Claimant did nothing wrong in condoning a longstanding custom and practice which saved time and money for the Respondent and which did not contradict any express health and safety rule or regulation of which the Claimant had been informed, and the Claimant's stated view at the time of the accident when he took full responsibility for the accident. It is true that the Claimant drew back from that position at the Tribunal. … It is also true that the Claimant's apparent admissions at and shortly after the accident can be seen to have allowed the Respondent to treat him as she did."**

It was ultimately concluded:

> **"79. In my judgment and notwithstanding the Claimant's representation of contrition at the time of the accident he was not to blame for that accident. He did not contribute towards his dismissal by any relevant action which I judge to be culpable or blameworthy. Accordingly it would not be just and equitable to reduce the award by any proportion."**

19. The ET went on to make a reduction from compensation under **Polkey**, and a further reduction in respect of mitigation but neither concern me for the purposes of this appeal.

The Appeal

20. There are three grounds of appeal. First, relating to the decision on unfair dismissal liability, it is said that the ET erred in failing to apply the correct legal test in the light of the Claimant's admissions to the Respondent during the investigatory and disciplinary processes (**RSPB v Croucher** [1984] IRLR 425). Second, on the question of unfair dismissal remedy (contributory fault), the ET erred by limiting its consideration to whether the Claimant was blameworthy in respect of the incident when it should properly have considered the question of contribution more generally, including the Claimant's failure to respond honestly in the investigation process. Alternatively the ET reached a perverse conclusion. Third, on the question of wrongful dismissal, the ET erred by failing to refer to the correct legal test and giving wholly inadequate reasons (see paragraph 70); alternatively the conclusion was perverse.

Submissions

The Respondent's Case

(1) Unfair Dismissal Liability

21. For the Respondent, Mr Rees submitted this was a **Croucher** case (**RSPB v Croucher**). The Claimant had made numerous admissions and accepted full responsibility for the incident. In mitigation, he said "It is a practice we had been doing for a long while" but also volunteered that he knew how serious it had been. The Respondent was not thereby required to investigate into the practice, although, when it did, the evidence did not support the Claimant's case.

22. In his responses to Mr O'Flaherty's investigation, the Claimant accepted there had been a serious breach of health and safety rules; something he effectively reiterated at the disciplinary hearing. Although the ET had found that was not an honest account of the practice, for the purposes of determining unfair dismissal liability, the ET should have allowed that the admissions made were significant and relevant to the test to be applied. To the extent that the Claimant retreated from his admissions before the ET, that was not relevant. The ET had to determine the fairness of the dismissal at the time, not on the facts as it had found on the evidence before it. The ET had failed to distinguish properly between the task on the wrongful dismissal claim and that on the unfair dismissal claim.

(*2) Unfair Dismissal Remedy*

23. There were two main points. First, the ET erred in limiting consideration to the Claimant's culpability in respect of the incident as opposed to the question of his contributory fault more generally. Second, the conclusion was perverse.

24. On the first argument, in oral submissions Mr Rees accepted that the ET apparently did have regard to the very points that the Respondent said it should, i.e. to the Claimant's stance in the internal process and his admissions (see end of paragraph 78); given that seemed to show the ET had not confined its analysis simply to the Claimant's conduct in the incident, Mr Rees accepted it was difficult to pursue the first argument. He fell back on the second point, that it was perverse to find no reduction for contributory fault when the Claimant had made admissions in the internal process.

(3) Wrongful Dismissal

25. On the question of wrongful dismissal, Mr Rees observed that there was no self-direction as to the law and there should have been (**Autism Sussex Ltd v Angel** UKEAT/ 0205/13/SM). It was for the Respondent to show, on the balance of probabilities, that the Claimant was in fact guilty of the misconduct alleged (the repudiatory breach of contract), thus entitling him to be dismissed without notice or pay in lieu. It could not be seen from, the reasons provided, that the ET had applied that test. It had either failed to correctly direct itself as to the legal test or had not provided adequate reasons for reaching the conclusion it did. Even allowing that the Judgment must be read in its entirety, the reasoning could not be properly understood.

