Appeal No. UKEAT/0052/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 June 2013
Judgment handed down on 6 March 2014

Before

HIS HONOUR JEFFREY BURKE QC

MR P M SMITH

MR M WORTHINGTON

MS J C DAVIES — APPELLANT

(1) CORNWALL COUNCIL
(2) GOVERNING BODY OF SHORTLANESEND COUNTY PRIMARY SCHOOL — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR JAMES BAX (of Counsel) Instructed by: Nalders LLP Solicitors Farley House Falmouth Road Truro Cornwall TR1 2HX
For the Respondents	MR ANGUS GLOAG (of Counsel) Instructed by: Cornwall Council Legal Services Room 481, New County Hall Treyew Road Truro Cornwall TR1 3AY

SUMMARY

PRACTICE AND PROCEDURE – Review

The Claimant was dismissed by the Respondents after a lengthy history. The Employment Tribunal found that the dismissal was for some other substantial reason, namely a breakdown of trust and confidence.

Subsequently the Claimant discovered, through freedom of information requests, relevant documents which had not been disclosed by the Respondents as they should have been; and she applied for a review. The ET rejected the application; and she appealed to the EAT.

Held

1 The Tribunal had a broad discretion; see **Newcastle on Tyne City Council v Marsden** (2010 ICR 743). It had not been shown that they had erred in principle in reaching their decision on the review application.

2 The Tribunal were entitled, in exercising that discretion, to take into account factors such as the prospects that, if there were to be a rehearing, and the dismissal were to be found to have been unfair, the Claimant would be found to have been guilty of substantial or 100% contributory fault and the time which had passed between the relevant events and any rehearing.

3 The Tribunal had considered the relevant factors; the result of their assessment of those factors was an issue of fact which the Tribunal had to decide. They were in the best position to make that decision. Perversity had not been overwhelmingly established.

Appeal dismissed.

HIS HONOUR JEFFREY BURKE QC

The nature of the appeal

1. This is an unusual appeal. It is brought by Ms Davies, the Claimant before the Employment Tribunal, against the judgment of that Tribunal, sitting at Truro, presided over by Employment Judge Hollow and sent to the parties on 3 September 2012, on Ms Davies' application for a review of an earlier judgment of the same Tribunal dated 18 June 2009. By that 2009 judgment, the Tribunal rejected Ms Davies's claim that the Respondents, Cornwall Council and the Governing Body of Shortlanesend County Primary School ("the school") had unfairly dismissed her on 31 August 2008. By her review application she sought to obtain a re-hearing of her unfair dismissal claim. Over the two years which followed the Tribunal's original judgment the Claimant, by the means of Subject Access Requests under the Freedom of Information Act and with the assistance of the Information Commissioners Office, had obtained further documents from the Respondents which had not been disclosed before the original hearing. As a result of those documents she sought a review in December 2011.

2. By this appeal, Ms Davies seeks to demonstrate that the Tribunal erred in law in concluding on her review application that the original decision should be confirmed; she submits that we should grant her the remedy which she sought from the Tribunal by her review application, namely an order that her unfair dismissal claim be reheard or, alternatively, that we should remit that application to the Tribunal for reconsideration.

The facts

3. We take the facts from the findings of the Tribunal as set out in their original judgment. The Claimant was employed as a teacher at the school from January 1998 until her dismissal some 10 years later. From November 2002 to December 2005 the Head Teacher at the school

was Ms Curnow; there were differences between the Claimant and Ms Curnow; there were also concerns about the Claimant's effectiveness as a teacher. In 2002 the Claimant came out well from an OFSTED report after an inspection of the school; but, as she accepted, concerns about her teaching existed from about 2003 and continued thereafter. From May 2006 to July 2007, Mrs Dyer became Head Teacher, Ms Curnow having retired; there was an uneasy relationship between Mrs Dyer and the Claimant. In November 2006, Mrs Dyer became so concerned about the Claimant's teaching that she proposed that the Claimant be put on a capability improvement plan; but that proposal met resistance and was not implemented. In September 2006 the Claimant raised a grievance, claiming that Mrs Dyer had bullied her. The grievance was considered and rejected by the school's Governors who found no evidence of bullying, but that there had been poor communication. Those conclusions were upheld on appeal in November 2007 and on a second appeal in 2008.

