Appeal No. UKEAT/0011/13/SM
UKEAT/0184/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 October 2013
Judgment handed down on 9 April 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MRS C BAELZ

MS G MILLS CBE

THAMES WATER UTILITIES LTD APPELLANT

MR R NEWBOUND RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR PHILIP JONES (of Counsel) Instructed by: Ashfords LLP Ashford Court Blackbrook Park Avenue Taunton TA1 2PX
For the Respondent	MR DAVID MITCHELL (of Counsel) Instructed by: Waring and Co Solicitors 6th Floor Kingmaker House Station Road New Barnet EN5 1NZ

<u>SUMMARY</u>

UNFAIR DISMISSAL

Reasonableness of dismissal

Compensation

Contributory fault

The Employment Judge erred in substituting his view of the fairness of the Claimant's dismissal for gross misconduct in entering a Class C sewer without breathing apparatus contrary to an instruction rather than considering whether the conclusion on sanction of dismissal was within the range of reasonable responses of the reasonable employer in the circumstances. The conclusion of the EJ that the dismissal of the Claimant was unfair was based on erroneous views of the facts as found by him. Further, the alternative finding of unfair dismissal for difference in treatment of another employee was also reached on the basis of an erroneous view of the findings of fact and was unsustainable. Finding of unfair dismissal set aside and decision that the Claimant had been fairly dismissed substituted. The high hurdle in **<u>Dobie v Burns International Security Services (UK) Ltd</u>** [1984] ICR 812 was reached in this case.

If the appeal on liability had not been allowed:

(a) the deduction for contributory fault was based on an erroneous view of the facts and would be increased to 50%. **<u>Hollier v Plysu Ltd</u>** [1983] IRLR 260 applied;

(b) appeal from withdrawal factor of 20% from the pension scheme dismissed;

(c) appeal from compensation in respect of a lump sum payable under the pension scheme dismissed.

Cross-appeal from reduction in awards for contributory fault dismissed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Thames Water Utilities Ltd ('the Respondent') appeals from two judgments of Employment Judge Bedeau. By a judgment sent to the parties on 17 September 2012 ('the liability judgment') the Employment Judge ('EJ') held that Mr Newbound ('the Claimant') had been unfairly dismissed. He was found to have contributed to his dismissal by his conduct. The reduction for contributory fault was assessed at 40%. The Respondent appeals both from the finding of unfair dismissal and alternatively from the level of contributory fault which was said to be perversely low. The Claimant cross-appeals from the decision to make any reduction for contributory fault. By a judgment sent to the parties on remedy on 20 December 2012 ('the remedies judgment') the EJ made awards including compensation for pension loss assuming continued employment until the age of sixty-five with a deduction of 20% for withdrawal. An award was also made to compensate for reduction in the lump sum payment which would have been made if employment had continued until the age of sixty-five. The Respondent contends that the EJ erred in failing to make a larger deduction for the likelihood of withdrawal from the pension scheme before the age of sixty-five. Further, the Respondent submits that the EJ erred in compensating the Claimant for the reduction in size of the lump sum payment on retirement. Mr Philip Jones appeared for the Respondent and Mr David Mitchell for the Claimant.

Relevant findings of fact

2. The following findings of fact were made by the EJ. The Claimant was employed by the Respondent from 22 November 1976 until his dismissal on 15 September 2011. He had thirty-four years' service. From 1 April 2010 he was a penstock co-ordinator. This involved working on the maintenance of the Respondent's water assets on a regular preventative programme. The Respondent has approximately 1,200 assets made up of penstocks, cloughs

and flaps. These are mechanical devices within sewers to regulate the flow of water. They require regular inspection and maintenance. A penstock is a large valve, several tons in weight, which is operated by sliding it up and down to open and close a sewer. The work carried out by some employees, including the Claimant, involves working under ground in hazardous conditions which could lead to serious or even fatal injury. Breathing apparatus is to be used in carrying out some tasks.

3. The Respondent's health and safety policy updated on 1 July 2010 provides:

> **"All employees, regardless of grade or seniority, have responsibilities for health and safety at work. Each employee is expected to co-operate. This includes-**
> - **Taking reasonable care for the health, safety and welfare of themselves, their colleagues and others not employed by Thames Water."**

A Note to the policy provides:

> **"No employee, at any level, is authorised to initiate, or continue any activity that places themselves or others in danger. Any such deliberate act or action will be viewed as a disciplinary matter with appropriate measures taken to secure the interests of Thames Water, its employees and stakeholders."**

The Respondent's disciplinary policy includes under "Acts Constituting Gross Misconduct":

> **"…deliberate and serious infringement of health and safety rules."**

Paragraph 4.2.1 of the disciplinary policy dealing with investigation provides:

> **"An appropriate investigation will be undertaken to identify the full circumstances of the case. The investigation will usually be undertaken by your line manager, but it may alternatively be appropriate to use an independent line manager, relevant specialist manager or internal audit. In some cases it may be necessary to hold an investigatory meeting with you before proceeding to a disciplinary hearing. In other cases, the investigation will be the collation of evidence for use at any disciplinary hearing."**

4. The Claimant reported to Mr David Dennis, inspection team manager, who in turn reported to Mr Mike Gunn, field service manager – trunk sewers. Mr Gunn reported to Mr Robert Nason, regional performance manager – large assets group.

5. The events which gave rise to the Claimant's dismissal concerned his failure to wear breathing apparatus when inspecting a sewer on 19 July 2011. The flap and penstock at Albert Road sewer in East London were due for an annual report following an inspection. A proposed diversion of the flow from the Albert Road chamber to a chamber at Bargehouse Road was also to be taken into consideration. Mr Dennis discussed with the Claimant the equipment which would be needed and whether a contractor who would be working with him, Mr Alan King, would be able to use the Respondent's trolly set. A trolly set is a full breathing apparatus with an umbilical air line attached to the surface above the sewer. Air is fed from a supply outside to the breathing apparatus. A trolly set is used for difficult and/or dangerous tasks where manoeuvrability is minimal in a confined space. It was agreed between Mr Dennis and the Claimant that the inspection would take place on 19 July 2011 as a trolly set would be available on that day. The EJ held:

> **"9.11. On 19 July 2011, Mr Dennis met with the claimant and Mr King to go through the safety requirements, in particular, the Safe System of Work Form referred to as the SHE4. Of concern to him was whether Mr King could use the equipment. The SHE4 form is a formal method statement detailing a safe system of work and is used by the respondent for more complex activities which are not covered by the usual risk assessment. As this was a new document, Mr Dennis explained the reasons why it was necessary and the fact that the form was part of the respondent's new health and safety management system. He read a brief description of the work and went through the tasks involved. He made it clear to both men that they were required to use a breathing apparatus. The SHE4 form clearly stated in the description of work that it was a Class C sewer and the inspection must be undertaken in full breathing apparatus. I was satisfied, having heard the evidence that both the claimant and Mr King fully understood that they were required to wear breathing apparatus on entry into the sewer and signed the relevant paperwork. Prior to leaving Mr Dennis read out what was written in the second box on the first page of the SHE4 form, namely:**
>
> > **'An annual inspection is required on two Trunk Sewer assets in the Albert Road Connecting Sewer Chamber. The sewer is C Class and must be completed in full BA in accordance with the Thames Water Confined Space Code of Practice.'"**

