Appeal Nos. UKEAT/0605/12/SM
UKEAT/0057/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 May 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

VODAFONE LTD — APPELLANT

MISS A NICHOLSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Beachcroft LLP Solicitors Portwall Place Portwall Lane Bristol BS99 7UD
For the Respondent	MR GARETH GRAHAM (of Counsel) Instructed by: Lyons Davison Solicitors Westbury House 701-705 Warwick Road Solihull B91 3DA

SUMMARY

UNFAIR DISMISSAL

Reasonableness of dismissal

Contributory fault

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

An employer dismissed a store manager (who had some 11 years' experience) after an employee at the store committed thefts of a number of valuable mobile phones. She had failed to keep a proper stock control, to reconcile the computer systems accounting for sales and for agreements made with customers, and had allowed staff to sign off the agreements they had made with customers without being cross-checked by another staff member, and had not responded with increased vigilance after demonstrator phones went missing, she raised the matter with staff, and they mysteriously reappeared in a strange place. The dismissal was agreed to be for conduct, though described by the employer as for "gross incompetence". The Employment Judge held that there had been no suggestion that the Claimant was herself dishonest, nor had there been any criticism of her work in the past; that the conduct for which she was dismissed did not feature in, nor was closely related to, the examples of gross misconduct specified in the employer's disciplinary policy; that the employer had promulgated no policy on the way in which stock controls were to be exercised; and that the Claimant had had no warning that a failure of this sort could lead to dismissal. It held the dismissal outside the range of reasonable responses (though in its reasoning, had wrongly approached the matter as one in which there were no reasonable grounds for the employer's belief, accepted as genuine, that the Claimant was guilty of gross misconduct as alleged). Despite some infelicities in the expression of its reasoning, the finding of the EJ that dismissal was unfair was held sufficiently clear, and was not perverse, nor reached by substitution of the EJ's view for that of the employer.

However, the finding that there was no contributory fault could not stand. It was reached by assuming that the dismissal was in effect for capability, and wrongly that that meant there could be no contribution; that there had been no misconduct, though the EJ had earlier identified a final written warning as appropriate, thus expressing inconsistent views; and was insufficiently reasoned. Remitted to a fresh tribunal.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. There are two appeals before this Tribunal, one in respect of liability and the second in respect of costs, both decisions of Employment Judge Walker made at Lincoln on, respectively, 20 September 2012 and 6 November 2012, when the Reasons were sent to the parties.

2. There is no longer any issue between the parties as to the costs of appeal. The central legal point taken by Mr Milsom, who appears for Vodafone, is that the Tribunal proceeded to award costs against it without there having been any opportunity for oral representations to be made and without the Tribunal having indicated in advance that it might be proposing to take that course. That is contrary to rule, it is unfair and it is accepted that accordingly this appeal should be allowed. The parties are agreed that there will be no further application for costs.

3. I turn therefore to the finding in respect of unfair dismissal. The Judge upheld the Claimant's complaint that she had been unfairly dismissed and declined to make any deduction for contributory fault.

The facts

4. The Claimant was a store manager with Vodafone from the beginning of 2000 until she was summarily dismissed on 5 December 2011. As such she was responsible for monitoring the store costs and stock levels and was expected to reconcile computerised till checks and records of sales, and mobile phone contracts which had been entered into, on a daily basis.

5. It emerged through the regular compliance-checking conducted by Vodafone that four high-value mobile phones were missing and there were no agreements (for customers to buy

phones) filed which corresponded with those phones. That led to further enquiries. A member of the Claimant's staff was identified as having stolen the phones and covered up the theft by fraudulently entering data on the store's computer system, such that the deficiency had not previously been identified. Had there been daily cross-checking by the Claimant it is an inference from the Tribunal's decision that the theft might have come to light earlier than it did.

6. Further enquiries revealed that some two or three months earlier the Claimant had also discovered that two demonstrator phones were missing. Although they were returned some five days later, the circumstances were regarded as highly suspicious. A high-value accessory was also found to be missing. The employer complained that that should have alerted the Claimant to the need, as manager, to have ensured that regular checks were made because it might be that a member of staff was defrauding the company.

