Appeal No. UKEAT/0313/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 & 23 October 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

PROSPECT — APPELLANT

MR A HAJEE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MOHINDERPAL SETHI (of Counsel) Instructed by: Slater & Gordon (UK) LLP 50-52 Chancery Lane London WC2A 1HL
For the Respondent	MS AKUA REINDORF (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St John's Lane London EC1M 4LB

SUMMARY

UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal

The Employment Tribunal held that the Claimant was unfairly dismissed by reason of misconduct and suffered an unlawful deduction from wages of £750. Although the Employment Tribunal concluded that the Respondent had a genuine belief in the misconduct alleged and reasonable grounds for that belief, it held that the dismissal was procedurally unfair because there was no preliminary investigation and the dismissing manager was not impartial. The Employment Tribunal plainly thought that if somebody without an axe to grind had considered the situation during a preliminary investigation, the disciplinary allegations might never have got off the ground. The Employment Tribunal also held that the appeal stage did not cure earlier defects.

The appeal sought to challenge the finding that the investigation stage of the process was flawed; and the conclusion that the appeal did not remedy deficiencies in the earlier stage of the process. There was also a discreet ground challenging the holding that a repayment agreement signed by the Claimant authorising deductions from his wages was not valid so that the deductions were unlawful.

The appeal failed and was dismissed. The Employment Tribunal made findings of fact based on the evidence and correctly applied the law to the facts reaching conclusions that were open to it and not arguably in error in relation to the dismissal. In particular, the Employment Tribunal was entitled to conclude that the failure to conduct an investigation, coupled with the failure to have an impartial dismissing officer made the dismissal procedurally unfair. Further it was open to the Employment Tribunal to conclude on the facts that the appeal did not cure the earlier deficiencies in the process. As for the unlawful deduction finding, the Employment Tribunal's conclusion was supported by reliance on section 13(6) **Employment Rights Act 1996** in light of its findings, and was not in error of law on that basis.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This is an appeal from a Judgment of the London South Employment Tribunal (comprised of Employment Judge Andrews and members Mr Mills and Ms Leverton) promulgated on 7 September 2016, holding that the Claimant was unfairly dismissed by reason of misconduct and had suffered an unlawful deduction from wages of £750.

2. The misconduct alleged was insubordination arising out of the Claimant's failure to confirm in writing in response to emails from his line manager that (i) he would cooperate fully with a transfer to a different role and (ii) what he had said about the forthcoming transfer at a branch meeting on 13 January. Although the Employment Tribunal concluded that the Respondent had a genuine belief in the misconduct alleged, and reasonable grounds for that belief, it held that the dismissal was procedurally unfair because there was no preliminary investigation and the dismissing manager was not impartial. Moreover, the Employment Tribunal concluded that the appeal stage did not cure the earlier defects. Questions of remedy including the question whether a **Polkey** deduction should be made remain to be addressed at a Remedy Hearing listed in late November.

3. Prospect appeals and has been represented by Mr Mohinderpal Sethi (who also appeared below) and advances five grounds of appeal which have been permitted to proceed to a Full Hearing. In summary, the first two grounds of appeal seek to challenge the Employment Tribunal's finding that the investigation stage of the process was flawed. The next two grounds challenge the conclusion that the appeal did not remedy deficiencies in the early stage of the process. Finally, there is a discrete ground challenging the holding by the Employment

Tribunal that a repayment agreement signed by the Claimant authorising deduction from his wages was not valid so that the deductions were unlawful.

4. The appeal is resisted by Mr Hajee who appears by Ms Reindorf, who did not appear below. She contends that the Employment Tribunal made careful findings of fact and correctly applied the law to the facts reaching conclusions that were open to it and not arguably in error in relation to the dismissal. As for the unlawful deduction finding, she relies on different reasoning to support the Employment Tribunal's holding, notwithstanding the absence of any Respondent's Notice setting out the point on which she relies. I shall return to those points in due course.

5. I refer to the parties as they were before the Employment Tribunal for ease of reference.

The Facts

6. The facts so far as relevant to this appeal can be taken from the Employment Tribunal's findings. The Claimant commenced employment with a predecessor union in 1999 as a Negotiations Officer. By the time of the Full Hearing, he was an extremely experienced union officer with an extensive and impressive track record in tackling workplace issues, particularly with regards to equality and discrimination.

7. The Employment Tribunal made findings about the Respondent's disciplinary procedure at paragraphs 24 to 29, concluding that a reasonable reading of the disciplinary process led to "a conclusion" that on an allegation of serious misconduct an investigation officer should be appointed, and that officer would not be connected with the line management chain concerned. The policy provided no express exception for appointment of an investigating officer even in

cases where facts were not in dispute, in relation to serious misconduct. By contrast such an exception was provided in cases of ordinary misconduct.

8. On 27 May 2011, the Claimant's line manager, Mr Leighton wrote to him about his working relationship with one of his Executive Assistants and stated that a "big improvement" in the working relationship was required. Subsequently, in 2014, there was a further complaint on behalf of the same Executive Assistant about the Claimant's treatment of her and about conduct that was said to amount to bullying and harassment. Disciplinary proceedings followed and by a letter dated 5 June 2014, the Claimant was issued with a final written warning to remain on his file for two years. He was also required to undergo a management training programme in respect of which he would be required to make a contribution of 50% of the costs (up to a maximum of £1,000).