4. In November 2006 the Claimant went off work sick. The Respondents' occupational health advisor made no formal diagnosis of any condition, save that the Claimant was suffering from stress arising from her perception that she had been bullied in the workplace. By May 2007 she was fit to return to work but did not feel able to do so while Mrs Dyer was still in post. In the summer of 2007 Ms Grigg was appointed as Head Teacher; she was to take over in September 2007; but she met the Claimant in July. The Claimant had her trade union representative with her; and Ms Grigg was accompanied by Mrs Sandland from the County Council's personnel services department. It was proposed that the Claimant should return to work on a phased basis over 4 to 5 weeks and that she should start in the afternoon of the first day of the new term, after an INSET meeting that morning. After she had thus met Ms Grigg for the first time, the Claimant wrote a letter to Mrs Sandland, saying that she had no confidence that she would be treated fairly by Ms Grigg, that her exclusion from the INSET meeting was an example of bullying and that she wished to appeal against the rejection of her

earlier grievance. In her reply Mrs Sandland explained in detail the proposals for the Claimant's return to work and warned her that, if the present situation continued, there might be a breakdown in trust and confidence which would have implications for the future of her employment. At paragraph 16 of their original decision the Tribunal said: –

> **"We have to say that we find it extraordinary that the Claimant should have written a letter expressing lack of confidence in Ms Grigg when she had only met her for the first time that day and had not started work at the school under Ms Grigg's leadership. It is clear to us that the stance that the Respondents were taking over the Claimant's return to work was both constructive and supportive."**

5. The Claimant did return to work as planned, on a phased return basis; but concerns about her teaching continued; and a timetable of observations of her teaching was drawn up. On 10 October, a member of the Schools Improvement Team observed her teaching and recorded that a number of areas needed improvement. On 18 October Ms Grigg herself observed the Claimant and deemed the lesson which she observed to have been a disaster, a view with which the Claimant agreed.

6. There were three incidents in October 2007. The first involved a disagreement between the Claimant and the Assistant Head, Mr Strevens, when the Claimant queried an instruction given by Ms Grigg relating to who should attend an educational show by a clown. Mr Strevens found the Claimant to have been confrontational. The second incident occurred later that day. Ms Grigg had given an instruction that staff should not stay in the school after 5pm, in order to achieve a reasonable life/work balance. Mr Strevens found the Claimant in the school after 5pm and reported this to Ms Grigg. He said that when he spoke to the Claimant – who the Tribunal regarded as having a reasonable explanation for being there – she was unco-operative, turned on her heel and went back to the classroom. The Claimant put forward a different account of this incident. Two days later, there was a further disagreement, this time between Ms Grigg and the Claimant directly. The Claimant did not sit beside a troubled child at the Harvest Festival so

as to monitor the child's behaviour, as Ms Grigg had instructed her to do. There was an exchange between the Claimant and Ms Grigg as to which there were two different versions; the Tribunal did not need to resolve the issue; on Ms Grigg's version the Claimant had not followed her instructions and she, Ms Grigg, needed to be assertive; but on any view the Claimant was extremely upset and was, reasonably as the Tribunal found, told to go home. She did not do so; instead, she sat in her car outside the school for two hours and was observed there in a state of distress by parents and staff. The Tribunal did not say and perhaps did not need to say expressly that this was regarded as unprofessional.

7. Three weeks later the Claimant went off sick again, suffering from stress, and never returned. She then launched two further Dignity at Work grievances, against Ms Grigg and Mr Strevens, in which she made only imprecise allegations; and she sought to appeal again against the rejection of her earlier grievance.

8. The Respondents then decided to set up an investigation into the continued tenure of the Claimant's employment. Mrs Sandland was appointed to carry out the investigation, and to report to Mr Holroyd, the Chairman of the Governors. A schedule of concerns was drawn up and put to the Claimant, who was given time to respond, as she did; and Mrs Sandland then produced a report which recommended to the Governors that they might conclude that the Claimant's employment was becoming untenable.

9. The Claimant contended that Mrs Sandland's report was biased; the Tribunal found that it was not.

10. A disciplinary hearing then took place on 1 May 2008; the Claimant was provided with Mrs Sandland's report and supporting documentation and produced a lengthy written

submission in response. On the next day the Governors set out their conclusion that there had been a difficult working relationship between the Claimant and the school's management for 5½ years and that she had demonstrated negativity, inappropriate challenge and disregard of management requests and decisions, as a result of which: –

> **"In conclusion, it was unanimously agreed by the Governors hearing the case that your employment has become untenable on the basis of a breakdown in trust and confidence with no reasonable prospect of you being able to return to work from your current sickness absence. In view of this conclusion, the Governors' recommendation is that you be dismissed from the service of Cornwall County Council."**

11. The Claimant appealed to an appeal panel of Governors, chaired by Mr Tinney; the appeal took the form of a complete rehearing; but it was unsuccessful; and the Claimant's employment came to an end.