26. In the alternative the conclusion reached on the wrongful dismissal was perverse. Given: the admissions made by the Claimant; the risk to health and safety regardless of any question of custom and practice; the fact that the Claimant was in a senior position and should not have condoned this practice; and the erroneous examination of the conduct of the Respondent rather than that of the Claimant, the conclusion was perverse and could not stand. The EAT should allow the appeal in its entirety and should substitute its view for that of the ET in all respects.

The Claimant's Case

(1) Unfair Dismissal Liability

27. On behalf of the Claimant it was submitted that the ET had correctly identified the primary issue as being the potential failure to investigate. It then went on to make clear findings, open to it on the evidence, as to the failures of the investigation. Specifically, the failure to identify the time pressures on operatives; the failure to see that Mr Metcalf's solution - condoned by the Claimant - was in response to that pressure; the failure to take reasonable steps to ensure that witnesses were able to give honest answers; the failure to interview witnesses suggested by the Claimant; and the failure to consider historical problems with lifting damaged containers, which put the actions of the Claimant and the others into context.

28. The ET was thus entitled to conclude that the Respondent had failed to carry out a reasonable investigation. Properly analysed, this was not a **Croucher** case. As the EAT observed in **Boys and Girls Welfare Society v McDonald** [1996] IRLR 129, **Croucher** laid down an approach applicable to cases where there was no conflict on the facts. That was not this case. Had the Respondent carried out a reasonable investigation, it would have identified the issues identified by the ET.

(2) *Contributory Fault*

29. The ET had made findings as to the Claimant's conduct during the internal processes and had specifically referred to that when considering the question of contributory fault (see paragraph 78). As for perversity, the ET was entitled to reach the conclusions it did. In particular, given that it ultimately concluded the accident was caused by the Respondent and its failure to lay down a safe system of work, having considered the circumstances surrounding the accident the ET was entitled to conclude that it arose from the Respondent's failings not those

of the Claimant. Having given a correct self-direction as to the law, the ET took into account the Respondent's case regarding the Claimant's admissions in the internal processes but was entitled to reach the conclusion he did. The appeal did not meet the high test for perversity.

(3) The Wrongful Dismissal Claim

30. Accepting that the ET had given only a brief explanation of its conclusion (paragraph 70), the failure to set out the self-direction did not necessarily amount to an error of law. The Respondent had to demonstrate that the Claimant had committed an act of gross misconduct. Reading the Judgment as a whole, the ET obviously rejected the case that the incident in question was the Claimant's fault. It was clear from the Judgment as a whole that the ET considered that the Claimant was wrongfully dismissed. It would have been trite to simply repeat the legal test. Paragraph 70 should be read as a culmination of the ET's reasoning on wrongful dismissal; simply the statement of the conclusion. The reasons for that conclusion were clear from all that had preceded it. As the ET had found that the Respondent was responsible for the accident, it obviously did not find the Claimant sufficiently culpable to warrant his summary dismissal. That was not perverse. The finding was that the Claimant had followed the standard practice in that workplace and the Respondent was ultimately responsible for it. The ET was entitled to reach the conclusion it did.

The Relevant Legal Principles

31. There is no issue as to the correct legal principles in respect of the wrongful dismissal and contributory fault grounds of appeal. It is helpful, however, to remind myself of the principles relevant to the unfair dismissal liability ground. The starting point is section 98(4) of the **Employment Rights Act 1996**:

> **"(4) 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."**

32. The leading case relating to the fairness of a misconduct dismissal remains **BHS v Burchell**, which laid down a three-stage test. First, the employer must establish that it genuinely believed that the employee was guilty of the misconduct. Second, applying a neutral burden of proof, that belief must have been formed on reasonable grounds. Third, also with a neutral burden, there must have been a reasonable investigation. Although **Burchell** provides useful guidance, it does not replace the wording of section 98(4), and there is a question as to whether it is sensible to focus on the question of reasonable investigation when for example an employee has admitted the misconduct in question (see **RSPB v Croucher**, paragraphs 36 to 38). Where, as in **Croucher**, dishonest conduct has been admitted, there may be very little scope for the kind of investigation envisaged in **Burchell**: investigation, that is to say, to confirm suspicion or clear up doubt as to whether a particular act of misconduct has occurred.

