Appeal No. UKEATS/0020/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 15 October 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MRS SUSAN ROONEY — APPELLANT

DUNDEE CITY COUNCIL — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID HAY (Advocate) Instructed by: Bell Brodie Solicitors 77 Castle Street Forfar DD8 3AG
For the Respondent	MR BRIAN NAPIER (One of Her Majesty's Counsel) Instructed by: Dundee City Council 21 City Square Dundee DD1 3BY

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Claimant was employed as a cashier supervisor by the Respondent. Her employment began in 1985 and ended on 30 March 2012 when she was dismissed. The Claimant had received a final written warning in connection with an incident related to failure to follow instructions which took place on 9 August 2010. The essential complaint against her was that she had disregarded an express instruction from a Ms Russell, who was senior to her. Following a disciplinary hearing on 10 September 2010 the Claimant received a final written warning which was to stay on her record for 15 months. She appealed against that but no appeal was ever heard. A further incident took place on 2 December 2011 when the Claimant failed to follow instructions given to her. A disciplinary hearing was heard in March 2012, following which she was dismissed. The person conducting it was aware of the final writing warning previously put on her record and was aware that the appeal had not been determined. The Appellant appealed against the decision to dismiss her and the decision was upheld on appeal. The Employment Tribunal found that the dismissal was not unfair. On appeal to the EAT, the Claimant sought to argue that the ET had misapplied the law in relation to the original final warning. Held the ET did not err in law. There was no reason for the ET to hear evidence on the reason for the imposition of the first final warning as there was nothing to indicate that it was manifestly inappropriate or in any way invalid. Further, the ET considered fully the fairness of the dismissal, including the circumstance that there was an appeal outstanding. It reached the view that the decision to dismiss was a decision which a reasonable employer could have reached. There is no error in law and the appeal is dismissed.

THE HONOURABLE LADY STACEY

1. This case is about unfair dismissal where there has been a final warning prior to the incident which leads to dismissal. I will refer to the parties as the Claimant and the Respondent, as in the ET.

2. This is an appeal by the Claimant in those proceedings against a judgment of the Employment Tribunal consisting of Employment Judge McFatridge sitting alone at Dundee on 9 and 10 January in a decision copied to parties on 29 January 2013. The Claimant was represented by Mr Bell, solicitor and the respondent by Ms Geddes, solicitor. Before me, the Claimant was represented by Mr Hay, Advocate and the Respondent by Mr Napier QC.

3. The essential issue as defined by the Employment Tribunal at paragraph 47 of the judgment was whether or not the Claimant had been unfairly dismissed by the Respondent. The EJ identified three issues set out in the ET1 in the following terms.

1. Material inaccurate statement by Ian Gillanders implying the cancellation of meetings by myself in respect of 10 September 2010 hearing.
2. Failure to implement Local Disciplinary Procedure in respect of 10 September 2010 hearing.
3. Material unfairness in the implementation of Investigatory Meeting conducted by Tracey Russell on 14 February 2012.

The EJ noted that joint minutes were submitted at the outset of the hearing in which the Claimant confirmed that she no longer insisted on point 3. He noted that point 2 relates to the suggestion that the Claimant had been denied her right to appeal an initial final written warning.

4. The background to the dispute between the parties is that the Claimant was employed by the Respondent as a Cashier Supervisor. She had stared in a Youth Training Scheme in 1985 with Tayside Regional Council. Since then she had been employed by the successor of that local authority, Dundee City Council and was latterly employed as a Cashier Supervisor.

5. On 9 August 2010 she was the sole supervisor within the Cashier's Office. A member of the public attended the office seeking to pay approximately £10,000 by debit card. He said that it was in respect of rent due to the Council. He had with him a letter saying that legal action would be taken if payment was not made by that day. He was not the person to whom the letter was addressed but he wanted to make the payment. The Claimant was concerned about the amount of money being paid on a debit card and spoke to Tracey Russell who was her manager. Ms Russell advised her not to process the payment until further investigation was carried out because Ms Russell was concerned about money laundering issues. The Claimant did not think that money laundering was an issue given that the money was already in the bank. The Claimant was aware that she could not explain to the member of the public why there was a delay in taking his payment as she knew she must not "tip off" a person that there was a concern about money laundering. She therefore asked him to wait. He became irritable and after about 20 minutes, threatened to leave. The Claimant had not heard back from Ms Russell and took the view that it would better serve the Council if she took the money from the member of the public rather than let him leave. The Claimant therefore processed the payment despite having been told by Ms Russell not to do so until Mrs Russell gave her instructions. When she discovered what had happened, Ms Russell made a complaint that the Claimant had ignored her instructions.