9. The Claimant's appeal against those conclusions was rejected by Mr Clancy (as the appeal officer) on 14 July 2014. The Claimant signed the repayment agreement on 10 December 2014. Meanwhile, on 15 July 2014, the events leading to the disciplinary action that led to the Claimant's dismissal commenced.

10. In particular, on 18 November, Mr Leighton emailed the Claimant advising him of a decision to go ahead with a change in work allocation for the Claimant. He acknowledged the Claimant's unhappiness about the proposal. The Claimant responded by email dated 30 November making it clear that he was unhappy about the move and annoyed about an announcement made at a team meeting earlier. He referred to the equality implications of the move stating, "It is not the right time for me to be forced to relinquish UKPN" (the UK Power Networks Branch).

11. Mr Leighton responded by email dated 1 December 2014, stating that he found the Claimant's email of 30 November disappointing, confusing, and offensive. He specifically invited a response by 3 December on two points: first, whether the Claimant would abide by his decision regarding the change in work allocation; secondly, to clarify if he was suggesting that the decision was an act of race discrimination and expected to raise a grievance. Mr Leighton sent a copy of his email to Mr Manasseh (his line manager) and Ms Maccrimmon (a member of the Human Resources team).

12. The Claimant responded by email dated 3 December 2014. He said he could not understand why Mr Leighton found the email offensive. In relation to the two specific questions, he did not expressly answer the first, but queried whether he had an option as to whether to abide by the decision. In relation to the second, he said that he did not intend any suggestion that the decision was an act of race discrimination. Thereafter, Mr Leighton repeated his specific queries and in response, the Claimant repeated his response.

13. The expectation was that the Claimant would take part in a handover process. In an email from Mr Leighton to the Claimant dated 7 January 2015, he referred to a lengthy conversation between them in which he made specific reference to a statement the Claimant was said to have made that he was "not going to make this easy" in relation to the handover. Mr Leighton advised that this was unacceptable and that the Claimant had a responsibility to cooperate with the transfer and with any management instructions.

14. By email dated 9 January 2015, Mr Leighton advised the Claimant to be careful about his communications and said he would take firm action if he saw any further examples of

obstructive or uncooperative behaviour. Then on 12 January, the Employment Tribunal found that:

> **"… Mr Leighton e-mailed the claimant and Mr Bye checking on progress with the handover and asking if they had agreed a date for the transfer. He also said that it seemed sensible to tell the UKPN BEC which was due to meet the following day of the decision to effect the transfer by 31 March and asked the claimant to do that." (See paragraph 65)**

15. Later that day, the Claimant responded to Mr Leighton's 9 January email stating that there was never any intention to disregard Mr Leighton's request to inform the branch and denying that he had said he was not going to make the transfer easy.

16. On 12 January at 6.28pm, Mr Leighton emailed the Claimant asking for explicit confirmation from the Claimant that he would cooperate fully with the transfer and asking him to give notice of the change the following day. The Claimant did not respond (see paragraph 67).

17. Mr Leighton's team meeting took place on 14 January and a difficult exchange took place between him and the Claimant with regards to the move. By email dated 16 January 2015, Mr Leighton noted that the Claimant had not provided the confirmation sought in relation to full cooperation with the transfer and asked to receive that by 5pm on 19 January, though the Employment Tribunal found the deadline changed to 5pm on 21 January. He also asked for confirmation of what had been said at the UKPN branch meeting on 13 January (see paragraph 70).

18. At 11.49am on 22 January, the Claimant replied to Mr Leighton's email. He confirmed that he continued to query the transfer decision and sought to persuade Mr Leighton to change his mind. He also confirmed that he had every intention of cooperating fully with any transfer

to facilitate a positive handover. However, he did still intend, he said, to utilise whatever legitimate processes were available to him, including internal grievances, to raise any issues including the equality implications associated with the decision.

19. By email dated 26 January, Mr Manasseh wrote to the Claimant advising him that he was convening a disciplinary hearing on 9 February 2015 in relation to the Claimant's failure to follow a number of reasonable instructions contained in emails from Mr Leighton dated 12 and 16 January.

20. At the subsequent disciplinary hearing, the Claimant's position, in summary, was that he had confirmed the transfer to the branch meeting on 13 January. He agreed he told the branch and team meetings that he reserved his position, but said that was due to confidentiality. He said he complied with the instructions given, but accepted that he should have responded more fully and did not do so because of how he was feeling.

21. The Employment Tribunal summarised Mr Manasseh's decision, following a disciplinary hearing, to dismiss the Claimant and the reasons for that decision at paragraphs 81 to 85. Mr Manasseh concluded that the Claimant had failed to comply with explicit and reasonable instructions and was therefore guilty of serious misconduct. Taken with the earlier warning on record, he concluded that the Claimant should be dismissed with notice.

