Appeal No. UKEAT/0320/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 January 2015

Before

HIS HONOUR JUDGE HAND QC

MR P GAMMON MBE

PROFESSOR K C MOHANTY JP

MRS N GONDALIA — APPELLANT

TESCO STORES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOE SYKES (Advocate) Employment Law Centres 107 Fleet Street London EC4A 2AB
For the Respondent	MR RICHARD RYAN (of Counsel) Instructed by: Squire Patton Boggs (UK) LLP 2 Park Lane Leeds West Yorkshire LS3 1ES

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

PRACTICE AND PROCEDURE - Review

Dishonesty

The concept of subjective dishonesty did not mean that the Employment Judge was bound to consider the approach taken in **John Lewis plc v Coyne** [2001] IRLR 139, which stated that, where an issue arose as to whether conduct might be dishonest or not, that should be determined by reference to what had been said by Lord Lane LCJ in **R v Ghosh** [1982] QB 1053 at paragraphs 162 and 163. The issue did not arise in the instant case and did not need to be decided but it was doubtful how useful a jury direction in a criminal case was in the employment context.

Reasonableness of dismissal - Inadequacy of reasons

The Judgment overall does not say how important issues have actually been resolved. It asserts conclusions, which it adopts from the Respondent's case and submissions, but that does not make for an adequately reasoned decision. The Written Reasons did not fulfil the criteria for a properly reasoned decision, either as set out in paragraph 62(5) of the **Employment Tribunal 2013 Rules** or in accordance with the familiar authorities of **Meek v Birmingham City Council** [1987] IRLR 250 and **Greenwood v NWF Retail Ltd** [2011] ICR 896. Case remitted for a complete re-hearing.

Application for review of EAT Judgment

That the appeal succeeded on the above ground did not mean it must succeed on the second ground of appeal, namely that the Employment Judge must have fallen into the error identified

in **Whitbread plc t/a Whitbread Medway Inns v Hall** [2001] IRLR 275 and **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854 of concluding that where there was an honest and genuine belief that the employee had committed an act of gross misconduct then the dismissal must be axiomatically fair. It was impossible to be confident that was the case because of the inadequacy of reasons; the factors relating to whether or not this Tribunal should review its own decisions set out at paragraph 47 of the judgment in **Zinda v Governing Body of Barn Hill Community High School** [2011] ICR 174 were considered.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal from the Judgment of Employment Judge Ryan, sitting at Watford on 1 November 2013, the Written Reasons having been sent to the parties on 20 January 2014, whereby the Appellant's complaint that she had been unfairly dismissed from her employment with the Respondent as a cashier was dismissed. Today she has been represented by Mr Sykes of Employment Law Centres, who did not appear below. The Respondent had been represented by Mr Ryan, now of Counsel, who appeared below as a solicitor.

The Rule 3(10) Hearing

2. The Notice of Appeal is at pages 49 to 65 of the appeal bundle. When the matter was heard by HHJ Eady QC, pursuant to Rule 3(10), on 10 September 2014, she condensed the Grounds into the following three propositions. Firstly, had Employment Judge Ryan erred in law by not considering or applying, in the context of an unfair dismissal misconduct case, the definition of dishonesty by the then Lord Chief Justice, Lord Lane, in his Judgment in **R v Ghosh** [1982] QB 1053, a case decided in the Court of Appeal Criminal Division? Secondly, had Employment Judge Ryan erred in law by concluding that once gross misconduct had been established, then dismissal was axiomatically within the band of reasonable responses and therefore axiomatically fair? Third, had Employment Judge Ryan erred in law in reaching a conclusion that no reasonable Tribunal, properly directing itself, in deciding that the Respondent had formed a genuine belief in the Appellant's misconduct following a reasonable investigation?

3. As a result of the argument addressed to her, HHJ Eady thought that the proposition that the Judgment had been inadequately reasoned by Employment Judge Ryan ought to find some place in the appeal if it was to go forward. In directing that it should proceed to a Full Hearing, she ordered that it would do so on the proposed amended Notice of Appeal. The appeal was duly amended, and it proceeds on the amended Notice of Appeal, which appears at pages 1 to 20 of the appeal bundle. The amendments are twofold: firstly, the first ground of appeal, to which I have just referred, has been narrowed down to consideration of only whether the Respondent had reasonable grounds for its belief that the Appellant was subjectively dishonest, applying the second subjective test in **Ghosh**, and at ground 3, a general inadequacy of reasons ground is added to what I might describe as the perversity ground.

The Facts as found by the Tribunal

4. In the Judgment, at paragraph 13, Employment Judge Ryan makes a series of findings of fact. The findings at paragraphs 13.2 and 13.3 on page 42 of the bundle deal with different policies. At the heart of this case lies a policy with the catchy title "Double the difference". It is explained by Employment Judge Ryan in that paragraph. At paragraphs 13.4 and 13.5 an account of events on Tuesday 12 March 2013 begins. In the appeal bundle there is a note taken at the disciplinary hearing on 4 April 2013 at pages 113 to 116, which was a document that was clearly placed before Employment Judge Ryan, and some of his Judgment is obviously derived from it. It does not, however, entirely agree with the compressed version of events that he gives at paragraphs 13.4 and 13.5. Because he does not refer to it in any more detail, we are somewhat reticent about fleshing out the factual material. That is a slippery slope that might lead to the risk of us substituting our own views for that of the Employment Tribunal and/or the employer or to us trespassing into the area of fact-finding. But because the findings made by Employment Judge at paragraphs 13.4 and 13.5 to an extent are not entirely self-explanatory, it

seems to us permissible to patch into them the slightly more extensive account given by the Appellant at pages 113 and 114.