6. The Claimant attended a disciplinary hearing on 10 September 2010, conducted by Mr Ian Gillanders. He found Ms Russell's complaint to be upheld and he imposed a final

written warning which was to stay on the Claimant's record for 15 months. The Respondent had a disciplinary procedure which prescribed various penalties for misconduct or poor performance which included an oral warning, a written warning which would last for 12 months, a final written warning which would last for 15 months and dismissal. The disciplinary procedure provides for a right of appeal to be lodged within 14 days. The Claimant lodged an appeal.

7. Various dates were set for the appeal hearing before Ms Stewart, the Director of Finance, all between 26 October 2010 and 23 February 2011. None of these hearings went ahead. One was cancelled due to Ms Stewart's unavailability; another due to severe weather; for others, the reasons were obscure. At no time did the Claimant withdraw her appeal.

8. On 2 December 2011 a further incident took place involving the Claimant. This related to procedures set down by the Respondent for cashiers to follow. They operated a system whereby each cashier was responsible for her own cash box. She was expected to do a balance at the end of each working day. At the start of each shift cashiers would be told when they were required to cash up. This information was posted on a rota which the cashier was expected to check at the beginning of her shift. The time for cashing up was staggered between 4pm and 4.30pm. The Respondent had a procedure referred to as "corporate float transaction". This related to other departments of the Council seeking to have petty cash. The departments were advised that any requests for floats which were received after 3.30pm might not be processed until the following working day. Cashiers were told that if any requests came in after that cut off time then they should process them only if they had time. This was a relatively new procedure. On 28 November 2011, the Claimant was allocated to do the corporate float. Her team leader, Mrs Howard, was at work that day and the Claimant carried out the corporate float duty with guidance where appropriate from Mrs Howard. The Claimant

worked part time and when she next returned to work on Friday 2 December 2011 she consulted the rota immediately after starting. The rota noted the Claimant's balance time as 4.30pm. It also stated that she was on "corporate float". As the ET found, "for some reason the claimant noted her balance time but did not take in that she was meant to be doing the corporate float duty that day".

9. The Claimant worked as normal until about 4pm. She then realised that other cashiers around her were making up a float as a courier had called for it. She checked the rota again and discovered she was on corporate float. She immediately apologised to the cashier, Catherine Robertson, who was making up the float for the courier. She logged into the system. She noticed that a float request had come in at 3.10pm and she began to process it. She felt flustered because she had to do this on her own as Mrs Howard was not available that day. She was unsure how to save the attachments in the appropriate folder and had to ask Catherine Robertson how to do it. At about 4.20pm another request for a float came through. It was therefore after the cut off time of 3.30pm. The Claimant understood Catherine Robertson to point out that another request had come in by saying something along the lines of "there is another one". From this the Claimant assumed that she was to process the transaction. She began to do so and as a result did not start her own balance at 4.30pm as she was supposed to. All of this happened on a Friday. It was particularly important that the balance was carried out promptly on a Friday afternoon. The Claimant was aware that it was practice within the Cashier's Department not to try to process anything after around 4.50pm since it was feared that major computer difficulties would be caused. Catherine Robertson reminded the Claimant of this. An altercation took place between the Claimant and Ms Robertson. Ms Robertson told the Claimant to stop doing the corporate float and to get her balance done. The Claimant disagreed. There was also a conversation between the two women about an item known as the "Z reading" which had to be done in respect of the petty cash that the Claimant had processed. The

Claimant did not know how to do this and once again asked Ms Robertson. There was a trainee present who offered to show her. Ms Robertson felt that it was not appropriate that a trainee should be showing a supervisor what to do. Voices were raised. At this point Mrs Russell came in and told the Claimant that she should do as Ms Robertson suggested as the important thing was to get her balance done. The Claimant disagreed with her and the argument continued. The outcome was that the balancing of the Claimant's cash had to wait until the following Monday. That was an extremely rare event which neither the Claimant nor Ms Russell had any recollection of ever having happened before. There were possible consequences such as instructions being given to proceed with eviction for rent arrears, or summary warrants being taken for council tax arrears, if the cash was not properly balanced and recorded on a Friday. Happily there were no such consequences on this occasion.