The Tribunal's original decision

12. The Tribunal decided that: –

(1) The Respondents had concluded that the relationship between them and the Claimant had broken down, largely because of the Claimant's conduct. She perceived, wrongly on the Respondents' case, that she was being bullied; as long as she continued to have that perception, her absences from work would continue. There was ample material on which the Respondents could conclude that trust and confidence "was rapidly disappearing if it had not already done so".

(2) The October 2007 incidents were significant; the Claimant's actions had been a gross overreaction. The view that problems of that nature would continue was reasonable; the reason for the dismissal was some other substantial reason – namely a breakdown in trust and confidence.

(3) The suggestion that Mr Holroyd wanted to get rid of the Claimant and should not have chaired the disciplinary panel was rejected. The Tribunal found that he would have striven to be fair and, in any event, was only one of a three-person panel whose conclusions were, in any event, subject to the subsequent appeal which, as a complete rehearing, would have remedied any defect in the original hearing.

(4) There was no sustainable criticism of the procedures leading to the dismissal.

(5) The conclusion that trust and confidence had gone and could not be repaired was one which was open to the Respondents to reach.

(6) The sanction of dismissal was not unreasonable.

The new material

13. It is not necessary to go into the details of the process through which the Claimant and her husband went, with considerable persistence, in order to obtain the documents which formed the basis of the review application. The new material relied upon consisted of four items. The first was a letter from Mr Holroyd to a member of the County Council's personnel staff dated 16 March 2005, three years before the dismissal but in the course of the 5½ years of difficult working relationships to which the school had referred in its dismissal letter in May 2008. The previously undisclosed letter said, so far as is relevant: –

> **"We have both discussed the matter, and I'm in agreement with the contents of a letter which he had received from Mr Tinney, that if something isn't done about J D, and soon, the school will crumble at a faster rate than it already is.**
>
> **Our feelings are to let the LEA come in with more authority and sort out the mess we find ourselves falling into.**
>
> **At present we will sit on the letter to see how the situation develops with J D and the school in general. To think that we are carrying out our roles unpaid and J D is on £30,000 and causing us all this trouble. Is it not possible to move her to another school?"**

14. The second document was an e-mail sent by Mr Tinney, the governor who chaired the appeal panel, to Mrs Sandland on the day after the appeal hearing. It started by saying: –

> **"Thank you for all your hard work over the last few months, in putting the case together for Jo. We do appreciate it very much. Needless to say that we uphold the decision of the dismissal, and wish her contract with (the school) to be terminated. I've been thinking about the letter that needs to be sent to Jo and was hoping that you would be able to help me draft up something. I think something along the lines as before, but possibly slightly different wording just so that it looks as if we have made an effort."**

15. The Claimant's case was that these documents showed that both Mr Holroyd and Mr Tinney were biased against her and that, had they been available to her at the original hearing, they would or could have resulted in a different outcome. As to Mr Holroyd, it was said that cross-examination of him would have been more trenchant; he would, of course, have been cross-examined strongly on the March 2005 letter. As to Mr Tinney, it was said that the e-mail showed or could have been seen as showing that he was biased and that he had "gone through the motions" at the appeal hearing.

16. Two further documents were relied upon as new evidence. There was a note of a telephone conversation between Mr Trathen, who had been acting Head Teacher for six weeks in early 2006 and Mrs Sandland, from which she put together Mr Trathen's witness statement for the disciplinary hearing. At page 3 of that note, Mrs Sandland recorded Mr Trathen as saying: –

> **"P T confirmed that he was aware of some unusual behaviour traits in J D. He was aware that she kept very detailed records of everything. P T said "You had to be really careful about what you said and how you said it" when talking to J D. He confirmed that he found her to be a difficult person to manage."**

The point made on behalf of the Claimant was that, in the witness statement based on that note, Mrs Sandland had used the words "I found that communicating with Mrs Davies was difficult in that I often gained the impression that she mistrusted or disagreed with what was being said."

That appears to have gone further than what was set out in the note and, it was said, revealed or could be taken as showing that Mrs Sandland, Mr Holroyd and Mr Tinney were all acting in a conspiracy together to get rid of the Claimant.

