Appeal No. UKEAT/0358/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 June 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR B BEYNON

MR S YEBOAH

MS F BRITO-BABAPULLE — APPELLANT

EALING HOSPITAL NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NABILA MALLICK (of Counsel) (Appearing under the Employment Law Appeal Advice Scheme)
For the Respondent	MR ANDREW MIDGLEY (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

DISABILITY DISCRIMINATION – Disability

UNFAIR DISMISSAL – Reasonableness of dismissal

A consultant had both private and NHS patients. Whilst certificated sick and receiving sick pay from her NHS employers she worked for her private patients. She was dismissed for doing so, the employer thinking this could be described as fraud. An Employment Tribunal dismissed her claim that her dismissal was unfair. Her appeal on the ground that the employer could not properly regard the conduct as fraud, or had no reasonable basis for doing so, was dismissed on those grounds. The Claimant was dismissed for what she had done – labels such as fraud were emotive but uninformative of the essential facts – and the ET and employer entitled to regard it as gross misconduct. However, the ET went straight from a conclusion that there was gross misconduct to a decision that dismissal for that reason was inevitably within the band of reasonable responses. It did not ask whether the employer's decision was nonetheless unfair as being unreasonable in the light of all the personal mitigation available to the Claimant, since it appeared to think that the conclusion that there was gross misconduct inevitably answered the question of fairness. The EAT was persuaded, if reluctantly, that the matter should be remitted for the ET to decide if it was reasonable (in all the circumstances) within s.98(4) **Employment Rights Act 1996** to dismiss this Claimant for the gross misconduct found.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. By Reasons delivered on 22 March 2011, an Employment Tribunal at Watford, (Employment Judge Manley and members) dismissed claims brought by the Claimant doctor for unfair dismissal and for discrimination on the grounds of disability. The latter was dismissed on the ground that she was not disabled. If she were, there was no discrimination but, anyway, all but one of the alleged acts of discrimination were pursued out of time.

2. The reason for the dismissal was said to be conduct. The central question for the Tribunal was what it was. She appeals on three grounds that surround that question and its consequences defined after original Notices of Appeal, first under rule 3 and then later under rule 3(8), raising a number of allegations, were considered and, finally, an amended Notice of Appeal, substituted after a preliminary hearing in front of HHJ Peter Clark.

The facts

3. The Claimant is a consultant haematologist who worked for Ealing Hospital, Ealing, in the NHS under a contract that permitted her to have private patients for a session. She suffered intermittent health problems. They caused her to be off work from 13 March 2009 until cleared to return to work on 8 June 2009, apart, we are told, from one day in between. The employer, "Ealing", had reason to think that whilst certificated sick and in receipt of her full contractual sick pay from Ealing she was working treating her private patients. Accordingly, it came to the view that she should be disciplined for undertaking private practice while certified as unfit for work.

4. The Tribunal found that during the course of the disciplinary proceedings she accepted that what she had done was wrong. She asserted that she had not thought it was at the time.

The panel had regard to two previous notifications given by Ealing to the Claimant that if certificated sick she should not work in private practice. They had first been given in 2007 orally and then repeated in a letter of 16 November 2007 from the Medical Director. She said that she could not recall being told and she could not recall receiving the letter. The Tribunal later found that it did not accept that evidence nor, it is plain, did the disciplinary panel.

5. The panel concluded (paragraph 6.16) that there had been gross misconduct. Alternatives to dismissal were not seriously considered because the question was one of breach of trust. Its reasoning was that the allegation of working in private practice whilst certificated sick from the NHS and receiving sick pay was substantiated and, indeed, had not been denied. It went on to say that that constituted fraud; that could be considered gross misconduct and, therefore, it said "turned to consider the mitigation presented by you and on your behalf". It is plain it did not have high regard for that mitigation because of the fact that the Claimant, who was saying she did not really know what she was doing was wrong, had (so the panel thought) clearly had been told that that was the case on two occasions and, furthermore, with 20 years experience in the health service in her position ought anyway to have known better. She appealed. The appeal was dismissed.