33. The question is really whether there remains a conflict on the evidence before the employer. Even if the act of misconduct plainly occurred, a question might arise as to motivational intention rather than simply the fact of the incident in question.

Discussion and Conclusions

34. The ET in this case was charged not just with determining whether or not the dismissal of the Claimant was fair but as to whether he had been wrongfully dismissed and/or whether he had contributed to his dismissal. The tests to be applied in respect of each those matters were different, and it was important to keep that in mind.

35. For the purposes of the wrongful dismissal case, the ET had to make its own findings of fact as to what had happened and as to the Claimant's culpability. It had to reach his own conclusion as to whether the Respondent had established that the Claimant was guilty of conduct such as to amount to a fundamental breach of contract entitling the Respondent to dismiss him without notice or pay in lieu. For the purposes of the unfair dismissal case, however, the ET was not entitled to have regard to its own findings as to what had happened on the evidence it had heard. It was obliged only to test the Respondent's decisions, including the decision to dismiss itself, against the range of reasonable responses of the reasonable employer, not by applying its own view as to the respective culpability of the parties on the facts that it, the ET, had found. Although it is not uncommon for ETs to be faced with these very different tests when having to determine claims of unfair and wrongful dismissal, that does not detract from the difficulty of the exercise.

36. I start with that observation because I believe that that provides the key to what went wrong in this Judgment. There is a basic difficulty in that there is no clearly structured approach to the questions the ET had to answer; no separation out of the findings relevant to wrongful dismissal and those relevant to unfair dismissal. That might not have been fatal, but it does make it all the more difficult to be sure that the ET clearly kept in mind the different tests that there needed to be applied when reaching its conclusions.

37. On the unfair dismissal case, the first question the ET had to determine was what was the reason for the dismissal? Had the Respondent discharged the burden upon it of establishing a reason capable of being fair for section 98 purposes? There is no specific identification of the reason for the dismissal in the Judgment, although one can infer that the ET found the Respondent had a genuine belief in the Claimant's misconduct, and that led it to dismiss him.

The ET was then bound to ask whether, applying a neutral burden of proof, that belief was based on reasonable grounds and whether the Respondent had carried out a reasonable investigation. The standard was that of the range of reasonable responses of the reasonable employer and the ET was not entitled to substitute its view for that of the reasonable employer. If the grounds relied on by the Respondent included, as they did here, admissions made by the Claimant during the internal process, the question would arise as to whether the Respondent acted within the range of reasonable responses of the reasonable employer in limiting the scope of its investigation in the light of those admissions. That is really what is being said in **Croucher**. If the employer is relying on an admission by the employee, and that constitutes reasonable grounds, it is hard to see why is not within the range of reasonable responses of the reasonable employer to conclude that it is unnecessary to carry out any further investigation.

38. In the present case the ET felt that further investigation would have highlighted other factors which put the Claimant's conduct in context such that a very different view of his culpability might be taken. The difficulty is that the ET's conclusions as to what further investigation would have uncovered are derived from its own findings, on the evidence before it, not that before the Respondent. Adopting that approach, the ET failed to see the significance of the admissions made by the Claimant from the Respondent's perspective at the time. The Claimant, employed in a supervisory role, had told Mr O'Flaherty he knew this practice occurred and had done nothing about it notwithstanding it was a serious breach of health and safety rules. At the disciplinary hearing his evidence was much the same, acknowledging this was a dangerous act and failing to put the case as he put it before the ET (that this had effectively been condoned by the supervisors without correction from managers for years).

