Appeal Nos. UKEAT/0572/12/LA
UKEAT/0573/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 May 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MS V BRANNEY

MR J R RIVERS CBE

DEPARTMENT FOR WORK AND PENSIONS APPELLANT

MRS J COULSON RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS HELEN BELL (of Counsel) Instructed by: Treasury Solicitor One Kemble Street London WC2B 4TS
For the Respondent	MRS J COULSON (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL

Reasonableness of dismissal

Contributory fault

Compensation

Mitigation of loss

Employment Tribunal decided that when determining penalty for misconduct (accessing personal records without authorisation, contrary to a number of policies) the employer had thought that the only mitigation which could reduce sanction from dismissal to a lesser penalty would be that which established that the Claimant did not know what she was doing when she accessed the documents. The mitigation (as presented) did not go that far. Accordingly, because the employer had not given any weight at all to that mitigation, and had not explored medical issues with the Claimant though there was reason to do so, the ET held that dismissal was outside the range of reasonable responses. It was held entitled to do so, but that it erred in law by holding that although the Claimant had admitted knowing that she should not access the records, and accepted she had done wrong, nonetheless as a matter of fact she did not know what she was doing was a breach, and therefore ought to be excused any finding of contribution. The ET had made inconsistent findings, had failed to consider what the Claimant ought to have known, had not considered the effect of the Claimant saying (misleadingly) to her employers that she had been guilty of misconduct, having changed her account from one of denial of misconduct to one of acceptance, had not sought authorisation to access the records, nor had she made any referral for the investigation of fraud by others although claiming that was what motivated her actions.

In a preliminary hearing on a linked appeal, the employer sought to argue that the ET erred by concluding that a lifetime pension loss could be attributed within s.123 **ERA** to its actions in dismissing the Claimant, and that the ET erred in concluding that the Claimant had mitigated her loss. **Held** that these findings were open to the ET.

In the result, the issue of contributory fault was remitted to a new Tribunal, in the light of the clear views the ET had expressed, in the light of which its impartial objectivity might be questioned.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. By Reasons delivered in writing on 18 December 2012 Employment Judge Lewis, at East London, upheld the Claimant's complaint that she had been unfairly dismissed. The Department for Work & Pensions, the Respondent, whom we shall call "the Department", appeals against that conclusion and against a conclusion that the Claimant should not suffer any deduction from any award by reason of contributory conduct.

The facts

2. Taken from the Tribunal's Reasons the facts are these. The Claimant worked as a performance team manager at Basildon Jobcentre Plus. That was a band C post; she was for a time acting up as an EO. She was dismissed on 24 March 2011: the Tribunal's date (25 March 2011) is agreed to be one day out. That was because in November and on 21 December 2010 she had accessed the personal records of what the Tribunal said were her sister-in-law, her sister-in-law's mother and her boyfriend. The attempt to access personal records was picked up by the Department's in-house security team. The Claimant was interviewed. She agreed that she knew that she should not access records for friends and family members and should only do so for designated purposes. But she had accessed the records, she said, in order to report a benefit fraud which she had suspicions was being conducted by her former in-laws, which she thought was a legitimate purpose. However, later she was to accept (see paragraph 42 of the Tribunal decision) that there was no legitimate business reason for doing so. That explanation was not thought credible by Mr Pole to whom it was advanced. She was subject to a disciplinary hearing in front of a Ms Gilbert, who determined that she should be dismissed.

3. The Claimant appealed. That appeal came before a Mr Gisbey, who dismissed the appeal. Both he and Ms Gilbert regarded accessing the personal records of others as a clear breach of departmental standards. It was plainly something of importance to the Department, not least because a lot of its work involves the handling of confidential data. At least three separate documents promulgated by the Department to employees emphasise that fact.

4. The Tribunal set out at paragraph 24 its findings about the hearing before Ms Gilbert. It found that the Claimant put mitigation before her. Ms Gilbert understood that mitigation could only be relevant if it excused the conduct completely, meaning that the Claimant did not know what she was doing. If it did not show that the Claimant did not know what she was doing, then it would not be relevant to the question of penalty, and the mitigation would have no effect if the conduct was found to have been culpable. For his part, Mr Gisbey had similar advice from the Department's HR Department to the effect, as the Tribunal found, that, unless he were satisfied that the Claimant did not know what she was doing, any mitigation that she put forward to soften the penalty in respect to such a serious offence should simply be disregarded.