6. The Tribunal approached the issue of unfair dismissal asking the familiar questions: first, what was the reason for the dismissal? The Claimant contended it was to do with her disability; the Respondent, that it was her conduct. The Tribunal accepted the latter. It said that the conduct was:

> **"[…] working in private practice whilst certificated and on paid sick leave for her employers, the Respondent."**

7. It thought the belief was genuine (see paragraph 12) and, indeed, noted the Claimant accepted before it that it was misconduct. As to whether there were reasonable grounds for that belief, the Tribunal said:

> **"We are bound to answer Yes to that question as she accepted that she had carried out the private work."**

8. It turned to look at the reasonableness of the investigation. It found that that too fell within the range of reasonable investigations:

> **"It is a full and through investigation carried out by an independent person who interviewed those people who appeared to be relevant. Within the investigation the investigating officer gave the Claimant a chance to give her versions of events. We can find nothing within that investigation that was unreasonable."**

9. It then came to the question of whether, after that, the genuine belief, thus formed on reasonable grounds after reasonable investigation, justified dismissal within the terms of s.98(4) of the **Employment Rights Act 1996**. It said, so far as material:

> **"On the facts decided by and known by the Respondent at the time we take the view that this dismissal did fall within the range of reasonable responses. The Respondent was entitled to find that the Claimant's actions amounted to gross misconduct. We bear in mind the not unreasonable findings that the Claimant had been told in 2007 about this very same conduct; that she was a very experienced doctor who had knowledge of sick certificates and had herself decided not to sign the reverse of those sick certificates as she had indeed been working. Once gross misconduct is found, dismissal must always fall within the range of reasonable responses and it is not for this Tribunal to substitute any sanctions we might have imposed or whether we would have dismissed the Claimant in these circumstances. We cannot say that the dismissal was outside the range of reasonable responses."**

The reference to signing the reverse of the sick certificates was a reference to an answer given by the Claimant to the Tribunal to effect that she did not do so because to do so she thought would certify that she had not been working and that to claim that on the back of the certificate would amount to fraud.

10. The appeal raises no issue as to the Tribunal's conclusions of fact. It raises no issue as to its determination in respect of disability. It raises three points in respect of the dismissal for misconduct. The first is that the Tribunal erred in law in considering what the reason was for the Appellant's dismissal. The error was failing to identify whether the Appellant's conduct in truth amounted to fraud and to say why, if so, it did so. That, asserts the Claimant, was the reason that Ealing relied upon to dismiss the Claimant.

11. As to this, the question is whether the Tribunal was entitled, as a matter of fact, to come to the conclusion that the Claimant was dismissed not only for conduct but for conduct consisting of working in private practice whilst certificated and on paid sick leave from Ealing, as it had found at paragraph 11. The label attached to a reason for dismissal may be "conduct", "capability", "some other substantial reason", etc, but it is well recognised that the reason for dismissal is more than just a label which subsumes within it a variety of circumstances. The reason is a set of facts, or it may be beliefs, known to or held by the employer which causes it to dismiss. There is a danger, as it seems to us, in using an emotive word such as fraud or dishonesty as a label rather than as a description of the conduct for which was a dismissal. However, if there is an allegation of fraud or dishonesty, it is a serious allegation and it deserves to be approached with commensurate care and seriousness.

12. Here many of the submissions made in the course of a sustained address by Ms Mallick on behalf of the Claimant were to the effect that the Tribunal could not possibly have concluded that there was any misconduct at all, let alone one which would merit the word fraud. She argued that the Claimant was entitled to do private practice which was not work for her employer and that the case of **Perry v Imperial College Healthcare NHS Trust** UKEAT/0473/10 (a decision of 22 July 2011 at this Tribunal presided over by Wilkie J) provided a useful precedent. Ms Perry had two jobs: one, that of a community health worker,

she was unable to pursue because it involved riding a bike and she had had a knee injury. The second included work which was sedentary. She could do the latter despite her injury whereas she could not do the former. The Tribunal was held in error of law because it addressed the fourfold question deriving from **British Home Stores Ltd v Burchell** [1978] IRLR 379 without mentioning the issue whether dismissal fell within the range of reasonable responses and, so far as the decision to dismiss was concerned, addressing only the decision to do so reached by the employer at the conclusion of a disciplinary hearing, when very different reasons had been given for the self same dismissal at an appeal hearing at which the disciplinary panel's decision reasoning had not been accepted. Since this was a fundamental failing it therefore fell to the Tribunal to determine whether it should itself decide whether it was perverse to dismiss the employee in those particular circumstances. At paragraph 47, upon which heavy reliance was placed in the present appeal by Ms Mallick, it said this:

