Appeal No. UKEAT/0160/16/JOJ

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 March 2017

**Before**

**HER HONOUR JUDGE EADY QC**

**BARONESS DRAKE OF SHENE**

**MISS S M WILSON CBE**

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MR J WITTS — APPELLANT

(1) WYRE FOREST SCHOOL
(2) WORCESTERSHIRE COUNTY COUNCIL — RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

MS SUSAN CHAN
(of Counsel)
Bar Pro Bono Scheme

For the Respondents

MR DAVID A ELLIOTT
(Solicitor)
Worcestershire County Council
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**SUMMARY**

**UNFAIR DISMISSAL - Reasonableness of dismissal**

*Unfair dismissal - fairness of dismissal*

The Appellant (the Claimant below) had been a Teaching Assistant for over 20 years, some 19½ of which were at the First Respondent School - a state school for pupils with special needs - where he had an unblemished disciplinary record. On 12 March 2015, there had been an incident at the School involving a pupil, VB; initially the Appellant had intervened to pull VB away from a door into the School - conduct which the Respondents criticised but saw as warranting no more than a verbal warning - but as he walked away, VB attacked the Appellant from behind, causing the Appellant to suffer various injuries. As the Appellant responded to the attack, VB ended on the ground with what was described by others as "a thud". After a disciplinary hearing, the Respondents determined this amounted to gross misconduct and the Appellant should be summarily dismissed. The ET rejected the Appellant's complaint of unfair dismissal, holding he had been dismissed because of his ill-judged intervention with VB, contrary to the Respondents' training (which encouraged de-escalation), which had caused VB to land on the ground; the Respondents had a reasonable belief in the misconduct and had carried out a reasonable investigation and process. Although the Appellant had asked to see various documents, he failed to respond to the Respondents' request for better explanation as to what he was seeking, failed to ask to see the documentation made available at the disciplinary hearing and made no complaint about not seeing this in his subsequent appeal. The dismissal was for a reason relating to the Appellant's conduct and was fair in all the circumstances.

The Appellant appealed on two bases: (1) the ET failed to consider whether - as the Respondents had failed to consider the question of self-defence - his dismissal had been unfair; and (2) it erred in finding the investigation was fair when the Appellant had not been provided

with VB's personal handling plan ("PHP"), which supported his contention that the staffing ratio had been inadequate.

Held: *allowing the appeal in part*

The ET's reasoning had wrongly characterised the Appellant's conduct as a physical "intervention" both in the first part of the incident - his admitted intervention in pulling VB down the ramp - and at the end - when in fact the Appellant was responding to an attack from behind. That was not how the disciplinary panel had described the situation, allowing that the latter part of the incident had involved "physical action" on the Appellant's part, not a proactive intervention as such. Recognising the different nature of the Appellant's conduct at the start of the incident and at the later stage was a relevant factor given that the Respondents had said he would not have been dismissed simply for the initial intervention - that was not the reason for his dismissal. In the circumstances, the ET had needed to assess whether it was fair to dismiss the Appellant for his physical action in responding to VB's attack on him from behind. In assessing that question, an employer might reasonably consider that the context - including the Appellant's earlier ill-judged intervention - was a relevant factor (although here the Respondents had taken the view that the earlier intervention itself would not have led to the dismissal) but the ET would also need to ask whether it was within the range of reasonable responses to consider this physical response an act of gross misconduct given that the employee was himself being attacked from behind at the time, which raised the issues of self-defence relied on by the Appellant. The appeal would be allowed on this basis.

As for the second basis of challenge, however, the ET had not lost sight of the issues raised in respect of the PHP but had expressly dismissed the point being made, both as a matter of substance and procedure. It had, moreover, noted that the Appellant had the opportunity to raise this as a matter on appeal but chose not to do so: if the Respondents had been at fault at the disciplinary hearing stage, the appeal allowed for this to be rectified but the Appellant did

not pursue it as a point and the Respondents were reasonably entitled to take the view that it was not something that needed to be revisited. The second ground of appeal was dismissed.