17. The last item in this list was a short bundle of e-mails indicating that letters sent in by parents who were on good terms with the Claimant had been instigated not by the Claimant, as Mr Trathen had speculated, but by Mr Holroyd.

The Tribunal's review decision

18. The Tribunal treated the review application as having been made on the grounds that there was new evidence which had become available since the original hearing and, secondly, that the interest of justice required a review, i.e. under rules 34(3)(d) and (e) of Schedule 1 to the then applicable 2004 Rules. At paragraph 15 they expressed the view that the documents should have been disclosed prior to the original hearing; they said that it was a great pity that they had not been disclosed and that they "could not help but be critical" of the Respondents, although, considering the volume of documents which had been put before the Tribunal at the original hearing, it was not altogether surprising that these documents had not been disclosed and the nondisclosure was the result of a genuine mistake. They summarised, accurately, the Claimant's contention, based on the documents, that they shone a different light on the evidence and demonstrated that the Respondents did not act properly in their rejection of the Claimant's grievances and in the procedures leading to her dismissal.

19. It had been suggested to the Tribunal that, if they acceded to the Claimant's application, there would be no need to have a full rehearing and that any rehearing could be limited to an investigation of the actions of Mr Holroyd and Mr Tinney. The Tribunal rejected that suggestion and concluded, at paragraph 17, that their options were either to confirm or revoke

the original decision and that, if they revoked that decision, the claim would have to be re-heard from the beginning. That was plainly correct; and no criticism of that part of the Tribunal's decision has been made. They then asked themselves what was plainly a very relevant and arguably the most relevant question - what would be the outcome if the claim were to be reheard; and they answered that question in this way at paragraphs 19 to 21 of their judgment:-

> **"18. We bear in mind that this is an application which is made very much out of time, but we do not criticise the Claimant for that. Nevertheless, it is a factor to be weighed in the balance. In considering the application, one of the factors we think it proper to take into account is the possible outcome if the matter is to be reheard. It would be a considerable comfort to Mrs Davies, if on rehearing the judgment were to be that she had been unfairly dismissed. We have canvassed with Mr Davies the likely outcome beyond that. It has been well established that, even if the tribunal finds that a dismissal was unfair, it may conclude that the claimant was either wholly, or in part, the author of their own misfortune, with the consequence that would be reflected in any award of compensation if compensation were sought.**
>
> **19. It is clear from the evidence that we had before that we took the view that there were a number of factors upon which the Respondents were entitled to form the view that trust and confidence between the parties had broken down. There are two examples that we can refer to; they are only examples and there are others.**
>
> **20. In July 2008, the Claimant had a meeting with the prospective Head Teacher of (the school), whom she had not met before. She immediately took the view that she doubted that the Head Teacher would treat her fairly. It does seem extraordinary to us that she would reach that conclusion after such a brief acquaintanceship. Secondly, there was the instance of the harvest festival in October 2007, which, as we have already indicated, was a gross overreaction on the part of the Claimant.**
>
> **21. Those are only examples, but do serve to support the view that the Respondents formed that the trust and confidence between the parties had broken down. Our view was that that was a conclusion the Respondents were entitled to reach. We think it probability that a further tribunal would reach the same conclusion and conclude that there must be a very substantial, if not total, contributory element on the part of Mrs Davies. Although Mrs Davies would be comforted by the finding of unfair dismissal if one were achieved, it seems unlikely that she will achieve anything more than that."**

20. The Tribunal went on, at paragraph 22, to point out that a rehearing would be a very substantial, lengthy and expensive exercise for both parties and would not be heard for some time and until many years after the relevant events had taken place. For the reasons that they set out, they decided that the original judgment would stand.

The grounds of appeal

21. The Notice of Appeal put forward six grounds of appeal. The last of those was withdrawn by Mr Bax, counsel for the Claimant, at the beginning of the appeal; and we need say no more

about it. In his skeleton argument, Mr Bax helpfully summarised the five grounds of appeal, which we have had to consider in this way: –

1. The Tribunal applied the wrong test in law to their consideration of the review.
2. The Tribunal erred in taking into account contributory fault and in deciding that a substantial finding as to contributory fault would be made if there were a rehearing.
3. The Tribunal erred in taking into account the lapse of time when the Claimant could not be criticised for it.
4. The Tribunal erred in focusing on the issue of trust and confidence and in failing to consider the surrounding circumstances.
5. The decision was in any event perverse.