The Claimant could not recall Mr Dennis reading out the passage in the SHE4 form that as the sewer was C Class the work had to be carried out in full breathing apparatus but the EJ was satisfied that he did. The EJ continued:

> **"I was, however, satisfied that neither the claimant nor Mr King had been trained on this new health and safety procedure involving the use of SHE4 form."**

6. The EJ held at paragraph 9.13 the work also required a "C permit" authorising entry into a confined space. This was issued by Mr Robert Smith, OPS field specialist and countersigned by Mr Shaun Andrews, as the "competent person" in charge of the entry to the sewer referred to as the "CP2" in charge. The EJ held that Mr Andrews was therefore in charge of health, safety and entry on the site. The "C permit" stated:

> **"Forced air ventilation must be used. Monitoring of the atmosphere and use of umbilical BA on Didsbury hoist."**

7. When the Claimant and Mr King arrived on site, Mr Gunn and Mr Nason were present as well as a breathing apparatus trolly team. The EJ found that the Claimant and Mr King discussed with Mr Andrews whether it would be safe to enter the sewer chamber without breathing apparatus and whether forced air ventilation was required. The EJ found:

> **"Mr Andrews checked the readings and the gas monitor three times and found that it was safe to enter as all the readings were within safe parameters. There was a good level of oxygen and no presence of methane or hydrogen sulphite."**

The Claimant and Mr King entered the chamber without breathing apparatus but had an extra gas monitor to continually test air quality throughout their inspection. After they had been in the chamber for about five minutes the Claimant and Mr King were called to the surface as there was no Didsbury winch on site. The winch was required for use in the event of an emergency to lift an injured person from inside the chamber. When the Claimant came out of the sewer, Mr Gunn, who was with Mr Nason, noticed that neither he nor Mr King was wearing breathing apparatus. Mr Andrews went to collect a Didsbury winch. By the time Mr Andrews returned, Mr Nason and Mr Gunn had left. The EJ held that:

> **"9.17. As the atmosphere within the chamber was within safe limits, Mr Andrews, as the CP2 in charge, allowed the claimant and Mr King to enter the chamber without wearing breathing apparatus or a forced air ventilator."**

The men completed the job and returned to the surface.

8. The next day, 20 July 2011, Mr Gunn learned that both the C permit and the SHE4 made reference to the requirement for breathing apparatus to be used. The EJ held:

> **"As Mr Gunn had observed the claimant and Mr King exiting the sewer without breathing apparatus, he became aware that a breach of procedure had occurred."**

Mr Gunn contacted Mr Nason who instructed him to prepare a report on the conduct of all who were involved in the Albert Road inspection and their respective contribution towards the breach of procedure. Mr Gunn carried out a fact-finding investigation and prepared a report. He did not speak to the Claimant. The C permit and the SHE4 method statement stated that breathing apparatus was required to be worn by workmen entering the C Class sewer. Mr Andrews had countersigned the permit and the Claimant had countersigned the SHE4 method statement. Mr Gunn considered that:

> **"Although the claimant was not the CP2 in charge, he was a senior employee and was involved in leading the working party, that is Mr King, into the sewer."**

Mr Gunn wrote in his investigation report that Mr Andrews was responsible for health and safety as the CP2 in charge. He should have read the SHE4 and C permit and should have been aware that breathing apparatus was required. However Mr Gunn commented:

> **"In mitigation he is a fairly inexperienced CP2 in charge, was clearly fully committed to correcting his mistake when observed by myself, and could have been subject to pressure to get the job done from more experienced staff members in the team. I feel potential gross misconduct could apply here."**

In relation to the Claimant, Mr Gunn wrote:

> **"Bobby was the most experienced and senior operative on site. He had signed the SHE4 document which stated that full BA was to be used for the entry. He entered the sewer using just a dust mask accompanied by the Delphini operator who also wore a dust mask.**

> **No breathing apparatus was used. I can find no mitigating behaviour. I feel potential gross misconduct could apply here."**

9. Mr Nason discussed the report with Mr Gunn. Mr Nason considered that Mr Andrews should be subject to disciplinary proceedings for misconduct rather than gross misconduct. This was because Mr Andrews was relatively inexperienced and:

> **"…his behaviour after the incident demonstrated remorse for what had happened and was keen to learn from his mistakes."**

Mr Nason's opinion of the Claimant's role was different. He was one of the most senior employees involved and was leading Mr King into the sewer. He should have been aware of the high risk of the operation. The Claimant had failed to follow safety procedures twice. Mr Nason felt that the Claimant had put himself and Mr King in unnecessary danger in a situation where an incident could easily have resulted in serious injury or fatality to one or both of them. Mr Nason agreed that the allegation against the Claimant should proceed as one of gross misconduct.

10. On 25 July 2011 Mr Nason and Mr Gunn had a meeting with the Claimant. He was suspended from work on full pay by Mr Nason as he had placed himself and Mr King in unnecessary danger. The EJ observed at paragraph 9.25:

> **"There was no questioning on how he felt about his behaviour to assess whether he had shown remorse and wanted to learn from his mistakes."**

11. Mr Nason carried out a disciplinary investigation. Mr Nason looked at the Claimant's health and safety record. He had been injured on four occasions since February 2010. Mr Nason considered that three of those incidents demonstrated the Claimant's complacency towards his own health and safety. The Claimant was competent in the use of breathing apparatus in working in high risk confined spaces, he was familiar with permits to work

authorisations and was qualified as a Competent Person authorising him to be put in charge of activities and of others working in confined spaces.

12. In conducting his investigation, on 10 August 2011 Mr Nason spoke to Mr Andrews. Mr Andrews admitted that he had made a mistake by not challenging the Claimant on his failure to use proper safety equipment. He said that he found it difficult to challenge those with many more years experience. He was relatively inexperienced as a CP2 in charge. He had only been appointed to that unrestricted position in April 2011.

13. Mr Nason invited the Claimant to attend a disciplinary hearing. The allegation against the Claimant was:

> **"…of failing to follow the correct health and safety procedures and undertaking CP2 work without the required PPE, which potentially constitutes gross misconduct. To that end the outcome of the disciplinary hearing may result in formal disciplinary action being taken against you, including dismissal."**

14. The disciplinary hearing was held on 15 September 2011. It was conducted by Mr Kemp, maintenance manager. The Claimant was represented by a trade union representative, Mr Hedges and had Mr Dennis as a witness. Notes were taken of the meeting. The EJ recorded at paragraph 9.3.2 that it was said on his behalf that:

> **"The claimant relied on his experience by not using breathing apparatus."**

Mr Nason said that the work was stopped initially because there was no Didsbury winch present. The EJ held that the Claimant acknowledged that he had signed the SHE4 document but admitted he had not read it fully. He thought it was a method statement and that breathing apparatus was not going to be used on site for the work. Mr Nason said that the Respondent had been using the SHE4 process for eleven months. The only difference between the previous document and the SHE4 was that the new document required a signature confirming that it had

been read and understood. Mr Hedges said that no training had been given on use of the document. In response to a question from Mr Hedges as to why the CP2 in charge, Mr Andrews, did not stop the work from being carried out if he was unhappy about the Claimant and Mr King entering the sewer without breathing apparatus Mr Nason said that it was the Claimant's responsibility to follow the safety procedures. Mr Dennis then read out his statement. He said that he read out the SHE4 to the Claimant and said that although it was a simple job it required the use of breathing apparatus.