**HER HONOUR JUDGE EADY QC**

## Introduction

1. This is the unanimous Judgment of the court, in which we refer to the parties as the Claimant and the Respondents, as below. We are concerned with the Claimant's appeal from the Judgment of the Birmingham Employment Tribunal (Employment Judge Findlay sitting alone, on 3 and 4 February 2016; "the ET"), sent to the parties on 29 February 2016. The Claimant appeared in person before the ET but has had the benefit of representation by Ms Susan Chan of counsel pro bono on this appeal; Ms Chan having first represented the Claimant under ELAAS at the earlier Appellant-only Preliminary Hearing on 14 September 2016. The Respondents have been represented by their solicitor, Mr Elliott, throughout.

2. By its Judgment the ET dismissed the Claimant's claim of unfair dismissal. At the earlier Appellant-only Preliminary Hearing HHJ David Richardson permitted the appeal to proceed on two grounds: (1) whether the ET erred in law in failing to properly consider whether the Claimant had been acting in self-defence in the second part of the incident in issue; and (2) whether the ET erred in failing to consider whether a reasonable investigation had been carried out by the Respondent with particular reference to the issue whether pupil VB required two-to-one supervision according to his personal handling plan ("PHP").

## The Relevant Background

3. The Claimant was employed by the Respondents as a Teaching Assistant from January 1996 until 2 July 2015. Prior to his dismissal he had had over 20 years' experience as a Teaching Assistant - some 19½ at the First Respondent School - and he had no prior

disciplinary warnings. The First Respondent is a maintained special school in Worcestershire that has a very high staff-to-pupil ratio due to the nature of its pupils' needs.

4. On 12 March 2015, the Claimant had been asked at short notice to assist with lunchtime playground supervision. Almost immediately upon entering the playground the Claimant became aware of the behaviour of pupil VB; a pupil who was then aged 11 and who had been diagnosed with Pathological Demand Avoidance ("PDA") syndrome, which is considered to be part of the autism spectrum. It was common ground that VB's behaviour was at the extreme end for pupils at the School and although the Claimant had previously been considered as a potential support worker for VB that plan had been abandoned after the Claimant had spent a day with him that had culminated in VB attacking the Claimant, causing him injury. The Claimant had also had some earlier involvement in a rota organised to supervise VB's behaviour at lunchtimes. He was therefore aware of the general challenges arising in dealing with VB, albeit he had not seen the PHP relevant to VB as at March 2015. Had he done so, he would have seen it had been suggested that, at least in certain circumstances, there should be a two-to-one staffing ratio in respect of VB.

5. In any event, on 12 March 2015 (as the ET observed at paragraph 22), it appears that a two-to-one staffing ratio was not being implemented in respect of VB and an incident occurred between the Claimant and VB, described by the ET as follows:

> **"23. On 12 March, an incident involving the claimant and VB, which lasted around 10 minutes, evolved in one of the playgrounds during the lunch break. The claimant says it took less than 10 minutes, some witnesses suggest it was longer. The incident included the claimant forcibly bringing VB down a ramp, located next to an entrance where the child was making it difficult for staff to enter or exit the School building, and had been climbing on some railings. It concluded with VB attacking the claimant and smashing his glasses, with the claimant somehow becoming involved in a manoeuvre whereby VB fell to the ground with his legs in the air. A witness describes the child as landing on the ground with "quite a thud". VB then "escaped", and went on to attack another pupil, with whom he had been involved in a dispute the previous day."**

6. Assistance was called and statements taken, and later on that day the Claimant had to attend A&E due to injuries he had sustained. VB was excluded for three days due to the incident, and his mother complained, asking if he had hit his head, as he was saying he had a headache and dizziness. For his part, the Claimant disputed that VB had banged his head during the incident between them, and it was common ground before the ET that the Respondents had no way of knowing whether VB was actually dizzy or, if he was, how that had occurred. Further statements were taken from the witnesses to the incident, save for VB (who remained too agitated to provide an account), and all were present at the eventual disciplinary hearing. Meanwhile, the Claimant, who candidly accepted he could not say exactly what had happened at the end of the incident or how VB had ended up on the ground, was suspended on the basis that he had used excessive force when he restrained VB.