10. Ms Russell carried out an investigation and invited the Claimant to an investigatory meeting on 9 December. The outcome of that investigatory meeting was that the Claimant was told that she had to answer, as a disciplinary matter, the following allegations.

1. Failure to carry out allocated duties within a reasonable time on 2 December 2011.
2. Failure to follow specific instructions to cash up in December 2011.
3. Inappropriate behaviour on 2 December 2011.

11. The disciplinary hearing was fixed for 29 March. It was conducted by Mr Gillanders. The Claimant was present and accompanied by a trade union representative. Mr Gillanders had been reminded prior to the meeting that the Claimant was subject to a final written warning. He was well aware of that as he had imposed it. He also knew that he had been invited to attend various dates for an appeal hearing relating to that final written warning. He knew that he never attended and made enquiries as to the reason why the hearing had been cancelled. He did not receive any specific reason but he did know that the Claimant had not abandoned her appeal.

He took advice from the Respondent's HR Department and decided that he would deal with the matter on the basis that he would take the warning into account despite the fact that no appeal had ever been heard. He decided that it would not be appropriate to hold the appeal although there was no particular reason preventing that happening.

12. Following the hearing Mr Gillanders adjourned to consider the issues. He found that the failure to balance and cash up on a Friday was particularly serious. He accepted that the Claimant had been told by both Ms Russell and Ms Robertson to cash up but had refused to do it. He also found it proved that there had been raised voices and that it would have been clear to any member of the public that there was some kind of altercation going on. He accepted from the submission made by the Claimant's representative that she had forgotten to look at the rota. She had tried to complete her tasks and had had no intention not to complete the balance but she had become agitated.

13. He decided to take the allegations before him in isolation, and if he decided they were established he would decide what to do in light of the previous warning. He thought that the allegations about the incident on 2 December 2011, which he found established, would of themselves justify a final written warning to remain in force for 15 months. The appeal from the first final written warning was to have been heard by Ms Stewart, the Director of Finance. He checked with her secretary why no appeal hearing had been heard. He formed the view that whilst the first one had been rescheduled by Ms Stewart and the second one had been rescheduled because of the weather, the remaining three still appeared in the Director's diary which led him to believe that the instigation for cancelling these had probably though not certainly come from the Claimant. He stated that view in a letter sent to the Claimant.

14. Mr Gillanders thought that, considering the two incidents together, they had similarities as they both involved an allegation of the Claimant failing to follow clear and specific instructions. He decided that dismissal was justified. His view was that if he had not taken the previous final written warning into account, the Claimant would not have been dismissed but would have received a final written warning in respect of the events of 2 December 2011.

15. The Claimant appealed against that decision. The appeal was conducted by Ms Stewart on 10 May 2012. Mr Gillanders presented the management case and the Claimant was present and accompanied by a Union representative. The Claimant wanted to argue that the grounds had not been substantiated; that there had been procedural failings in as much as Mr Gillanders had thought that the appeal hearing following the 10 September 2010 incident had been cancelled by the Claimant, which was not correct; that her appeal had never been determined; and that it was unfair that the investigatory meeting was conducted by Tracey Russell as she had been involved in the incident itself.

16. Ms Stewart conducted a hearing at which she reviewed the evidence in the statements and concluded that she agreed with Mr Gillanders that the allegations were substantiated. She questioned Mr Gillanders and he stated that his decision to dismiss was in no way based on the statement made in his letter that the Claimant had been responsible for postponing the appeal. Ms Stewart took the view that it was regrettable that when the appeal hearing was postponed it was not rearranged. She decided the appropriate way for her to proceed would be to review the file in respect of the original decision to issue a final written warning in September 2010 as she wished to satisfy herself that the procedures were fair and that the decision to issue a final written warning was substantiated. She carried out this process in private after the meeting. She thought that the final written warning was justified and she could see no reason to ignore it. She regarded the failure to carry out instructions as serious. Ms Stewart took the view that the

incident in December 2011 was substantiated. She thought that Mr Gillanders had been correct to take into account that final written warning. She agreed with Mr Gillanders that had it not been for the final written warning, the Claimant would not have been dismissed. She refused the appeal.