7. She was suspended. A disciplinary hearing on charges which were described as gross incompetence was held in December 2011. The conclusion at that disciplinary hearing was that of a manager, Mr Dixon, who thought that the Claimant should summarily be dismissed. The reasons for that were said to be:

> **"Lack of stock control after identifying an issue.**
>
> **Failure to control checks on relevant paper work leading to gross incompetency causing financial loss to Vodafone.**
>
> **You have abdicated responsibility for key roles that form part of your position as manager."**

8. The first two of those related to the failures to ensure sufficient checks on stock and computer records. The third was the consequence of a procedure which the Claimant had adopted or allowed to flourish whereby store staff were permitted to check their own customers' agreements rather than have them checked by another colleague. A consequence of

that might be that an employee seeking to steal a mobile phone could say that there was an agreement in place but there would be no check on it.

9. The Claimant appealed. The decision on the appeal was in effect that she had not exercised satisfactory stock control, even after having had suspicions about stock issues, that she had abdicated her responsibility as store manager by allowing team members to check their own legal documents and that there was no further evidence to show effective management control.

The Employment Tribunal decision

10. Importantly, for present purposes, it is common ground that before the Employment Tribunal it was accepted between the parties that the genuine reason for the dismissal of the Claimant by the Respondent was misconduct.

11. The question thus posed by section 98(1) of the **Employment Rights Act 1996** was answered. That section provides:

> **"... it is for the employer to show—**
>
> **(a) the reason (or, if more than one. the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee from a position which the employee held."**

12. Subsection (2) provides that a reason falls within the subsection if it "(b) relates to the conduct of the employee". Accordingly the issue before the Tribunal for its resolution was whether having regard to that reason the dismissal was fair or unfair. The Tribunal reminded itself of the familiar guidance which is given to Tribunals originating in the case of **British Home Stores v Burchell** [1978] IRLR379, as exemplified by **Iceland Frozen Foods v**

Jones [1983] ICR 17. It accepted there was here a genuine belief in the Claimant's misconduct and that there had been a reasonable investigation into it, but it did not hold that the belief had been reached on reasonable grounds. The reasoning for that at paragraph 28 was in summary that it could not be said to be gross misconduct, that the contract which the Claimant had gave a list of conduct which might be gross misconduct and nothing in that list fitted the conduct of which the Claimant had been found guilty. Nor, in the Tribunal's view, did the conduct amount to conduct which was serious and would lead to a complete breakdown of the employment relationship. It came to that view having considered a case to which the Tribunal Judge himself had referred the parties, namely the unreported decision of this Tribunal presided over by HHJ Hand QC of **Sandwell and West Birmingham Hospital NHS Trust v Westwood** (UKEAT/32/09, 17 December 2009).

13. At paragraph 33, the Judge said:

> **"There was never any suggestion that Miss Nicholson was in any way complicit in the actions of the dishonest colleague in the theft and fraud relating to the four or more mobile phones. Nor was there any suggestion by Vodafone of deliberate wrong doing or a gross negligence (until Mr Milsom's final submission when he did use that word). I find that Vodafone did not find that there was deliberate wrong doing or gross negligence by Ms Nicholson but rather gross incompetence."**

14. In using the expression "gross incompetence" the Judge was reflecting words which Vodafone itself had used somewhat oddly in framing the disciplinary charges.

15. He considered, as I read the decision, that the belief in gross misconduct was not based on reasonable grounds, given what he held in paragraph 33, the fact that the conduct was not within the list of gross misconduct which Vodafone had, that there was no policy applicable to the Claimant's work which required her to behave in the manner in which she had not and that in general one should not be dismissed for a first offence but rather warned, although the

possibility did exist. Insofar as the Claimant had shown incompetence, then training might be an appropriate answer. The employer had ruled that out (paragraph 34) because she had not expressed remorse nor indicated any understanding of the incompetence of which she was guilty during the disciplinary proceedings, but the Tribunal observed that the issue of training was never fully explored with her.