> **"By the time it came before the appellate body the following matters were, or should have been, plain: first, the Appellant was permitted to take second employment whilst working for the Respondent; second, she was under no obligation to inform them that she was so doing; third, the hours of the two employments were mutually exclusive, that is to say her hours of work at Ealing did not overlap with the hours in employment with Respondent; fourth, it was permissible for the Appellant to be off sick from work for the Respondent whilst, at the same time, being fit to continue her work with Ealing and continuing to do so; fifth, in the circumstance which, by then, must have been apparent to the Respondent, there was no question of the Appellant having obtained statutory sick pay from the Respondent for hours during which she was working for Ealing and, therefore, there was no basis for any contention that they had suffered any loss; sixth, they were entitled to view her failure to ask for permission to continue to work for Ealing as a breach of her contractual obligation; seventh, they were entitled to form the view that she was not acting in good faith in asserting her belief that she was not required to ask for permission."**

13. As it happened, the Tribunal there had found that there was good faith in what the Claimant had done. The Appeal Tribunal, accordingly, decided it could properly substitute its own decision.

14. It is perfectly plain that any case such as **Perry** is one which turns upon its own facts. The principle for the decision is contained in the findings that there was a wrong approach to

the two different stages of disciplinary hearing, and that the Tribunal had failed to address the relevant questions in respect of the whole dismissal process.

15. The facts (as opposed to the reasoning) of **Perry** have a superficial similarity to the present. Thus, Ms Mallick emphasised that this was a case of a health worker who had a second job, which she could do, and indeed so far as statutory sick pay was concerned there was no basis for concluding there was any fraud as had been in contention in **Perry**. It was said at one stage that that was the reason for the dismissal of **Perry**. It was said of the factors enumerated in paragraph 47 that those in favour of the appellant in that case were broadly replicated in the present one.

16. We do not accept those submissions in the context of this particular decision. The question for us is whether this Tribunal erred in law in coming to the conclusion it did that the reason for dismissal was the conduct it had found. Since this is a determination of fact, we could only come to that conclusion, if it could be shown to be perverse. The conclusion was that the Claimant was found guilty of that for which, on the face of the record of disciplinary proceedings, she was charged. The charge was repeated in the letter of dismissal. It formed the essence of that which was described as fraud. This was not an unspecific label "fraud". It had the substance given to it by the Tribunal. It was accepted by the Claimant before the disciplinary body, so the Tribunal said, and certainly before the Tribunal, that to do as described was misconduct.

17. The submissions made to us shaded into and, we think, in many cases amounted to, a submission that there was no misconduct at all. The submission made was that the Claimant simply did not know that what she was doing was wrong; that, indeed, she was entitled to do as she did because it was no part of her contract with the employer to deal with private patients

and that there was no contractual term restricting her from so doing. This is suggested to be wrong by Mr Midgley because he points to the letter of November 2007 as being an instruction from her employer not to engage in work elsewhere of a similar nature to that which she did at Ealing. If this were such a letter, giving such an instruction within the scope of the employer's ability to give reasonable directions to its employees, then the answer would be clear.

18. The response from Ms Mallick to this was to draw attention to the precise wording of the letter, albeit that her client's case was that she could not remember having read it at all. It said, so far as relevant:

> **"[…] if you are certificated as being unfit to work in your NHS post at Ealing Hospital and then if you engage in work in a similar nature elsewhere then that could be construed as fraud. You will also need to notify any other employer that you were on certificated sick leave."**

19. She draws these points from it: first, that the work would have to be of a similar nature; second, that it would not be construed as fraud, merely "could be" so construed; third, the reference to "any other employer" showed that it was contemplated that the Claimant might have another employer for whom she might legitimately work.

20. As to work of a similar nature, it might be thought that the work as an haematologist in the NHS is not of a different nature or quality from that in private practice as an haematologist. The submission is that the work is, however, so different in intensity that it is truly of a different nature. This argument was not clearly addressed to the Tribunal below in respect of whom, as we have said, there was an acceptance that the conduct was misconduct. But it is misplaced. A consideration of the quantity of work may be relevant to the stresses which that work imposes, but it does not touch upon the nature of the work which, on any reasonable reading of the words of the letter, was what was being addressed.