5. The Tribunal found that the Respondent's belief that the Claimant had been guilty of misconduct was genuine, based on reasonable grounds after a thorough and reasonable investigation, but, at paragraph 44, that the employer had not followed its own policies: the policy was to take mitigation into account. The dismissing officer, Ms Gilbert, and the appeals officer, Mr Gisbey, had been advised by HR that they could only take account of mitigation if the effect was that the employee did not understand what she was doing. The Tribunal thought that to completely disregard mitigation in that way was something no reasonable employer would do. Secondly, in paragraph 47, the Tribunal noted that Mr Gisbey had in front of him a letter from the Claimant's GP. That letter was to the effect that the Claimant's mental health

may have affected her actions and suggested that she was on the point of being referred for psychiatric assessment. Despite having had that letter in front of him, Mr Gisbey, without any evidence to the contrary, had ignored it and had not investigated the medical position in which the Claimant had been.

6. The Tribunal set out that medical position in some detail at the outset of its decision. The Claimant had been ill. She had suffered a number of misfortunes in the year or so leading up to the events in November and December 2010. She had had an operation to remove a gall bladder and had since suffered from chronic diarrhoea, which was, she tells us, being investigated as potential Crohn's disease or cancer. She was not sleeping well in consequence. She had separated from the father of her son, who was now a young adult, some time before and was not in good relations with him. He was emotionally vulnerable and had himself a range of autistic spectrum disorders, a hearing impairment, and as a consequence of past bullying had become epileptic to the extent that it could be life-threatening. He had been subject to threats not to reveal some fact relating to his father and the Claimant's former in-laws to the Claimant. She thought that must relate to potential benefit fraud, hence her reason for investigating.

7. The stresses were compounded by the move of two employees, from whom the Claimant had previously been separated in her work, when they had been held guilty of bullying her. She was now required to work alongside them in the same office. This added to the stress to which she was subject. The Tribunal thus plainly felt that there was, here, a situation in which any reasonable employer would have investigated the medical position more thoroughly in order to see how strong and powerful the mitigation was in order to determine whether the sanction of dismissal for a Claimant who had served 20 years with unblemished service and was in what

the Tribunal described as "some of the most extreme personal circumstances it had come across" might not have dismissed her.

8. Taking the view that any mitigation would be ineffective, no matter what it was, unless it showed that the Claimant did not understand what she was doing, and secondly, failing to investigate medical material further, were the principal defects in the employer's approach which the Tribunal identified in concluding that the decision to dismiss was not within the range of reasonable responses.

9. It had also had to consider the argument put forward by the Claimant that her own treatment had been inconsistent with the treatment by the Department of others who had also broken confidentiality in relation to documents (see paragraph 49). It came to no developed conclusion, so far as we can see, in respect of that, and we accept what Ms Bell says, appearing as she does for the Department before us today, that the Tribunal did not regard that as a reason for holding that the employer did not act reasonably.

10. At paragraph 50 the Tribunal summed up its reasoning in these terms:

> **"The Claimant was dismissed despite 20 years' previously unblemished service in some of the most extreme personal circumstances that this Tribunal found any employer might come across. The Claimant's personal circumstance was [sic] such that she had clearly been suffering extreme emotional stress and strain on her mental health throughout the relevant time that she committed each of accesses in breach of the Respondent's policy she had a history of depression [sic]. We are satisfied in the circumstances, particularly the Claimant's extreme personal circumstances and the complete failure to take both into account those circumstances and mitigation of the sanction that the decision to dismiss was outside the range of reasonable responses."**

11. It added to that in the immediate following paragraph, under the heading "*Polkey*" (**Polkey v A E Dayton Services Ltd** [1987] IRLR 503), as follows:

> **"We find given our conclusions above that that [sic] there is no basis for a *Polkey* reduction. This was not simply a procedurally unfair dismissal; dismissal was not justified taking into**

account all the circumstances. In any event we are satisfied that had the mitigation been taken into account in accordance with the Respondent's stated disciplinary policy it would have reduced the sanction from dismissal to a final written warning."

12. There has been no appeal against the conclusion of the Tribunal in this paragraph in respect of **Polkey**, though its wording might illuminate something of the Tribunal's approach to the case in general.

The grounds of appeal

13. The Department raised six grounds of appeal. Three of those (1 to 3) related to the decision as to the range of reasonable responses. Grounds 4 to 6 related to the Tribunal's decision as to contribution. As to that the Tribunal had concluded, at paragraph 52, that it had to make its own findings in respect of the Claimant's conduct, that it became clear to it, through the evidence, that the Claimant had not realised that what she was doing was wrong at the time, although she had accepted that at the disciplinary hearing (and we might add, on the findings of fact at the appeal hearing) that was because after she had committed the actions she had gone through the relevant policy with an officer of the Department and had realised that she was in breach of it. The Tribunal found that:

"[…] at the time the Claimant accessed the records she believed that in doing so she was trying to protect her son, that was not itself a legitimate business reason. However, we accept that she also did it with the intention of reporting the individuals for fraud (as this was how she hoped to protect her son) and that a substantial part of her motive was to prevent fraud against the DWP. We are satisfied that her belief at the time was that accessing records to prevent fraud was a legitimate business reason […]."