16. Paragraph 34, expressing those views as I read the decision, however, is not easily worded. It says:

> **"In relation to gross incompetence I did have regard to paragraph 4.42 of the *IDS Employment Law Handbook on Unfair Dismissal* and recognise that it may be fair to dismiss without warning where the employees continued employment is against the interests of the business. However the burden of proof that you would not change with training is on the employer. However that was never fully explored with her. It was based purely on their view that she had not expressed remorse or indeed understanding of the incompetencies of which she was alleged to have been guilty. I also had regard to paragraph 6.12 in relation to misconduct or gross misconduct to which makes reference [sic] to *Sandwell [& West Birmingham Hospital NHS Trust]l v Westwood* [UKEAT/0032/09]."**

17. At paragraph 35, the Judge summed up:

> **"Accordingly, in my judgment, there are no grounds on which to regard Ms Nicholson's conduct as gross misconduct on the facts. I find that the decision to summarily dismiss her for that reason was outside the range of reasonable responses of a reasonable employer and accordingly she was unfairly dismissed and her claim of unfair dismissal and breach of contract succeeds."**

18. I should note here that the claim was not just for unfair dismissal but also for wrongful dismissal. This is the only place in the decision in which there is a finding as to that latter claim. There is no separate treatment of it though the Judge's treatment of gross misconduct in the light of **Westwood** (see paragraph 32) showed why it was that he came to the conclusion that there had not been conduct which could be classified in common law terms as sufficiently serious to amount to conduct which abandoned and altogether refused to perform the contract,

otherwise known as a fundamental breach, which would be necessary to justify summary termination.

19. The Judge, having resolved the question of the fairness of the dismissal, dealt with the question of contribution. He did so in three short paragraphs, which require to be cited in full:

> **"37. [Mr Milsom] did raise the question of contribution and sought a finding that she had contributed to her dismissal. I had regard to *Nelson v BBC (2)* [1997] IRLR 346 and the need to make three findings. First that there was conduct on her part in connection with her unfair dismissal was culpable or blameworthy. Second that the matters to which the complaint relates were caused or contributed to some extent by action that was culpable or blameworthy. Third that it is just and equitable to reduce the assessment of the Claimant's loss to a specified extent.**
>
> **37. [This is the second 37] Given that the matters alleged against her were categorised as incompetencies and as I have found not matters of conduct let alone gross misconduct, they cannot amount to culpable or blameworthy conduct contributing to her dismissal. In any event I would have found that it would not be just and equitable to reduce the assessment of her loss on that account as they were performance or culpability [sic] issues.**
>
> **38. Accordingly, I find that there was no contribution and there will be no reduction in her award."**

The submissions

20. It was accepted, rightly in my view, by Mr Graham, in engaging and candid submissions, that the Judgment has many real shortfalls. It is not felicitously phrased. It is short. Mr Graham agreed that it lacked important findings of fact. It does not make for happy reading, he submitted. Nonetheless, he argued that its shortcomings were not sufficient for this Tribunal to identify an error of law which fundamentally vitiated its reasoning.

21. Mr Milsom addressed eight arguments of law. The first ground was that the Tribunal failed expressly to state what the reason for dismissal was; secondly, that the Tribunal's Reasons were not **Meek v City of Birmingham District Council** [1987] IRLR 250 compliant; thirdly, that it had erred by failing to apply the **Burchell** test and/or reached a perverse conclusion if it determined that test was not satisfied; fourthly, erred by amalgamating the tests for wrongful and unfair dismissal; fifthly, fell into the substitution mindset; sixthly, erred in

applying the burden of proof in paragraph 34 when there was no burden of proof for the employer to satisfy that an employee would not change with training; seventh, as to contributory fault; and the eighth was a general unspecified plea as to perversity.

22. The central question, as it seems to me, is what it was the Tribunal was deciding. I accept from Mr Milsom's submissions that the Tribunal here had been seduced by the labels which might be applied to behaviour. The approach it took was over-complicated. By using the expression which Vodafone itself had used at stages in the disciplinary procedure, that of gross incompetence, the Tribunal had regarded the dismissal as not being for conduct, although that is what the parties had agreed, but categorised it, or appeared to categorise it, as a capability dismissal.