21. The reference to "other employer" does not, in that light, fall for consideration - but we were told that with private patients she had no other employer since she was her own boss, and the words might be understood, perhaps, as a reference to taking other employment of a totally different kind if she were unable through physical or mental illness to pursue her NHS contract though remaining subject to it.

22. Accordingly, we do not think that the Tribunal was in error in regarding doing work in private practice whilst claiming to be unable to do similar work for the NHS as being something that might be classed as gross misconduct and in noting, indeed, that the employer had said that it thought it could be construed as fraud. The simple answer to Ground 1 is that the Tribunal was entitled to hold that the reason for dismissal was misconduct, detailed in the way it was.

23. This is subject to some extent to the second ground which, as Ms Mallick said, rightly overlapped with the first. That was whether the Tribunal rightly found that the employer had reasonable grounds to believe that what had occurred was misconduct. She argued that it should have found that Ealing did not because what was being alleged was fraud.

24. In **John Lewis plc v Coyne** [2001] IRLR 139 an Employment Tribunal held that employers had acted unfairly when dismissing an employee for using the company's telephone for making personal calls without first investigating the seriousness of the offence. The Tribunal accepted that the test which had been propounded by the Lord Chief Justice in the case of **R v Ghosh** [1982] QB 1053 applied. In summary this is that dishonesty involves assessing the facts under a two-stage process: first, to decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest and, if so, secondly, considering

whether the person concerned must have realised that what he or she was doing was, by those standards, dishonest.

25. The need for a careful investigation was emphasised further by the case of **A v B** [2003] IRLR 405 in which this Tribunal, presided over by Elias J, emphasised that where there is an investigation into a serious allegation of criminal behaviour, then, if there is a dispute about that behaviour, it must always be the subject of the most careful and conscientious investigation. The investigator carrying out the investigation should focus no less on any potential evidence that may exculpate or point towards innocence as on the evidence directed towards proving the charge.

26. Ms Mallick submits that the Tribunal should have decided those two questions. It should have asked and decided whether the Claimant thought, at the time, what she was doing was wrong.

27. The question for us again is whether the Tribunal took the proper approach. Before that Tribunal it had been accepted that the Claimant had said to the employer that she had done that which was alleged. She had done private work; she had done it whilst certificated sick from work with Ealing; she had had contractual sick pay from Ealing. Whether that was culpable or not would plainly depend upon what she knew about that behaviour. As to that, the Tribunal acting as if it were the primary fact-finder, heard and rejected the Claimant's explanation that she did not remember the oral warning nor receive the letter which we have quoted. The Tribunal did not have to go so far. It was only concerned with whether the employer was entitled to come to that conclusion, not whether it thought the same - but the inevitable consequence of the Tribunal having decided that that was the position, is that the employer, whose documents show clearly that it came to that view, was entitled to do so. The employer's

response took into account not just the two warnings but also its conclusion that the Claimant had worked for so long as a senior employee as to recognise that working privately whilst medically certified was entirely inappropriate. Accordingly, as it seems to us, there is no force in either the first or second grounds of appeal. The Tribunal was entitled to come to the conclusions it did.

28. We turn now to the third ground. The Tribunal's reasoning here was blunt and possibly truncated:

> **"Once gross misconduct is found, dismissal must always fall within the range of reasonable responses […]"**

29. That is stated as an unforgiving principle. It is based in turn upon the question whether the employer was entitled to find that the Claimant's actions amounted to gross misconduct. Here is what we consider to be the nub of this case. The arguments which we have dealt with under grounds one and two seek to minimise the severity of conduct which it was accepted occurred and to venture the suggestion that it was less culpable than might appear. The Claimant argues that the Tribunal could not properly come to the conclusion that there was gross misconduct, but, if it did, that it did not necessarily follow that the dismissal must fall within the range of reasonable responses.