5. On Tuesday 12 March 2013 the Appellant was working at the Respondent's Pinner Green superstore. As we have all become familiar with in the last couple of years, at the Respondent's stores and similar stores, there is now a proliferation of what are called self-service tills. The Appellant was at the self-service tills at the superstore when a customer complained about Easter eggs which were on the shelves at a price of £1.50 but reduced to £1.00 showing up on the tills as £1.50. In at least one instance the Appellant operated her scan card and inserted her number so that she was able manually to override the price shown on the till and replace £1.50 with £1.00.

6. At paragraphs 13.4 and 13.5 of the Judgment the impression is given that she then advised those customers to go to Customer Services and claim a refund or rebate under the "double the difference" policy. But the note at pages 113 and 114 seems to us to mean that in the cases where she had manually reduced the price shown as the discounted price in the shopping aisle, namely £1.00, she did not advise those customers to go and seek a refund under the "Double the difference" policy. Her account continues at page 114 that later she called her team leader and told him what had happened and he said that the Appellant should give the label to the team leader and he would let another person know. After that, and she says about an hour later, customers were once again complaining that they had been overcharged in relation to Easter eggs. This time she did not attempt to alter the price manually at the till but she simply advised them to go to Customer Services and apply for the double the difference rebate. She had said that she was willing to go and take the labels offering the discount off the goods, but she had been told that was not her job.

7. The Appellant was an experienced cashier with 16 years of unblemished service. When she finished her shift at 2.30pm, she went to the Easter eggs and found that the labels had not been changed. She bought ten of them, receiving a staff discount, something which is mentioned at paragraph 13.3 of the Judgment, although it is not quantified there. In her witness statement at paragraph 11, which is to be found at page 77 of the appeal bundle, she refers to a 10% staff discount. Therefore ten Easter eggs would have cost her £13.50. Having bought them, she took them to Customer Services and she had a conversation, which is recorded at page 114 of the appeal bundle in the notes of the dismissal hearing but is not dealt with as fully in the Judgment.

8. At page 114 she gives an account to Mr Lane, the manager who dismissed her, of the events, which as I say are referred to by Employment Judge Ryan in his Judgment at paragraph 13.5. Then the next day, according to the second part of paragraph 13.5, she returned to work and, seeing that the pricing anomaly was still in place, she bought what is said at paragraph 13.5 to be nine eggs or so. That is obviously an imprecise figure. Mr Ryan tells me that it was in fact clearly ten eggs, and that is consistent with what appears at page 115 in the note of what she told Mr Lane of the events of 13 March. Employment Judge Ryan states that she was late, but he regarded nothing as having turned on it. Later, at paragraph 13.10 he does quote from the note, although Employment Judge Ryan seems to have run together what is said on page 113 and 114.

9. At page 113 is a conversation between the Appellant and Mr Lane, which is quoted by Employment Judge Ryan at paragraph 13.10. In many ways the conversation epitomises the difference between the position of the Appellant and the position of the Respondent in relation to what she had done. At paragraph 13.11 of the Judgment there is an account of events of 13

March 2013. It is out of sequence. The quotation from paragraph 13.10 came later in the disciplinary hearing than the quotation in paragraph 13.11. Nothing turns on that. Employment Judge Ryan then recites what conversations that the Appellant had with managers at Customer Services the following day when she bought ten eggs.

10. If the Appellant bought in total 20 eggs, then with her staff discount she would have paid £27 at the higher price or £18 at the discounted price and the double the difference policy would have applied so that she would receive a rebate of £18. This would mean that she would be obtaining 20 Easter eggs for a total outlay of £9.

11. What she was saying to Mr Lane at the disciplinary hearing in April, and what Judge Ryan recorded at paragraphs 13.10 and 13.11, is that she had certainly on 13 March made it clear that she knew that these goods were wrongly priced and notwithstanding that, on 13 March at least, she was given the discount. Mr Lane's attitude to that can be seen in the quotation at paragraph 13.10 that this was "At the expense of the company you work for, which pays your wages, you were more than comfortable to take it?", to which the Claimant replied "Yes". Indeed the whole of the disciplinary hearing was conducted on the basis that the Appellant thought that she was doing nothing wrong, a proposition with which Mr Lane plainly did not agree.

12. Although the above events had taken place on 12 and 13 March, the matter was not raised formally with the Appellant until 19 March when she was called to an investigatory meeting. That could not be completed on that day. It continued on 20 March, and then resumed on 2 April. The result was that, by a letter of that date, she was invited to attend a disciplinary

hearing on 4 April (see page 124 of the appeal bundle). The letter stated the purpose of the meeting as follows:

> **"This meeting is to investigate you claiming overcharge for Easter eggs amounting to £18 when you know [sic] the label was wrong."**

This is the first example of a not particularly clearly worded sentence emanating from the Respondent. Nevertheless the sense of it seems clear. It was to investigate that knowing the labelling had been wrong the Appellant had sought and obtained a rebate of £18 over the price that she should have paid, leaving her with a £9 outlay, as I said earlier.