The ET judgment

17. The ET decided that the dismissal was not unfair. The EJ directed himself that the appropriate legislation was section 98 of the **Employment Rights Act 1996** (ERA) and directed himself that the relevant cases to which he had to have regard were **British Homes Stores Ltd v Burchell** [1978] IRLR 379, **Iceland Frozen Foods v Jones** [1982] IRLR 434 and **Post Office v Foley**; **HSBC Bank Plc v Madden** [2000] IRLR 827. At paragraph 53 of his judgment, the EJ noted that it was not for the Tribunal to form a view as to whether or not the Claimant was guilty of the misconduct alleged. The question which he posed for himself, and answered, was whether the Respondent entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. He noted that the case of **British Home Stores Ltd v Burchell** involves three elements. First there must be established by the employer the fact of that belief; that the employer did believe it. Second it must be shown that the employer had in his mind reasonable grounds on which to sustain that belief; and third the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as is reasonable in all the circumstances of the case. He noted that he had to decide on the balance of probabilities and that the burden of proof was neutral. At paragraph 54 they EJ found that the evidence before him was such as to satisfy the three tests. He found at paragraph 55 that Mr Gillanders and Ms Stewart had not taken any account of the suggestion that the Claimant had been responsible for the postponing of the appeal hearings.

18. In paragraph 56 the EJ stated that he had "considerably more concern" about the second ground raised by the Claimant. He noted that Ms Stewart gave evidence before him to the effect that an appeal hearing would have been a proper hearing at which the Claimant would have been entitled to lead evidence and make representations. Ms Stewart's evidence was to the effect that she simply could not speculate as to what the outcome of the appeal might have been. Thus the EJ was well aware that the Respondent had made the decision in circumstances where there was an outstanding appeal, in which the result could not be predicted.

19. The EJ was referred to the case of **Wincanton Group Plc v LM Stone & C Gregory** UKEAT/0011/12. He noted the analysis in that case of the line of authorities as to how the issue of an outstanding warning should be dealt with. He referred to the case of **Tower Hamlets Health Authority v Anthony** [1989] ICR 656. He referred to part of paragraph 37 of the **Wincanton** case in the following terms.

> **"If a tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facia grounds of making it, then the earlier warning will be valid ... Where the earlier warning is valid then, (1) the Tribunal should take into account the fact of that warning, (2) a tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. ... An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too and a tribunal is entitled to give that such weight as it sees appropriate."**

20. The Employment Judge took the view that both Mr Gillanders and Ms Stewart had proceeded as set out in the **Wincanton** case. In paragraph 60 of his judgment the EJ stated that he would probably not have acted as they did. He noted that a hearing could have been convened without undue delay, which would have meant that from the point of view of the Claimant the matter would have been finally dealt with one way or the other. He took the point made to him by the solicitor appearing for the Claimant that there is a considerable difference in at least perception between a hearing at which a party is able to participate and the

consideration of the same issue in private behind closed doors. He came to the following view in paragraph 61.

> **"That having been said I am mindful of the fact that it is not for me to substitute my own judgment for that of the respondents in the matter. The respondents have decided that rather than have an appeal hearing they would deal with the issue of the outstanding appeal in the manner they did. I was quite satisfied on the evidence that they had considered the matter of the outstanding appeal and that for the reasons they gave they had decided that the Final Written Warning was valid. This was certainly a decision they were entitled to come to. I consider that in such matters the range of reasonable responses test is appropriate and where, as here, it is clear that although the approach taken by the respondents is not the one I would have chosen [if] it is not itself an unreasonable way to proceed then it is not for me to interfere in that decision."**

21. The Employment Judge was careful to note that it was not for him to substitute his own view for that of the Respondent. He found the decision made to be "harsh"; he recognised that many employers might not have dismissed an employee in these circumstances. Nevertheless, he decided the appropriate test which he had to apply was the "range of reasonable responses" test. He applied his mind to the outcome for the Claimant and took the view that it was an outcome which was within the range of reasonable responses.

