Appeal No. UKEAT/0311/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2013

Before

THE HONOURABLE MR JUSTICE SINGH

(SITTING ALONE)

MISS L KISOKA APPELLANT

MS RUNG RATNPINYOTIP T/A RYDEVALE DAY NURSERY RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR ANDREW WATSON (Free Representation Unit)
For the Respondent	MR THOMAS O'DONOHOE (of Counsel) Instructed by: DAS Law Solicitors Ltd North Quay Temple Back Bristol BS1 6FL

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Appellant contended that the EAT should lay down general guidance to the effect that an appeal panel decision must be followed by an employer in the absence of exceptional circumstances. He also contended that, if the Respondent was entitled not to follow the decision of the appeal panel in this case, he had not had an effective appeal hearing.

Held, the EAT would not place a gloss on the statutory test of reasonableness in s.98(4) of the **Employment Rights Act 1996**. The Appellant had not been denied an effective appeal hearing. The Employment Tribunal was entitled to reach that conclusion and the conclusion overall that the Appellant's dismissal had been reasonable. There was no error of law in that conclusion.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. This is an appeal against the judgment of the Employment Tribunal at London South promulgated on 18 March 2013. By that judgment Employment Judge Corrigan rejected the claim of unfair dismissal.

Factual background

2. The material factual background can be gleaned from the findings of fact made by the Employment Tribunal at paragraphs 7 to 43. The Respondent is a nursery caring for children between 18 months and five years of age. It has been managed by Miss Ratnpinyotip since May 1998 and employs ten members of staff.

3. The Claimant was first taken on by the Respondent as a student in January 2008 and became a Nursery Practitioner in August of that year. On 16 August 2011 an incident occurred: an item was found smouldering in the bin in the Respondent's office. The first two people at the scene were the Claimant and Karen Hadfield. The next day Stella Bryan came into the nursery and Karen Hadfield reported to her that there had been a small fire in the office. In the enquiries that were then made the Claimant said that she was in the bathroom and smelt smoke and so she came to see where it was coming from. Subsequently Ms Bryan began to become suspicious about this incident. There was found a picture belonging to a seven year old who was coming to the nursery during the summer holiday. Children's drawings were not normally kept in the office, which was out of bounds to the children. Eventually Ms Bryan concluded that there were only two members of staff who had been in the vicinity of the office; one was a colleague called Jola and the other was the Claimant. Ms Bryan concluded that there was only one possible person who was in the vicinity at the time of the fire and that must have been the

Claimant. She believed that it could not have been accidental and decided to report the matter to the police. Although the police attended no further action was taken by them at that stage.

4. Ms Bryan decided to suspend the Claimant and wrote her a letter dated 17 August 2011 to that effect. It stated that the reason for the suspension was to allow time to investigate the incident surrounding a small fire in the nursery office. She said the suspension was a neutral act and the Claimant would be contacted. Ms Bryan then investigated the CCTV record. The timeline from that confirmed that Jola had left the office at about 17:16 and left the premises at 17:19. It showed the Claimant moving around the building, including to and from the office area between 17:16 and 17:26 and then that Karen Hadfield entered the office at 17:28. Accordingly it seemed to Ms Bryan there were 12 minutes between Jola leaving and Karen Hadfield discovering the Claimant in the office, during which time the Claimant was moving around including towards the office area.

5. On 18 August 2011 Ms Ratnpinyotip discovered there were also burnt ash and scorch marks under the desk area where she usually sits. The Claimant was then invited to a disciplinary hearing on 22 August 2011. The allegation was that the Claimant was trying to start a fire in the nursery office on 16 August.

6. After that disciplinary meeting Stella Bryan wrote to the Claimant with the outcome on 24 August 2011. The decision was to dismiss the Claimant without notice for gross misconduct since the view was taken that CCTV evidence established that the Claimant was the only person who could have been in the vicinity of the potential fire.