13. In the meantime other members of staff had been interviewed (see paragraph 13.8 of the Written Reasons). The disciplinary hearing to which I have just referred took place on 4 April. It lasted an hour and 13 minutes (see paragraph 13.9 of the Reasons). During the course of the hearing the Appellant was invited to put forward mitigating circumstances (see paragraph 13.3 of the Written Reasons). At the end of the hearing she was dismissed by Mr Lane, who said that "he considered the claimant had committed gross misconduct twice by claiming the refunds to make personal gain" (paragraph 13.14 of the Written Reasons). At paragraph 13.15, taking them from the notes at page 116 and not the dismissal letter, to which I will come in a moment, Employment Judge Ryan set out Mr Lane's reasons as follows:

> **"13.15.1. that at no point had the claimant shown remorse or understanding of the unacceptable nature of her actions;**
>
> **13.15.2. that the actions were premeditated and deliberate and the claimant said that she would do it again for personal gain;**
>
> **13.15.3. that the claimant had been fully trained on relevant checks and was fully aware of the consequences of abusing the policy;**
>
> **13.15.4 that any trust he had was lost and because of the loss of trust he considered he had to dismiss."**

14. In his letter of dismissal, written on 4 April, Mr Lane said this (page 117 of the appeal bundle):

> **"I am writing to confirm that you are summarily dismissed for Gross Misconduct in accordance with the Company's Disciplinary Procedures for the following reason:**
>
> **Claiming repeated overcharges for Easter eggs when known [sic] issues for personal gain."**

15. This is a worse example of unclear use of English than the previous one. Mr Ryan submitted that even so, when one reads them together, it is quite clear that the Appellant has been dismissed for her conduct in applying for a double the difference discount on Easter eggs when she knew what the price was or when she knew that there was a pricing anomaly.

16. There was an internal appeal. As part of the process the Appellant wrote a letter dated 11 April 2013. It is referred to at paragraph 13.17. In the second sentence she makes complaints about what had happened at the dismissal meeting. Employment Judge Ryan puts it in this way.

> **"The points she made were that before the meeting had started she was aware of the decision and was going to be dismissed. She was not given a fair hearing with Mr Miller, he was rushed because he was late for a funeral. …"**

The reference to Mr Miller is plainly a typographical error or simply an error. It must be a reference to Mr Lane.

17. There seems little doubt that there was dissatisfaction, on the part of the Appellant, with the way that Mr Lane had conducted the hearing. At page 115, in the notes, it is clear that after a relatively short adjournment of 27 minutes, after the hearing but before the decision was announced by Mr Lane, the Appellant's trade union representative, Ms Tracey Root, had complained. She had said that the Appellant "feels no one understood the point" and she had become stressed and a grievance would be taken out. That is clearly what is being reiterated in the letter written in advance of the appeal.

18. At paragraph 13.17 Employment Judge Ryan quotes from the letter.

> **"I did not think I was doing anything wrong, but as a member of staff and also from the company's perspective I now do realise that I took advantage of a pricing error in store. I had no intention of performing any means of fraud in the company which I am accused of and I would like to be given a second chance."**

19. In saying that she did not think that she had done anything wrong but now realised that she had taken advantage of the pricing error, at the Employment Tribunal the Appellant said that this was at the suggestion of her trade union representatives. Employment Judge Ryan recorded the matter in this way at paragraph 13.18:

> **"She said that both her trade union representatives, Tracey and Dee, had assured the claimant she had done nothing wrong, it appears from Ms Root's evidence to the tribunal that Ms Root, to some extent at least, may have thought better of that view, if it was her view at the time. The claimant went on that she did not feel it was fair to get dismissed over the incident and that she had had a clear record for 16 years. There were another six members of staff involved, some of whom were managers, and they had not done their jobs and the company lost £18.00 in the process, but none of those people had been investigated or treated in the same way, and overall the decision was harsh."**

20. Her difficulty was that, having put the matter in that way to Mr Winter, he could not have known what she told Employment Judge Ryan. In fact Mr Winter had noted on the appeal hearing, as recorded by Employment Judge Ryan at paragraph 13.21, that the Appellant had said to him:

> **"Chris has made me aware that what I did was wrong. I wanted managers to do their job, stop the customers getting the double difference."**

21. At the Employment Tribunal hearing the Appellant denied that had been said. Employment Judge Ryan, in the second sentence at paragraph 13.22, says this:

> **"The notes however are contemporaneous and were signed by her representative."**

It might have been better if he had gone on to say "And for that reason I find that she did indeed say that to Mr Winter". It seems to us, however, implicit in paragraph 13.22 that is the conclusion that he reached.

22. Returning to the admission that she had made in the letter, Employment Judge Ryan says this, at paragraph 13.20:

> **"Her case before me in the tribunal was that the admission she made in the letter that I have quoted was made because the union representative who conducted the case for her at the appeal, Mr Chris Hope, had advised that if she admitted it Mr Winter was reasonable and was likely to change the decision."**

23. Employment Judge Ryan then records, in the rest of paragraph 13.20, what appears to us to be the Claimant's case, expressed in terms of her lack of understanding of the Respondent's case. He says this:

> **"The claimant's case before me was that she still did not think that what she had done was wrong and effectively what she was saying was that she did not see any difference between a customer who unknowingly would take the benefit of a pricing error and get the refund, and a member of staff whose job, at least in part it is to protect the assets of her employer and to ensure that it makes a profit generally rather than a personal profit for herself, doing, and then repeating, the action for which the respondent disciplined her."**

This is said by Mr Ryan on behalf of the Respondent to be one of the fundamental planks upon which the decision rests.

24. Employment Judge Ryan then went at paragraphs 13.23 and 13.24 on to make further findings, which are perhaps better quoted in full:

> **"13.23. It was pointed out to her that in her interview she had said that she had bought the eggs when she did not need them and then she said that she would return them. The claimant explained she would return on the second day if she could get the double difference refund.**
>
> **13.24. Mr Winter explained to her in the meeting, as he explained in evidence, that he considered that this was effectively a dishonest action by a member of staff. It was dishonest because it was using knowledge that she had from her position as an employee to take advantage of a benefit available to customers, and whilst members of staff are entitled to be customers, they also have a duty to act honestly throughout. Mr Winter accepted that the claimant had been honest with him. He accepted that she had been poorly advised in the first stage by representatives, but found no reason based upon that to overturn the decision. He expressed his regret that the decision had to be upheld."**

The letter rejecting her appeal, referred to at paragraph 13.25, is not, we think, amongst the papers in the bundle.