15. The Claimant then read his statement and was questioned. He said that he had signed and had skim read the SHE4 document but thought it was a method statement. The Claimant had attended a CP2 course. He said that the refresher course for CP2 would cover the use of breathing apparatus. This should be worn in a confined space. He knew what the C permit was for. He made a decision using his experience to enter the sewer without breathing apparatus. He said that if breathing apparatus should have been worn the job should have been called off by the CP2 in charge.

16. After an adjournment of about one hour Mr Kemp announced his decision. Mr Kemp concluded that the Claimant had failed to follow a safe system of work on two occasions by carrying out the C Class entry work without breathing apparatus or the Didsbury winch, in spite of these being requirements of the safe system of work. The Claimant had received full and refresher CP2 training over the last ten years. By his own admission the Claimant understood the risks associated with a C Class sewer and subsequent entry. Despite understanding this the Claimant entered the sewer without breathing apparatus and:

> **"…repeatedly implied to me at this hearing that it was not your responsibility to identify health and safety omissions as you were not the CP2 in charge."**

Mr Kemp referred to the fact that the Claimant was the senior employee on site with thirty-five years' experience. Mr Kemp considered:

> **"…this act as a serious infringement of health and safety rules and a serious breach of the company's health and safety policy."**

The Claimant was dismissed for gross misconduct.

17. On 9 September 2011 Mr West, field service manager, conducted the disciplinary hearing into Mr Andrews' conduct. The allegation he faced was that he had failed to carry out his full duties whilst in charge of a CP2 manned entry team. Although not referred to in the judgment of the EJ, the notes of the disciplinary hearing show that Mr Andrews agreed that he had read the C permit and was aware that breathing apparatus was required. When asked why he let the job proceed without breathing apparatus being used he replied that he:

> **"…thought that Bobby and Alan were competent and knew what they were doing."**

He thought he did instruct them to wear breathing apparatus but:

> **"…allowed them the final decision due to their experience."**

Mr West decided to give Mr Andrews a written warning which was to stay on his file for twelve months.

18. The EJ recorded at paragraph 9.3.9 that the Claimant exercised his right to appeal. In his grounds of appeal of 30 September 2011 the Claimant wrote:

> **"I now understand from this situation that the company, rather than rely upon individuals experience, are now required just to follow chapter and verse."**

The Claimant said that he was sorry for his actions and wanted to be employed by the Respondent. He was prepared to undergo any refresher training.

19. The EJ recorded that Mr James Gardner, head of capital procurement, conducted the hearing of the Claimant's appeal on 9 November 2011. The Claimant said he did not recognise the SHE4 document but signed it because he trusted Mr Dennis. He said he did not read the document and it was not read back to him. The Claimant said that when he arrived at the site Mr Andrews was in charge and he said that it was safe to enter the sewer. The Claimant said he was wrong and apologised. He said that everyone deserved a second chance and asked for Mr Gardner to reinstate him.

20. Before reaching a decision on the appeal, Mr Gardner made other enquiries, including into the circumstances surrounding action which had been taken against Mr Andrews. He was told that Mr West had issued Mr Andrews with a written warning as he had taken into account Mr Andrews' inexperience in the CP2 role and the fact that he did not feel capable of challenging the more experienced members of the team. Mr Gardner considered that there were justifiable reasons for the difference in the disciplinary action taken against the two employees.

21. On 14 November 2011 Mr Gardner wrote to the Claimant dismissing his appeal.

22. On 21 July 2011 Mr Shaun Walkling, trunk sewers field operations team manager, had written to Mr King's employer stating that because he had entered the sewer without wearing breathing apparatus and was in breach of health and safety requirements they did not want him to carry out any more duties for the Respondent.

The conclusions of the Employment Judge

23. The EJ referred to a number of authorities including **British Home Stores v Burchell** [1980] ICR 303. The EJ directed himself that:

> **"It is not the role of the Tribunal to put itself in the position of the reasonable employer."**

The Employment Tribunal ('ET') also cited from the judgment of Stanley Burnton LJ in **Bowater v Northwest London Hospitals NHS Trust** [2011] IRLR 331 in which he held:

> **"The appellant's conduct was rightly made the subject of disciplinary action. It is right that the ET, the EAT and this Court should respect the opinions of the experienced professionals who decided that summary dismissal was appropriate. However, having done so, it was for the employment tribunal to decide whether their views represented a reasonable response to the appellant's conduct. It did so. In agreement with the majority of the ET, I consider that summary dismissal was wholly unreasonable in the circumstances of this case."**

24. The EJ held at paragraph 38 that the reason for the Claimant's dismissal was that he had entered the Albert Road sewer on two occasions without breathing apparatus. The EJ held:

> **"He admitted to his conduct on 25 July and at the disciplinary and appeal hearings."**

25. The EJ held that the Respondent had carried out a reasonable investigation. Whilst conducting his disciplinary investigation Mr Nason spoke to Mr Andrews but not the Claimant, the EJ held at paragraph 39 that:

> **"The claimant, however, with the assistance of his union representative, put forward his account during the disciplinary hearing, having been provided with the documents pertaining to the management's case. I do not accept that Mr Nason's presence at the sewer in any way affected the reasonableness of his investigation."**

Further, at paragraph 41 the EJ held:

> **"Whatever concerns there might have been about the investigation prior to the dismissal, I was satisfied that during the appeal the overall effect was that the enquiry into the claimant's conduct was reasonable."**

26. The EJ recognised that the Respondent has to have clearly defined health and safety policies and to make sure that they are adhered to. He observed in paragraph 44 that:

> **"Any changes in procedure and the significance of those changes must be spelt out to the employees."**

27. The EJ then directed himself to consider "whether a reasonable employer facing the circumstances as found by the respondent have dismissed the claimant?"

28. The EJ concluded that the SHE4 was a comparatively recent document and he was not satisfied that the Claimant and his colleague had been trained in its significance. He was not satisfied that Mr Dennis had explained to the Claimant that the failure to wear breathing apparatus would lead to disciplinary action, possibly dismissal. The EJ referred to evidence before him that the Claimant had not worn breathing apparatus on previous occasions and had not been disciplined for failing to do so. He had used his discretion whether to use such apparatus "hence his genuinely held belief that the SHE4 was a method statement".

29. In paragraph 47 the EJ described as "misleading" the statement that the Claimant had failed to show remorse at the earliest opportunity. The EJ held:

> **"The Claimant was called to a meeting with Mr Nason and answered questions put to him without the purpose or significance being explained to him. He showed considerable remorse during the appeal and offered to go on training and be given a second chance after 34 years' service. This was not given any credence."**

30. The EJ held at paragraph 48 that the assertion of the Respondent that the Claimant did not own up to his guilt at the disciplinary hearing "could not be further from the truth". The basis for this conclusion was that the Claimant:

> **"…admitted to Mr Nason prior to his suspension that he did not wear breathing apparatus. At the disciplinary hearing he gave an account of events. He said that it was Mr Andrews who gave him and Mr King the green light to enter the sewer without the apparatus. This was precisely the evidence Mr Andrews gave to Mr Gunn on the 5th**

> **August 2011. Mr Andrews was aware that breathing apparatus was required yet allowed the claimant and Mr King to use their discretion."**

31. The EJ held that the Claimant's length of service, thirty-four years, clean disciplinary record and participation in training others in health and safety had not been given sufficient weight by the Respondent. He took into account that Mr Andrews was the CP2 in charge of the task.