30. Ms Mallick cites **Trusthouse Forte (Catering) Ltd v Adonis** [1984] IRLR 382, which was a case in which the Appeal Tribunal upheld a decision of an Industrial Tribunal. That Tribunal had found that there had been a breach of contract by the employers in dismissing an employee who had smoked in a no smoking area. The approach on appeal, conflating the contractual position with that under s.98(4) is not, perhaps, a modern one but the point of

reference is contained in paragraph 18 where this Tribunal endorsed the view of the Industrial Tribunal that long service and good conduct of an employee were relevant considerations.

31. If further support were needed for that, she drew it from **Salford Royal NHS Foundation Trust v Roldan** [2010] EWCA Civ 522, [2010] IRLR 721, in which, again, an Employment Tribunal had found a dismissal unfair and, again, was upheld in doing so. What was relevant to the unfairness was the length of service of the Claimant, the fact that that was unblemished and the fact that there was a real risk that her career would be blighted by the dismissal which would certainly lead to her deportation and destroy her opportunity of building a career in the United Kingdom.

32. She argued, therefore, that in jumping straight from the question of gross misconduct in respect of conduct which, she submitted, should not have been held to be gross, to a conclusion that dismissal was within the range of reasonable responses, the Tribunal had failed to give any consideration to mitigating factors, such as the length of exemplary service and the consequences of dismissal from the NHS.

33. In response we accept the submissions of Mr Midgley to this extent: first, we accept that here the word 'fraud' was used as a label most probably in a lay sense rather than in a technical legal sense. It conveyed the sense of someone who had been told not to do what she did; who said that she had no recollection of the instruction when that was not true; said she had no recollection of the content of a letter advising her of that when that was not true; had said that she had been advised or permitted, or it had been indicated to her by a Dr Ballard - an occupational health doctor - that she could act in performing private practice to work her way back into work whilst ill when that was misleading; (The Tribunal's finding on that is at paragraph 6.9 where the suggestion referred to was raised with the Respondent and not, says

Mr Midgley, with the Claimant) that she had said that she was undertaking private work having discussed the matter with PHP - health providers to the trust - when the Tribunal did not accept that (see paragraph 6.10); when she had said or indicated that had been discussed with Occupational Health and the Tribunal did not accept that (6.10); where she said that she could not have done what she did deliberately because she was incapable of having the intention to act deceitfully when that finding was dealt with at paragraph 6.15 (see the first few lines).

34. He characterised her response to the suggestion that what she did was no misconduct and if misconduct was not gross by saying that she had said to the employer she was not told not to do what she did, but if she was she did not recall been told; that she had been told by the health providers that she could do it and was acting with accordance with their instructions, when that was not so, but insofar as she did do it, that there was nonetheless no dishonesty because she could not have formed the intent at the time because of her mental condition. That was rejected. These contentions, he submitted, contained an inherent tension between them.

35. We return to the two matters relevant to the finding in paragraph 13. The first is whether the Tribunal was perverse in concluding that what the Claimant did in the particular facts and circumstances of this case, which we must emphasise must be judged on their facts and not on the facts of **Perry** or other cases, there had been gross misconduct. Whatever our own views as to whether we would label the misconduct gross or not, the question is whether the Tribunal was entitled so to do. We have no hesitation in concluding that it was. There are a number of reasons for this: first, the Claimant here had twice specifically been given a lawful direction by her employer not to do what she did, but she did. Second, she submitted to her employer certificates that purported to show that she was unwell. It is true she did not sign the reverse saying that she had done no work, but it is plain that submitting the certificates had the result that she was paid her full pay by Ealing upon the basis that she was unfit to work when on the

facts that the employer was entitled to conclude she was doing highly similar work, albeit not at the same intensity, elsewhere, and she had not, it would appear, told her employer before late May that that was the position.

36. We note that it was the view of Judge Richardson on the sift on 18 June 2012 that working in private practice whilst certificated and on paid sick leave from her employers would:

> **"[…] certainly be fraud if the Claimant were capable of work for the NHS and failed to disclose that fact."**

He plainly thought that it would not necessarily be perverse to call the conduct fraud.

37. The lay members of this Tribunal would emphasise that in the employment world claiming sick pay whilst working elsewhere is in general regarded very seriously by employers. In their experience any substantiated case almost inevitably will lead to dismissal, not least because if it did not, the employer might find it difficult to distinguish on any proper basis between the cases of other employees doing the same. That is not, however, to say that it is an inevitable conclusion. We conclude here, therefore, that it was not perverse of the Tribunal to make the finding it did as to misconduct and as to it being gross. The Tribunal had taken into account in so concluding the fact that the Claimant had had the instructions she did. Where we have some difficulty is with what follows.