23. What must be remembered, in my view, is that the focus in any case of unfair dismissal must be upon the statutory questions. Those questions are posed once the issue of the reason for dismissal has been determined by applying section 98(4). The test originating in **Burchell** is hallowed and so approved by higher authority that it has become second nature to employment lawyers and Judges, but it must not be applied mechanistically. It is an aid to Tribunals to reach a decision whether dismissal for the reason given by the employer is fair or not. But it is necessary for the reason given to fall into a category within section 98(1). Usually the boundary lines between one category and another will be sharp, but sometimes that is less the case. The section itself contemplates that there may be more than one of the five reasons provided for by section 98: capability, conduct, statutory prohibition, redundancy and some other substantial reason. The focus is on the principal reason: but it does not assist in determining the fairness of a dismissal to accept the label necessarily used in categorisation

without knowing more. What has to be assessed is the reason for the dismissal, not as a category or label but as a real, live, operative reason.

24. The words of Cairns LJ in **Abernethy v Mott Hay and Anderson** [1974] ICR 323, [1974] IRLR 213, at paragraph 13, the opening paragraph of his Judgment, are so well known that their force may sometimes be overlooked as too familiar:

> **"A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee."**

25. He was looking not at the label under which statute summarises the facts; he was looking at the reason as it was, as determined by the evidence. In a conduct case the Tribunal needs to know what the conduct was, which is said to be misconduct: it cannot assess fairness without doing so. "Misconduct" without more does not help much. The same is true of the other categories of reasons for dismissal, in particular capability, where a Tribunal could not fairly assess dismissal without knowing what the particular capability was: or "some other substantial reason" where, again, the need to know the facts is clear.

26. Thus the focus of the Tribunal should not be upon the label; it should be upon the conduct itself. What precisely did the Claimant do or fail to do that caused the employer to dismiss him? Was it fair for the employer to dismiss for that reason? So viewed, looking for the acts here which the Tribunal identified, it held that what she did was to fail to keep proper stock control when it was her responsibility to do so, fail to check the stock and systems when she should have been alert to the possibility of theft, fail to reconcile the accounting systems in the branch, and to permit staff to be responsible for their own contracts without check, facilitating the occurrence of fraud, albeit entirely unintentionally. She had failed in those respects to do the job that she was employed to do.

27. So viewed, that is plainly conduct. It is not capability. The use of the word "incompetence" here may simply, I suspect, have been because the employer accepted that she herself had not been dishonest, and the Judge found that the employer thought that she had not been grossly negligent: findings which were open to the Judge having heard all the evidence.

28. The question so viewed for the Judge would be whether conduct established in those respects after a reasonable investigation was such that a decision to dismiss for it fell within the range of reasonable responses. He did make a finding that the decision was outside the range of reasonable responses (see paragraph 35). Nonetheless, he never approached the question of reasonable responses as a separate stage: his approach was such that he dealt in effect with the questions which would have required consideration when looking at the range of reasonable responses by what he said in respect of the employer having reasonable grounds for its belief in misconduct.

29. The view that the Judge took of whether there was a reasonable basis for the employer's conclusion as to is conduct was, as I have indicated, vitiated by the focus on that as a label rather than by asking what it was the Claimant had actually done or failed to do. But the approach set out at paragraph 32 was heavily influenced by **Westwood**. He referred in particular to paragraphs 111 and 112 of that decision.

30. At paragraphs 111-113 Judge Hand said:

> **"Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee: see *Wilson v Racher* [1974] ICR 428, CA per Edmund Davies LJ at page 432 (citing Harman LJ in *Pepper v Webb* [1969] 1 WLR 514 at 517): 'Now what will justify an instant dismissal? - something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract' and at page 433 where he cites Russell LJ in *Pepper* (page 518) that the conduct 'must be taken as conduct repudiatory of the contract justifying summary dismissal.' In the disobedience case of *Laws v London***