7. On 25 August the Claimant said that she was not happy with that decision and she was advised that she was entitled to appeal. She did appeal although this was not within the

timescale given of five working days. The Respondent arranged for an independent body to conduct the appeal; this was Wandsworth Primary Play Association (now known as Childcare and Business Consultancy Services). This was done on the advice of Wandsworth Early Years. As the Employment Judge put it at paragraph 29 of her judgment there was minimal discussion with the Wandsworth Primary Play Association about the terms of their engagement and what procedure would be followed in the appeal. In particular, there was no discussion as to whether the final decision would be made by the appeal panel or the Respondent. Eventually an appeal meeting was organised for 24 October 2011.

8. A letter was sent to the Claimant dated 13 October which informed her of the composition of the independent appeal panel, which consisted of Ms Susan Reid (Deputy Head of Wandsworth Early Years); Jackie Coward (Childcare Services Manager); Kim Bronock and Rabin Khalid (both childcare and education advisers). There was also to be Stella Bryan as a minute taker. The Claimant was informed that she was entitled to be accompanied by a work colleague or a union representative. In the final sentence of that letter it was stated:

> **"Please note that the decision made at this hearing will be final and there will be no further right of appeal."**

9. The appeal panel considered representations that were made in support of the appeal but they also met the Claimant and minutes were taken. The appeal panel decided to overturn the Respondent's decision to dismiss. The reasons given for this, as recorded at paragraph 35 of the Employment Judge's Judgment were as follows:

> **"35.1 that they considered that there was not enough conclusive evidence to indicate the Claimant had started a fire;**
>
> **35.2 that Stella Bryan had not asked staff to write their own accounts of the facts; she had just transcribed their statements on their behalf. Also she had not asked the staff to read or sign these statements as an accurate account of the day;**
>
> **35.3 initially, Stella Bryan had been accompanied by two members of the nursery team when interviewing the Claimant about the event and they believed that this could be seen as inappropriate."**

10. That decision by the appeal panel was confirmed in writing to the Respondent by a letter dated 28 October 2011. The Respondent was unhappy with the outcome of the appeal and considered the panel had made certain assumptions in coming to its decision. Ms Bryan wrote to the panel asking for further information to be taken into account and inviting them to reconsider the decision. Following the appeal hearing, as the Employment Judge recorded at paragraph 38 of her Judgment, the Respondent investigated with the relevant child's mother whether not the child had requested his drawing, as the Claimant asserted. His mother did not corroborate the Claimant's account. She said that he never asked for his drawings and if he had done on the day in question she would have remembered it as it would have been unusual. She had signed a statement dated 6 July 2012 about this and saying that Stella Bryan had investigated this with her a few weeks after 16 August 2011.

11. The panel, however, refused to reconsider its decision. Subsequently the Respondent decided not to implement the appeal panel's decision. It is that failure which lies at the heart of the present appeal.

Employment Tribunal's Judgment

12. Having set out the facts which I have sought to summarise, the Employment Judge outlined the relevant law at paragraphs 44 to 46. In particular, she set out the provisions of section 98 of the **Employment Rights Act 1996** to which I will return.

13. At paragraph 47 she also stated that she had had regard to the ACAS Code of Practice in relation to appeals; I will again return to that. The Employment Judge then set out her conclusions at paragraphs 48 to 59. At paragraph 53 the Employment Judge found that looking at the evidence the Respondent had before her as whole, including the Claimant's movements

on CCTV and her failure adequately to explain her movements, the Respondent had reasonable grounds for finding that the Claimant had committed misconduct. The Employment Judge found the investigation to have been reasonable.

14. At paragraph 54 of her Judgment the Employment Judge identified the principal issue in the case as being whether or not, having set up an appeal with the independent panel, the Respondent was bound to follow their decision and whether the failure to implement that decision rendered the appeal unfair, or whether, having not followed the recommendation of the appeal panel, the Claimant was effectively denied the right of appeal. The Employment Judge stated at the end of paragraph 54:

> **"The test remains whether the Respondent's conduct was reasonable in all the circumstances."**

15. At paragraph 55 of her Judgment, the Employment Judge observed that the Claimant was given the opportunity to introduce further information on appeal such as the fact that the paper had belonged to a particular child. The Respondent had investigated that account and found it was not substantiated. She observed that the Respondent and Ms Bryan had also given consideration to the appeal panel's views but felt they could not be adopted. The Respondent considered the basis of the panel's decision was unclear and that there remained a number of reasons why the Claimant was considered responsible, including the Claimant's failure to explain her movements and the fact that she had changed her account during the appeal and information provided had been proven inaccurate.