The Employment Tribunal Decision

25. Paragraph 14 is a recitation of the submissions made by Mr Tomlinson, who represented the Appellant. He pointed out her unblemished career of 16 years. Employment Judge Ryan appears to have included the riposte that the fact that "you have been employed with an unblemished record" does not mean "that you cannot be dismissed". Therefore that aspect of Mr Tomlinson's submissions was immediately despatched by the Employment Judge.

26. But Mr Tomlinson went on to seek to rely upon the fact that the rebates had been authorised by managers. As he put it, the Appellant had acted overtly throughout and that it was not right that somebody who had shown remorse in front of Mr Winter and who had had a blameless career should be dismissed. Employment Judge Ryan, in the first sentence of paragraph 15, suggested:

> **"The submissions of the claimant, heart-felt as they may have been, did not specifically address the legal principles."**

He went on to say:

> **"The questions I have to ask and my conclusions upon them are as follows.**
>
> > **15.1. Has the respondent shown the reason for dismissal? In my judgment the respondent has shown that the reason for dismissal, as set out [by] Mr Lane and Mr Winter, namely that she had effectively wrongly taken advantage of a refund policy to which she knew she was not legitimately entitled at that stage. That was one of those types of misconduct which really falls within the common sense provision of the respondent's disciplinary procedure."**

27. Both Mr Sykes and Mr Ryan suggested, for different reasons, that is also a significant and further fundamental plank of the Decision. It is a finding that the reason for dismissal was that the Appellant had "effectively wrongly taken advantage of a refund policy to which she knew she was not legitimately entitled at that stage".

28. The last sentence of paragraph 15.1 is clearly a reference to part of the handbook which appears at page 123 of the appeal bundle. Under the heading of "gross misconduct" there are set out specific examples of conduct such as theft or physical assault or eating food on the premises. These are said to be examples of conduct that is:

> **"… serious enough to make it impossible to continue the contract of employment.**
>
> **These cases of 'gross misconduct' will result in the employee being dismissed without being given notice."**

There then appears the following:

> **"Any other action which on a 'common sense' basis is considered to be a serious breach of acceptable behaviour, will be seen as 'gross misconduct'."**

29. It is obviously that latter passage which Employment Judge Ryan had in mind when he referred to common sense in paragraph 15.1, referred to above. There had been a suggestion at the Employment Tribunal that there was some ulterior motive on the part of Mr Lane for reaching the conclusion that the Appellant should be summarily dismissed. The suggestion was discussed and rejected at paragraph 15.2 of the Judgment. We need spend no more time on it because it does not feature in this appeal.

30. At paragraph 15.3 Employment Judge Ryan takes a view, again accepted by everybody, that the reason for dismissal related to the Appellant's conduct. He points out at 15.3 that, even though the Claimant had doubts about Mr Lane and his bona fides, she had accepted that she had no doubts about Mr Winter and she did not suggest that he had other reasons for the dismissal. This seems to relate back to paragraph 15.2. There are then two paragraphs as to which the parties differ in respect of their meaning. Paragraph 15.4 and 15.5 read as follows:

> **"15.4. In my judgment, at the end of the process, the [respondents] genuinely believed that the claimant had committed the misconduct that was alleged against her.**
>
> **15.5. In my judgment they had reasonable grounds to do so for the simple reason that the claimant accepted [the] way in which she had acted."**

Mr Ryan submitted that 15.5 was an indication that Employment Judge Ryan had accepted that the Appellant had acted in the way that she did knowing that there was an anomaly in relation to the price. Mr Sykes submitted that 15.5 was connected to 15.1.

31. At paragraph 15.6 Employment Judge Ryan discusses whether the investigation was reasonable and finds that it was. At 15.7 Employment Judge Ryan points out that Mr Tomlinson on behalf of the Appellant had accepted that the central issue in the case was whether the sanction was a fair one and whether "the dismissal sanction lay within the reasonable range of responses". He also reminded himself that he must not substitute his decision for that of the employer. His conclusion is at paragraph 15.8:

> **"The employer is a large organisation, it reposes trust in its employees and many of them, including the claimant, are responsible for handling what must be substantial sums of money in the course of it. It is therefore necessary for the employer to be satisfied that they can trust the employees in matters relating to money, which is of course intrinsic in the purchase of retail goods. Given the findings that the respondent made, it seems to me that it is not possible for the claimant in this case to argue with any great force that, notwithstanding her unblemished career, the decision to dismiss and to dismiss summarily was not one which lay within the reasonable range of responses."**

Submissions

32. Mr Sykes submitted, in the context of ground 1 of the Notice of Appeal, that Employment Judge Ryan had erred in law by failing to consider whether the Respondent had reasonable grounds for its belief that the Appellant was subjectively dishonest. This was, he submitted, plainly an issue in the case. The Employment Judge was bound to consider this because a division of this Tribunal, presided over by Bell J in the case of **John Lewis plc v Coyne** [2001] IRLR 139 had said that, where an issue arose as to whether conduct might be dishonest or not, that should be determined by reference to what had been said by Lord Lane in **R v Ghosh** at paragraphs 162 and 163.