> ***Chronicle (Indicator Newspapers) Ltd*** **[1959] 1 WLR 698 at page 710 Evershed MR said: 'the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.' So the conduct must be a deliberate and wilful contradiction of the contractual terms.**
>
> **112. Alternatively it must amount to very considerable negligence, historically summarised as 'gross negligence'. A relatively modern example of "gross negligence", as considered in relation to 'gross misconduct', is to be found in *Dietman v LB Brent* [1987] ICR 737 at page 759.**
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> **113. Consequently we think that the Employment Tribunal was quite correct to direct itself [...] that 'gross misconduct' involves either deliberate wrongdoing or gross negligence."**

31. **Westwood** was a case of unfair dismissal. The case of **Wilson v Racher** was not; it was a case of wrongful dismissal in which no question of the statutory right not to be unfairly dismissed arose. The citations which supported the conclusion were based upon the contractual analysis. The conclusion at paragraph 113 might be taken as being that an employer cannot dismiss fairly for conduct unless there has been either deliberate wrongdoing or gross negligence. That is not the law, if that is what is meant, and I rather doubt that it was.

32. The point is made luminously clear by HHJ Peter Clark in **Weston Recovery Services v Fisher** UKEAT/0062/10 in a passage which deserves repetition:

> **"13. It is now well established at Employment Appeal Tribunal level that the question of section 98(4) ERA is not simply answered by deciding whether or not the employer or employee is in breach of the contract of employment. We refer to the analysis by Phillips P in *Redbridge, London Borough v Fishman* [1978] ICR 569 which I gratefully adopted in *Farrant v Woodroffe School* [1998] ICR 184, 195 B-C, a case later followed by the Employment Appeal Tribunal in *Ford v Libra Fair Trades* [2008] UKEAT 77/08.**
>
> **14. As Mr Justice Phillips put the matter in *Fishman* at page 574: 'Many dismissals are unfair although the employer is contractually entitled to dismiss. Contrary-wise, some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee.'**
>
> **15. […] Section 98 is, so far as is material, concerned with the sufficiency of the conduct reason for dismissal. It is not concerned with the common law concept of gross misconduct, that is, conduct by the employee amounting to a repudiatory breach of the contract of employment entitling the employer to terminate the contract without notice or pay in lieu of notice."**

33. I could not put the matter better.

34. The Tribunal's reasoning was thus here in some error, but the error needs to be carefully identified and understood to see what the consequences are in terms of the overall decision.

35. Mr Milsom, in his reply, drew upon the candid submissions made by Mr Graham to submit that if indeed there were infelicities in the Judgment, if indeed there were errors of approach, then it could not be a permissible decision here to uphold the Tribunal's decision as to the unfairness of dismissal.

36. I acknowledge that in many cases that would be trite, but Mr Graham's submission was that the errors, such as they were, arose by looking at the right facts in the wrong place. They did not deprive the fact finding of its validity nor the assessment which the Tribunal Judge made of its force. In my view he is right in that submission.

37. Although, in my view, as I have already indicated, Mr Milsom is entirely right to say that here the Judge should have accepted "conduct" rather than analysing the matter as one in which there was no misconduct, he did look at the reasons for dismissal in the **Mott v Abernethy** sense in reaching an overall assessment, briefly expressed though it was, as to whether dismissal for that reason was or was not fair. It is clear to me that reading the decision overall, as one must do, the Judge thought it was unfair to dismiss for the matters I have identified because, (1) the Claimant was not herself guilty of deliberate wrongdoing or gross negligence; (2) there was no indication in the policies of Vodafone that to do what she did was to risk dismissal. The whole point of listing matters as gross misconduct in an employer's documentation is to indicate to an employee what will or will not be regarded as such egregious behaviour as to risk and indeed invite dismissal. Thus many cases have emphasised the importance of a warning, if that has not been in a policy or procedure, so that the employee is aware of the consequences of any repeated action.

38. (3) Where there is no personal blame in the sense of wrongdoing or negligence, but a failure to do a job properly, Tribunals will generally look to see whether training has been offered and whether training might remedy the problem. Here the Judge thought that although the employer had its view as to whether the Claimant would or would not have responded to training, it had not been fully explored with her. It took that into account.

39. Next, it did not regard the episode as of sufficient seriousness to justify dismissal. That is what Mr Graham submitted, and I accept was the general thrust of the expressions or view as to whether the misconduct was gross or not.