14. It goes on to say that she accepted with hindsight that her mental health meant that the state of her mind might have been impaired and that she was not exercising clear judgment when she decided to access the records. It added that:

"[…] it is likely she did not realise at the time that she carried out the actions that it was a serious breach of the Data Security Policy […]."

15. All of that was summed up at paragraph 53, in which the Tribunal said:

> **"On that basis we are unable to find that her conduct was culpable or blameworthy which is the quality needed in order to support a finding of contribution and we therefore find that there was no contributory conduct in this case."**

Grounds 1 to 3

16. The first ground was that the Tribunal, though setting out at paragraph 43 an appropriate reminder that it was not for it to substitute its view for the employer, had gone on to do just that. Ms Bell reminded us that it has been recognised in cases such as **Crawford v Suffolk Mental Health Partnership NHS Trust** [2012] IRLR 402, EWCA Civ 138 (see in particular paragraph 28) that the mere fact that the Tribunal has set out an appropriate self-direction does not mean to say it has necessarily observed it, although it should not readily be assumed that it had failed to follow its own directions. Here she emphasised that the Tribunal had indicated it was substituting its own view by what it had said from paragraphs 7 to 9 when it had set out (plainly with considerable sympathy) an account of the social and medical background, lifted, she tells us, virtually word for word from the Claimant's own witness statement. The same was true in large part of what was said at paragraph 26. By the time one got to paragraph 50 the Tribunal was, by using the words it did, indicating what it would have decided in the circumstances rather than asking whether the employer did what was within the range of reasonable responses, as to which it has to be recognised that one employer may choose quite reasonably to dismiss in circumstances when another might quite reasonably choose not to do so.

17. She reminded us of the observations in **London Ambulance Service v Small** [2009] EWCA Civ 2200, IRLR 563, where Lord Justice Mummery recognised that it was all too easy, even for an experienced Employment Tribunal, to slip in to the substitution mindset. That is

what Ms Bell submitted had happened here. Although paragraph 52 related to contributory fault on the face of it, it set out a clear view by the Tribunal as to what it made of the Claimant's behaviour. That was a view which had not been expressed by her to her employer during the disciplinary hearing or the appeal, when she had accepted that she knew that accessing the records as she did had been wrong.

18. The express view at paragraph 33 (page 9 of the Tribunal Judgment) made comments about the Respondent which indicated an approach of substitution. There the Tribunal said:

> **"The Respondent put much emphasis on its belief that the Claimant would know exactly what was and was not acceptable under its own policy as to accessing relevant records and referred to training that she acknowledged she had received. However, there was absolutely no evidence before us of the content of the training being relied on. It was never put to the Claimant (either before us or in the investigation or disciplinary) that the training that she had received addressed specific policies in respect of accessing records, who counted as a member of the family, or whether forward referral was a legitimate use."**

19. Yet later, in its conclusions, the Tribunal had said (at paragraph 42) that the Claimant did not dispute that she had received the relevant training. The Employment Tribunal had failed, she maintained, adequately to separate the findings it made in respect of unfair dismissal when its role was to review the employer's reasons for dismissal and ask whether in the light of those it was or was not reasonable for the employer at that time to treat that reason as a sufficient reason for dismissing the employee. The test to be applied there is the test as set out in section 98(4) in words which are so familiar as not to bear repetition here. By contrast, where a Tribunal looks at a question of contributory fault it has to ask itself what the Claimant actually did or did not do, which fell within the words of section 102(3)(vi):

> **"Where the tribunal finds that the dismissal was to any extent caused or contributed to by action of the complainant [it should reduce the compensation]."**

There the Tribunal had to come to its own conclusions as to what the Claimant did or did not do. There is a risk that a Tribunal might not sufficiently separate the two. Here it did not do so.

20. She argued, as a second ground, that the Tribunal had failed to have any or sufficient regard to the Department's policies in relation to the misuse of information, which designated what the Claimant had admitted as being gross misconduct, for which the appropriate penalty would ordinarily be dismissal. She drew our attention to the case of **Wincanton PLC v Atkinson** UKEAT 0040/11/DM, a Judgment of 19 July 2011 by this Tribunal, presided over by Silber J. That was an example of the application of an approach which took into account the potential for damage as well as the actuality of harm which had resulted. She submitted that the principle was that an Employment Tribunal ought to consider potential as well as actual harm which might result from misconduct. The employer's polices classed browsing amongst personal records as serious or gross misconduct: as serious (in the case of an isolated incident) and gross (in the cause of a repeated incident).