22. There was an appeal heard on 20 April 2015 by Mr Clancy. The Claimant was represented by Mr Carter as he had been before Mr Manasseh. Towards the end of the appeal meeting, the Employment Tribunal found that "the Claimant said that the nub of the matter was

A that he did carry out the decision but he did not make it clear and that he could have done better" (see paragraph 87).

B 23. By letter dated 23 April, Mr Clancy rejected the Claimant's appeal. The Employment Tribunal found:

> **"… In summary he rejected that there had been a lack of investigation as the issue was a failure to confirm to his manager that he had complied with the instruction and therefore investigation was not necessary. He also rejected that Mr Manasseh was biased as he said his prior involvement was "marginal", the issues were between the claimant and Mr Leighton and there was no evidence of bias. On the substantive issues he concluded that the claimant's behaviour in respect of the handover was misconduct and that in context of having a live final written warning on his record Mr Manasseh had no option but to dismiss him and he therefore endorsed that decision." (See paragraph 89)**

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D 24. Following the dismissal, the balance of the money owed by the Claimant in relation to the training costs of £750 was deducted from his wages.

The Employment Tribunal's Judgment

E 25. The Employment Tribunal dealt with deductions from wages at paragraph 91. The Employment Tribunal held that the Claimant was unfairly dismissed by reason of misconduct and suffered an unlawful deduction from wages of £750. The misconduct alleged was

F insubordination arising out of his failure to confirm in writing, in response to emails from his line manager that (i) he would cooperate fully with a transfer to a different role and (ii) what had been said about the forthcoming transfer at a branch meeting on 13 January. There was no

G dispute that the Claimant did not provide the explicit confirmation sought, but there was a critical dispute about his motivation and attitude in failing to do so. It was his case throughout that he was not insubordinate and had every intention of cooperating fully with the transfer and facilitating a positive handover. The Respondent however, concluded that he was belligerent

H and insubordinate and concluded that dismissal was the appropriate penalty when an earlier final written warning was put into the mix.

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26. The Employment Tribunal dealt with its conclusions on unfair dismissal at paragraphs 98 to 120. The Employment Tribunal concluded that this was a dismissal for conduct reasons and that the **Burchell v British Home Stores** approach applied. The Employment Tribunal was satisfied that the Respondent had a genuine belief in the misconduct alleged, namely, that there was a failure by the Claimant to give confirmation of full cooperation with the transfer and a failure to answer Mr Leighton's specific questions. Insofar as the investigation conducted by the Respondent in order to support that belief is concerned, the Employment Tribunal concluded that the Respondent did have reasonable grounds for its belief in the Claimant's misconduct.

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27. However, the Employment Tribunal was not satisfied that there was a reasonable investigation into the question of whether the Claimant failed to confirm his cooperation because, effectively, the Employment Tribunal found, no investigation was carried out (see paragraph 114). If a preliminary investigation had been carried out, the Employment Tribunal concluded that it might have led to the conclusion that the Claimant did inform the branch meeting of the change on 13 January, and this could have led to a different interpretation of the Claimant's email dated 22 January which was fundamental to the charge. Overall, the Employment Tribunal found the investigation of the charges was materially insufficient and unreasonable.

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28. The Employment Tribunal also identified a number of concerns in relation to the disciplinary process itself. First, the refusal to hold an investigation meeting was regarded as a deficiency that impacted on the appropriateness of the charge. Secondly, the Employment Tribunal was concerned about the ability of Mr Manasseh to conduct the disciplinary hearing impartially having been involved in the preceding events, advising Mr Leighton in relation to

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A the correspondence, and directing events to a great extent (see paragraph 117). Insofar as that is concerned, the Employment Tribunal regarded as untenable Mr Clancy's conclusion that Mr Manasseh's involvement was marginal. At paragraph 119, the Employment Tribunal held as follows:

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> **"We regard this flaw as so fundamental that it could not be corrected at appeal even if Mr Clancy himself had been completely impartial. It is so fundamental to the fairness of the dismissal to have an impartial dismissal officer and to be denied that is effectively being denied the opportunity for the 2 stage process required both by the respondent's own procedure and the ACAS Code of Practice. This must make the dismissal procedurally unfair. In any event, Mr Clancy was not completely impartial as he had extensive prior knowledge of the claimant (and in his evidence was critical of his past performance), having previously not allowed his appeal against the final written warning. These indicate that even if Mr Clancy was making every effort to be impartial again it must be very likely that he could not have come to the appeal with a completely open mind."**

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29. In the result, the Employment Tribunal found that the process followed by the

D Respondent was flawed and the dismissal was procedurally unfair even though not substantively unfair.

E **The Applicable Legal Principles**

30. The principles that apply to claims of unfair dismissal are very well established. There are normally two stages involved. First, the employer must show the reason for the dismissal and that it is one that falls within section 98(1) and (2) **Employment Rights Act 1996**.

F Secondly, if that is established, it is for the Employment Tribunal to determine whether the employer acted reasonably under section 98(4) in dismissing the employee for the reason given. The second stage involves no burden of proof on either party and the issue of whether the

G dismissal was reasonable is a neutral one for the Employment Tribunal to decide; see **Boys and Girls Welfare Society v MacDonald** [1997] ICR 693.