16. The burden of the Employment Judge's reasoning is to be found at paragraphs 56 to 58 which I will quote in full:

> **"56. In my view the Respondent's decision not to overturn the decision was reasonable. The Respondent's organisation is a small organisation and both the Respondent and her HR**

Manager made the original decision to dismiss. There was no other person at that level to hear the appeal internally. An independent panel was used. There were no clear terms as to the engagement of the independent panel and whether they were to make the decision or advise the Respondent who would then make the final decision. Further information was provided by the Claimant in that process which the Respondent (rather than the panel) investigated. The appeal panel gave their considered view prior to that further investigation but the Respondent felt that this view could not be adopted as in their view the Claimant still had not adequately accounted for her actions and movements on the CCTV, especially bearing in mind their own knowledge of the premises and processes (such as cleaning processes and whether it was usual to hang children's artwork on the children's pegs). I find the Respondent's concerns about the panel's decision were reasonable. I take into account the fact the Respondent is responsible for the welfare of the children in their care and her concern to re-employ the Claimant in circumstances where she still considered there were reasonable grounds to consider the Claimant had tried to start a fire.

57. I find the decision was given fresh consideration at the appeal stage as the Respondent investigated the further information and gave consideration to the panel's decision as evidenced in the correspondence. Although Ms Bryan was asked to leave the appeal hearing with the Claimant the Respondent was given sight of the minutes of that meeting.

58. On balance I do not find the Respondent's decision unreasonable and I consider the Claimant was given the right of appeal, through the process with the independent panel and the resultant reconsideration of the decision by the Respondent."

17. As the Employment Judge then concluded at paragraph 59 it followed that she found the Claimant's dismissal to have been fair.

Material legislation

18. As I have already noted, the principal provision which the Employment Judge had to consider and apply in this case was the well known provision in section 98 of the **Employment Rights Act 1996** which governs the determination of the question of the fairness of a dismissal of an employee. In particular subsection (4) provides that where the employer has fulfilled the requirements of subsection (1) the determination of the question of 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.

19. The reason which the employer in the present case relied upon was, of course, one that related to the conduct of the employee: see section 98(2)(b).

20. As I have already mentioned the Employment Judge had regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2009). Paragraph 3 of that code, which is a statutory code and although not binding as a matter of law is something that Employment Tribunals should have regard to, states that:

> **"Where some form of formal action is needed what action is reasonable or justified will depend on all the circumstances of the particular case. Employment Tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this code."**

21. At paragraphs 25 to 28 of the Code addresses the question of providing employees with an opportunity to appeal. Paragraph 25 states that where an employee feels that disciplinary action is wrong or unjust they should have an appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing. Paragraph 26 advises that the appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case. Paragraph 27 notes that workers have a statutory right to be accompanied at appeal hearings. Paragraph 28 advises that employees should be informed in writing of the result of an appeal hearing as soon as possible.

The Appellant's grounds

22. Before this Tribunal the Appellant has advanced two grounds of appeal. The first ground is that the Employment Tribunal erred in concluding that the Respondent was not bound by the decision of the appeal panel. It is submitted that as a matter of principle a reasonable employer will not depart from an appeal panel decision without a very good reason amounting to an

exceptional circumstance. It is further submitted that no such reason was present in this case and the Claimant's dismissal was therefore unfair.

23. It is submitted that this Tribunal should proffer guidance to employment tribunals about how to approach the present sort of case. It is said that there are many areas in which this Tribunal and higher appellate courts have given detailed guidance about what standard an employer will have to meet in order for a dismissal to be fair under section 98.