38. The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. Mr Midgley attempted to answer this point by saying that the

sentence could not be simply looked at in isolation; it had to be seen against the totality of the Judgment as a whole. He relies upon **Hewage v Grampian Health Board** [2012] ICR 1054 in which there is emphasis upon the generosity which an Appeal Tribunal should give to the reasoning of an Employment Tribunal. The employer here had itself looked at the question of mitigation because it had said in its dismissal letter that having decided that the allegation could be considered as gross misconduct it, therefore, turned to consider the mitigation presented. The Tribunal's function was to look at the employer's conclusion. Implicitly the Tribunal here, giving the generous interpretation which should be permitted, had taken account of potential mitigation in concluding that the misconduct was gross.

39. We can see that that might possibly be what the Tribunal had meant to say. However, we have only the Tribunal's words to rely on. What is set out at paragraph 13 is set out as a stark proposition of law. It is an argument of cause and consequence which admits of no exception. It rather suggests that gross misconduct, often a contractual test, is determinative of the question whether a dismissal is unfair, which is not a contractual test but is dependent upon the separate consideration which is called for under s.98 of the **Employment Rights Act 1996**.

40. It is not sufficient to point to the fact that the employer considered the mitigation and rejected it, largely upon the basis that the failure to observe the verbal notice and the letter undermined it, because a tribunal cannot abdicate its function to that of the employer. It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. For that reason, we think that there was here an error of direction to itself by the Tribunal.

Consequence

41. The consequence is this: we reject grounds one and two but we uphold ground three upon the specific basis that the Tribunal misdirected itself as to whether it was simply sufficient to identify whether the conduct taken into consideration without regard to mitigation justified dismissal and by assuming, wrongly that to label conduct gross misconduct answered that question when it did not.

42. What follows, however, is whether we can conclude that the Tribunal was plainly and obviously right to come to the conclusion it did. We can see that much might be said to support such a view. However, we have in mind here that there are matters which may also be said on the other side. In assessing the employer's conduct and the question of fairness the Tribunal would want to have regard to whether, taking into account not just the nature of the misconduct but, insofar as it is separate from it, the question of long service, the consequences of dismissal and having a previously unblemished record may play any part. We cannot here say that they necessarily would not. It is a matter which, we think with some reluctance, has to be left to the assessment of the Tribunal itself.

43. Accordingly, this appeal, to the extent we have indicated, must be allowed upon the ground we have identified with a direction that the matter be remitted to the Tribunal. We shall hear counsel briefly upon whether that should be to the same or to some different tribunal.

44. We have considered the factors set out in paragraph 46 of the leading authority **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 in the light of the contested question whether remission should be to the same or to a different Tribunal. In favour of it being to a different Tribunal are the passage of time and the prospect that the Tribunal, having reached the decision it did, might on a second bite seek to achieve the same result: an understandable

human trait, even if it lacks professionalism. Against that it is said that the Tribunal should be the same Tribunal because that would be proportionate, there is no question here of a flawed decision and that although there is always a tension between the prospect of a second bite and professionalism, this is a case in which professionalism is like to trump the former.

45. We have come to the conclusion that here there should be a remission to the same Tribunal. We think that that would be proportionate in particular given the amount of detail and time which the Tribunal spent below. It would be a pity if a disproportionate amount were now spent at some expense again. Passage of time needs to be acknowledged but is moderated by the fact that this is a case which we would expect the Tribunal will remember very well because of its particular facts and nature. The risk of a second bite is more than balanced by a Tribunal whose professionalism is not at all in question.

46. We would emphasise that it must take a proper and professional approach in asking whether the gross misconduct justified dismissal in the light of all, and we emphasise that word, the mitigation available personally to the Claimant. We think we need say no more about that other than it is the sole scope of the remission, but we do not seek to confine the Claimant in her submissions as to unfairness beyond saying that she must start with an acceptance that what she did was legitimately regarded as gross misconduct. The issue is whether dismissal for that reason fell in her particular case within the range of reasonable responses open to Ealing.