39. Given this failure to separate out the findings and the approach relevant to wrongful dismissal from the approach it was required to adopt for unfair dismissal, the ET's Judgment is unsafe. I cannot be sure that the ET would necessarily have reached the same conclusion if it had applied the correct test and assessed the question of fairness on what was before the Respondent at the relevant time - including the admissions made by the Claimant - as tested against the range of reasonable responses of the reasonable employer. Can I simply substitute my own conclusion as to the fairness of this dismissal? I do not think I can. Even allowing for the admissions made by the Claimant, the ET might see it as relevant that he had also highlighted issues relevant to customer practice, and there may be a question as to whether that gave rise to a conflict of evidence sufficient to require, applying the range of reasonable responses test, further investigation. That is a matter for the ET; not this court.

40. Although not strictly necessary given the conclusion I have reached on the first ground, I turn to the second ground of appeal, contributory fault. I reject any suggestion that the ET confined its consideration only to the question of the Claimant's conduct in respect of the incident. Paragraph 78, particularly when read together with the preceding findings, makes clear it did not. It plainly had in mind the issue that the Claimant's responses to the internal investigation disciplinary hearing might have contributed to the decision reached. I do, however, think that there is something to be said on the perversity argument. I think the ET rather lost sight of the significance of the Claimant's admissions and his stance in the internal process. That may have impacted upon the Judgment on liability, for the reasons I have already outlined. Even if there was still an unfair dismissal, it is very hard to see how any ET could conclude that those matters were of no relevance to the question of contributory fault.

41. As I am remitting this case on the question of liability for unfair dismissal, I remit this point as well for the ET, at the remitted hearing, to reach its conclusions in the round.

42. Finally, I turn to the wrongful dismissal claim. It is right to say that Judgment includes no self-direction as to the correct legal test in respect of this claim. That might not have amounted to an error in itself; the ET may have seen it as so obvious as to be unnecessary. Here, however, I do think that the failure to ask the right question meant that the ET unduly constrained its considerations (or, at least, the Reasons do not sufficiently disclose the ET's reasoning to be sure that it did not). Even if this was a practice generally condoned in the workplace, issues still arose as to the Claimant's role as a supervisor, given his apparent acceptance of the health and safety risks involved in the practice. I cannot be sure, from the reasons provided, that all relevant matters were taken into account, and on that basis I would allow this ground of appeal.

43. That said, I do not think I can say that is necessarily the case that the conclusion reached was perverse. Ultimately it seems to me a point that could go either way, and that is for the ET hearing this case on the remitted hearing to reach its own conclusion.

44. Having given my Judgment, I permitted the parties to make further representations as to whether the remission should be to the same or a different ET. For the Respondent, Mr Rees submits it should be to a different ET, adopting the guidance laid down in **Sinclair Roche Temperley v Heard and Fellows** [2004] IRLR 763. He contended that the ET here had taken a wholly flawed approach and should not be given a second bite at the cherry. For the Claimant it was submitted that the matter should be remitted to the same ET, who had made extensive findings of fact. It was proportionate to do so, and the Employment Judge in question - against

whom there was no allegation of bias or other prejudice - could be relied on to reach an objective view on any remitted hearing.

45. My conclusion on this appeal was essentially that there had been a fundamental flaw in the approach adopted in this case, which undermined the conclusions reached. I suspect it probably arose from sympathies that the ET felt for the Claimant, having heard the evidence and reached the conclusions it had to on the wrongful dismissal case. I do not think there was a flaw in any other sense; there was no question of bias or prejudicial conduct or anything of that nature. I can see that, given the quite extensive findings of fact made, there is an issue of proportionality in terms of sending this matter back. That said, the issues involved are not insignificant for either party, either as to the sums or the underlying issues, and I note that the length of hearing itself is relatively short, and it might be hoped that a new ET could approach this matter in a proportionate manner and hear it relatively quickly.

46. Ultimately it seems to me that the balance comes down in favour of sending it back to a differently constituted ET. That is not to say that I do not think that this Employment Judge could approach the remitted hearing in an entirely professional manner; I am sure he could. It is just that I think it is difficult, having reached such clear views on the evidence, for this Employment Judge to then be seen as approaching it afresh without those views informing his second consideration. It is for those reasons that I direct that this matter is remitted to a different ET for fresh consideration on both the unfair dismissal and the wrongful dismissal cases.