7. An investigation hearing took place on 13 May 2015, there having been a delay due to the Respondents also having to follow statutory procedures in relation to incidents of this nature. The Claimant explained that he did not know VB very well and had not been told that on previous occasions he was taken into the premises when he had wanted to go in. The Respondents decided the allegation of using excessive force was sufficiently serious to warrant proceeding to a disciplinary hearing, on the following charges:

> **"● You intervened in a situation with a pupil (VB) of [the First Respondent] in which you used excessive force,**
>
> **● You may have caused harm to our pupil by using inappropriate physical intervention, and**
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> **● Your action was not in accordance with the School Procedures or Team Teach Training."**

8. "Team Teach" refers to the Respondents' preferred training provider, which is used to support the School's behaviour code, which, in turn, provides guidance for the use of physical intervention with an emphasis on the use of verbal and non-verbal de-escalation strategies

before positive handling strategies are used. Team Teach's methodology does include particular holds where physical intervention is necessary but is largely focused on de-escalation and the avoidance of physical intervention. The Claimant had been trained to an advanced level on these methodologies and had attended Team Teach refresher training as recently as February 2015, after an earlier incident that month when the Claimant had used a physical intervention on a 6 year old child, which had caused other staff to raise concerns. That earlier incident was not taken into account by the disciplinary panel, but the Claimant's training was considered relevant, not least as on 12 March 2015 the Claimant had said to the Head Teacher, "*I'm not using Team Teach, but it is my right to use reasonable force*". That was apparently a reference to the Claimant's belief that, in the latter part of the incident, he was acting in self-defence.

9. The disciplinary hearing itself lasted some five hours, and the panel, chaired by a Mrs Tildesley, the Chair of Governors, took over an hour to reach its decision. It concluded that the Claimant had physically intervened with VB although VB had not been causing harm to persons or property at the time and other staff had been watching VB and had told the Claimant they did not need his help. Moreover, once the Claimant had intervened, he had not used Team Teach principles but had used unnecessary physical action. The panel considered it could not have confidence in the Claimant, believing that, should a similar situation arise, the Claimant would behave in the same way again. The Claimant had failed to express any understanding that his actions might be wrong, and that had destroyed the relationship of mutual trust; this, together with the points already made, amounted to gross misconduct and the Claimant should be summarily dismissed. In evidence to the ET, Mrs Tildesley explained that the disciplinary considered the Claimant had crossed the line:

> **"62. … at the point that he (somehow) caused VB to land on the ground with some force, so that the 11 year old pupil landed with his legs in the air. …"**

A The ET asked whether the Claimant's admitted action in taking hold of VB and forcibly leading him down the ramp close to the start of the incident would, of itself, have merited disciplinary action. The response was that it would not; it would only have merited a verbal warning.

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10. The Claimant appealed against the decision but was unsuccessful.

**The ET's Decision and Reasoning**

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11. The ET was satisfied that the reason for the Respondents' dismissal of the Claimant was that it had a genuine belief in his misconduct relating to the incident involving VB on 12 March 2015, specifically:

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> **"72. … he intervened in a situation involving VB when he need not have done so, and did so in such a manner that it resulted in VB ending up hitting the ground with a thud with his legs in the air. …"**

12. That was a potentially fair reason for the purposes of section 98(2) of the **Employment Rights Act 1996** ("ERA"); further, it was a reason that fell within the scope of the disciplinary charges that had formed the basis for the Claimant's disciplinary hearing, and the Claimant had understood the nature of the case he had to address. Whilst the Claimant and his trade union representative had asked for more documentation prior to the disciplinary hearing, he had not taken the Respondents up on their offer to consider a more detailed request, and the issue had been taken little further. Specifically, the ET concluded that the Claimant and his union representative had probably discussed asking for the documents before the disciplinary hearing but, for whatever reason, had not pursued a request in the hearing and the panel had not acted unfairly in not itself ensuring that the Claimant looked at the documents made available for him. Moreover, the requests made had been disproportionate, given the issues the panel was concerned to determine. As for VB's PHP, the ET recorded that the disciplinary panel was aware that the Claimant was critical of the staffing levels that lunchtime but it also had evidence

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from others that the staffing levels had been as they should be. Being satisfied as to the fairness of the procedure followed, the ET considered whether there had been a fair investigation and a reasonable basis for the Respondents' belief and was satisfied in both respects. Moreover, given the circumstances of the case, which included the Claimant's recent refresher training, dismissal had been within the range of reasonable responses. The claim was dismissed.