21. When the Tribunal came to draw its conclusions it did not refer to the departmental policy, as contained in our bundle at pages 145 and 146, in particular paragraphs 7, 31 and 32 relating to access to data. It did not take sufficient account of the way in which the policy clearly said that a possible outcome for browsing customer data on more than one occasion would be dismissal. We observe that although it seems plain to us that that document contemplates dismissal as a possibility, and emphasises the seriousness of the offence, it nonetheless does indicate that there is room for mitigation. It is perhaps not as clearly drafted as it might have been.

22. She argued that, thirdly (ground 3), the conclusions were perverse and it was wrong to find that the decision-makers (Ms Gilbert and the appeal officer, Mr Gisbey) had failed to have regard to the mitigation relied upon by the Claimant. She drew our attention to paragraph 23 of

the decision. That set out as matter of fact that Ms Gilbert had completed a check list, tick box, pro forma, which asked, amongst other questions, whether the misconduct was minor, serious or gross and identified it as gross, asked whether the offender had offered any mitigation for the offence and recorded, "Relationship with ex-husband and family and the stress this has caused", and asked whether the mitigation had resulted in a reduced penalty, the answer being, "No".

23. The paragraph ended by saying that Ms Gilbert noted that the Claimant expressed regret for her actions, but otherwise no reference was made to any mitigating circumstances, and then this:

> **"There was also no reference in the dismissal letter of any consideration of mitigating circumstances."**

24. The dismissal letter, dated 24 March 2011, had on the second page a summary of the account which the Claimant gave. That included a note that the Claimant was expressing concern about her son, about stress and gave the reason why she said she had accessed the data. It was thus incorrect to say that there had been no reference to considerations of mitigating circumstances. Similarly, the Tribunal in dealing with the appeal before Mr Gisbey said (at paragraph 30) that he had found that Ms Gilbert did take the mitigation into account and commented at 31 that he found there was no basis for him to conclude that mitigation had been taken into account my Ms Gilbert:

> **"There was no note of this other than as identified above and nothing referred to in the decision letter."**

25. If that decision letter is the decision letter we have just referred to, there plainly was. Accordingly she submits that that, taken together with the plain importance to an organisation such as the Department of maintaining data confidentiality and the extreme seriousness with

which it must regard any breach, added to the fact that the Department had itself set out (albeit not absolutely clearly, but certainly sufficiently so) that such conduct was likely to result in dismissal, it could not be said without perversity that dismissal was outside the range of reasonable responses.

Contributory fault

26. The three grounds in respect of the finding of absence of contribution argued, first (ground 4), that the Tribunal erred in law in failing to apply the appropriate test for contributory fault, as set out in **Nelson v British Broadcasting Corporation** (No.2) [1980] ICR 110, secondly, that the Tribunal erred in law in holding that if the Claimant did not know what she was doing was wrong at the time of the alleged acts of misconduct there could be no reduction for contributory fault pursuant to section 123(6) of the **Employment Rights Act 1996** (ERA), and thirdly, (ground 6) reached a decision was perverse in that the Tribunal: (1) held that the Claimant did not know what she was doing was wrong at the time of the alleged acts of misconduct; and (2) held that there was no contributory conduct on the part of the Claimant for the purposes of section 123(6) of the ERA.

27. In argument before us she identified further that there was an incongruity between the Tribunal saying (as it did in paragraph 52) that the Claimant was not at fault, and that which it said at paragraph 51, where the Tribunal had expressed satisfaction that if the mitigation had been taken into account it would have reduced the sanction from dismissal to a final written warning, thereby on the one hand implying that there was absence of fault and on the other a sufficient presence of fault to justify not just a warning but a final written warning.

28. **Nelson** contains within it guidance, in the Judgment of Brandon LJ, as to the meaning to be given to the words "contributory fault" in the context of section 123. Having noted that there is no express reference in the statutory predecessor of that section to culpability or blameworthiness, he went on to use those two words. Thus, at page 121C-D he noted that:

> **"An award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct, if the conduct on his part relied on for this purpose was culpable or blameworthy."**

29. In a significant passage, E-H, he said this:

> **"It is necessary however to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind, but it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or if I may use the colloquialism 'bloody-minded'. It may also include action which, though not meriting any of those more pejorative epithets is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy, it must depend on the degree of unreasonableness involved."**

30. Ms Bell maintained that by focusing upon the words "culpable" and "blameworthy" the Tribunal here had omitted to ask whether the conduct might be described as perverse, foolish, bloody-minded, or just unreasonable in the sense in which Brandon LJ meant it. She maintained that had it done so it could have come to only one conclusion.