22. We will consider each ground separately and in the order adopted by Mr Bax; that order does not precisely coincide with the Notice of Appeal; but it is a convenient and sensible route to take.

The correct test: ground 1

23. Mr Bax submitted that the correct test which the Tribunal had to apply in considering whether to revoke their original judgment on the basis of the new evidence was set out by the EAT, Popplewell J presiding, in **Wileman v Minimec Engineering** (1988 IRLR 144), at paragraph 14, in these terms: –

> **"So far as the Industrial Tribunal's Rules of Procedure Regulations are concerned, we would read into them, not only that the new evidence must be relevant, but that it will probably have an important influence on the result of the case. The reason for that is that that simply because it is relevant, unless it is also likely to affect the decision, a great deal of time will be taken up by sending cases back to an Industrial Tribunal for no purpose."**

As to that test, Mr Bax referred us to the decision of the EAT in **Newcastle upon Tyne City Council v Marsden** (2010 ICR 743) (Underhill P sitting alone). In his judgment in that appeal, the President said, at paragraph 16 and 17:-

> **"16. *Williams v Ferrosan* and *Sodexho Ltd v Gibbon* clearly show that the extensive case law in relation to rule 34(3)(e) and its predecessors should not be regarded as requiring tribunals when considering applications under that head to apply particular, and restrictive, formulae - such as the "exception analogy" and "procedural mishap" tests which were understood to be prescribed by *Moncrieff (Farmers) Ltd* and *Trimble*. I would not in any way question that approach or the general message of both decisions. There is in this field as in others, a tendency - often denounced but seemingly ineradicable - for broad statutory discretions to become gradually encrusted with case law. The decisions are made by resource to phrases or labels drawn from the authorities, rather than on a careful assessment of what justice requires in the particular case. Thus, a periodic scraping of the keel is desirable. (The exercise would indeed have been justifiable even apart from the introduction of the overriding objective. It is not as if the principles of the overriding objective were unknown prior to their explicit incorporation in the Rules in 2001; rule 34(3)(e) itself is based squarely on the interests of justice; but I can see why its introduction has commended itself to judges of this tribunal as a useful hook on which to hang an apparent departure from a long stream of previous authority).**
>
> **17. But it is important not to throw the baby out with the bathwater. As Rimer LJ observed in *Jurkowska v Hlmad Ltd* (2008 ICR 841), paragraph 19 it is 'basic'**
>
> > **'that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case-by-case basis to meet what are perceived to be the special or exceptional circumstances of the particular case. But they at least provide the structure on the basis of which a just decision can be made.'**
>
> **The principles that underlie such decisions as *Flint* and *Lindsay* remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation, or, as Phillips J put it in *Flint* (at a time when the phrase was fresher than it is now), the view that it is unjustified to give the losing party a second bite of the cherry - seems to me entirely appropriate; justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general, be entitled to regard the tribunal's decision on a substantive issue as final (subject of course to appeal….)"**

24. Mr Gloag, on behalf of the Respondents, did not take issue with Mr Bax's submissions as to the correct approach in law. However, we see nothing in the Tribunal's review judgment which supports the argument that they failed to apply that approach. Mr Bax submitted that, while he recognised the importance of the need for finality, that had to be weighed against the need to ensure that, if new evidence has been discovered, an injustice has not been done to the losing party by reason of the unavailability of that evidence at the original hearing. We do not disagree with that; but in our judgment there is nothing in the Tribunal's review decision which demonstrates that they did not have the relevant principles in mind or that they applied any

erroneous principle. At paragraph 22 the Tribunal referred expressly to the need for finality; but nothing suggests that by taking that into account they were not carrying out the essential balancing exercise; if they had approached their situation only on the basis of finality, much of what they had said earlier would have been unnecessary. They did not make that mistake. They have not been shown to have shackled the broadness of their approach to the task before them by an application of an erroneous test.

25. In our judgment there is nothing in the Tribunal's decision, which indicates or supports the argument that the Tribunal applied the wrong general principle. They referred at paragraph 15 to the Claimant's submission that the documents shed substantially different light on the evidence in but if they accepted that as a test. That is not to any significant degree inconsistent with the test in **Wileman** i.e. would the new evidence probably have had an important influence on the result is clear from paragraph 1522 of the Tribunal were carrying out a balancing exercise which considered the importance of and the issue of finality. As to the former, they reached at paragraph 21 a conclusion on the facts, which is not contrary to principle, however, that principle is expressed; they found as a matter of probability that, if there was to be a rehearing, the Tribunal would be likely to reach the same conclusion.