**Submissions**

*The Claimant's Case*

13. The Claimant contends that the ET erred in its treatment of the crucial issue of self-defence by conflating two distinct parts of the incident on 12 March 2015. The first was the Claimant's intervention when he blocked VB from getting into the School, which had involved the Claimant pulling VB down the ramp; at that point the Claimant was not acting in self-defence. The second part of the incident saw the Claimant walking away from VB following which VB followed him and started punching, biting and kicking the Claimant. It was as the Claimant sought to protect himself that VB lost his balance and landed on his back on the floor. The two parts of the incident were separated in time and location, and it was the Claimant's case that he had acted in self-defence in the second part of the incident. Both the Respondents and the ET had, however, conflated the two parts of the incident and thus focused on whether his initial intervention had been reasonable rather than whether the force he had used to defend himself when attacked by VB had been reasonable and proportionate.

14. Specifically, the Respondents had judged the Claimant's actions in the latter part of the incident only by reference to whether he had been justified in initially intervening, something that could be seen in the disciplinary panel's reasoning. The Claimant's conduct in the latter part of the incident could not fairly be described as intervening; he was responding to a serious

physical attack. The disciplinary panel ought to have asked whether the Claimant was entitled to take any physical action to defend himself from attack and, if so, whether his response had been proportionate in the light of the threat posed to him. The ET had repeated the Respondents' error in this regard, which could be seen from the criticism of the Claimant for:

> **"97. … avoidable physical intervention … [which] culminated in VB being brought to the ground with excessive force …"**

15. In fact, the second part of the incident had not involved the Claimant in physical intervention; he had been subject to attack whilst walking away from VB with his back to him. Whilst on the ramp there may have been scope for de-escalating or diversion tactics, that was not so when he was walking away. That was fatal to the ET's determination of the question whether the decision to dismiss the Claimant was fair for section 98(4) purposes.

16. As for the second ground of appeal, the Claimant submits the ET erred in failing to consider whether a reasonable investigation had been carried out with specific reference to VB's PHP, which was only produced at the ET hearing. That document showed VB should have been supervised by two staff; that was crucial, because the disciplinary panel was under the incorrect impression that staffing levels had been as they should have been (see paragraph 93 of the ET's Reasons). An employer's obligation to conduct a reasonable investigation (see **BHS Ltd v Burchell** [1978] IRLR 379 EAT) must include a duty to collect potentially relevant material, especially if requested by the accused. In the present case, this gave rise to a material procedural unfairness that might have impacted on the disciplinary panel's decision. Although some documentation was brought to the hearing, it was unclear that the Claimant was to be afforded access to those documents as opposed to being offered the opportunity to have some parts read out to him. In any event, the Claimant had been unable to see the PHP, and the disciplinary panel itself could not have had regard to it; had it done so, it would have been

aware that staffing levels were too low. In turn, the ET erred in failing to take into account the Respondents' withholding of the PHP from the Claimant when determining whether a reasonable investigation had been carried out for **Burchell** purposes, something that was all the more important given that this was a potentially career-ending dismissal (see **Crawford v Suffolk Mental Health Partnership NHS Trust** [2012] IRLR 402 CA).

*The Respondents' Case*

17. The ET's reasoning had to be viewed as a whole, just as the ET had considered the evidence in the round. Adopting that approach, the EAT must be careful not to interfere with what was a permissible assessment by the ET as the first-instance Tribunal of fact (see **BT plc v Sheridan** [1990] IRLR 27 CA). Here, having heard all of the evidence, the ET had accepted that the disciplinary panel saw the incident as a whole, feeling that the Claimant should not have intervened in the way that he had, which had led to a physical conflict. Whilst the Claimant was attacked by VB at the end, he had been involved in an inappropriate and avoidable physical intervention, and that had ultimately led to VB landing on the ground with a thud; the overall incident had taken only a matter of some seven to ten minutes, and the second part of the incident had arisen from the first. The ET had properly approached this as a dismissal arising from the Respondents having - reasonably - seen this as all one incident. At paragraph 72 the ET had set out its acceptance of the Respondents' evidence as to the reason for the dismissal, starting with the inappropriate intervention by the Claimant and ending with an inappropriate and excessive use of force. The ET accepted that the panel had evidence before it on which it could take the view that the pupil fell to the ground with a thud and that was not accidental. The appeal gave rise to no real point of law but was, in truth, an attempt to overturn the ET's legitimate findings of fact and its permissible assessment on those facts.