Discussion

31. We did not need to trouble Mrs Coulson to respond to the arguments put forward to us in respect of the conclusion that the dismissal here was unfair. We are not convinced that the Tribunal here substituted its own judgment. It was plainly sympathetic to the Claimant, but sympathy is not to be equated with substitution. It set itself the right test, though that does not insulate it from a proper finding of substituting its own judgment impermissibly. As was observed in **Crawford**, it should not readily be assumed that a Tribunal has failed to follow its

own directions. The Tribunal here structured its decision carefully. Before paragraph 43 it had considered the first three relevant questions upon a standard approach to assessing the fairness of a dismissal. Thus it had asked about the genuineness of belief, reasonable grounds for that, and whether there had been a reasonable investigation. It then turned to the question of the sanction. In doing so it expressly said at paragraph 45 what it regarded as being the behaviour which a reasonable employer would, or in this case would not, have adopted. The reasoning it gave was entirely appropriate. We cannot regard the conclusion was being perverse if it is a conclusion that the reasonable employer did not act appropriately in determining the sanction because it ruled out of proper consideration matters of mitigation which it ought to have taken into account, whatever the result of doing so might have been.

32. The evidence before the Tribunal had been sufficient to entitle the Tribunal to make the findings of fact it did, at paragraph 24, in respect of Ms Gilbert, and at paragraph 31, in respect of Mr Gisbey. We were shown the relevant passages in the notes of evidence. Mr Gisbey had said at page 18 of the Notes of Evidence, in answer to the Employment Judge:

> **"Unless the mental health was such that she did not know what she was doing then not an excuse. If I believed that was the case then that would be strong mitigation to reduce the penalty."**

33. So far as Ms Gilbert was concerned, at page 4, HR had told her that dismissal was the obvious sanction:

> **"[…] unless I could find some mitigation that could lower it to a final written warning. That mitigation would have to such that the person was sufficiently mentally ill so as to not know what they were doing, but normally dismissal would be the expectation."**

34. Those passages are capable, particularly where a Tribunal has seen and evaluated the witnesses and considered the context in which the evidence is given, of supporting the conclusions of fact to which the Tribunal came, which cannot individually be said to be

perverse, that the dismissing officer and the appeals officer both thought here that unless the mitigation amounted to the Claimant not knowing what she was doing at the time she committed the acts, it could not affect the sanction of dismissal. It was open to the Tribunal to conclude that the mitigation, though reported in the documentation and referred to, was thus not considered in any real sense except to ask if it amounted to meeting that hurdle. It did not and so it was discarded. It is not considering mitigation to ignore its relevance in any other context.

35. Secondly, we see no error of law in the Tribunal's approach to the treatment of the medical report from the GP which was before Mr Gisbey, though it was not before Ms Gilbert. In effect the Tribunal was deciding that an employer in these circumstances could not reach the decision it did reasonably by discarding mitigation rather than considering it, and by failing to ask further questions of the medical state of the Claimant at the time of the events.

36. So expressed, the conclusion as to reasonable response has something of the flavour of procedural fault and failure about it rather than necessarily meaning that an employer would be bound to conclude in those circumstances that the Claimant should not have been dismissed. The Tribunal went to that further stage, but it did not in doing so, in our view, substitute its own view. It did so only after it had reached the view that the approach taken by the Respondent was unfair. We do not see that its mistake in reading the dismissal letter and thinking that it said nothing about mitigation was of relevance. What mattered was not whether there was mitigation and whether it was referred to, but the more subtle factual question of whether it was actively considered.

37. The second ground is something which emphasises the importance of the policies of the Respondent. It will almost inevitably be the case that any conduct which is labelled as gross in

an employer's disciplinary policy will be something which has serious effects and is considered by the employer to have serious consequences potentially for its business. That does not mean to say that a dismissal for that reason cannot be outside of the band of reasonable responses.

38. The Tribunal did pay regard to the policies. It did not set them all out, but there were a number of policies covering the same area. A Tribunal does not have to dot every "i" nor cross every "t" in giving judgement. Although Ms Bell complained that it did not set out *seriatim* the arguments which had been put before it by counsel for the Department, it did not have to do so. It had to say why it reached the conclusion it did and what were the relevant facts, and that it did.

39. The decision made was, as we have indicated, not perverse. We agree entirely with the observations made by the former President of the Employment Appeal Tribunal, now Underhill LJ, on the sift in this case where he commented that he saw nothing inherently wrong in the Tribunal's Judgment and that it was not reasonable to apply the sanction of dismissal on the facts of this case, adding that it was good to see a Tribunal which was not emasculated by the range of reasonable responses test (a comment we would fully endorse), and that he saw no obvious signs of substitution.