24. The Appellant's second ground of appeal is that if the Respondent was entitled to depart from the decision of the appeal panel the Tribunal nevertheless erred in law because the Claimant was not then given an effective appeal hearing. The way in which this ground was formulated in paragraph 28 of the Appellant's grounds of appeal was as follows:

> **"In the present case the Claimant did not have a full and fair appeal hearing. The outcome of the actual appeal hearing was ignored by the Respondent, who was also one of the dismissal managers. The Respondent then went on to uphold the original dismissal decision. The same individual therefore ended up hearing both the original dismissal hearing and the appeal hearing. If an employee is given a right to appeal, this entails an appeal which is dealt with impartially and by somebody not previously involved in the case. The approach taken by the Respondent deprived the Claimant of this."**

25. I will turn to consider each of the Appellant's ground of appeal in that order.

<u>The Appellant's first ground</u>

26. The Appellant submits that if an employer adopts a disciplinary procedure which provides for an appeal the default position is that the appeal decision should be final. The Appellant also places some reliance on the letter of 13 October 2011, which I have already quoted from. In particular the Appellant draws attention to the fact that that letter ended by informing the Appellant that the decision made at the appeal hearing, "will be final and there will be no further right of appeal".

27. The Appellant fairly accepts that this does not mean that the Respondent was bound in all circumstances to follow the views of the appeal panel. However, the Appellant submits that the only circumstances in which the Respondent could reasonably depart from the decision of the appeal panel is where there are, "exceptional circumstances". Put another way, the Appellant submits that the reasonable employer will not depart from an appeal panel decision, "without a very good reason". In support of the Appellant's submissions Mr Watson has placed reliance upon a number of authorities. He accepts that there is no direct authority on the precise issue raised in the present appeal. Nevertheless, he submits that as a matter of general principle which is to be derived from the authorities, the first ground of appeal should succeed.

28. Both parties placed considerable reliance on the decision of the Court of Appeal in **Taylor v OCS Group Ltd** [2006] ICR 1602 in which the judgment of the court was given by Smith LJ. Mr Watson placed particular reliance on the passage which appears at paragraphs 47 to 48. In that passage the court considered the earlier authorities which had used words such as "re-hearing" and "review". A debate had ensued in the preceding law about whether an appeal is strictly speaking by way of re-hearing or by way of review. After citing relevant authorities Smith LJ continued at paragraph 47:

> **"47. The use of the words 're-hearing' and 'review' albeit only intended by way of illustration does create a risk that employment tribunals will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a re-hearing or a mere review. This error is avoided if employment tribunals realise that their task is to apply the statutory test, in doing that they should consider the fairness of the whole of the disciplinary process. If they find at an early stage that the process was defective and unfair in some way they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be determine whether it amounted to a re-hearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it in the process and the open-mindedness (or not) of the decision making the overall process was fair, notwithstanding any deficiencies at the earlier stage."**

29. At paragraph 48 she continued:

> **"48. In saying this it may appear that we are suggesting that employment tribunals consider procedural fairness separately from other issues arising; we are not. Indeed it is trite law that section 98(4) of the Employment Rights Act 1996 requires the Employment Tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for dismissal as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious an employment tribunal might well decide (after considering equity and the substantial merits of the case) that notwithstanding some procedural imperfections the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct is of a less serious nature so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee."**

30. At the end of that passage at paragraph 48 of her Judgment, Smith LJ quoted from the dicta of Donaldson LJ in **Union of Construction Allied Trades & Technicians v Brain** [1981] ICR 542 at 550 and thought that passage to be worthy of repetition. That is a passage to which I will return later.

31. Mr O'Donohoe, who appears for the Respondent at this appeal drew my attention to several other passages in the judgement in **Taylor**. In particular he reminded me that at paragraphs 43 to 44 Smith LJ expressed the view that a view had been propounded by some to the effect that there was a rule of law that only a re-hearing as opposed to a review is capable of curing earlier defects. She emphasised, "There is no such rule of law". She also said that there are at least two good reasons why there should not be any such rule of law; first such a rule would place a fetter on the discretion of the Employment Tribunal when considering section 98(4). In that context she cited with approval the decision of this Tribunal in **Adivihalli & Export Credits Guarantee Department** EAT/917/97, a decision to which I will return.

32. The second reason she gave is that the distinction between a review and a re-hearing is hard to define in the abstract and even harder to apply in practice. That, it seems to me, is a particularly important consideration in the context of the provisions of section 98(4) which, as has already been mentioned, is designed to by applied in a practical fashion by the Employment

Tribunal sitting as it does as an industrial jury. Furthermore, at paragraph 25 of her judgment, Smith LJ, again citing **Adivihalli** with approval, said that as this tribunal had made it plain in that case the duty of the Tribunal is to apply the statutory test of fairness to the individual circumstances of each case as a whole, "and not to restrict the statutory test".