26. For the reasons we do not accept that the Tribunal erred in terms of the general principles which should guide their approach to task which they undertook.

Contributory fault: ground 2

27. It is wholly clear that the Tribunal took into account that, if there were to be a rehearing, they would be likely to conclude that the Claimant was either wholly or in part the author of her own misfortune, and that any award of compensation could be severely limited or eliminated as a result. Mr Bax submitted that that approach involves an error of law; if the Claimant were to

establish at a new hearing that the dismissal had been unfair, whatever the degree of any contributory fault on her part, and even if she were held to have been 100% at fault and the dismissal was held to be only procedurally unfair, she was entitled to a finding that she had been unfairly dismissed. He referred us to **Telephone Information Services Ltd v Wilkinson** (1991 IRLR 148) in which, when the employer sought strike out in the claimant's claim because they had offered him the maximum sum which the Tribunal could award, the EAT, Tucker J presiding, said, at paragraph 21: –

> **"In our judgement, the respondent has a right under section 54 of the 1978 Act to have a claim decided by the Industrial Tribunal. His claim is not simply for a monetary award; it is a claim that he was unfairly dismissed. He is entitled to have a finding on that matter, and to maintain his claim to the Tribunal for that purpose. He cannot be prevented from exercising this right by offer to meet only the monetary part of the claim. If he could be so prevented, any employer would be able to evade the provisions of the Act by offering to pay the maximum amount of compensation. If the appellant in the instant case wish to compromise the claim, it is open to them to do so by admitting it in full – they cannot do so by conceding only part of it."**

28. In **Gibb v Maidstone and Tunbridge Wells NHS Trust** (2010 IRLR 786) the facts were essentially more complex and need not be examined for present purposes. Proceedings had been brought in the Queens Bench Division to enforce a compromise agreement between a departing employee and her employers. In the Court of Appeal Laws LJ said, at paragraph 19 of his judgment: –

> **"There is a further point. An unfair dismissal claim is not in all respects to be equated with a common-law action which a defendant can simply choose to settle by a monetary offer…"**

And he continued by setting out the excerpt from the judgment of Tucker J which we have just quoted. Thus, that excerpt has been approved by the Court of Appeal.

29. In **Mindimaxnox LLP v Gover & Anor** (EAT/0225/10), the Tribunal had had to decide whether proceedings before them should be stayed because there were High Court proceedings which raised the same or similar issues between the parties. At paragraph 16 the EAT (HHJ

McMullen QC sitting alone) said that, notwithstanding that, in many cases, it might be accompanied by modest or even no compensation, a declaration which a tribunal is empowered to give for unfair dismissal is valuable in its own right. However, that principle did not prevent the EAT from allowing the respondents' appeal and staying the tribunal proceedings until after the trial of the High Court action.

30. Mr Bax drew our attention to another decision of the EAT, **Nicolson Highlandwear Ltd v Nicolson** (2010 IRLR 859) (Lady Smith sitting alone). In that case compensation for procedurally unfair dismissal had been reduced to nil by reason of the claimant's conduct; the employers applied for costs; the tribunal rejected the application on the basis that the claimant had established that he had been unfairly dismissed. The EAT pointed out that the claimant had persisted with the claim in circumstances in which he had been dismissed on charges of dishonesty which he knew to be soundly based. At paragraph 39 the EAT, said: –

> **"The Employment Judge was wrong to approach matters on the basis that it is open to a claimant to pursue an unfair dismissal claim purely for the purpose of obtaining a declaration that he was unfairly dismissed… There is nothing in the relevant provisions of the Employment Rights Act 1996 … to suggest that the obtaining of a declaratory order as a remedy that can be sought in an unfair dismissal claim."**