H 31. The Employment Tribunal does not decide what it would have done in the shoes of the employer, but whether the employer's decision fell within the range of reasonable responses

available. The range of reasonable responses applies not only to the substantive decision, but also to the procedure by which the decision is reached. The requirement to avoid substituting its own subjective view of the dismissal for that of the employer applies to the Employment Appeal Tribunal as well which cannot, under the guise of perversity, substitute its own judgment for that of the Employment Tribunal.

32. Employment Tribunal decisions must be read in the round without undue focus on infelicities of expression and bearing in mind the application of the range of reasonable responses test is not an exact science. In borderline cases, it is possible for different Employment Tribunals to apply the test differently. Decisions reached by such Employment Tribunals will be difficult to challenge unless the Employment Tribunal has plainly substituted its own judgment for that of the employer. Employment Tribunal decisions on reasonableness are essentially decisions based on findings of fact, making any appeal to the Employment Appeal Tribunal difficult absent a clear misdirection in law or clear perversity. Procedural fairness is integral to the reasonableness test. A failure to follow the ACAS Code is a relevant factor for an Employment Tribunal to take into account when determining the reasonableness of a dismissal in accordance with section 98(4), but does not render the dismissal automatically unfair. Similarly, a failure to follow an employer's internal disciplinary policy is a factor for an Employment Tribunal to consider, but not determinative.

The Appeal

33. Ground 2 raises a question of construction of the Respondent's disciplinary policy and challenges as wrong the Employment Tribunal's conclusion that the policy required the Respondent to conduct a formal preliminary investigation in all cases of serious misconduct even where facts are not in dispute.

34. Mr Sethi contends that the Respondent's construction, that the policy permits the Respondent to avoid conducting a preliminary investigation where the facts are not in dispute, is a permissible one, but the Employment Tribunal failed to say why the Respondent's construction was not a reasonable construction and why, ultimately, it rejected it.

35. The disciplinary policy provides (at paragraph 16.3):

> **"16.3.** ***Formal Stage - Serious or Gross Misconduct***
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> **Preliminary Investigation**
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> **16.3.1. Where a line manager considers there may be evidence of either serious or gross misconduct then a preliminary investigation will be conducted to establish the facts, but not to arrive at any final judgement.**
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> **16.3.2. An Investigating Manager will be appointed and required to produce a report upon the issue that will be presented to the Hearing Manager. The Investigating Manger will be at least Grade B. The Investigating Manager will not be connected with the line management chain concerned with the events that are the subject of the investigation.**
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> **16.3.3. The Investigating Manager will provide a report on the factual evidence but will not reach any conclusion on the outcome of any subsequent hearing. However, they must specify the potential seriousness of the allegations and the penalty that may follow if the complaint is upheld following the formal hearing. This will ensure that the correct grade of Hearing Manager conducts the hearing, relative to the issue under consideration and the penalty that may apply if the misconduct is proven.**
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> **16.3.4. The employee concerned must be notified in writing that they are the subject of an investigation prior to it commencing. The notification will state when the investigation is likely to conclude and when the report of the Investigating Manager will be available. The notification will remind the employee of their right to representation and that this includes their attendance at interviews conducted as part of the investigation.**
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> **16.3.5. The Hearing Manager conducting the disciplinary hearing will receive the report of the Investigation Manager. If the Hearing Manager concludes that there is an issue to address at a formal disciplinary hearing, they will inform the employee and their representative accordingly and convene a formal disciplinary hearing. The report of the Investigating Manager will then be provided to the employee and their representative.**
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> **16.3.6. If on receipt of the report from the Investigating Manager the Hearing Manager concludes there is no issue to answer, they will inform the employee and their representative accordingly in writing. Any reference to the investigation will be removed from the personnel record of the employee."**

36. That is to be contrasted with the formal stage of the disciplinary policy dealing with an allegation of ordinary (as opposed to serious) misconduct. In such a case, at paragraph 16.2.9, the written procedure provides that "Most occurrences of misconduct will not require a preliminary investigation if the facts are not in dispute or can be established from Prospect records".

37. The Employment Tribunal dealt with this issue at paragraphs 24 to 29. It held that the policy did not require a preliminary investigation in all conduct cases and, in particular, did not require it in ordinary misconduct cases where the facts are not in dispute. However, by contrast, the Employment Tribunal concluded that in cases of serious or gross misconduct, a preliminary investigation was always required.

38. Mr Sethi criticises the Employment Tribunal's reasoning at paragraph 27 where the Employment Tribunal referred to 'a' reasonable reading of the disciplinary policy as leading to 'a' rather than 'the' conclusion that in cases of serious misconduct a preliminary investigation would always be required. He submits that the use of the word 'a' implies the existence of alternative constructions that were equally available, but that the Employment Tribunal failed to analyse the alternative constructions or to explain why the alternative constructions were not a reasonable interpretation. He submits that an alternative reasonable construction is that, if the very purpose of the preliminary investigation is to establish the facts, then it follows that in cases of serious misconduct in which the facts are not in dispute, there can be no need to establish the facts. In such a case, the preliminary investigation is unnecessary. He submits that was the Respondent's interpretation of its own written policy and the Employment Tribunal failed to have regard to the words "to establish the facts" in construing that written policy. Moreover, the absence of reasons renders the Employment Tribunal's conclusion unsafe.