Contributory fault

40. As did the former President, so do we take a rather different view in respect of the conclusions the Tribunal reached on contribution. Here, essentially, three points were developed orally by Ms Bell. First, that there was an incongruity, as we have described it, between the Tribunal's conclusion in paragraph 52 and its view as to what it would have done or an employer would have reasonably done expressed at paragraph 51.

41. Secondly, she argued that the Tribunal had not considered as it should have done whether someone in the position of the Claimant ought to have known that she should not have accessed the records for the purposes which she did. She had worked for the Department for 20 years. Given the policies of the Department, there would be no reason to think that she should not have known fully well the importance of security. She did not ask for authority to investigate the records. She did not report the fraud which she suspected. She, therefore, might be said to have been guilty of conduct which had contributed to her dismissal.

42. The third is a yet more subtle point. The Tribunal did not express its view as to what it thought of the Claimant's understanding until it gave its Judgment. We are told it did not put that view to the parties and invite their submissions. That has this consequence. The Claimant here had said at the outset to Mr Pole that she did not know that what she was doing was wrong but when she came to the disciplinary hearing and to the appeal hearing she accepted she fully did. Indeed, there was no hint in her witness statement that she denied actually knowing what she did was wrong. That plainly emerged during the course of the hearing.

43. Accordingly, the employer could not be blamed for approaching discipline and sanction upon the footing that she accepted that she had knowingly and deliberately done wrong. That, we can see, was therefore entirely likely to have had an effect in causing or contributing to her dismissal. It was conduct which was not revealing. Arguably, it was conduct upon which the employer could rely in arguing for contributory fault, but the employer here did not have that chance because the employer did not know that the findings were going to be made as they were by the Tribunal.

44. Finally, we regard with such scepticism the viewpoint that an employee working for this length of time in these surroundings, who was not mentally ill such as to be unable to perform her job (though plainly had medical problems) was not someone whose behaviour would not fall within the class identified by Brandon LJ. The decision, for the reasons we have given in respect of contributory conduct, cannot, as we see it, stand. In particular, the lay members would wish to emphasise that it is rarely, if ever, likely to be an acceptable reason for misconduct not being culpable at all or blameworthy that the employee, who has had appropriate training and time on the job, is able to show subjectively that he or she did not know what she was doing was against the employer's policies.

45. Accordingly, in our view, the appeal in respect of contributory fault must be allowed. That has this consequence: we were invited tentatively by Ms Bell to assess contributory fault for ourselves. We do not think that we can do so. We have not heard the dismissing officers to whose decision the fault may have been contributory. We have not heard the Claimant being cross-examined. We decline to make such a finding, which is essentially for a primary fact-finding Tribunal.

46. We do not in this case remit the case to the same Tribunal. We have in mind the matters set out in paragraph 46 in the case of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. In particular here we note that the sum of money ultimately awarded to the Claimant was very considerable. It is not disproportionate for there to be a fresh hearing purely in respect of contributory fault upon the footing that there has been an unfair dismissal because the employer did not take into account the potential effect of mitigation and did not explore the medical position properly.

47. Secondly, we think that this Tribunal has so expressed itself as potentially to be seen by the impartial observer as being so favourable toward the Claimant's position that we do not think it proper that the case should be remitted to the ET for rehearing. Its decision in respect of contributory fault is, we consider, considerably flawed.

The preliminary hearing

48. Apart from the appeal, we had to consider a preliminary hearing on a proposed appeal in respect of remedy. Again, we can take this appeal fairly shortly, since we did not need to call upon Ms Coulson in the event to respond to it, although it was an inter partes preliminary hearing.

49. The Tribunal's decision on remedy was split into two parts. The first decision, made on 19 September 2012, dealt with two matters of principle which are subject to appeal. It permitted the Claimant to claim her loss of income such as she would have received from the Department up until 22 June 2012, less such amounts as she had received in an alternative job which she had taken up after dismissal as a foster carer.

50. Secondly, it is accepted that the Claimant was entitled to claim a pension loss which would extend to compensation for the loss she would have received if she had remained in the employment of the Department until her retirement, which in her case would be at the age of 68. The Claimant is now 43 years of age and was 42 at the date of the hearing. She had decided to retrain to become a foster carer, and had her first placement in October 2011. Subsequently, she had a second placement from 22 June 2012. At that stage, she obtained more income per week from being a foster parent than she would have if she had remained in the employment of the Department, subject only to the financial cost of pension.

51. The Tribunal found that the Claimant did intend to work until retirement age and thought that she may well have done so, but at paragraph 20:

> **"[…] it may not have been possible for her to do so depending on her health, the vagaries of everyday life, risk, mortality and so forth. Some reduction is likely to be necessary to reflect that uncertainty. This will be a matter for further argument on the next occasion."**

52. As to pension, it was satisfied that the Claimant had lost a civil service "classic" pension. It was no longer possible for her to replace that with a comparable pension.