31. It is not necessary for the purpose of this judgment for us to resolve any apparent conflict which lies within that sequence of authorities; we say this because the Tribunal in this case did not decide that the Claimant's application was bound to fail because on a rehearing she would or might be found to be wholly or largely at fault if there were to be a finding of unfair dismissal; the Tribunal took into account at paragraphs 18 to 21 the likelihood that the Claimant would be found, if there were to be a rehearing, to have been very substantially or totally at fault; but they did not decide that she was not entitled to the rehearing which she sought for that reason alone. The Tribunal concluded that the Respondents were entitled to assert that there had been a fundamental breakdown in trust and confidence between the Claimant and the

school; it is clear from the original decision that at least to a major extent that conclusion was based on the Claimant's conduct; the Tribunal when considering the review application were entitled to take into account as a factor in the balancing exercise which they had to carry out that the fruits which the Claimant might gain from a rehearing were likely to be small at best, and to weigh that against the other relevant factors. In considering the issue of fault and the issue of the extent of potential recovery, if any, which the Claimant could expect from a rehearing the Tribunal were not in our judgment, acting in conflict with the principles set out in the authorities and were not acting in breach of any principle of law. When a tribunal is considering whether to grant a rehearing on the grounds which were relied upon in this case, the broad discretion explained in **Newcastle upon Tyne v Marsden** (see above), including the factors included within the overriding objective, should not, in our judgment, be shackled by a requirement that considerations of the prospect on a rehearing of a finding of major or 100% contributory fault or of the size of the sum which may be recovered are to be ignored.

Delay: ground 3

32. The essence of Mr Bax's submissions on this ground was that the Claimant had not been a cause of the delay since the original hearing, that delay arising wholly from the Respondents' failure to disclose the additional documents before the original hearing and their failure to disclose them thereafter until sustained efforts led to their production, as a result of the intervention of the Information Officer. To take delay into account, it was argued, was to penalise the Claimant who was innocent of any contribution to the delay, and to permit the Respondents to take advantage of their own failure.

33. Mr Gloag submitted that, whoever was responsible for the delay – and he made no suggestion that the Claimant was so responsible – the Tribunal were entitled to consider the overall effect of the time, which had passed in reaching their decision. If there were to be a

rehearing it would involve looking, at the date of the Tribunal's decision in 2012, reconsideration of detailed evidence going back to 2003, when the concerns about the Claimant's teaching first emerged, up to 10 years after the relevant events and 5 years after the Claimant's employment came to an end. That was undesirable and equally problematic for all witnesses and not simply for the Claimant.

34. It is important, in our judgment, that the Tribunal did not find the Respondents to have acted dishonestly in relation to the documents which should have been but were not disclosed. They expressed the view at the end of paragraph 15 that the failure to disclose was a genuine mistake and not part of a deliberate tactic: and, at paragraph 16, they justifiably declined to make further findings about what had happened thereafter, without evidence. It is also important that the Tribunal did not conclude that, but for the delay, they would have granted the rehearing which the Claimant sought. The Tribunal can, in our judgment, be seen to have regarded delay as a factor which entered into their consideration but was not determinative of the outcome. The argument that the Claimant was, as a result, being punished for the passing of time for which she was not responsible and the Respondents were escaping punishment when they were responsible for the delay is, at best, a jury point which, even if not made to the Tribunal (as surely it was), must have been apparent; but it too could not be conclusive, as Mr Bax appeared to suggest, in the sense that the Tribunal were not as a result permitted in law to consider delay at all.

35. In our judgment, the Tribunal were entitled in law to consider the passing of time as a relevant factor; as in the case of relative blameworthiness, so in the case of the passing of time the Tribunal were not acting contrary to any principle of law in taking that factor into account when reaching their overall decision.

Failure to consider surrounding circumstances: ground 4

36. To the extent that Mr Bax addressed this ground separately from the perversity ground, ground 5, we do not accept that the Tribunal made any error of law. The issue of the loss of trust and confidence was manifestly central to the Tribunal's original judgment; see the dismissal letter, at paragraph 29 of that judgment and also paragraphs 32 and 33. On any rehearing, while of course peripheral matters might have to be considered, the central issue would necessarily be whether the conclusion reached by the Respondents as expressed in the dismissal letter was one which it was not unreasonable for the Respondents to reach. It was entirely appropriate for the Tribunal, in our judgment, in considering the potential outcome of a rehearing, to focus on what the resolution of the central issue was likely to be; they might have been legitimately criticised if they had not approached their task in that way.. There can be no legitimate criticism of the approach which they adopted, which laid emphasis on the trust and confidence issue. The Tribunal did not say that they were not taking into account the other evidence; they clearly looked at the extent to which it might be thought that there was some form of conspiracy to oust the Claimant and at the other factors to which they refer. It was not necessary for them to go through each of the points made on behalf of the Claimant; they addressed the central issues; the weight which they gave to the relevant factors was a matter for them.