33. In my judgment, to accept the Appellant's first and main ground in this appeal would be to put a gloss onto the statutory language which Parliament has thought right to use in this context. It is liable to be unhelpful rather than helpful both as a matter of principle and as a matter of practice. I would deprecate the addition of such a gloss to the statutory test which Parliament has set out in this context. I would prefer to leave it to the good sense of employment tribunals to reach their judgments applying the statutory test to the individual facts of the case before them. For example in other areas of the law it has been sometimes the experience that where a test is laid down that a certain course should be followed unless there are, "exceptional circumstances" there can sometimes be arid debate about whether such exceptional circumstances have arisen. Attention is liable to be distracted therefore from the true statutory test which Parliament has laid down and the application of that test to the facts of an individual case.

34. In support of his submissions before this Tribunal Mr O'Donohoe also drew attention, as I have mentioned, to the decision of this Tribunal in **Adivihalli**. That judgment was given by the then President of the Tribunal, Morison J, sitting with lay members. Although there is no direct authority on the precise issue which arises under ground 1 in the present appeal Mr O'Donohoe submits, and I accept, that the closest case to address the point is in fact **Adivihalli**. At page 13 of his Judgment the President said:

> **"With great respect to the argument which was put to us, namely that because under the procedure involving the Civil Service Appeals Court the board did not have the power to require the employer to give effect to its decision there should be reinstatement. It ceased to**

be an appellate process within the meaning of what was said by Lord Bridge, a contention which goes much too far [the reference to the speech by Lord Bridge is a reference to the case of *West Midland Cooperative Society Ltd v Tipton* [1986] ICR 192, a case to which I will return.] It is true that the Appeal Board was entitled to allow an appeal or dismiss an appeal if it allowed an appeal but then it obviously had power to make recommendations, but it was an independent body it was unlikely therefore the various departments would wish to confer on such an independent body the right to compel it to take back employees in whom they had lost trust and confidence, but it does not follow from that that the appeal to the Civil Service Appeals Board was incapable thereby of curing a procedural defect it would depend."

35. In the circumstances of the case before it this Tribunal held at page 14 that the Industrial Tribunal was manifestly entitled to conclude that the appeal to the Board was such as to cure any defects in the previous process, had it been necessary for its decision.

36. I said that I would return to the decision of the House of Lords in **Tipton**. My attention was drawn in particular to the passage at page 204 in the speech of Lord Bridge of Harwich:

> **"By the same token a dismissal may be held to be unfair when the employer has refused to entertain an appeal to which the employee was contractually entitled and thereby denied to the employee the opportunity of showing that in all the circumstances the employer's real reason for dismissing him could not reasonably be treated as sufficient. There may of course be cases where on the undisputed facts the dismissal was inevitable, as for example where a trusted employee before dismissal was charged with and pleaded guilty to a serious offence of dishonesty committed in the course of his employment. In such a case the employer could reasonably refuse to entertain a domestic appeal on the ground that it could not affect the outcome. It has never been suggested however that this was such a case."**

37. Aspects of that will need to be considered particularly in the light of subsequent decisions to which I will make reference. Nevertheless, the fundamental point which Mr O'Donohoe makes by reference to that passage in my judgment remains good. The fact that an appeal to which an employee is contractually entitled, and that is far from being clear in the present case, has been denied to the employee does not by itself render a dismissal unfair. The question is whether by depriving an employee of a contractual right to an appeal an employer has thereby denied to the employee the opportunity of showing that in all the circumstances the employer's real reason for dismissing him could not reasonably be treated as sufficient.

38. That brings one back, as time and again one is driven back in this context, to the statutory test set out in section 98(4). All the circumstances have to be considered. It might have been thought at first sight that the language used by Lord Bridge in **Tipton** could not necessarily stand alongside the decision of the House of Lords in **Polkey v A E Dayton Services Ltd** [1987] IRLR 503. However, as Mr O'Donohoe submitted, a reconciliation of those authorities was provided by the Court of Appeal in **Westminster City Council v Cabaj** [1996] IRLR 399 in which the principal judgment was given by Morritt LJ.