39. I do not accept this submission. It seems to me that paragraph 27, read fairly and without inordinate focus on a single word ('a'), reflects a conclusion of the Employment Tribunal that the construction of the policy identified by it was its reasonable understanding of the policy and not simply one of a number of possible reasonable constructions. Moreover, it seems to me that this is the only reasonable interpretation of paragraph 16.3. The formal stage

in the case of ordinary misconduct is plainly to be contrasted with the formal stage in a case of serious misconduct. The former expressly provides that there are cases where no preliminary investigation is required, whereas the latter does not. The policy uses the words, "will be appointed" and "is required to produce a report" in relation to the Investigation Manager, rather than "may be appointed" and "if appointed, must produce a report".

40. This is a rational approach. Given the importance of a reasonable investigation in the context of a fair disciplinary procedure, even in a case where the employer concedes the facts to be undisputed, there is a clear purpose to be served in identifying those facts clearly, and at an early stage, so that the employee who is being charged with serious misconduct knows precisely what facts the employer considers undisputed and can identify the extent of any dispute if such exists. If there is no dispute, that will become clear once the report produced (or conclusions reached) by the investigation officer identifies the factual basis for the charge.

41. In any event, I do not agree with Mr Sethi that this is a case where it could be said there was no dispute as to the facts. Indeed, it is now common ground that a critical dispute existed as to the Claimant's motivation and attitude when he failed to give the confirmation sought by Mr Leighton. That went to the heart of the allegation of misconduct; namely whether the Claimant's failure to give the requisite confirmation amounted to deliberate insubordination, or whether there was some other explanation for it that could be differently characterised. There was also a dispute, as a matter of fact, about what happened at the branch meeting on 13 January and it is clear that both at the disciplinary hearing stage and at the appeal stage, the Claimant was not believed when he put forward his account that he told the branch meeting about the transfer.

42. It is also significant to my mind, that the Employment Tribunal did not conclude that the mere failure to conduct an investigation in accordance with the policy rendered this dismissal unfair. Rather, the Employment Tribunal analysed the failure and concluded that there were disputed factual issues that would have been clarified had a preliminary investigation been conducted in accordance with the Respondent's policy and a report drawn up, and that might have led to disciplinary charges not being laid at all. It seems to me those conclusions were amply open to the Employment Tribunal and not arguably in error. In the circumstances, this ground fails.

43. Ground 3 is a related ground. Even if there was no preliminary investigation, despite such an investigation being a requirement of the disciplinary policy, Mr Sethi argues that that is simply one element of procedural fairness and must be considered in light of all the subsequent opportunities the Claimant had in the course of the process as a whole, whether at the disciplinary or appeal stages, to explain his attitude and to give his explanation for failing to give the confirmation sought of him by Mr Leighton, his line manager.

44. Mr Sethi contends that the Employment Tribunal focused overly on the absence of a preliminary investigation and wrongly concluded that whether the Claimant in fact notified the branch of his transfer was "a key area of factual dispute" and "fundamental to the charge" he faced, and in respect of which he was ultimately dismissed. However, that missed the point argues Mr Sethi. The issue for the Respondent was the insubordination displayed by failing to confirm what the branch was told and failing to confirm that he would cooperate in the transfer. Even if there was an early dispute about whether the Claimant informed the branch, that was not subsequently in dispute and it is difficult to see what the Claimant could have said at a preliminary investigation meeting that he could not have said later. Given that what he did say

ultimately made no difference, the Employment Tribunal was not entitled to conclude that it would have made a material difference in this case, if there was a preliminary investigation.

45. Mr Sethi also points to the finding that the Claimant requested that the disciplinary hearing be changed to an investigation hearing as the allegations were of serious misconduct, but HR refused to do so, as in the view of HR the facts were not in dispute. The Employment Tribunal did not refer to the stated reasons given by the member of HR for that decision. Mr Sethi also identifies a series of further points by reference to paragraph 5.2, all of which he says the Employment Tribunal overlooked or failed to have proper regard for in reaching its decision. The Employment Tribunal's focus on the preliminary investigation meant that it did not consider the reasonableness of the investigation as a whole, having regard in particular to the absence of any dispute about the critically relevant facts. Moreover, in writing, he submitted, that the consequences of the Employment Tribunal's failure to follow an objective approach to the overall reasonableness of the investigation, led it to adopt a substitution mindset. That latter point was, however, abandoned in the course of oral submissions.

46. I do not accept the broad thrust of the submissions made by Mr Sethi in relation to this ground of appeal, and have concluded that there is no error of law in the Employment Tribunal's approach. My reasons are as follows. First, it seems to me that the Employment Tribunal plainly understood the nature of the charge of serious misconduct in this case. The Employment Tribunal held expressly that the charge was in two parts as set out at paragraph 21 of the Judgment and repeated at paragraph 104 (see paragraph above). Mr Sethi agreed in the course of the hearing that this accurately set out the charge and shows no misunderstanding. There is nothing to suggest that the Employment Tribunal proceeded on the basis that part of

the disciplinary charge related to whether the Claimant had, in fact, informed the branch meeting of the change of his role on 13 January.