32. Taking all these matters into account the EJ concluded at paragraph 51 that:

> **"…no reasonable employer would have dismissed the claimant in the circumstances and that the decision to terminate his employment was perverse."**

33. If he were wrong in reaching the conclusion that the dismissal of the Claimant was unfair on the basis of the factors set out above, the EJ concluded that the dismissal was in any event unfair based on the difference in treatment of the Claimant and Mr Andrews. Mr Andrews had been in overall charge of the operation. The Claimant was not. Due to their experience Mr Andrews had allowed the Claimant and Mr King the final decision on whether to wear breathing apparatus.

34. The EJ relied on the fact that unlike the Claimant, Mr Andrews was interviewed prior to his disciplinary hearing. Mr Nason took a decision in his case to re-categorise the allegation against him as misconduct. Once this was done Mr Andrews was not at risk of dismissal. The EJ held at paragraph 52:

> **"The assertions that Mr Andrews had shown remorse and was inexperienced were not sufficient grounds for treating them differently as the claimant was not given the opportunity prior to any disciplinary investigation to express himself to Mr Nason or Mr Gunn. Both men were employed in the same operation. Mr Andrews was in charge the claimant was not. Mr Andrews allowed both men to enter the sewer without a Didsbury winch being on site and without breathing apparatus. Yet Mr Andrews was given a written warning and had to undergo training. This was not an appropriate case for disparity in treatment notwithstanding that the day they performed different roles."**

35. The EJ considered that the compensatory and basic awards should be reduced by 40% for contributory fault. He held that the Claimant had been guilty of blameworthy and culpable conduct. That conduct was failing to have regard to what was read out to him by Mr Dennis that the work required the use of breathing apparatus and entering the sewer on two occasions without using such apparatus. The Claimant entered the sewer with the subcontractor Mr King who also was not wearing breathing apparatus.

36. By the remedies judgment the EJ held that loss of pension rights should be calculated on the basis that the Claimant would have remained in the employment of the Respondent until the age of sixty-five and should be compensated for the loss of the resulting additional lump sum payment under the pension scheme. The EJ calculated the loss of annual pension by using the "substantial loss" approach and the table in the *Employment Tribunal's Compensation for Loss of Pension Rights Guidelines Third Edition* ('the pension loss Guidelines') for private sector pensions. The EJ agreed with submissions of counsel then acting for the Claimant that ETs did not have to follow the guidance in the pension loss Guidelines and could award a separate compensation for loss of lump sum to the larger payment. The EJ held at paragraph 25 of the remedies judgment that:

> **"The loss of an enhanced lump sum payment is a direct loss to the claimant and he is entitled to be compensated accordingly."**

An award was made in the sum of £7,779.69 for the loss of the additional lump sum which would have been paid under the pension scheme if the Claimant had remained in the employment of the Respondent until the age of sixty-five.

37. The EJ applied a deduction of 20% from total pension loss on the basis that the Claimant was aged fifty-eight at the date of dismissal and that although he was in good health there was a risk that he might not have worked up to the retirement age of sixty-five.

The submissions of the parties

38. The primary argument advanced by Mr Jones for the Respondent was that the EJ erred in his approach to determining the fairness of the Claimant's dismissal. He had what counsel contended was a "substitution mindset". It was submitted that the EJ erred in failing to determine the fairness of the dismissal by considering whether the sanction was within the band of reasonable responses of the reasonable employer. Not only did the EJ make his own assessment of what was reasonable but in doing so, on certain issues he took into account the evidence given at the hearing before him rather than the evidence of what was said and known at the time the decision to dismiss was taken. Mr Jones contended that the EJ fell into the same error as that of the ET in **London Ambulance Service v Small** [2009] IRLR 563 in which Mummery LJ held at paragraph 47:

> **"The ET erred in law in its failure to apply the law correctly. On the issue of liability, the ET should have focused its fact-finding on the trust's conduct of Mr Small's dismissal. Instead, it concentrated on the conduct of Mr Small and it then used findings of fact in order to substitute its views for the grounds on which the trust actually formed its belief and acted when it took the decision to dismiss."**

39. Mr Jones contended that in a case such as this in which some employees, including the Claimant, carry out work which is dangerous and carries a risk of serious or fatal injury their employer is obliged and entitled to treat health and safety issues with the utmost seriousness. In these circumstances ETs should respect the employer's decision making on breaches of health and safety. Based upon these propositions Mr Jones submitted that, having regard to the fact that the Claimant twice went into the sewer in breach of a requirement to wear breathing apparatus and when doing so placed himself at risk, absent exceptional circumstances, the EJ

erred in holding that dismissal for such conduct was unfair. It was submitted that it is for the Respondent to decide how it goes about enforcing its health and safety policy.

40. Mr Jones contended that the conclusion of the EJ that the dismissal of the Claimant was unfair was sufficiently surprising to require scrutiny of the basis for that decision. The EJ set out in paragraphs 46 to 50 the factors which he took into account in reaching his decision.

41. The Claimant did not assert that he did not understand he must wear breathing apparatus when working inside a Class C sewer. Mr Jones contended that whether he had been trained in the "significance" of the SHE4 document was irrelevant. The EJ erred in relying on his finding that he was not satisfied that the Claimant had been trained in the significance of the document. The EJ also erroneously relied on his finding that he was not satisfied that Mr Dennis had explained to the Claimant that the failure to wear breathing apparatus would lead to disciplinary action, possible dismissal. It is plain from its terms that a breach of the Respondent's safety policy, with its necessary importance, could lead to dismissal.

42. The Claimant was a senior and experienced employee. The EJ held that Mr Dennis read out to the Claimant and Mr King the requirement on the SHE4 form that they must complete their work in what they were told was a C Class sewer using full breathing apparatus in accordance with the Thames Water Confined Space Code of Practice. It was surprising that the Claimant asserted at the hearing before the EJ that he could not recall being told this by Mr Dennis.

43. Further Mr Jones submitted that the EJ erred in failing to take into account or even refer to a letter dated 18 January 2012 to the Claimant from his Union, UNISON, in which they explained they would not support his claim. They wrote:

> **"The Company dismissed you for a very significant and potentially dangerous breach of health & safety, to both yourself and others, health & safety breach. Despite the mitigation you raise, the failure to abide by the requirements as set out by the onsite briefing is totally damning."**

44. The EJ referred to evidence before him that the Claimant had in the past exercised his discretion in deciding whether or not to use breathing apparatus. The Claimant said that such earlier decisions did not lead to disciplinary action. Mr Jones submitted that there was no evidence, other than an assertion by the Claimant, upon which the EJ could have reached this conclusion. Neither at the disciplinary nor appeal hearings had the Claimant said that the Respondent knew he had disobeyed a requirement to wear breathing apparatus in the past and had decided not to discipline him.