53. Mitigation of loss was raised. The Tribunal found as to that, paragraph 18:

> **"The Tribunal found that it was reasonable for the Claimant to become a foster carer in October 2011 and we were satisfied that once she had embarked on that route it was reasonable to continue in that role until the day of this Hearing, being 30 July. We find that she has reasonably mitigated her loss to date. She does not seek any future loss, save for the pension loss, beyond 22 June 2012."**

54. Paragraph 19:

> **"We are satisfied that there is no pension attached to the role of Foster Carer. We find that once the Claimant had committed to fostering it is a reasonable course for her to see that through until the child who was first placed with her is 18. We do not find that the Claimant has failed in her duty to mitigate her loss."**

The proposed appeal

55. The Department again raises six grounds. They fit under two heads: one is causation; the second is a failure to mitigate. Ms Bell argues that in applying section 123 of the ERA the Tribunal has to have regard to the loss sustained by the complainant "in consequence of the dismissal, insofar as that loss is attributable to action taken by the employer". That involves the question of whether the loss can truly be said to be caused by the dismissal. She takes us to Lord Johnson's expression of the principles in **Simrad Ltd v Scott** [1997] IRLR 148 at paragraph 6:

> **"The process is a three-stage one, requiring, initially factual quantification of the losses claimed; secondly, but equally importantly, the extent to which any or all of those losses are attributable to the dismissal or action taken by the employer, which is usually the same thing, the word 'attributable' implying that there has to be a direct and natural link between the losses claimed and the conduct of the employer in dismissing, on the basis that the dismissal is the causa causans of the particular loss and not that it simply arises by reason of a causa sine qua non, that is but for the dismissal the loss would not have arisen. If that is the only connection, the loss is too remote."**

56. He went on to consider the third part, the phrase "just and equitable", which required a Tribunal to look at the conclusion drawn from the first two questions and determine whether, in all the circumstances, it remained reasonable to make the relevant award, although what had to be emphasised was that what was to be considered under the third test already had to have passed the second.

57. She argues that the Tribunal did not properly consider the issue of causation. It was rare for there to be a full lifetime loss, as there would be here in the case of the pension. The Tribunal had not given full reasons in responding to the submissions which she made, which are set out at paragraph 17, in saying, at paragraph 21:

> **"Addressing, as we do, the test in Section 123 of the Employment Rights Act 1996, we find that the ongoing loss of pension is attributable to the action of the Respondent in dismissing the Claimant, and we are also satisfied that it is just and equitable that she should be compensated for that loss, although the amount is yet to be quantified."**

58. No losses, she submits, could be regarded properly as attributable after October 2011 when she began work as a foster carer. She identifies five reasons for that in her skeleton argument at paragraph 14. Secondly, she argues that the Tribunal wrongly conflated the issue of causation of loss and mitigation when determining the appropriate compensatory award for the purposes of section 123 and that finding for the Claimant's loss of earnings or pension was attributable to the action of the Respondent in dismissing the Claimant was perverse.

59. As to those, we say this: when a person is dismissed, a consequence is bound to be that they will lose the earnings that they have had from the job from which they are dismissed. Accordingly, subject only to questions of notice period or lump-sum payments, the loss suffered by the Claimant will be the loss of income for as long as she would have held the job from which she was dismissed. If, in such a situation, a Claimant obtains employment at the same or higher wage, then usually, though not necessarily always, any further loss which she claims as, for instance, if the second job were surrendered by her or lost or if she were found guilty of misconduct in that second job, would be regarded as something entirely independent of and not caused by the original dismissal.

60. There may be occasions when even if there has been an intervening job, the circumstances may be such that the loss can be said to continue. In those cases, a Tribunal must carefully explain the reasons why it has regarded the loss as continuing despite the intermediate position at a higher rate of pay. That reasoning cannot, however, apply where someone takes a job at a lower rate of pay and does not act unreasonably in doing so. Then, the headline loss is that suffered by losing her former employment. It is mitigated to the extent of her new salary but not completely extinguished. The partial loss continues.

61. It will be for a Tribunal to assess, having regard to its knowledge of employment conditions, in particular in the locality which the Claimant is based, how long that may continue. It is not inconceivable, though much may depend upon the age and the nature of the employment, that it would go on for a lifetime, though that would be a less usual case than that of a loss which is extinguished relatively quickly.

62. Similar considerations apply in respect of pension. If pension is treated as a separate head of loss, then again the headline loss is that of the pension, which the Claimant prospectively would have had arising from her service in the employment from which she was dismissed less the amount she will have. To be offset against that would be such pension earnings as she might reasonably be expected to achieve. That is a matter for assessment in anticipation as best the Tribunal can.