39. At paragraph 29 of the Judgment Morritt LJ stated:

> **"The relevance to those questions of a failure by the employer to follow agreed disciplinary procedures is shown in the passages in *West Midlands Cooperative v Tipton* and *Polkey v AE Dayton Services Ltd* which I have quoted already. Thus, as pointed out by Lord Bridge of Harwich in the former the relevance of the failure to entertain an appeal to which the employee is contractually entitled is whether the employee is thereby denied the opportunity of demonstrating that the real question for his dismissal was not sufficient. It is irrelevant to that question to consider whether the employer would have acted differently if he had followed the agreed procedure for that is hypothetical."**

40. The true relevance of the answer to that hypothetical question, as **Polkey** decided lies at the stage of remedies, in particular what compensation, if any, should be payable to the dismissed employee if there was an unfair procedure adopted but it would not have made any difference to the outcome. That there is that important distinction between substance and remedy was well explained by this Tribunal in **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664 in which the judgment was given by the then President, Elias J, sitting with lay members. In that case this Tribunal disapproved its earlier judgment in **Post Office v Marney** [1990] IRLR 170, as Elias J explained at paragraph 77 of his Judgment. This Tribunal did not consider that **Marney** remains good law. It suggests that a defect in the appeal process would only be relevant if a properly conducted appeal would have made a difference to the outcome. That view is inconsistent with the decision of the House of Lords in **Polkey**. However, as Elias J went on to explain it is also inconsistent with the decision of the House of

Lords in **Tipton**; he certainly did not understand there to be any inconsistency between **Polkey** and **Tipton** and nor do I. The correct position, as I understand it, was set out by Elias J at paragraph 80:

> **"In our view this makes it plain that even if a dismissal could be fair if the employee chose not to appeal, the significance of the appeal is that it may enable further matters to be advanced by the employee or representations to be made which might affect the outcome. In those circumstances the denial of that right is capable of rendering a dismissal unfair and equally a failure to apply the appeal process fairly and fully may have the same result. If dismissal would be likely to have occurred in any event then that will affect compensation but not the finding of unfairness itself."**

41. In my view what that passage makes clear is the distinction between substance and remedy. At the remedy stage, consistent with the decision in **Polkey**, if dismissal would be likely to have occurred in any event, even after a fair procedure, that will affect compensation but not the finding of unfairness itself. However, at the substantive stage Elias J did not say that the denial of a right of appeal will necessarily in all circumstances render a dismissal unfair. He said, rather, that the denial of that right is, "capable" of rendering a dismissal unfair and equally a failure to apply the appeal process fairly and fully, "may have the same result".

42. In support of his submissions, Mr Watson cited a number of other authorities to which I will turn more briefly. He cited the well known decision of this Tribunal in **Sillifant v Powell Duffryn Timber Ltd** [1983] IRLR 91 in which the judgment was given by the then President, Brown-Wilkinson J, sitting with lay members. In particular Mr Watson relied upon paragraph 19:

> **"The common sense of Industrial Relations demands that in considering the reasonableness of the employer's conduct account must be taken of information coming to his knowledge on the hearing of the appeal; the appeal is part of the procedural structure established by the employer to ensure fair treatment … The relevant point in time in which to assess the reasonableness of the employer is the time when he takes the final decision to dismiss in the case where the operation of a dismissal is suspended the final decision is not taken until that suspension ceases. It is at that stage that the employer takes its final decision …"**

43. That passage does not, in my view, establish the proposition for which Mr Watson cites it in the present case. It certainly does not go any way to establish the proposition he needs to establish if he is to succeed on ground 1 of his appeal. Furthermore, as Mr O'Donohoe reminded me, an important passage appears at paragraph 31 of the same Judgment which needs to be set out so far as material:

> **"The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. An Industrial Tribunal is not bound to hold that *any* procedural failure by the employer renders the dismissal unfair. It is one of the factors to be weighed by the Industrial Tribunal in deciding whether or not the dismissal was reasonable within section 57(3) [the corresponding provision now is section 98(4)]. The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal, not on the actual consequence of such failure."**

44. Mr Watson also cited the decision of the Court of Appeal in **Stoker v Lancashire County Council** [1992] IRLR 75, in which the principal judgment was given by Dillon LJ. There was in that case, as noted at paragraph 11 of the Judgment, a discipline code applied by the relevant local authority, that provided, in paragraph 8, for any matters reported to the disciplinary sub-committee to be followed by a certain procedure. That procedure was then set out.