47. Nevertheless, in determining the Claimant's motivation and attitude in relation to his manager's instructions, to decide whether there was insubordination and in evaluating the seriousness of the Claimant's conduct, it was plainly relevant to consider the surrounding circumstances. The Claimant's actions and conduct at the branch meeting on 13 January were likely to shed light on his motivation and attitude in the context of the two charges. In the circumstances, it seems to me that it was perfectly proper for the Employment Tribunal to conclude that the question whether the Claimant had in fact informed the branch meeting, though not forming part of the actual charge he was facing, was nevertheless part of the factual matrix because it bore on the proper interpretation to be placed on the Claimant's words and conduct in the critical communications.

48. In particular, it was open to the Employment Tribunal to conclude that if the Respondent had investigated and prepared a report setting out all the facts, these would, in all likelihood, have included the fact that the Claimant did inform the branch meeting of change on 13 January. The Employment Tribunal concluded that this could well have led to a different interpretation being placed on the Claimant's email of 22 January and the investigation was materially unreasonable as a consequence. That was the relevance of the Respondent's failure to follow its own disciplinary policy. It denied the Claimant the opportunity, at an early stage, of demonstrating that he was not being insubordinate when he failed to respond to the email. That finding does not depend upon the Respondent's policy, but represents a finding of fact in the circumstances of this case, that the failure to conduct a preliminary investigation was outside the band of reasonable responses.

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49. It follows in light of the factual dispute that existed in relation to the disciplinary charges, that the Employment Tribunal was entitled to approach this case as a conduct case within the **Burchell** guidelines. The Employment Tribunal properly directed itself as to the three stages of the **Burchell** test and the band of reasonable responses. The Employment Tribunal warned itself against falling into the substitution mindset. Moreover, the Employment Tribunal directed itself as to the effect of the principle established in **Boys and Girls Welfare Society**. Although the Employment Tribunal found the decision not to conduct a preliminary investigation to be unreasonable and to fall foul of the first stage of **Burchell**, the essence of the Employment Tribunal's conclusion was that notwithstanding the Respondent's genuine belief in the charge and notwithstanding that the Respondent had reasonable grounds to believe in the charge, a proper investigation would, quite possibly, have led to a different decision at an early stage that the charge was, in fact, inappropriate.

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50. I do not agree with Mr Sethi that this conclusion was not open to the Employment Tribunal and was in error of law because the Claimant could have said nothing at a preliminary investigation meeting, which could have altered the charge given the subsequent opportunity he had to explain his attitude and thinking, which ultimately changed nothing. The Employment Tribunal's finding on this issue must be read in context and with the Employment Tribunal's parallel conclusion about the lack of impartiality of the dismissing and appeal officers in this case. The Employment Tribunal plainly thought that if somebody with an open mind had considered the full facts surrounding the emails during a preliminary investigation, this disciplinary charge would not have got off the ground because a different interpretation would have been placed on the Claimant's responses. In other words, the Claimant did not have his side of the story considered or analysed in an impartial way at any time before his dismissal. Had this been done properly and fairly at the outset, there may have been no disciplinary case at

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all. That is why the Employment Tribunal considered the investigation stage so important in the context of procedural fairness, and why it made the difference. The bias that infected the later stages of this process may have been headed-off by a full and open-minded preliminary investigation.

51. Mr Sethi was critical of the failure by the Employment Tribunal to deal fully with the emails from HR explaining why there would be no investigation and inviting the Claimant to explain why an investigation was necessary, or why the facts were in dispute. I do not consider that it was necessary for the Employment Tribunal to set out the emails on which Mr Sethi relies. They were plainly considered. Further, the Employment Tribunal made clear in its finding at paragraph 72 what the real reason was for the Respondent's refusal to undertake a preliminary investigation in this case, as follows:

> **"On the following day Mr Manasseh e-mailed Ms Maccrimmon stating that he needed to write to the claimant convening a disciplinary hearing further to the claimant's failure to follow a reasonable instruction and enclosing a draft letter asking for her assistance. In her reply she referred to the fact that he had suggested serious misconduct which would usually initiate an investigation and suggested alternative wording and that:**
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> > **"I think that will then circumvent the need for an IO to be appointed""**

That, in my judgment, sets out sufficiently the Employment Tribunal's finding. There was no need for the Employment Tribunal to amplify this point any further.

52. For all those reasons, ground 3 also fails.

53. Grounds 4 and 5 are interlinked and interdependent. Ground 4 complains that the Employment Tribunal failed to take into account the fact that the appeal was comprehensive and amounted to a full rehearing. Instead, it is said that the Employment Tribunal proceeded on the erroneous basis that the unfairness at the earlier stage was "so fundamental that it could not

be corrected at appeal even if Mr Clancy himself had been completely impartial". Ground 5 challenges the finding that Mr Clancy was not himself completely impartial in handling this appeal, as a perverse finding.