40. Next, it took into account the fact that the Claimant had been a manager for over ten years. This cuts both ways. It might support the view that she ought to have known how to deal with the issues which arose and therefore support the conclusion that she abandoned her responsibilities. But it is also true that it supports the conclusion, as the Tribunal noted, that she had had no problem identified in the quality of her management at any stage prior to the events of June to September 2011.

41. Next, there was no policy and procedure which required a manager to behave in the way in which the Claimant did not. The Tribunal expressly found that too.

42. Accordingly, it is clear to me that the Tribunal Judge came to the conclusion that in his view dismissal was not within the range of reasonable responses, as he summarised it at paragraph 35, having regard to the real reasons and to these circumstances, and thereby giving an answer to the statutory question.

43. It will be appreciated to any reader of the Tribunal decision that although all these elements are present within it it is not precisely the way it is put in that decision. I bear in mind the fact that Tribunal Judgments may, and regularly do, contain infelicities. They are not to be read as if trust deeds or High Court Judgments. The question is whether taken overall they show and show clearly what decision has been reached and why. Here, although a wrong route was taken in analysing under the heading 'Reasonable Grounds for Belief' what was properly to be analysed under, "Was it within the range of reasonable responses?" to regard that as an error of law which vitiated the decision would be to give a rigidity to the **Burchell** approach and require it to be approached in a way which is not realistic and is too formalistic. The question the Judge had to answer was that posed by section 98(4). That he did clearly, or at least clearly enough, in my view, for the parties to know why he thought it was not fair for Vodafone to dismiss this Claimant for this misconduct, taking into account all the facts and circumstances.

44. I shall deal briefly with specific individual points which Mr Milsom made in the course of the submissions which I have summarised more generally above. He argued that the Tribunal had become hooked up on labels. I accept that, but it does not, as I have explained, in these circumstances mean that the decision should be overturned.

45. Secondly, he argues that the case was not **Meek** compliant. There are three reasons for that. In paragraph 31 the Judge referred very generally to a number of cases to which he had been referred by Mr Milsom. Mr Milsom complains that justice should have been done to his argument by dealing with each and saying what the Judge made of them. Then, at paragraph 33 the Judge did not give reasons for his finding that Ms Nicholson had been guilty of gross incompetence rather than deliberate wrongdoing or gross negligence. He argued therefore that on those matters and others the Judge had not said enough.

46. As to that, it must be remembered that Judgments need only be long enough to show to the parties, and if necessary to the court reviewing the matter on appeal, why the decision has been reached. The Tribunal does not have to cross every "t" nor dot every "i". It does not have to deal with authorities put before it unless those authorities are actually material to the matters it has to decide. If it had considered the authorities Mr Milsom put before it, it might have avoided the errors that we have identified, but there would be nothing fundamental in what he was submitting by reference to authority which would have caused a different conclusion. That must be so in a case which is heavily fact specific such as where a judgment of reasonableness is required by the statute.

47. Thirdly, he argues that the Tribunal here substituted its own decision. I can see no evidence of that. It is true, as Mr Graham submits, that the tenor of the Judgment is strongly in favour of the Claimant. That does not, in my view, indicate substitution, although it is plainly a reaction to the evidence which the Tribunal heard.

48. Finally, he points out, with justification, that in one respect the Tribunal overstated the facts. In saying at paragraph 33 that there was no suggestion by Vodafone of gross negligence until Mr Milsom's final submission, it was actually in error since on one occasion in the documentation that expression is to be found. That is accurate, but it does not seem to be material to the issues I have to decide. Not being material, it is no error of law.

49. In conclusion, on the question of fairness of dismissal, I accept Mr Graham's argument that the Tribunal here has said sufficient, sufficiently clearly giving reasons why,

understandably in these circumstances, it would conclude and did conclude that dismissal was outside the range of reasonable responses.

Contributory fault

50. It is in my mind a different story when one comes to the conclusion as to contributory fault. The reasoning depended upon categorisation. The Tribunal thought dismissal was for capability. It did not appreciate that it was agreed that the dismissal was for conduct. If it had, its next question would be what if anything it was that the Claimant did that caused or contributed to her dismissal (so far as section 123(6) concerned) or which ought to be taken into account as being just and equitable to do so (so far as the basic award was concerned).