45. Further the EJ held that the Respondent failed to take into account that the Claimant and Mr King were in a rush to get to the Albert Road sewer and had only scanned the SHE4 document. Mr Jones submitted that this was not relevant in the light of the finding that Mr Dennis had told them to use breathing apparatus.

46. The characterisation by the EJ of the statement by the Respondent that the Claimant had shown no remorse for his action of descending twice into the sewer without breathing apparatus as "misleading" was, Mr Jones submitted, wrong. In the disciplinary hearing the Claimant admitted what he did but did not accept that what he did was wrong. It was only after he had been dismissed that he admitted at the appeal hearing that he had done wrong in a bid to get his job back. Further, finding that the assertion by the Respondent that during the disciplinary

hearing the Claimant did not own up to his guilt "could not be further from the truth" displays a complete misunderstanding of the evidence. It was also inconsistent with the finding in paragraph 40 that Mr Kemp, who conducted the disciplinary hearing, took the view that the Claimant failed to acknowledge his responsibility and focused on the role of Mr Andrews. Further, Mr Jones contended that the observation of the EJ in paragraph 48 that:

> **"The claimant was not seeking to deflect blame but gave his account of events supported to a large extent by Mr Andrews."**

was a clear example of substitution.

47. Mr Jones pointed out that the EJ had the notes of the disciplinary hearing before him. The notes show that the Claimant was maintaining that:

> **"Because the atmosphere in the chamber was in the correct parameters there was no need to use either BA or a Forced Air Ventilator."**

The index to written submissions by the Claimant indicates that he was to explain "Procedure if I had been in charge." The Claimant ignored the instruction to wear breathing apparatus given to him by Mr Dennis. The notes show that the Claimant said that:

> **"BN [RN]: I thought that if everything was within the required parameters that [the breathing apparatus] wasn't needed.**
> **…**
> **RN [BN]: So a decision was made at some point whether or not to use the additional equipment.**
> **RN: I made a decision when on the job using my experience of that sewer."**

The Claimant's union representative said:

> **"GH: He didn't call off the job as he would have carried on with it if he was the CP2 in charge."**

48. Mr Jones contended that a further example of the EJ substituting his own views of the gravity of the Claimant's offence rather than considering whether that of the Respondent was

reasonable was his statement that the Claimant's length of service and his clean disciplinary record were given insufficient weight in the circumstances. The EJ observed:

> **"It is very rare nowadays to have an employee with so many years service. His contribution towards the respondent's own health and safety practice was considerable."**

Mr Jones submitted that the weight to be attached to length of service was for the Respondent. Further, the letter dated 15 September 2011 from the Respondent to the Claimant giving the outcome of the disciplinary hearing refers to the fact that he had thirty-five years' experience. Length of service was not ignored.

49. As for the alternative basis upon which the EJ held the dismissal of the Claimant to be unfair, Mr James contended that Mr Andrews was not a genuine comparator. There were reasons for the difference in treatment. The EJ held that Mr Nason was of the view that Mr Andrews was relatively inexperienced. His behaviour after the incident demonstrated remorse for what had happened and he was keen to learn from his mistakes. This contrasted with the attitude of the Claimant who maintained until after his dismissal that he had done nothing wrong.

50. Mr Jones relied upon the judgment of the Court of Appeal in **Paul v East Surrey District Health Authority** [1995] IRLR 305 to contend that the attitude of an employee to his misconduct is a justifiable ground for an employer making a distinction in the treatment of two employees. Sir Christopher Slade held at paragraph 36:

> **"The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions…"**

Mr Jones contended that yet again the EJ substituted his own view of how the Claimant should have been treated rather than considering whether it was within the range of reasonable responses of a reasonable employer to treat him and Mr Andrews differently. In this case it was open to the Respondent so to do.

51. Further, Mr Jones contended that the EJ erred in holding that the assertions that Mr Andrews had shown remorse was not a good ground for the difference in treatment as:

> **"…the claimant was not given the opportunity prior to any disciplinary investigation to express himself to Mr Nason or Mr Gunn."**

Mr Jones submitted that there was nothing to prevent the Claimant at any time from expressing remorse for entering the sewer without breathing apparatus. He could have done so before the disciplinary hearing. Even at that hearing, knowing that he faced dismissal for his action, he did not accept that he had done anything wrong.

52. Accordingly Mr Jones contended that the alternative basis for the EJ holding the dismissal to be unfair was unsustainable.

53. Mr Jones recognised that the barrier facing an appellant seeking to challenge the percentage reduction in awards made by an ET is high. It is well established by **Hollier v Plysu Ltd** [1983] IRLR 260 that the EAT is not entitled to interfere with an ET's conclusion on the question of deduction for contributory fault unless the ET have gone wrong in law or their conclusion is one which no reasonable ET could have reached on the evidence. Mr Jones contended that if the EJ had not erred in holding that at the disciplinary hearing the Claimant had owned up to his guilt, and in holding that it was misleading for the Respondent to say that the Claimant had failed to show remorse at the earliest opportunity, he would have deducted a

much higher percentage for blameworthy contributory fault than 40%. Failure to accept responsibility for his actions or to recognise that he was at fault before the appeal hearing showed that the Claimant had deliberately disobeyed an instruction on a safety issue. That material factor had not been taken into account by the EJ in determining the culpability of the Claimant.

54. Mr Jones contended that the cross-appeal from the making of any deduction for contributory fault was unsustainable. The cross-appeal was made on the basis of the finding of the EJ that this was not an appropriate case for disparity in treatment with Mr Andrews who was the CP2 in charge and who was not dismissed. In **Parker Foundry Ltd v Slack** [1992] ICR 302, Woolf LJ held at page 308B that in deciding whether to make a reduction in an award for blameworthy contributory fault, an ET is not required or indeed entitled to take into account what happened to another employee involved in the incident for which the claimant was dismissed.

55. As for the remedies judgment, Mr Jones no longer pursued the ground of appeal that the Claimant had failed to mitigate his loss by taking his pension from the age of sixty.

56. Mr Jones contended that the EJ erred in failing to take relevant factors into account in assessing as low as 20% the deduction for the possibility of withdrawal from active membership of the pension scheme that the Claimant's employment with the Respondent may have come to an end before the age of sixty-five in any event. On this issue, Mr Jones contended that the fact that the Claimant could have taken an early retirement pension at the age of sixty made it less likely that he would have remained employed by the Respondent until the age of sixty-five and continued as an active rather than a pensioner member of the scheme.

Further, Mr Jones contended that the EJ had failed to take into account his finding at paragraph 3.2 that the Claimant's vision in his left eye became seriously impaired after his dismissal. It was said this made it less likely that the Claimant would have remained in the Respondent's employment. Mr Jones further contended that the EJ had failed to take into account the likelihood of dismissal in the future. The Claimant had displayed intransigence over wearing breathing apparatus which indicated likelihood of disobedience in the future and consequential disciplinary action. In his grounds of appeal Mr Jones contended for a withdrawal factor of at least 50%.