54. It is well established and a matter of common ground that a procedural defect in a disciplinary process may be remedied by an appeal which is sufficient to cure the unfairness caused by that defect. In **Taylor v OCS Group Ltd** [2006] ICR 1602 CA guidance was given on the proper approach to adopt where, on claims for unfair dismissal, criticism is made of an employer's disciplinary procedure leading to an internal appeal. The Court of Appeal held that Employment Tribunals should focus on the statutory test and look at the substance of what happened throughout the disciplinary process, rather than seek to categorise an internal appeal process as a rehearing or a review. The label does not matter. What matters is whether the disciplinary process as a whole is fair. If the tribunal finds an early stage of the process to be defective or unfair, subsequent stages will require particularly careful examination, but as was made clear (at paragraphs 47 and 48):

> **"47. … But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.**
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> **48. In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The dicta of Donaldson LJ in *Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542, 550, are worth repetition:**
>
> > **"Whether someone acted reasonably is always a pure question of fact … where Parliament has directed a tribunal to have regard to equity - and that, of course, means common fairness and not a particular branch of the law - and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question**

> **in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane.""**

55. A similar approach was adopted by the Employment Appeal Tribunal, in **Adeshina v St George's University Hospitals NHS Foundation Trust** [2015] IRLR 704, holding that the strict rules regarding apparent bias applicable to judicial processes are not applicable to internal disciplinary proceedings, although actual bias giving rise to a breach of natural justice may have fundamental relevance to the question of fairness, and must be considered in addressing the overall fairness of the process.

56. At paragraph 17, the Employment Appeal Tribunal continued:

> **"(3) … whether there is an appearance of bias may be a relevant factor in an unfair dismissal case; it will be something that will go into the mix for the ET to consider as part of fairness as a whole, as will the question whether the panel did in fact carry out the job before it fairly and properly, see *Rowe v Radio Rentals Ltd* [1982] IRLR 177 EAT, per Browne-Wilkinson J (as he then was), at paragraphs 11-14, citing Lord Denning in *Ward v Bradford Corp* [1971] 70 LGR 27 at p.35:**
>
> > **'We must not force these disciplinary bodies to become entrammeled in the nets of legal procedure. So long as they act fairly and justly, their decision should be supported.'**
>
> **See also per Kilner Brown J in *Haddow v ILEA* [1979] ICR 202 EAT, at 209G-H:**
>
> > **'… the only thing that really matters is whether the disciplinary tribunal acted fairly and justly …'**
>
> **(4) Provided the ET has taken all matters into account, its decision cannot be overturned on appeal unless it is perverse."**

Although there was a subsequent appeal, this aspect of the decision of the Employment Appeal Tribunal was not challenged.

57. In this case, the Employment Tribunal found that Mr Manasseh's earlier involvement in the disciplinary investigation, in which he directed events and redrafted the email that led directly to the charge, meant that he was unable to consider the allegations with a completely

A open mind. The Employment Tribunal concluded that this was very likely to have affected the outcome of the outcome of the dismissal stage.

B 58. The defects to be cured on appeal were, therefore, the absence of a preliminary investigation and a predetermined hearing at the dismissal stage. At paragraph 119, the Employment Tribunal held that this latter flaw was so fundamental that it could not be corrected on appeal, even if Mr Clancy himself had been completely impartial. That was, the C Employment Tribunal explained, because it was so fundamental to the fairness of the dismissal to have an impartial dismissal officer, and to be denied that was, in effect, to be denied the opportunity of a two-stage process provided by the employer's own procedure and by the D ACAS Code of Practice.

59. Mr Sethi contends that reveals a flawed approach. The Employment Tribunal, in effect, E elevated this point to a generic principle and concluded that the denial of a two-stage process was so fundamental that even a completely impartial appeal could not have cured it. That, he submits, was an error because it meant the Employment Tribunal failed to have regard to the thoroughness of Mr Clancy's careful, comprehensive and conscientious consideration of the F Claimant's appeal which was heard as a full rehearing, to determine as a matter of fact whether the process as a whole, including that thorough appeal stage, was fair.

G 60. Ms Reindorf, for her part contends, that although the Judgment could have been better expressed at paragraph 119, on a fair reading of the passage to which Mr Sethi refers, the Employment Tribunal was not making a statement of principle, but was instead making a finding on the facts of this case that the failure to investigate and the bias of Mr Manasseh H together, amounted to such a serious denial of fairness that they could not be cured on appeal.

61. Reading the passage relied on by Mr Sethi at paragraph 119 of the Judgment as fairly and generously as I can, I do not consider that it does reflect a pure finding of fact limited to this particular case. The Employment Tribunal does not, contrary to Ms Reindorf's submission, hold that the appeal did not cure the defect because the Claimant was denied an investigation and a fair dismissal hearing. Instead, the Employment Tribunal's decision is expressly justified by reference to the fact that the Claimant would be deprived of a two-stage process and would only have, in effect, one stage. That is wrong as a matter of principle. Even defects that are sufficiently serious to render the employer's decision to dismiss for misconduct unfair in the ordinary sense of the word because, for example, the employee is given no chance to be heard on the charge, or because he or she is not notified of the precise charge against him in time to prepare to answer it, or because the dismissing officer is not impartial, can be cured by a full and fair appeal.