The appeal to the EAT

22. The ground of appeal lodged on behalf of the Claimant is in the following terms: –

> **"(1) The employment judge had misdirected himself and erred in law in his approach to the issue of the failure of the respondents to hold an appeal hearing in relation to the final written warning of September 2010.**
>
> **(2) In particular the employment judge has not considered whether the respondents acted reasonably in not holding an appeal hearing prior to making a final decision on the issues arising out of the incident in December 2011. Rather as reflected in paragraph 61 of his decision he has concluded that by holding the desktop review the respondents have "considered the matter of the outstanding appeal and decided that the final warning was valid." What he has not asked is whether the respondent's decision simply to "consider the matter of the outstanding appeal" rather than actually hold the appeal process was reasonable. In doing so he has failed to properly apply the principle set out in *Wincanton* [*Wincanton Group Plc v Stone & Gregory* UKEAT/0011/12].**
>
> **Had the principles in *Wincanton* been applied the employment judge should have held that the respondents' actions were not reasonable. As reflected in paragraph 60 of his decision there was no reason why the appeal could not be heard against the final written warning. This would have allowed the appellant a full opportunity to have her and her union representative participate in a hearing and make whatever point they wished to make about whether or not the final written warning ought to have been issued or not. In addition as is reflected in the employment judge's decision, to have held an appeal hearing would not have unduly held matters up and may well have avoided the employment tribunal proceedings. In all the**

circumstances the employment judge should have held that the respondent's actions were not reasonable.

(3) The conclusions of the employment judge therefore arise from a misunderstanding of the law, misapplication of facts and are perverse."

23. Mr Hay, counsel for the Claimant refined those grounds and argued the case on a rather different basis. He began by helpfully outlining the factual background. He submitted that the starting point in an unfair dismissal case is section 98 of **Employment Rights Act 1996** (ERA) and confirmed that the Employment Judge's analysis of the test as set out in the **BHS v Burchell** case was not in dispute. He drew attention to the provisions of section 98(4)(b) which he described as crucial. That subsection is in the following terms: –

"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 reasons 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."

24. Mr Hay submitted that in each case an employment tribunal would require to place on scales all the relevant matters and weigh them up. The Tribunal had to determine whether the dismissal had been fair, viewed objectively. He submitted that a valid, subsisting warning will be a factor pointing to a dismissal being fair. Where there is a dispute as to the appropriateness of an employer having issued such a warning, it will not be for the employment tribunal to go behind that warning, provided that it was issued in good faith, and where there were prima facie grounds for it. He referred to the case of **Stein v Associated Duties Ltd** [1982] IRLR 447 and in particular paragraph 6 in which the EAT stated that it was not the function of the industrial tribunal to sit in judgment on the matter of an earlier final warning. It was sufficient if they were satisfied that the final warning had been issued in good faith and that there were at least prima facie grounds for following that procedure. Mr Hay also drew attention to paragraph 8 in the following terms.

> **"We do not consider that it can be laid down as a general proposition that in every case where an employee is dismissed for a subsequent offence at a time when his final warning for previous offences under appeal there is an obligation upon employers not to dismiss until that appeal has been decided. Certainly if there was anything to suggest that the warning had been issued for an oblique motive or if it was manifestly inappropriate that is a matter which a tribunal could take into account. There is nothing however in the present case to suggest that the evidence disclosed anything of this nature."**

25. In light of that, Mr Hay accepted that where there is an outstanding internal appeal, an employer is not bound to refrain from dismissal until the appeal is decided. The fact that there is an outstanding appeal is, Mr Hay submitted, a circumstance which the reasonable employer should take into account when deciding the overall fairness of the decision to dismiss. He then made reference to the case of **Tower Hamlets v Anthony** [1989] ICR 656 and 2 the dictum of May LJ at page 661 to the following effect: –

> **"..that, in my judgment, is the proper approach to this type of case. As we were reminded, an industrial tribunal in considering whether or not a dismissal has been fair or unfair, has to consider all the circumstances and to determine the question in accordance with equity and the substantial merits of the case. In a case such as this, the fact that an employee has received a formal warning at some stage prior to the ultimate dismissal is one of the circumstances in the case which are reasonable employer should take into account and which an industrial tribunal should also, as an industrial jury, take into account in passing judgment on the actions of the employer. Similarly the fact that that warning is still subject to an undetermined appeal is one of the circumstances of the case which a reasonable employer should take into account and which similarly an industrial tribunal should take into account in deciding whether or not the employer has acted reasonably and ultimately dismissing the employee, as in fact the employer did. In any given case there will be a substantial number of other circumstances which the reasonable employer and thereafter the industrial tribunal, if necessary, will have to take into account; all the factors which employers and industrial tribunals do take into account in this type of application. But where the circumstances are such as they were in the instant case and where the question is whether the requirements of the disciplinary code have been complied with, the reasonable employer is not only entitled to but should, as with the industrial tribunal, take into account the fact that there has been a formal warning, but he should also bear in mind that the formal warning is subject to an appeal which has yet to be determined."**