51. The Judge gave no reason for saying why he had found the matters were not matters of conduct, nor did he give any reason for concluding why he would have found in any event it would not be just and equitable to reduce loss on that account as they were "performance or culpability" issues. If he had taken that approach, he would, as it happens, have committed the error of thinking that because a dismissal was for capability (assuming that this is the starting point) there could not be any contributory fault.

52. In **Sutton & Gates (Luton) v Boxall** [1979] ICR 67 at page 74 Kilner Brown J wanted it to be understood that an earlier decision of his should not be misunderstood. He had said that in a *true* incapability case, it might well be that there was no degree of contribution at all. He commented:

> **"We meant that there are some cases where a person tries desperately hard and cannot cope at all. That decision of ours has regrettably been misunderstood and misapplied because it did not make sufficiently clear that in applying the test, whether or not the person has control over his actions, we were implying that where the "incapability" so called was due to the person's own fault, in the sense that he was lazy, negligent or idle, or did not try to improve, the degree of contribution may well be very high indeed."**

He went on to say it should be recognised that the Appeal Tribunal had never said that there should never be contribution in cases of incapability.

53. A further error in the Judge's reasoning was that he appears, as Mr Milsom demonstrated, to have paid regard to the employer's conduct rather than the employee's. The focus in assessing contribution is on the latter.

54. The Judge's approach was therefore entirely wrong. He should here have made findings as required by sections 122 and 123 of the **Employment Rights Act 1996** as to the extent to which the compensation given to the Claimant should be reduced.

Conclusion

55. It follows that the appeal against the finding of unfair dismissal is dismissed. The appeal insofar as it relates to the question of contribution is allowed.

Consequence

56. The parties were both inclined to invite me to substitute my own view as to contribution in the event that I reached this conclusion. Realistically they recognised that that would be difficult for this court. The essential judgment which has to be made is that of the employee's conduct, not the employer's. I could not sensibly evaluate her conduct without hearing her and her responses to questions, nor appreciating the whole of the evidence as to which only a part has been put before me on appeal.

57. Realistically, therefore, the parties accepted that I could not and should not determine the question of contribution for myself. They have agreed that in the event I reach this finding as I do that the case should be remitted to a fresh Tribunal for determination of the question of contributory fault. That will require, no doubt, evidence, expense and time which may very well be disproportionate to the amount at stake in this case overall. With that in mind the parties have invited me to express a view (acknowledging the limitations which I have) as to the extent to which I think, in these circumstances, there should be a deduction for contributory fault.

58. I am prepared to do that to assist the parties, though I emphasise I have not had a full perspective of the evidence.

59. In my view, the Claimant was dismissed for misconduct. She was dismissed for having failed to do what she should have done, which is manage the store appropriately. She failed to keep proper stock control. She failed to check when she should have been alerted. She failed to reconcile the accounts and, albeit unintentionally, facilitated the occurrence of fraud. Her further conduct can be taken into account, as Mr Milsom argues, that she showed no insight into these events when she went through the disciplinary procedures and no doubt that contributed too to her dismissal. She had been employed for so long as a manager that she ought to have known better.

60. These are serious failings. I take into account that she did nothing deliberately. I take it that the result was not one she would remotely have wished. She had no policy to observe, she had no specific training and she had no warning that her behaviour might give rise to dismissal, such as would have alerted her specifically to the need to avoid doing what she did.

61. Balancing those, it seems to me, that if my mind were otherwise unpersuaded by matters which emerged in evidence or by an evaluation of the Claimant herself, I would estimate the extent to which I would assess contributory fault at 60 per cent.

62. I acknowledge that is only a very broad-brush figure; it is bound to disappoint one party or the other. I make it as I am invited to do given the circumstances.

63. Finally, can I thank the parties for the preparation and the submissions, particularly Mr Milsom in the way in which he presented the authorities in accordance with the Practice Direction: it is pleasing to see that honoured.