57. Mr Jones contended that the EJ had erred in making a separate award for loss of a lump sum payment under the pension scheme. The EJ made an award for loss of annual pension applying the substantial loss approach and the tables in the pension loss Guidelines. He used a multiplier of 13.36 in reaching the figure awarded. Mr Jones contended that paragraph 8.6 of the pension loss Guidelines make it clear that the multipliers take into account the entitlement to a lump sum. If the substantial loss approach and the pension loss Guidelines are used there should be no separate award for a lump sum. In awarding compensation for loss of a lump sum as well as applying a multiplier of 13.36 for annual pension loss the Claimant was doubly compensated for loss of the additional lump sum he would have received had he remained in service for an additional seven years.

58. Mr Mitchell for the Claimant contended that by the appeal against the finding of unfair dismissal the Respondent seeks to challenge findings of fact. There has been no application for notes of evidence and in any event the challenge does not surmount the high hurdle erected by **Yeboah v Crofton** [2002] IRLR 634.

59. Mr Mitchell submitted that there was no dispute about the material facts which formed the basis for the conclusion of the EJ that the dismissal of the Claimant was unfair. There was no dispute that the decision whether the Claimant and Mr King should descend into the sewer without breathing apparatus was taken on the site. They descended without such apparatus with the approval of Mr Andrews, the CP2 in charge. It was the permissible view of the EJ that this breach of the requirement to wear breathing apparatus was not intentional.

60. On the findings of fact it was contended that the instruction given by Mr Dennis that the Claimant and Mr King should wear breathing apparatus changed once they were on site. The Claimant gave evidence that Mr Andrews said that it was safe to enter the sewer without breathing apparatus. Further, the EJ was entitled to have regard to the evidence supported by the letter from the trade union that the Claimant had not been trained in the significance of the SHE4 document. The Claimant thought the document was a standard method statement. The EJ did not err in taking this into account in deciding the fairness of the dismissal.

61. Mr Mitchell contended that the challenge to the finding that the Claimant had in the past exercised his discretion in deciding whether to wear breathing apparatus and had not been disciplined for failing to do so, was unsustainable. The Claimant had given evidence before the EJ to that effect which supported such a finding.

62. Further it was submitted that the issue of whether the Claimant had suffered a disadvantage by not being interviewed during the investigation was for the EJ to decide. So too was his description of the alleged failure of the Claimant to show remorse at the earliest opportunity as "misleading".

63. Mr Mitchell submitted that the EJ was entitled to take into account Mr Nason's evidence that the CP2 in charge, Mr Andrews, was responsible for any part of an operation going wrong if it could be avoided.

64. Mr Mitchell contended that in essence the "substitution" ground of appeal is a perversity challenge. Further, ETs are entitled to find whether the dismissal was outside the range of reasonable responses without being accused of placing themselves in the position of being the reasonable employer.

65. It was submitted that the conclusion that the dismissal of the Claimant was in any event unfair because Mr Andrews was treated differently was based on careful findings of fact and was open to the EJ to make on the evidence. The Respondent's disciplinary policy was not followed in the case of Mr Andrews. Mr Andrews was interviewed in the course of the investigation into the incident and as a result the level of the charge against him and consequential maximum penalty was changed. Mr Mitchell said that Mr Jones had accepted that the Respondent had some questions to answer in the treatment of Mr Andrews. Mr Mitchell contended that the EJ did not err in his alternative conclusion that the dismissal of the Claimant was unfair because of the more favourable treatment accorded to Mr Andrews.

66. In support of the cross-appeal Mr Mitchell contended that the EJ erred in making a reduction in the awards for blameworthy contributory fault. It was contended that such a conclusion is inconsistent with the finding in paragraph 52 that this was not an appropriate case for disparity in treatment with Mr Andrews. Further, the finding in paragraph 54 that the Claimant's conduct was blameworthy and culpable fell far short of the deliberate infringement of health and safety instructions required to establish a charge of gross misconduct pursuant to

the Respondent's disciplinary procedure. Accordingly there was no basis upon which the EJ could properly make a deduction for contributory fault.

67. As for the appeal from the remedies judgment, Mr Mitchell contended that the challenge to the award to compensate for the loss of part of a lump sum payable at normal retirement age was run and lost before the EJ. He did not err in law in his decision on the issue.

68. It was submitted that the EJ did not err in assessing the reduction in compensation for pension loss to be 20% in recognition of the chance that if he had not been dismissed in 2011 the Claimant may not have remained in the employment of the Respondent until the normal retiring age of sixty-five. There was no challenge to the finding of fact in paragraph 28 that the Claimant was in good health. Further, there was no justification to proceed on the basis that the Claimant was unrepentant and refused to apologise for not using breathing apparatus and so was likely to be dismissed in the future in any event.

Discussion and conclusion

Liability judgment

69. The ET held that the reason for the Claimant's dismissal was that he entered the Albert Road sewer on two occasions without breathing apparatus. The EJ held at paragraph 9.11:

> **"I was satisfied, having heard the evidence that both the claimant and Mr King fully understood that they were required to wear breathing apparatus on entry into the sewer and signed the relevant paperwork."**

In breach of this instruction the Claimant and Mr King entered the C Class sewer on two occasions without using breathing apparatus.

70. Although the EJ observed in paragraph 44 that the Respondent had to have clearly defined health and safety policies and to make sure that they are adhered to he did not refer to the unchallenged risk of serious injury to employees carrying out some work. In his findings of fact, the EJ set out in paragraph 9.38 the statement read to the Claimant by Mr Kemp at the conclusion of his disciplinary hearing. Mr Kemp recorded that the Claimant admitted that he understood the risks associated with a C Class sewer and subsequent entry. Mr Kemp concluded that the Claimant failed to follow a safe system of work which he confirmed he clearly understood by signing the SHE4 document. The document stated that breathing apparatus in accordance with the Respondent's Confined Space Code of Practice was to be used.

71. Mr Kemp concluded that despite the Claimant's admitted understanding of the requirement of the need to use breathing apparatus when entering and working in the Albert Road sewer he:

> **"…continued to carry out the entries on this day and repeatedly implied to me at this hearing that it was not your responsibility to identify health and safety omissions as you were not the CP2 in charge. You were the senior employee on site with 35 years' experience working alongside a contractor as the leader of the two man working party.**
>
> **I deem this act as a serious infringement of health and safety rules and a serious breach of the company's health and safety policy."**

This was viewed as gross misconduct for which the Claimant was dismissed.

72. On appeal the Claimant did not question that he had acted as alleged or the seriousness of his actions. In effect he offered mitigation: he did not read the SHE4 document, he was in a hurry to get to the site, others present at the site should have been disciplined including Mr Andrews, he had been with the company for thirty-five years and had good performance reviews. He was wrong and apologised. He said that everyone deserved a second chance.

Having considered the available information and the Claimant's representations, Mr Gardner who conducted the appeal concluded that the Claimant had been in serious breach of the Respondent's health and safety policy and that action short of dismissal for gross misconduct was inappropriate.

73. The seriousness with which the Respondent treats breach of health and safety requirements is made clear in their health and safety policy which provides that all employees have responsibilities for health and safety at work. Each employee is expected to co-operate. This includes:

> **"Taking reasonable care for the health, safety and welfare of themselves, their colleagues and other persons not employed by Thames Water."**

A note in the policy provides:

> **"No employee, at any level, is authorised to initiate, or continue any activity that places themselves or others in danger. Any such deliberate act or action will be viewed as a disciplinary matter with appropriate measures taken to secure the interests of Thames Water, its employees and stakeholders."**

The Respondent's disciplinary policy includes as acts constituting gross misconduct:

> **"…deliberate and serious infringement of health and safety rules."**

74. Having decided the reason for the Claimant's dismissal and that the enquiry into the Claimant's conduct was reasonable, the reasoning of the EJ on the reasonableness of the decision to dismiss concentrated on the factors advanced by the Claimant in mitigation at his appeal hearing.