26. Mr Hay submitted that the law is as set out in the Tower Hamlets case and noted that it had been recently endorsed by the EAT in the case of **Wincanton**. He referred firstly to paragraph 29 and to the guidance given there in the following terms: –

> **"What is an issue in the case of any dismissal alleged to be unfair for which conduct is an accepted reason is whether the employer acted reasonably or unreasonably in treating that reason as the reason for dismissal. The focus required by statute is thus on the employer's actions and not upon the actions of the employee. Hence where an employer has given a warning in good faith, the view of an employment tribunal as to whether it, the employment**

tribunal, would itself have given the warning or whether it should have been given by the employer is beside the point; the employer is entitled to think at the time of dismissal for later misconduct that the warning should have been given, and the employer's action in response in that light to any new misconduct must be judged on the basis that the employer is entitled to take that view. Where the employer knows, as the employer generally will, that the warning is the subject of challenge, plainly the employer will wish to consider whether that challenge moderates the employer's own view of the warning, and it will be right for the tribunal to take that into account in assessing the circumstances. That approach, soundly based in section 98 (4) of ERA, both underlies and explains the principles concisely expressed in Anthony and Davies."

27. Mr Hay went on to direct attention to the guidance given by the EAT in that case in paragraph 37, in the following terms: –

"We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98 (4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then.

(1) The Tribunal should take into account the fact of that warning

(2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it seems appropriate.

(3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning were some lesser category a warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.

(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct of the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.

(5) Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employers' employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of this sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

(6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98 (4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur

28. Mr Hay's submission was that both the employer and the Tribunal required to do more than simply determine that the warning made prior to the incident resulting in dismissal had not

been given for an oblique motive, and was not manifestly inappropriate. He argued that there is a second stage. The decision maker required to remember that even a warning which was on its face valid may be rescinded on appeal. Therefore he had to consider fairness in light of the uncertainty caused by that.

29. Counsel referred to the case of **Davies v Sandwell MB** [2013] all EWCA Civ 135, and the judgment of Mummery LJ at paragraphs 19 to 24. He noted that the case of **Wincanton** was not referred to by his Lordship and his submission was that the case of **Davies** dealt only with the first step, that is looking at the validity of the warning. He argued that the Court of Appeal did not require to look at the second stage in that case.

30. Mr Hay then made his submissions on this case. He argued that that the Employment Judge had stopped at the end of the first stage of the test. He referred to paragraph 61 of the judgment. There the EJ stated that there was nothing to suggest that the warning had been given for an oblique motive or was manifestly inappropriate. Thereafter there followed a narration of submissions made by the solicitor for the Claimant and the paragraph ends by stating that it could not possibly be said that the final written warning was manifestly inappropriate. Counsel argued that the EJ failed however to look at the second part of the test set out in the **Wincanton** case and instead stopped at the first step. By that he meant that he only decided that the warning was not given for an oblique motive and was not manifestly inappropriate. In paragraph 63, the last paragraph of the judgment, the Employment Judge said that the decision that he required to make was whether, applying the range of reasonable responses test, the decision to dismiss the Claimant was outwith the band of reasonable responses open to an employer, which employer was entitled to consider that the previous written warning was valid. He then went on to say that he was "required to answer it in the affirmative".

31. Mr Hay submitted that the error in law which the Employment Judge had committed was that he had failed to consider properly the terms of section 98(4) by failing to consider the second stage of the test set out in **Wincanton**. He had noted what the Respondent thought about the existence of the appeal but he had not given it thought himself. Therefore he had not put all the circumstances onto the scale and weighed them as he should have done.

32. Mr Hay submitted that if the Tribunal were with him then the case should be remitted back to the same Employment Judge to decide once again. He should be directed to take into account the existence of the outstanding appeal against the final written warning in considering all of the circumstances of the dismissal, as required by section 98(4).

33. I asked Mr Hay to address me on the terms of paragraph 60 of the judgment. I enquired what I should make of the Employment Judge stating that both Mr Gillanders and Ms Stewart had proceeded as set out in the **Wincanton** case, and stating that he personally would not have done so. I asked if that showed that the Employment Judge had considered matters because he had given his own view of what an employer might do, and had then applied the reasonable responses test. Mr Hay adhered to his argument that the Employment Judge had not applied his mind separately to the matter.