45. The actual reason why the appeal in that case was allowed by the Court of Appeal was that it considered that both the Industrial Tribunal and this Tribunal had misinterpreted the procedures which were to be followed under the local authority's disciplinary code. That was an error of law and the result of the successful appeal was that the Court remitted the case to a differently constituted Industrial Tribunal to reconsider.

46. In passing, and in my judgment, in an *obiter* passage at the end of paragraph 20, Dillon LJ said:

> **"It might be the view that a reasonable employer could be expected to comply with the full requirements of the appeal procedure in its own disciplinary code."**

47. That passage does not, in my view, bear the weight which Mr Watson has sought to place upon it for the purpose of advancing his ground 1 on this appeal.

48. Finally in this context Mr Watson relied upon two decisions from a very different context, not the context of employment law but rather the context of sporting disciplinary bodies. The first was the decision of the Privy Council in **Calvin v Carr** [1980] AC 574 in which the opinion of the Board was given by Lord Wilberforce. In particular he relied upon this passage at page 594:

> **"What is required is examination of the hearing process, original and appeal as a whole, and a decision on the question on whether after it has been gone through the complainant has had a fair deal of the kind that he bargained for."**

49. I have not found that passage helpful in the present context. First, as is clear, the case was not concerned with section 98(4) or any other provision in employment legislation. Secondly, it was dealing with a very specific context where there was an appeal right, "of the kind that he bargained for". As I have already indicated, in the present context Mr Watson does not go so far as to submit that there was an absolute right to a decision whereby the employer would be bound by the decision of the appeal panel. In fact, I am far from convinced that he can even demonstrate on the facts of the present case that there was any contractual right to an appeal in the first place. This was a small employer with no written procedures and certainly with no elaborate appeal processes which one can sometimes find in larger employment contexts.

50. The second decision of this kind that Mr Watson placed reliance upon was the decision of the Court of Appeal in **Modahl v British Athletic Federation Ltd**. He relied in particular on two passages. The first is at paragraph 61 in the Judgment of Latham LJ:

> **"It seems to me that in cases such as this where an apparently sensible appeal structure has been put in place the court is entitled to approach the matter on the basis the parties should have been taken to have agreed to accept what in the end is a fair decision. As Lord Wilberforce said [in *Calvin v Carr*] this does not mean that the fact there has been an appeal will necessarily have produced a just result. The test which is appropriate is to ask whether, having regard to the course of the proceedings, there has been a fair result. As Lord Wilberforce indicated there may be circumstances in which by reason of corruption or bias or such other deficiency the end result cannot be described as fair. The question in every case is the extent to which the deficiency alleged has produced overall unfairness."**

51. That last sentence in particular in my view underlines the point that, far from supporting Mr Watson's submission, that passage suggests that everything depends on the overall fairness of the procedure taken as a whole. The other passage upon which reliance was placed by Mr Watson is at paragraph 115 in the Judgment of Mance LJ:

> **"I would endorse the view that the present parties were implicitly agreeing to be bound by the ultimate outcome of the disciplinary process taken as a whole and therefore including the independent appeal panel's determination … A conclusion that process should be looked at overall matches the desirable aim of affording to bodies exercising jurisdiction over sporting activities as great a latitude as is consistent with fundamental requirements of fairness…"**

52. Again, that does not seem to me to be a passage which takes Mr Watson's submissions further. First, that was a case as Mance LJ noted where the parties had implicitly agreed to be bound by the ultimate outcome of a disciplinary process, including the independent appeal panel's determination.