75. Mr Jones contended that on such a serious health and safety issue as arose in this case it is:

> **"…only in the most exceptional of circumstances and on the most urgent of grounds should a Tribunal be permitted to override the Respondent's view of the seriousness of the conduct and the appropriate sanction."**

In this case in our judgment the EJ failed to consider the reasonableness of the gravity with which the Respondent viewed the conduct of the Claimant. The Respondent considered that the Claimant had deliberately entered a C Class sewer without breathing apparatus using his own assessment of the situation rather than complying with the instruction given to him by Mr Dennis. The Respondent considered that the acquiescence of the less experienced CP2 at the site, Mr Andrews, did not negate that instruction or relieve the Claimant from responsibility to take care of his own safety when working in a confined Class C sewer which could present serious risks to his safety. If the EJ considered that the Respondent formed a view of the seriousness of the Claimant's actions which fell outside that which could be taken by a reasonable employer he failed to give reasons for so concluding.

76. The first matter which the EJ considered in determining the fairness of the Claimant's dismissal was the SHE4 document. He observed:

> **"I was not satisfied that the claimant and his colleagues had been trained in its significance."**

Further he held:

> **"I was not satisfied that Mr Dennis had explained to the claimant that the failure to wear breathing apparatus would lead to disciplinary action, possibly dismissal."**

77. The EJ referred to the evidence before him in concluding that the Claimant had in the past exercised his discretion whether or not to use breathing apparatus and had not been disciplined for not doing so. Hence he believed that the SHE4 was a method statement. However the notes of the disciplinary hearing show that the Claimant said that whilst breathing apparatus was listed on the SHE4 document "in the past we have not had to follow every step".

They do not record that the Respondent knew that he had entered a C Class sewer in the past without breathing apparatus contrary to a written instruction and had not been disciplined. The EJ appears to have accepted that these earlier failures to use breathing apparatus did not lead to disciplinary action. By relying on evidence given to him at the hearing rather than the evidence before the Respondent when taking the decision to dismiss in our judgment the EJ erred in placing any weight on this factor in the absence of any findings as to whether the Respondent was aware of such failures, and if so the circumstances in which they occurred and, if it was not, why no disciplinary action was taken.

78. Further in our judgment the EJ impermissibly substituted his view of the importance of training on the SHE4 document rather than considering whether the Respondent acted unreasonably in not regarding this as a significant mitigating factor. Such an assessment should have been made by the EJ in the light of his finding that Mr Dennis had read the SHE4 document to the Claimant, and that it stated that breathing apparatus was to be used in the Albert Road sewer. The unchallenged statement by Mr Dennis at the conclusion of the disciplinary hearing was that the Claimant admitted that he understood this requirement. In commenting that he was not satisfied that Mr Dennis had explained to the Claimant that failure to wear breathing apparatus would lead to disciplinary action the EJ failed to refer to the statement in the health and safety policy that such action would result in such action.

79. In our judgment the EJ erred in characterising the Respondent's view that the Claimant had failed to show remorse as "misleading". The unchallenged statement of Mr Kemp at the conclusion of the disciplinary hearing set out in paragraph 9.38 of the judgment of the EJ and the findings of fact made by him established that he recorded that at the disciplinary hearing the Claimant agreed he had entered the sewer twice without breathing apparatus but he did not then

acknowledge he had done anything wrong. The statement made by Mr Kemp at the conclusion of the disciplinary hearing includes the following:

> **"Despite you admitting your understanding of this, you continued to carry out the entries on this day and repeatedly implied to me at this hearing that it was not your responsibility to identify health and safety omissions as you were not the CP2 in charge. You were the senior employee on site with 35 years' experience, working alongside a contractor as the leader of a two man working party."**

The Claimant's ground of appeal from the decision to dismiss set out in the judgment of the EJ is based on the assertion that he "now" understood that rather than rely on experience employees "are now required just to follow chapter and verse". The Claimant did not acknowledge that he had done anything wrong until after he had been dismissed and was appealing the decision. For the same reason that his characterisation as "misleading" was made in error, the conclusion of the EJ that it "could not be further from the truth" for the Respondent to say that the Claimant did not own up to his guilt at the disciplinary hearing was also unsustainable. The Claimant admitted that he had entered the sewer twice not using breathing apparatus but on the material referred to by the EJ including the statement of Mr Kemp at the conclusion of the disciplinary hearing it is clear that at that hearing he did not acknowledge he had done anything wrong. The EJ substituted his own view rather than assessing the reasonableness of that of the Respondent when he commented at paragraph 48:

> **"The claimant was not seeking to deflect blame but gave his account of events supported to a large extent by Mr Andrews."**

80. The EJ also considered the Claimant's length of service to be significant. He made his own observation on its importance saying:

> **"It is very rare nowadays to have an employee with so many years service."**

Further, the EJ made his own assessment when finding:

> **"His contribution towards the respondent's own health and safety practice was considerable."**

81. The EJ also referred to the fact that Mr Andrews was the CP2 in charge and was responsible for any part of the operation going wrong if it could be avoided. The EJ does not appear to have considered whether the view of the Respondent that Mr Andrews was less experienced than the Claimant and as Mr Gardner has been informed, did not feel able to challenge the more experienced members of the team, was one which they could reasonably take.

82. In our judgment the factors relied upon by the EJ to reach his conclusion that the dismissal of the Claimant was unfair were based on a misunderstanding of the facts and in certain respects represented his own views of the blameworthiness of the Claimant's conduct. Despite a correct self direction, the EJ fell into error by assessing the fairness of the dismissal on his own view of the facts and their significance rather than considering whether dismissal was within the range of reasonable responses of a reasonable employer in the circumstances. Notwithstanding that different employers may take different views of the blameworthiness of the Claimant, the EJ could only find the dismissal to be unfair if no reasonable employer taking into account all the relevant circumstances would have dismissed the Claimant.

83. In the alternative the EJ concluded that the dismissal of the Claimant was unfair because he was dismissed and Mr Andrews, the CP2 in charge, was only given a warning. The introduction to his consideration of disparate treatment indicates that the approach adopted by the EJ was to consider how Mr Andrews should have been treated and to decide on the relative culpability of the Claimant and Mr Andrews. The EJ started his account by saying at paragraph 52:

> **"I had all the relevant evidence before me in relation to Mr Andrews' case."**

In our judgment the EJ erred in observing that the Claimant was not given the opportunity prior to any disciplinary investigation to apologise to Mr Nason or Mr Gunn. The conclusion of the EJ that:

> **"The assertions that Mr Andrews had shown remorse and was inexperienced were not sufficient grounds for treating them differently as the claimant was not given the opportunity prior to any disciplinary investigation to express himself to Mr Nason or Mr Gunn."**

is not supported by the findings of fact. Those findings do not establish that the Claimant was prevented from apologising for his conduct, whether when he was suspended or at any other time. Further, later at the disciplinary hearing the Claimant did not acknowledge that he had been at fault.