Perversity: ground 5

37. Mr Bax acknowledged that to succeed on the ground of perversity he had to overcome the high hurdle, formulated by the Court of Appeal in **Yeboah v Crofton** (2001 EWCA Civ 1309), at paragraph 93 of the judgment of Mummery LJ, of demonstrating overwhelmingly that the Tribunal had reached a conclusion which no reasonable Tribunal could have reached. His submission was, essentially, that the new material was such that that hurdle was indeed overcome; and much of his argument on grounds 2 to 4, which we have addressed above, was

directed to supporting that submission. Thus he argued that, in relation to delay and contributory fault, the Tribunal's conclusions were perverse if not otherwise in error of law.

38. We have considered each item of new material with this submission in mind. As to the first item, Mr Holroyd's letter of March 2005, it was not, in our judgment, necessary for the Tribunal to regard it as demonstrating a biased approach to his part of the decision which had to be made in the disciplinary proceedings some 3 years and more later. As the Tribunal said, at paragraph 11, the letter does not indicate an intention to bring the Claimant's employment to an end, as opposed to a desire to "sort out the mess.", which could be achieved by retraining, providing greater assistance or other steps short of dismissal. It is natural that the Claimant should have seen that letter as evidence of bias; but in a small school with a small number of governors, it was, as a matter of common sense, to be expected that each should know about major problems within the school and indeed should have regarded as his or her duty to know about them and to wish to address them. It might be said that the fact that nothing much appears to have been done to "sort out the mess" until 2006 (see paragraphs 8 to 11 of the original judgment) evidenced the opposite of any strong desire on Mr Holroyd's pass to achieve the removal of the Claimant without consideration of merit. The Tribunal weighed up what might be drawn from the letter; at paragraph 11 of their second judgment they clearly considered both sides of the picture; but their conclusion that trust and confidence between the school and the Claimant had broken down, repeated in paragraph 21 of their second judgment, was a conclusion which they were entitled to regard as supporting their decision that, balancing all factors, there should not be a rehearing. Whether the 2005 letter or any of the new material persuaded them in the opposite direction was a matter for them.

39. As to Mr Tinney's e-mail, the Tribunal pointed out at paragraph 12 of their review judgment that it could be interpreted in the way in which the Claimant had interpreted it; or. it

could be interpreted as Mr Tinney's asking Mrs Sandland to draft the final letter which was to be sent out following the appeal hearing. Mrs Sandland had presented the case against the Claimant at hearing and must therefore have been fully aware of what had transpired and of what appeared to be the likely result on the basis of the evidence and arguments; it is to be noted that Mr Tinney thought that the Claimant's case had been "all over the place". Again, the Tribunal can be seen to have considered both sides of the picture; but, having done so, they were not persuaded to grant a rehearing.

40. Mr Bax, sensibly, did not put the effect of the other items very high. The Tribunal considered them; there was no argument that they failed to do so. They concluded in relation to the complaint letters that they had been written as a result of Mr Holroyd's request but that, in failing to disclose that he had done so, he had not done anything inherently wrong. If the first two items were not of sufficient force to persuade the Tribunal to grant a rehearing in the face of their view that there were a number of factors upon which the Respondents were entitled to form the view that trust and confidence between the parties had broken down (see paragraph 19 of the review judgment), the two further items of the new material were not such as to compel the Tribunal to a different view.

41. The Tribunal had to measure all of this material, each item of which could have been interpreted in more than one way, against what they regarded as the likely outcome of a re-examination through evidence of the central trust and confidence issue and to consider other relevant factors, such as the need for finality, the delay and the time and costs involved in a rehearing. In doing so, they were in the best possible position; they had heard the evidence and seen the witnesses over several days during the original hearing. Considering all the new material together, as we have done, there was nothing in which, in our judgment, must have driven the Tribunal to a conclusion in favour of a rehearing. The Tribunal reached a decision

on the facts before them which was open to them; another tribunal might have reached a different conclusion; but that is not the test. It has not been overwhelmingly demonstrated that the conclusion which the Tribunal reached was one which no reasonable tribunal could reach.

Conclusion

42. For the reasons we have set out above, none of the grounds of appeal succeeds; and the appeal is dismissed.

Postscript

43. We are grateful to the Claimant's solicitors for sending to the EAT after the hearing of the appeal some further documents, to which the Respondents have taken no objection. We accept that they were regarded as helpful in the light of questions asked by us during the hearing of the appeal. Having considered them, we have concluded that they do not affect what we have set out above.