33. In giving the Judgment of the Employment Appeal Tribunal Bell J had said this at paragraph 27 on page 143 of the Industrial Relations Law Report:

> **"Mr Wicks, in his submissions, equated use of Peter Jones's telephone for any personal reason with dishonesty. But the test of dishonesty is not simply objective. What one person believes to be dishonest may in some circumstances not be dishonest to others. Where there may be a difference of view of what is dishonest, the best working test is in our view that propounded by Lord Lane CJ in the *R v Ghosh* [1982] QB 1053 75 Criminal Appeal Reports at 1054. In summary, there are two aspects to dishonesty, the objective and the subjective, and judging whether there has been dishonesty involves going through a two-stage process. Firstly, one must first of all decide whether according to the ordinary standards of reasonable and honest people what was done dishonest. Secondly, if so, then one must consider whether the person concerned must have realised that what he or she was doing was by those standards dishonest. In many, but not all, cases where actions are obviously dishonest by ordinary standards, there will be no doubt about it. In the present case, in our view, it was not necessarily obvious that using the appellant's telephone for personal calls was 'dishonest'. Much might depend upon the circumstances of the particular case. The appellant, however, did not investigate the question of dishonesty. It assumed it from the making of any personal calls, putting it into the same category, in effect, as stealing money. Mr Wicks is entitled to argue that a reasonable employer would be entitled to regard what Mrs Coyne admittedly did as dishonest. But even so, her dishonesty, such as it was and if it was, did not in our view mean that the appellant necessarily had to dismiss her. Yet Mr Hunt clearly, on our interpretation of the tribunal's finding at paragraph 23, took the view that dismissal was an inevitable consequence. The disciplinary code highlighted that dishonesty was normally regarded as serious misconduct, normally leading to dismissal, and indeed gave it as an example of gross misconduct that is particularly likely to lead to dismissal. But that terminology must, in our view, mean that it did not inevitably lead to dismissal, or at least that the information given to the employee by the employer was that it did not inevitably lead to dismissal. In all those circumstances, in our view, as the tribunal concluded, the duty on the appellant to act fairly and reasonably required that it should investigate the seriousness of the offence in the particular case."**

34. Mr Sykes also referred to the Court of Appeal's Judgment in the case of **Whitbread plc t/a Whitbread Medway Inns v Hall** [2001] IRLR 275 and in particular to paragraph 13 of the Judgment. The important fact in this case was that the Appellant, certainly at the stage of Mr Lane's dismissal hearing, plainly admitted what she had done and clearly stated that she believed she was doing nothing wrong. Part of that included her position that two members of staff had authorised a rebate, at least one of them knowing that there was a price anomaly at the time she authorising the rebate. The fact that Employment Judge Ryan made no reference to **Ghosh** was, Mr Sykes submitted, because he had persuaded himself that there was really no issue about the Appellant's state of mind. This resulted from the letter that she had written to Mr Winter. But, submitted Mr Sykes, Employment Judge Ryan was wrong to do this because he failed to recognise that this was not an admission that all along she had appreciated that what she was doing was wrong. It was at best an admission that she had come to learn as a result of

discussions with her trade union representative that what she was doing might be regarded as wrong and that she now recognised that.

35. Moreover, the value of this was dubious, submitted Mr Sykes, because it had been withdrawn. But quite clearly, it was the mainspring of the Judgment at paragraph 15.5. The importance of this error was that Employment Judge Ryan had failed to consider her state of mind as one of the circumstances under section 98(4) of the **Employment Rights Act 1996**. The Appellant plainly had not regarded herself as having done anything dishonest. In fact, at the dismissal hearing, she had quite boldly asserted her right to behave as she had done. Mr Sykes accepted that many might regard her conduct as unattractive. Some might think of it as morally wrong. But neither was to the point. The question was, should her position have been a factor considered in deciding whether or not her dismissal had fallen within the band of reasonable responses? Other aspects of that were important as well. Her behaviour had in fact been transparent, and if Employment Judge Ryan had approached this point from a point of view of asking, as the **Ghosh** test required, whether the Appellant subjectively recognised that she was wrong and that others recognised that she was wrong, then the discussion in relation to section 98(4) should have been somewhat different.

36. On behalf of the Respondent Mr Ryan submitted that the Employment Judge had quite correctly directed himself as to law. Either the **Ghosh** case, and its gateway into this area of law, and the **John Lewis** case, simply did not apply in this context or, even if they did apply, there was no reason for thinking that, on the facts of the case, Employment Judge Ryan had not quite correctly directed himself in relation to the test. This was, submitted Mr Ryan, a short and simple case. It had taken a day or less, and it involved an issue of misconduct where on any objective view of the propriety of the conduct, whether one described it as dishonesty,

something which Mr Ryan submitted it should not be described as, or whether one simply looked upon it as unacceptable conduct, the world at large would see that the Appellant had been behaving wrongly. There was no error in the Written Reasons not referring to dishonesty or the **Ghosh** test. There was no finding of dishonesty made by Employment Judge Ryan because dishonesty was not an issue in the case. Judge Ryan's description of the reason for dismissal at paragraph 15.1 did not involve dishonesty, and the reference to common sense was clearly a reference to the fact that any objective and general view would be that this was unacceptable conduct.

37. Indeed Mr Ryan was at pains to emphasise that Ms Root, the trade union representative who had been at the dismissal hearing, was of the view that this was unacceptable conduct. This proposition he got from paragraph 13.18 of the Judgment. There were, submitted Mr Ryan, very considerable dangers in applying the **Ghosh** test in this area of law and in the forum of Employment Tribunals. What might prove to be a useful direction to juries in criminal cases did not necessarily translate well into a different context. This was recognised in regulatory discipline cases such as those conducted by the General Medical and Dental Councils (see the cases of **Uddin v GMC** [2012] EWHC 1763 and **Edward Mills v GDC** [2014] EWHC 89).