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18. As for the second ground of appeal, it was important to note that VB's PHP did not say he should be supervised by two workers at all times but that, if he were to have lunch on his own, two-to-one support was needed and two-to-one support was needed to prevent anxieties arising. None of that was of such a nature to render the Respondents' investigation into the issue unreasonable. As for the disclosure of the PHP to the Claimant, his union representative had been offered the opportunity to clarify what information was wanted, but no response had been made. The only answer from the Claimant's side was to ask that certain documents be available at the hearing and the ET accepted the Respondents' evidence that those documents had been brought to the hearing but neither the Claimant nor his representative had referred to them. In any event, the evidence before the ET was such as to support the disciplinary panel's view that the staffing at the time of the incident had been adequate: at least three members of staff had been observing VB. It was apparent that the panel had considered the staffing issue and had at least skim-read the PHP itself. The investigation on this point was reasonable.

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**The Relevant Legal Principles**

19. The starting point is section 98 **ERA**, which provides, relevantly, as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, 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 holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it -**
>
> **…**
>
> **(b) relates to the conduct of the employee,**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**

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**(b) shall be determined in accordance with equity and the substantial merits of the case."**

20. As is well known, a reason for the dismissal of an employee is a set of facts known to an employer, or set of beliefs held by it, that cause it to dismiss the employee (see per Cairns LJ in **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 CA). As to whether the dismissal is fair for the purposes of section 98(4), that is a question to be determined having regard to the reason shown by the employer; that is, the set of facts or beliefs the ET has found constitute the reason for the dismissal. Applying section 98(4) then requires the ET, having regard to that reason, not to itself stand in the shoes of the employer but to test the employer's decisions at each stage of the process against the range of reasonable responses open to the reasonable employer in the particular circumstances of the case. In a conduct case the ET will be assisted by approaching its task with regard to the well known guidance laid down in **Burchell**. We remind ourselves that Parliament has made clear that it is for the ET to make the relevant assessment under section 98(4); it is not the role of the EAT to intervene in that assessment unless the ET thereby erred in law. Specifically, it is not for us to effectively substitute what might be our view of the evidence for that taken by the ET (see **Sheridan**).

**Discussion and Conclusions**

21. The force of the first ground of appeal is that the incident that led to the Claimant's dismissal can be seen in two parts. First, there was the Claimant's action in taking hold of VB and forcibly leading him down the ramp. That was the start of the incident, and it is fair to say that it was at the forefront of the criticism of the Claimant: his intervention was seen as unnecessary; others were observing VB and were engaged in tactical non-intervention; the Claimant's involvement was seen as an error of judgement and as the catalyst for what took place next. Of itself, however, that first part of the incident would not have caused the

Respondents to dismiss the Claimant; in answer to the ET, Mrs Tildesley said this would only have merited a verbal warning. The second part of the incident involved VB attacking the Claimant. It was during this part of the altercation that VB landed on the ground. For the Claimant, however, it is observed that his response to VB at this stage would have to be seen in context, as a response to a sudden physical attack; had there been no first part to the incident, the Respondents would obviously have had to have seen the second as self-defence. It is the Claimant's case that the Respondents and the ET failed to properly consider that issue. For the Respondents, however, it is contended that this is simply an attempt to persuade the EAT to adopt a different view of the facts to that permissibly taken by the ET, the ET plainly testing the fairness of the dismissal based upon an evaluation of the incident taken as a whole.