34. For the Respondent, Mr Napier submitted that he agreed with much of Mr Hay's submission. The matter which was in dispute was essentially in the last part of his address, and related to whether or not the EJ had considered fairness, and applied the correct test when doing so. He would not challenge the submission that if the Tribunal was with Mr Hay a proper disposal would be to remit to the same Tribunal.

35. Mr Napier submitted the assertion that the EJ had failed to apply the second stage of the **Wincanton** test was wrong. He argued that the test had been applied and that it was clear that had been applied because the EJ set out the test in the judgment. Therefore it was obvious that the EJ knew that the Respondent knew that the final written warning was under challenge and it was plain that that the EJ decided that the employer, in that knowledge, was entitled to take the view that it did. It was also plain that the EJ considered for himself whether that was a reasonable response. He decided that the appropriate test was whether the response was within the band of reasonable decisions and decided that it was. Thus the EJ was well aware of how the guidance had been formulated in the **Wincanton** case. Looking at the judgment as a whole it could only be said that the EJ had clearly taken account of that guidance and had applied it in the way that it indicated. It put such weight on the existence of the challenge to the final written warning as was appropriate which was what it was directed to do.

36. For completeness Mr Napier submitted that the factual background to the case did involve serious matters which he argued Mr Hay had sought to underplay. He also argued that it was no criticism of Ms Stewart that she declined to speculate on what the outcome of any appeal would have been had it been heard.

37. Mr Napier referred to the case of **Davies** and commended it to me. He noted that it was a judgment of Mummery LJ in which guidance for tribunals was set out. He referred to paragraph 15 of the judgment from which it was noted that the claimant contended that there were "procedural irregularities" in the issuing of the final written warning. While the facts in that case were different, in the current case it was alleged that there were procedural irregularities in that that had never been a hearing. Thus, Mr Napier argued that the guidance given between paragraphs 19 and 24 should be followed. In paragraph 22 where his Lordship referred to "the circumstances of the final written warning", that would include the

circumstances in the present case that the final written warning was under appeal. In paragraph 23 his Lordship set out the function of the ET as follows: –

> **"The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct."**

38. That, he submitted was precisely what the EJ had done in the current case, in paragraphs 61 and 62. For these reasons Mr Napier argued that the appeal should be refused.

Discussion and decision

39. I have come to the view that the Employment Judge properly considered all the material before him and came to a decision to which he was entitled to come. I accept Mr Napier's submission that in his paragraph 61 and 62 the Employment Judge has shown that he appreciated that section 98(4) required him to consider whether the decision to dismiss was, objectively considered, reasonable. He applied the appropriate test, that is whether it was within the range of reasonable decisions that an employer might make and he did so in the knowledge firstly that the final written warning was under appeal which had not yet been determined, and secondly in the knowledge of the guidance set out in the case of **Wincanton**. I do not agree with Mr Hay's submission that he considered only the first step, that is validity. Nor do I agree with the submission made by Mr Hay that he only considered whether the employer had considered the matter. He applied his own mind to whether or not the decision was objectively reasonable.

40. The EJ set out his reasoning from paragraph 56 onwards. He began by saying that he had concern about the fact that the appeal had not been heard. He reminded himself, correctly, that he had to take care not to substitute his own view for that of the employer. In paragraph 57 he referred to the cases of **Iceland Frozen Foods v Jones** and **Post Office v Foley** which are often

referred to when the question of a Tribunal substituting its own view is discussed. Mr Hay's position was that when deciding on reasonableness in section 98(4) the Tribunal does require to consider matters for itself. The EJ did so, in my opinion and showed that he had done so by voicing his concerns and giving his opinion in paragraph 60. He clearly appreciated that looking at things from the Claimant's point of view, the matter would have been dealt with one way or the other if the appeal had been heard even at the late stage of the second disciplinary hearing. He decided, however, that the decision taken not to hear the appeal was reasonable, even if he would not have made it himself. He set out in paragraph 62 his reasons for so deciding, that is that the first incident was serious and that even though the Claimant was trying to prevent loss to the Respondent, she had ignored an instruction. Thus the EJ has considered both the decision to proceed without hearing the appeal, and the decision to dismiss. He has stated that he may not have reached the same results as the Respondent. He has stated that he applied the "range of reasonable responses" test in deciding whether the decisions were nevertheless fair. Thus the EJ has carefully applied the law.

41. In those circumstances there is no error of law and therefore this appeal is refused.