53. Secondly, and fundamentally as it seems to me, far from supporting Mr Watson's submission, what Mance LJ was saying was that the process needs to be looked at overall in order to see whether it is consistent with fundamental requirements of fairness. That in my view is consistent with the tenor of the employment law authorities which I have already cited

so far as relevant. It is also consistent in my judgment with the submissions advanced in this appeal by Mr O'Donohoe.

54. Before leaving the authorities it is important to return, as I said I would, to the decision of the Court of Appeal in **UCATT v Brain** [1981] ICR 542 (CA) at pages 549 to 550 in a passage which was cited more recently in **Taylor** and was said to be worthy of repetition. Donaldson LJ said:

> **"Whether someone acted reasonably is always a pure question of fact so long as the Tribunal deciding the issue correctly directs itself on the matters which should and should not be taken into account but where Parliament has directed the Tribunal to have regard to equity and that of course means common fairness and not a particular branch of the law, and to the substantial merits of the case the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane. It should therefore be very rare for any decision of an industrial tribunal under this section to give rise to any question of law and this is quite plainly what Parliament intended."**

55. In the end therefore I return to the critical question of whether the reasoning of the Employment Judge in the present case, in particular at paragraphs 54 to 59, discloses any error of law. In my judgment it does not. In my view the employment judge correctly understood the relevant law and then applied it to the facts of the individual case before her.

56. Criticism was made by Mr Watson of some of the reasoning adopted by the Employment Judge. It is not necessary in my view to go into the details of those criticisms; suffice it to say that whether considered individually or cumulatively the criticisms in my view do not amount to establishing any error of law. There is no perversity challenge as I understand it. In any event no such challenge could succeed.

57. The Employment Judge was perfectly entitled to take the view that overall the procedure in this case was not unfair, and that the decision of the employer was not unreasonable. In

particular, she was perfectly entitled to take into account, as she did at the end of paragraph 56 of her Judgment, the fact that the Respondent is responsible for the welfare of children and the Respondent's concern not to re-employ a member of staff in circumstances where she still considered that there were reasonable grounds to consider that she had tried to start a fire.

The Appellant's ground 2

58. I have already set out in this Judgment the way in which the second ground was formulated and has been maintained at this hearing. It is important to appreciate that one only reaches the second ground if the Appellant has already lost on her first ground. There were times, I have to confess, when the way in which Mr Watson developed his second ground appeared to assume that he had succeeded on the first ground. For the purpose of considering the second ground one has to keep firmly in mind that he has lost on the first ground. If he had succeeded on the first ground it would be unnecessary to consider the second ground. Therefore, one has to proceed on the premise that the Respondent was not bound to follow the decision or views of the appeal panel in this case.

59. What Mr Watson in the end submitted in developing this second ground was that in all the circumstances, having decided not to follow the appeal panel's views, the Respondent adopted a procedure which overall was unfair. In particular he complained that there was no person independent of the original decision maker who took the final decision and who upheld the decision to dismiss. He submitted that the Appellant should have been given a further opportunity to meet the evidence which had been gathered, in particular after the appeal panel hearing. He also submitted that there should in effect have been a further independent appeal panel.

60. In my judgment the Employment Judge cannot be criticised as a matter of law for reaching the conclusion that she did that there was no overall unfairness in the present case. There is no fixed or inflexible rule which applies. The question is essentially one of fact, as has been emphasised in the authorities which I have already cited. Furthermore, the Employment Judge was perfectly entitled to take into account the advice given in the ACAS Code of Practice from which I have already quoted. In particular, as the Code recommends at paragraph 3 Employment Tribunals will take the size and resources of an employer into account and it recognises that it may not always be practicable for all employers to take all of the steps set out in the Code.

61. The recommendation at paragraph 26 that, "wherever possible" appeals should be dealt with by a manager who is not previously involved in the case, was not necessarily something that all employers, in particular a small employer as in this case, could comply with fully. As it happens on the facts of the present case the Respondent did attempt in good faith to involve an independent appeal panel. In my judgment it was not required as a matter of law to do more or different from what it did in the circumstances of the present case. In any event (and this is perhaps crucial since this is an appeal from the Employment Tribunal) I cannot see any error of law in the approach which the Employment Judge took in the present case.

Conclusion

62. For the reasons I have given this appeal is dismissed.