22. We bear in mind that an ET's Judgment must be taken overall and viewed as a whole. As well as the passages from the Reasons we have already cited, we note the ET's recitation of the evidence taken into account by the disciplinary panel. Doing so, however, leads us to conclude that there is a confusion in the reasoning, the ET apparently approaching the history as if the Claimant could properly be described as having intervened both at the start of the incident - his admitted intervention in pulling VB down the ramp - and at the end, when in fact the Claimant was responding to an attack on him from behind. As Mr Elliott acknowledged in oral submissions, it is just inappropriate to characterise the Claimant's response in the latter part of the incident as an intervention, and, to be fair, that is not how the disciplinary panel itself described the situation, instead saying that this was "*avoidable physical action that ended up with VB on the ground*". That, we think, was what the ET really needed to assess: was it fair to dismiss the Claimant for his physical action in responding to VB's attack on him from behind?

23. In assessing that question, an employer might reasonably take the view that the context - including the Claimant's earlier ill-judged intervention - was a relevant factor, although here the Respondents had taken the view that the earlier intervention itself would not have led to the Claimant's dismissal. We consider, however, that the ET needed to ask itself whether it was within the range of reasonable responses to consider this physical response an act of gross misconduct, given that the employee was himself being attacked from behind at the time.

24. That raises the question of self-defence that has been the focus of the Claimant's argument on this first ground of appeal. On this, we allow, as Mr Elliott has pointed out, that there was other evidence before the disciplinary panel about the appropriate response in these circumstances and that it might be difficult to separate out the Claimant's response from his earlier interactions with VB. We consider, however, that the difficulty that arises from the ET's approach in this case is that tested the decision to dismiss against a factual basis that the Respondents themselves did not find had occurred: that is, that the Claimant had physically *intervened* in the second part of the incident, bringing VB down to the ground, when in fact he had physically *responded* to an attack by VB. We recognise that might seem to be a rather technical distinction, and we bear in mind that we should not be unduly critical of infelicities of expression in an ET's Judgment. Properly understood, however, the distinction is not merely one of language but of substance: an intervention as described here is a proactive act, but, as the Respondents have acknowledged before us, that is not the right way of describing the Claimant's conduct in the crucial latter part of the incident when VB was brought to the ground; that was a physical reaction to an attack from behind. The ET needed to ask whether dismissing the Claimant for that - allowing that the Respondents might reasonably have had regard to the broader context - fell within the range of reasonable responses. It gave rise to

questions relating to the possible justification of self-defence and we cannot be sure that the ET had regard to those matters, and therefore allow the appeal on this basis.

25. As for the second basis of challenge, we allow (as the Respondents contend) that the PHP was not so clear-cut in its recommendation as to staff ratio as the Claimant sought to suggest, although we can also see that it might have been material to bolster his argument that staffing levels were inadequate on the day of the incident, and we can see that might have given rise to a question as to the fairness of the process before the disciplinary panel, given that the Claimant was arguably not afforded the chance to see that potentially relevant material. We do not, however, think the ET lost sight of that issue: indeed, it expressly addressed the point being made by the Claimant both as a matter of substance and procedure. More than that, it noted that the Claimant had the opportunity to raise this as a matter on appeal but chose not to do so. If the Respondents had been at fault at the disciplinary hearing stage, the appeal allowed for that to be rectified, but the Claimant did not pursue it as a point and the ET permissibly concluded that the Respondents had been reasonably entitled to take the view that it was not something that needed to be revisited. We dismiss the second ground of appeal.

**Disposal**

26. Having given our Judgment in this matter, we have heard further from the parties on the question of disposal. Both accept that this is a matter that will need to be remitted; our Judgment allows for more than one outcome, and therefore that is the only possible course. The Claimant says it should be to a different ET; the Respondents say to the same. We have considered the factors in **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763 EAT. We note that this was a relatively short hearing, over two days before an Employment Judge sitting alone, and there are fairly full findings of fact that will not need to be revisited

whether this returns to the same ET or is heard by a different Employment Judge. We understand from Mr Elliott that the witnesses for the Respondents may not be in the same position, but it is not suggested to us that there could be no revisiting of certain parts of the evidence if that proved necessary, although it seems to us that if the remitted hearing is focused on the issue we have identified then it is likely to be a matter largely of submission. We think, however, that is more appropriately undertaken before a different ET, because it is so difficult otherwise to have confidence that, with the best will in the world, the Employment Judge has not already reached a view in this case. So, for those reasons, we will be directing that this matter be remitted to a different ET.