38. Furthermore, the direction in **Ghosh** was by no means ubiquitous in criminal cases and was usually given only in limited circumstances when the defendant raised the issue that he or she did not think that he or she had been dishonest. In civil cases generally the balance of authority at a high level favoured taking an objective view of matters such as breach of trust and one that did not necessarily involve concepts of dishonesty. For all those reasons, Mr Ryan submitted that the **Ghosh** test was not an applicable test.

39. He further submitted that, even though it was absent from the Judgment, the cases referred to by Employment Judge Ryan and the structure of his Judgment showed that this was an entirely conventional decision made in relation to section 28(4) of the **Employment Rights Act 1996** by applying the so-called **Burchell** test, which Employment Judge Ryan had quite correctly set out at the start of his Judgment in paragraph 6. That was a template that he had imposed on himself and which he had quite properly followed. In any event, paragraph 15.5 of the Judgment was to be understood as an acceptance of the proposition that the reason for dismissal was unacceptable conduct.

40. Mr Sykes' second submission was that Employment Judge Ryan had made the same error as the Employment Tribunal in **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854, namely the conduct in the case being admitted and not in dispute and being properly characterised as gross misconduct, of the Tribunal then moving straight to a consideration as to whether dismissal was a reasonable response. The real flaw in this decision, submitted Mr Sykes, was that Employment Judge Ryan had thus effectively short-circuited consideration of "in all the circumstances" part of the statutory formulation in section 98(4). What had been omitted in this case was consideration of mitigation and the fact that the employee had behaved in an entirely open way and had not believed that she had done anything dishonest or had acted unacceptably. He relied upon paragraph 16 of the Judgment of Hale LJ (as she then was) in **Whitbread plc v Hall**, where it is made clear the band of reasonable responses applies to both investigation and sanction. That of course was reinforced by paragraph 34 of the Judgment of Mummery LJ in **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23. The problem with the Judgment, submitted Mr Sykes, was that it did not address the way in which the Appellant was putting her case.

41. In answer Mr Ryan submitted that the Employment Judge had quite clearly considered section 98(4). The whole of paragraph 15 of the Judgment was setting out that consideration, and there was no basis for the suggestion that the error in the **Brito-Babapulle** case had been made by Employment Judge Ryan.

42. Mr Sykes' third point was that there was no proper consideration by Employment Judge Ryan of a number of factors such that the decision was one that no Employment Tribunal, properly directing itself, could have reached. He accepted that this was, in the words of the Court of Appeal in **Yeboah v Crofton** [2002] IRLR 634, "a high hurdle", but he submitted that the decision did not engage with a number of important factual matters in the case, in particular that the employee did not believe that she had done anything wrong and that she had done it overtly and that management had given her the rebate even though at least on one occasion it was known that this is what she was doing.

43. As I have already said, as a result of the hearing before HHJ Eady, Mr Sykes amended his Notice of Appeal, so he put the third ground in the alternative, that this was an inadequately reasoned decision. There were at various part of the Judgment, he submitted, a failure by Employment Judge Ryan to explain his findings as opposed to simply reciting what they were. He relied upon paragraph 15.1 as being a paragraph that was not adequately explained; likewise, paragraph 15.8. In particular he asked, "Where is the answer to the points raised by Mr Tomlinson at paragraph 14 of the Judgment?"

44. Mr Ryan submitted that by no stretch of the imagination could this case be regarded as a case in which the Employment Tribunal, on the evidence before it, reached a conclusion that no Tribunal properly directing itself on the facts could have reached. In order to find perversity

one needs to see an overwhelming case. This was not, in Mr Ryan's submission, an overwhelming case. As to the inadequacy of reasons Mr Ryan reminded us that what is essentially required is that the parties should know why one has won and one has lost. In a one-day case one cannot expect a wealth of detail in the reasoning, and not everything needs to be set out. Here the case passed the so-called **Meek** test and it was adequately reasoned.

Conclusions

45. It may be that in the future it will be necessary to consider in detail the extent to which it is helpful or sensible to have opened a gateway into employment law from jurisprudence about directions to a jury as to dishonesty in a criminal case. We have some sympathy with Mr Ryan's submissions that it may be far too complicated to import a yet further consideration into the steps to be taken in deciding whether a dismissal has been fair or unfair under section 98(4) and the gloss or template placed on it or over it by **Burchell v BHS** [1978] IRLR 379. It is not necessary, however, for us to decide that matter in order to dispose of this appeal.

46. We do not doubt that the subjective state of mind of an employee accused of misconduct is a relevant consideration. Nor can it be doubted that an objective view of that conduct will be of equal importance. Whether appeals to common sense or, for that matter, a handbook that defines gross misconduct by reference to common sense is a sensible way of approaching internal rules as to conduct or an external arbitration upon decisions relating to them is a matter that may need to be argued further in this case or in another, but we need say no more about it at this stage.

47. Plainly the issue was the Appellant's conduct, and the question of the acceptability of that conduct. Those were matters that needed to be considered under section 98(4). Whether the

word “dishonesty” is used or is not used will not necessarily be conclusive in an analysis of what sort of conduct it is. Where concepts such as personal gain are invoked, issues of honesty or dishonesty may or may not arise. Where conduct is regarded as unacceptable and as leading to a loss of trust, as appears to have been the case with Mr Lane, are all matters that will need to take a place amongst the circumstances to be considered in deciding whether the sanction of dismissal was within the band of reasonable responses, which is just another way of saying whether the factors set out in the statutory language of section 98(4) have been evaluated one way or another.

48. The first ground of appeal in this case, in our judgment, would not result in the appeal succeeding. The fact that Employment Judge Ryan did not give himself a **Ghosh** direction or approach the matter in relation to the concepts involved in the jury direction suggested by the Lord Chief Justice in **Ghosh** is not, in our view, an error of law. The question is whether the circumstances were considered in his analysis in paragraph 15 of the Judgment as required by section 98(4).