84. The EJ failed to explain why the difference in the attitude of the Claimant and Mr Andrews to their wrongdoing did not reasonably justify the Respondent in taking different action against them. Mr Andrews accepted at an early stage that he should have taken steps to ensure the Claimant and Mr King wore breathing apparatus. He explained his inexperience compared to that of the Claimant. The judgment of the Court of Appeal in **Paul** is an example that acknowledgement of wrongdoing can justify a Respondent treating one employee more leniently than another involved in the same incident.

85. In our judgment the alternative basis for holding the dismissal to be unfair was erroneously based on the EJ's own view of the relative culpability of the Claimant and Mr Andrews rather than a consideration of whether it was within the range of reasonable responses for the Respondent to form that view in the circumstances.

86. The finding that the dismissal of the Claimant was unfair is set aside. However, since we heard full argument on the appeal and cross-appeal on contributory fault and the appeal from the remedies judgment we will give our judgment on those matters.

Contributory fault

87. As is well established, since **Plysu** an appeal court will not interfere with the decision of an EJ on contributory fault unless there has been an error of law or the conclusion reached is one which no reasonable EJ could reach on the evidence. The blameworthy conduct of the Claimant is the basis upon which the EJ made a 40% reduction in the awards for contributory fault. In our judgment the assessment of contributory fault was based in part on the false premise that the Claimant had acknowledged at the disciplinary hearing that he had been guilty of blameworthy conduct. Failure to acknowledge the fault which led to the decision to dismiss can be regarded as blameworthy conduct. In our judgment the EJ erred in failing to take this into account. If he had taken into account the Claimant's failure to acknowledge that he had done wrong until after he had been dismissed, the percentage reduction in contributory fault would have been greater. This is not a case which would warrant remission to decide this issue. In our judgment the additional reduction would have been 10% making the total reduction to be 50%.

88. Having concluded that the EJ erred in deciding that it was not appropriate to accord different treatment to the Claimant and Mr Andrews, the basis for the cross-appeal is not sustainable. The cross-appeal from making a reduction for contributory fault in the awards is dismissed.

The remedies judgment

89. As for the challenge to the 20% reduction in pension loss as being too low, in our judgment it cannot be said that if the EJ had properly taken into account the impairment in the vision of one of the Claimant's eyes, the fact that he could take an early retirement pension at the age of sixty and the possibility of dismissal for misconduct in the future, the percentage reduction for possibility withdrawal from the pension scheme would have been assessed at more than 20%. The EJ did not err in law or reach a perverse conclusion is making a reduction of 20% in pension loss to take account of the possibility of withdrawal from the scheme before the age of sixty-five.

90. In calculating annual pension loss the EJ used the "substantial loss approach" in the pension loss Guidelines. To calculate the Claimant's annual pension loss the EJ applied table 5.1 for a man in the private sector where the normal retirement age is sixty-five and dismissal was at age fifty-eight. Using that table the multiplier used was 13.36.

91. Paragraph 8.6 of the pension loss Guidelines explains that there are separate tables for private sector and public sector schemes. The tables for private sector schemes set out different and lower multipliers from those used for the public sector. This is partly to take into account the presence in large public sector schemes of a separately identified lump sum equivalent to three times the annual amount of pension. The private sector tables are produced on the basis that those schemes pay no separately identified lump sum but have the option of partial commutation of annual pension. A worked example is given in paragraph 8.8 of the pension loss Guidelines for an employee who had been in a private sector scheme but then joined a public sector scheme. The Guidelines explain:

> **"'… as a matter of fact there is an expected lump sum at normal retirement age …but …no separate calculation is required for the lump sum in C as this is incorporated within the factors for public sector schemes."**

92. The EJ also made an award to compensate the Claimant for the reduction in lump sum payment under the pension scheme because his active membership ceased seven years before normal pension age. The EJ accepted that the Claimant was entitled under the Respondent's pension scheme to a lump sum upon retirement of 3/80th of his final pensionable remuneration multiplied by the number of years up to a retirement age of sixty-five. The EJ held at paragraph 25:

> **"The loss of an enhanced lump sum payment is a direct loss to the claimant and he is entitled to be … compensated accordingly. I therefore will award him the sum of £7,779.69."**

After the conclusion of the hearing before us counsel were asked whether the Respondent's was a public or private sector pension scheme. We were told that it is a private sector scheme. Since the EJ used a multiplier of 13.36 taken from the table for private sector schemes to calculate the Claimant's pension loss no account had been taken of the reduction in the lump sum by reason of the dismissal as the private sector table is based on commutation but no entitlement to a separate lump sum. In accordance with the findings of fact made by the EJ, if no award had been made for reduction in the lump sum, the Claimant would have suffered an uncompensated loss. The principle to be applied under the **Employment Rights Act 1996** section 123 is to award compensation "…having regard to the loss sustained by the complainant in consequence of the dismissal…" Since the EJ used a table for annual pension loss which did not include an element in the multiplier for loss of a lump sum, in our judgment he did not err in making a separate award for loss of the additional lump sum which the Claimant would have received had he remained in employment until the age of sixty-five. The Guidelines are to be used to assist ETs in calculating pension loss consistently with the Employment Rights Act. Section 123 requires just and equitable compensation to be awarded for loss sustained. Using

the Guidelines to calculate annual pension loss for a member of a private sector scheme does not preclude the award of compensation for loss of the additional lump sum which the Claimant would have received had he not been dismissed.

93. In response to the recent question from us on whether the pension scheme was public or private sector, counsel for the Respondent raised two further alleged errors made by the EJ in calculating pension loss. They were not included in the Grounds of Appeal or the subject of submissions before us.

Conclusion

94. The finding that the dismissal of the Claimant was unfair is set aside. We have considered whether, as contended on behalf of the Respondent, we should substitute a decision that the dismissal was fair. In order to do so, directing ourselves in accordance with **Dobie v Burns International Security Services (UK) Ltd** [1984] ICR 812, we would have to conclude that no reasonable EJ properly directing himself or herself on the evidence could decide that the dismissal was unfair. We have reached the conclusion that this is one such rare case. The reason for the dismissal of the Claimant was that he entered a C Class sewer twice without using breathing apparatus. There were known dangers in doing so. The Respondent had clear health and safety guidelines which stated that breaches would result in disciplinary action. The Claimant knew that he should wear breathing apparatus to enter the sewer. He took it upon himself to do so without that apparatus. The health and safety policy makes it clear that employees are responsible for their own safety. The Respondent could reasonably form the view that the Claimant's culpability was not excused by the presence of a less experienced employee, Mr Andrews as CP2 in charge. The Respondent could also reasonably form the

view that the Claimant, unlike Mr Andrews, did not acknowledge he had done anything wrong until after he had been dismissed.

95. In these circumstances we substitute a finding that the Claimant was not unfairly dismissed.

96. If we had not decided to set aside the finding of unfair dismissal we would have:

(i) increased the percentage reduction for contributory fault to 50%;

(ii) dismissed the appeal from the withdrawal factor of 20% from the pension scheme;

(iii) dismissed the appeal from the award of compensation in respect of the lump sum payable under the pension scheme.

97. The cross-appeal from the reduction in the awards for contributory fault is dismissed.