63. Looking at the uncertainties and the risks that apply as to the future when assessing what is a future loss, a Tribunal will be assessing chances and not probabilities. But there can be no doubt that the starting point established by the fact of dismissal is the loss of a pension. Historically, so many jobs may have been pensionable that to obtain another similar job within a short period of time would entirely extinguish the pension loss arising from loss of the original post. Economic conditions are such that that is less likely nowadays. The assessment calls for a judgment from the Tribunal based upon such evidence as is available to it. It must not speculate, but forecasting is not easy and often has to be achieved on slim evidential foundations. Here, it is not, as we see it, an error of law for the Tribunal to decide as a matter of assessment what was the pension loss which the Claimant suffered, and they were entitled to hold that it was attributable to her dismissal and went on beyond the time that she became a foster parent in October 2011: the foster parent role was not pensionable.

64. It dealt with the possibilities that the Claimant would obtain a commensurate pension scheme at paragraph 20. The classic pension scheme was closed to new entrants some years ago and is no longer available. The Tribunal did not go on to consider what pension earnings might possibly arise which would be offset against the pension loss. It did not exclude such an

offset. It expressly said that the quantification of the pension loss was to be dealt with at a subsequent hearing. Presumably offset is to be decided then.

65. The decision which we are required to address is the decision in principle whether the pension loss would be assessed on the basis that the Claimant would have remained (subject to the chances and vagaries of life, as the Tribunal put it) until retirement age to be in receipt of the classic pension. This finding was, we consider, open to the Tribunal.

66. It is or was open to the Respondent in assessing the loss at a later hearing, no doubt in accordance with the terms of this Tribunal's Judgment, to lead evidence which might allow the Tribunal in assessing the pension loss to offset any pension, which there was a chance the Claimant might have had, given the fact that she had some 25 years yet until retirement and the chances that she might not remain a foster carer throughout that period of time. But as a matter of law we can see no fault in the Tribunal's attribution of the loss of earnings until 2012 and the loss of pension throughout being attributable to the dismissal.

67. The second point was mitigation. Here, it was accepted that, in accordance with **Wilding v British Telecommunications PLC** [2002] EWCA Civ 349, the burden of proof is on the Department. It is for the Respondent, the employer, to show that a Claimant has acted unreasonably in failing to mitigate. It is not for the Claimant to show that what she did was or was not reasonable, although a positive finding to that effect will answer the question of the burden of proof.

68. We are told frankly by Ms Bell that no evidence was put forward by the Department showing what other alternative posts the Claimant might have had such that she was

unreasonable to begin to work as a foster carer. The reason for that was that there had been an application made on 30 July seeking to put off the hearing so that there might be such evidence. That application was refused. There has been no appeal against that refusal.

69. Accordingly, it seems to us that it cannot be said that it was perverse of the Tribunal to regard the Claimant's actions as failing to mitigate the loss. Indeed, we would point out she has succeeded not only in mitigating the loss but in extinguishing it, albeit it took a year and a half or so to do so.

70. The argument became that, because as recorded in paragraph 17, the Claimant accepted in cross-examination that she would now, having had a finding of unfair dismissal, be able to obtain employment in the civil service and a comparable pension, and it was clear that she had not made any effort to attempt to try and find any other work that would pay a wage and a comparable pension, she had failed to mitigate. The Tribunal, however, felt that it was not unreasonable for her, having taken on the commitment as a foster carer, to seek to honour it throughout its natural course until the foster child was 18. That seems to us a conclusion open to a Tribunal. As Ms Bell frankly accepted in the course of argument, it would be a sad day if foster parents too readily abandoned the responsibilities to the children in their care which they had taken on.

71. Accordingly, we do not see any force here in the grounds which are raised in respect of the remedy hearing. The Tribunal was entitled to hold the losses attributable. It was entitled to hold that there had been reasonable mitigation. Ground 5, dealing with an alleged error of law in that the Tribunal failed to have any sufficient regard to aspects of the Claimant's evidence,

seeks to argue evidential matters which were sufficiently determined by the Tribunal. In those circumstances, we are obliged to reject, at this stage, the appeal in respect of remedy.

Overall conclusion

72. The overall conclusion of these two linked appeals is that the decision as to unfair dismissals stands, save that the question of contributory fault is remitted for hearing completely afresh before a new Tribunal. It is not open to the parties to argue **Polkey**, since there has been no appeal on that. It is not open for them to argue the unfairness of the dismissal. It is open to argue any aspect relating to contributory fault. The issues of principle determined at the first of the remedy hearings give rise to no arguable ground of appeal. Accordingly, such unappealable findings as to overall quantum as were reached by the Tribunal must be accepted, subject only to a deduction, if any, upon which the Tribunal determines, having had regard to contribution.