49. Mr Ryan submitted that this was a case that involved the authority cited by Employment Judge Ryan at paragraph 10 of the Judgment, **Paul v Surrey District Health Authority** [1995] IRLR 305. This was a case relating to a discrepancy between the treatment of two nurses who had been drinking on duty on Christmas Eve. Mr Ryan sees a direct application of the facts and judgment in that case to this case. Try as we might we cannot make the connection that he believes is such a very clear one. In his view it shows that Employment Judge Ryan was considering, in the context of section 98(4), the position of other managers who were involved in this case and who gave the rebate or refund to the Appellant. We have tried very hard to follow where it is in the Judgment that Employment Judge Ryan, having cited the case, makes

good its application to the circumstances with which he was faced. That is an important aspect of the second ground of appeal, because what is suggested by Mr Sykes in his submission is that the Employment Tribunal had simply moved from the reason for dismissal (paragraph 15.1) straight to consideration of whether that reason, in all the circumstances of the case, was a sufficient reason to justify the dismissal. We do not think that it is clear one way or another whether Employment Judge Ryan did make that mistake. The reason we do not think it clear one way or another relates to the reasons overall, and we will return to that in a moment.

50. Before that we must address the issue of perversity. Whilst this is a case in which a conclusion has been reached from a number of factors that do not appear to us to be very clear we do not think that it could be said that there is an overwhelming case of perversity here. Indeed the whole of this appeal seems to us to lead to the conclusion reached by HHJ Eady, that this was a case where it might be arguable that there was inadequacy of reasons.

51. This Tribunal is the first to acknowledge the difficulties that face Employment Tribunals. Nowadays they are under very considerable pressure. We do not accept, however, Mr Ryan's characterisation of this case as a simple one-day dismissal case. It was certainly a one-day case and obviously a dismissal case. It did, however, in our judgment raise some issues that required careful analysis and careful explanation. Some of the Judgment is carefully set out and in some detail. Mr Sykes was tempted to say in regard to paragraph 10, where a citation was not supplied, that this was evidence that the Judgment had not been checked. We do not accept that.

52. But the Judgment does seem to us to comprise a series of unexplained assertions. Paragraph 13.20 analyses what the juxtaposition of the Claimant's case and the Respondent's

case. But, having identified those as the competing ways of viewing the matter, although it can be fairly be said, as Mr Ryan does, that the Judgment must mean that the Respondent's analysis has been expected, there is no explanation as to why that is so. Furthermore it is quite clear from paragraph 14 that the fact that this rebate had been authorised by managers and that the Claimant had acted overtly throughout was clearly laid before Employment Judge Ryan as a matter that ought to be considered the answer that he gives at paragraph 15 is, in our judgment, entirely inadequate. To say simply that this did not specifically address the legal principles does not explain at all why the fact that she did this openly and that she was authorised to do it by others is not something which should be weighed in the balance and, if found wanting, an explanation provided as to why that makes no difference to the outcome.

53. Moreover there appears to be no place whatsoever in the analysis for the Appellant's position that at the outset she did not believe that she had done anything wrong. It is tempting to think of the dismissal in this case as a composite of both the dismissal hearing and the appeal hearing and to reach the conclusion that, because she had admitted at appeal that she now recognised something was wrong, therefore the appeal answers everything and cures everything. If that is the analysis and the answer, then it ought to be clearly set out by Employment Judge Ryan. Also there is this difficulty with it, namely that, as Mr Sykes identified, this was an expression of hindsight on the part of the Appellant. The issue at the stage of dismissal must be her state of mind at a particular time. There is, it seems to us, no discussion of that all in paragraph 15.8.

54. Another problem arises out of the three paragraphs, 15.1, 15.4 and 15.5. We would connect 15.4 and 15.5 together. We do not accept Mr Sykes' submission that 15.5 is a critical factor that answers everything in the case. It is simply, in our judgment, a finding that it was

reasonable for the Respondent genuinely to believe that the Appellant had committed misconduct as alleged, because she accepted that she had acted in that way. But that goes too far if, as Mr Ryan seeks to do, one analyses Employment Judge Ryan's reasoning as being that she has accepted that she had behaved wrongly. This takes us back to paragraph 15.1 as both Mr Ryan and Mr Sykes suggest. But there is a problem with paragraph 15.1 because it is asserted the Respondent had shown that the reason for dismissal was that the Appellant knew she was not legitimately entitled to do what she had done. Where is the finding that supports that contention? If it is that Mr Lane believed that she was not legitimately entitled, that is a different matter to what is stated at paragraph 15.1. When one turns to paragraph 15.8 and links it with paragraph 14, we can see that essentially, at least on the face of the Written Reasons, these factors are being considered by Employment Judge Ryan as mitigation. The matter was, in our judgment, much broader than that. It is impossible to discern from paragraph 15.8 that the Employment Judge was taking into account her position and the factors that had been mentioned by Mr Tomlinson at paragraph 14 let alone answering them

55. The **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**, at paragraph 62(5), now set out what the reasons in an Employment Tribunal Judgment should amount to. As well as identifying the issues, the findings of fact must be stated. The relevant law must be stated and how it has been applied to those findings in order to decide the issues. It seems to us that Employment Judge Ryan has not done that in relation to the issues raised by paragraph 14. We refer to the familiar authority of **Greenwood v NWF Retail Ltd** [2011] ICR 896. That was a case relating to the **2004 Rules**, and what was said by a division of the Tribunal in that case was that the Judgment had to demonstrate substantial compliance with the Rules. It would not matter that the structure of the Rules was not necessarily explicitly visible, but what would have to be obvious from the structure of the Judgment was that the formal

substantial requirements of the Rule had been complied with. In this case it seems to us that paragraph 15.8 in particular, but the Judgment overall, is not telling us what the resolutions of important issues actually has been. It asserts the conclusion which it adopts from the Respondent's case and submissions. But that is not, in our judgment, an adequately reasoned decision. Accordingly we will allow the appeal on that ground.

The Application for Review

56. Our decision having been announced, Mr Sykes submits that it should be reviewed on this basis. We have reached the conclusion that the appeal should succeed on the third alternative ground, namely that it is an inadequately reasoned decision. Part of our analysis has been that the Employment Tribunal Judge did not, in his Judgment at paragraph 15.8, appear to have answered the issues raised on behalf of the Appellant by her then representative at paragraph 14 of the Judgment. These have been described by Mr Sykes during the course of the hearing as aspects of mitigation. He submits that if we find that the decision is inadequately reasoned in that the Appellant does not know why she has lost in respect of those alternative matters, then it follows that we ought to allow the appeal on ground 2 as well.

57. Ground 2 argues that the Employment Judge erred by failing to apply the requirement to look at all the circumstances, including mitigating factors, in applying the band of reasonable responses test to the decision made by the employer in this case. He submits that there is said to be, in the Judgment of Hale LJ in **Whitbread v Hall**, the need to look at all the circumstances. Particular reliance was placed on the **Brito-Babapulle v Ealing Hospital NHS Trust** case. That also was said to involve the consideration of the presence of what are described as mitigating factors. It is said that the Judge had failed to consider two factors in

particular, those set out at paragraph 38 of the Skeleton Argument, namely that the conduct was authorised and that there was no investigation of the managers.

58. We do not accept that we should, in the circumstances of this case, review the judgment just given. In the Judgment of this Tribunal in **Zinda v Governing Body of Barn Hill Community High School** [2011] ICR 174 various factors relating to whether or not this Tribunal should review its own decisions were set out at paragraph 47. First of all, reviews would be rare. Secondly, fresh evidence might be a basis for a review, but, obviously, that is not a consideration here. Thirdly, the underlying purpose of a review is the correction of mistakes. Fourthly, review should not be used as a substitute for an appeal; the EAT must not conduct a review which amounts to an appeal against its own decision. Alternatively, in an appropriate case, it might be preferable in some cases for the Employment Appeal Tribunal to conduct a review rather than compel an applicant for review to pursue an appeal.

59. Those, it seems to us, are the relevant considerations when deciding whether or not to review a judgment. We have reached the conclusion in this case that the error made in the **Brito-Babapulle** case, and, for that matter in the **Whitbread v Hall** case, of finding gross misconduct and then axiomatically concluding that the dismissal must be within the range of reasonable responses, has not arisen in this case. Employment Judge Ryan has not suggested for one moment that other factors are irrelevant. He has only mentioned the employee's good record at paragraph 15.8. But that does not mean that the genuine belief Employment Judge Ryan found the Respondent had in respect of the misconduct and his further finding that such a belief was on reasonable grounds meant that Employment Judge Ryan had moved straight to considerations under section 98(4). Paragraph 15.6 is an analysis of the investigation. He plainly did not move straight from having found that there was a genuine belief on reasonable

grounds to considering whether it was, in those circumstances, appropriate for the sanction of dismissal. It is perfectly true, of course, that he does not mention some of the factors set out by Mr Tomlinson but that is why we have concluded this is an inadequately reasoned decision.

60. The fact that Mr Sykes, in his Skeleton Argument or in his Amended Grounds, complains that those matters were not taken into account does not, in our judgment, mean that he can succeed on ground 2, which is based on the proposition that the Employment Tribunal has simply moved from one premise to another. It does not seem to us that it is possible to say from paragraph 15.8 exactly what has been taken into account. All that it is possible to discover is that the Employment Tribunal has not given answers to the issues raised by Mr Tomlinson, as set out at paragraph 14. In those circumstances it does not seem to us that the appeal in relation to ground 2 should succeed. The fact that two factors are not mentioned is a matter, in our judgment, of lack of reasoning, not an indication that none of the circumstances have been taken into account.

61. That said, Mr Syke's submission begs the question as to how we should dispose of this case. In our judgment this is not an inadequately reasoned decision in the sense that the Employment Tribunal should simply cast an eye over it and add one or two passages to it to clear up some ambiguities; this is an inadequately reasoned decision in the sense that it simply does not fulfil the criteria for a properly reasoned decision, either as set out in paragraph 62(5) of the **Employment Tribunal 2013 Rules** or in accordance with **Meek v Birmingham City Council** [1987] IRLR 250.

62. The failure to adequately reason a decision in some circumstances may be a flaw, but in some circumstances it may make the decision totally flawed. In the case of **Sinclair Roche**

Temperley v Heard [2004] IRLR 763 the then President, Burton J, set out at paragraph 46 a number of considerations to take into account in deciding the terms of a remission. In our judgment this is a totally flawed decision by Employment Judge Ryan. It would also be, in terms of paragraph 46.5 of the analysis of the division presided over by Burton J, be a second bite of the cherry. We do not think that it would be an appropriate disposal of this case to remit it to Employment Judge Ryan. In our judgment it should go back to a differently constituted Employment Tribunal for a re-hearing. In reaching that conclusion we have taken account of the fact that Mr Ryan has told us that some of the witnesses employed by the Respondent are no longer employed by the Respondent. That does not seem to us to be a reason why the matter should not go back for a complete rehearing if, as we have decided, it is a proper and just disposal of the case. That is the order that we will make.