62. What is required is a careful assessment of the seriousness of the misconduct relied on as the reason for dismissal, the impact of the procedural failings on the process, and consideration of the overall fairness of the appeal process said to have cured the particular defect or defects in order to decide whether looked at overall, the employer has acted reasonably in dismissing the employee. As the Court of Appeal held in **Taylor v OCS Group Ltd**, particularly in a borderline misconduct case, serious procedural failings at the disciplinary stage might have such an impact on fairness that the Employment Tribunal will have to examine the thoroughness and fairness of the appeal stage particularly carefully to decide whether the overall process is fair notwithstanding those failings.

63. Notwithstanding that conclusion, I am persuaded by Ms Reindorf's submission that this error by the Employment Tribunal goes nowhere unless the Respondent can successfully

challenge the findings that Mr Clancy was not completely impartial, since the Employment Tribunal found in any event that his lack of complete impartiality meant that the appeal did not cure the earlier flaws in the procedure.

64. Mr Sethi attacks that finding as perverse in circumstances where there is no suggestion that Mr Clancy had any prior involvement in the disciplinary case itself and his only prior involvement was in dealings with the Claimant as an employee in the Respondent's organisation which cannot, by itself, give rise to any bias. There is no finding of impropriety in Mr Clancy's handling of the earlier appeal, or of his handling of the appeal in question. Moreover, the unchallenged evidence, Mr Sethi submits, shows that Mr Clancy is legally qualified with considerable judicial experience sitting as a lay member in Employment Tribunal's and the Employment Appeal Tribunal. Mr Sethi points to the Respondent's disciplinary policy which anticipates that Mr Clancy would conduct appeals from decisions by the Deputy General Secretary. He points to the fact that this is a relatively small organisation with few administrative resources, and submits that the Employment Tribunal failed to identify who else, beside the General Secretary, could and should have conducted this appeal. He contends that the conclusion that Mr Clancy was not completely impartial is perverse, entirely speculative and inadequately reasoned.

65. I do not accept that the Employment Tribunal reached its conclusion, in relation to Mr Clancy, solely on the basis of prior management contact between the Claimant and Mr Clancy of the kind to be expected in a relatively small organisation. First, the Employment Tribunal was critical of Mr Clancy's response to the Claimant's objection to Mr Manasseh dealing with the dismissal stage in this case. The Employment Tribunal found that Mr Manasseh was very involved in advising Mr Leighton in detail on the correspondence leading up to the disciplinary

charge and was "clearly directing events to a great extent". Indeed, the Employment Tribunal found that Mr Manasseh redrafted Mr Leighton's email of 12 January which directly led to the disciplinary charges, explaining the redraft on the basis that the original draft gave the Claimant the chance "to prolong the issue". The Employment Tribunal concluded that this strongly suggested that Mr Manasseh was not neutral in the matter. Despite Mr Manasseh's obvious and detailed involvement in events leading to the disciplinary charge, and the Claimant's strong objection to it, the Employment Tribunal found Mr Clancy's rejection of the Claimant's objection and conclusion that Mr Manasseh's involvement was marginal, to be untenable.

66. Secondly and importantly, the Employment Tribunal heard evidence from Mr Clancy who was cross-examined about his prior involvement with the Claimant. The Employment Tribunal found that Mr Clancy had "extensive prior knowledge of the Claimant having previously not allowed his appeal against the final written warning and … was critical of his past performance". As a consequence of those matters, the Employment Tribunal found that Mr Clancy did not come to the appeal with a completely open mind and was not completely impartial. It is also to be noted that Mr Clancy made adverse credibility findings against the Claimant.

67. Against those findings of fact, whatever my own view, I am quite unable to conclude that the high hurdle for a perversity appeal has been established here. The Employment Tribunal heard evidence over a period of three days and had extensive documentation before it of which I have seen only a fraction. I am acutely conscious of the fact that it is difficult for findings of fact fully to capture all the nuances of impression made on an Employment Tribunal by the witness and the evidence it received and, therefore, of the need for real caution in approaching an invitation like this to reverse the Employment Tribunal's evaluation. It is clear

to me that this is not an Employment Tribunal which speculated. Rather, the Employment Tribunal made findings of fact based on evidence that were amply open to it in the circumstances.

68. Finally, I do not accept that the finding that Mr Clancy lacked complete impartiality is undermined by the conclusion that Mr Clancy held a genuine belief in the Claimant's misconduct and had reasonable grounds for that belief, as Mr Sethi argued. The conclusions at paragraphs 105 and 113 go to the first two stages of **Burchell** the test. They are wholly consistent with the Employment Tribunal's conclusion that the third stage of the test was not satisfied because the procedure as a whole did not fall within the range of reasonable responses because neither the disciplinary nor the appeal officer was impartial. Nor is it relevant that the Claimant did not argue that Mr Clancy should not have conducted the appeal. There is no burden of proof on a claimant in an unfair dismissal case to prove that the process as a whole is unfair. Rather, it is for the Employment Tribunal to examine the process as a whole and determine whether the dismissal is fair or unfair having regard to the facts and the circumstances.

69. For all these reasons, this ground of appeal fails and the consequence is that ground 4, which was made out, does not advance the Respondent's challenge to the finding of unfair dismissal. There was no material error in light of the Employment Tribunal's alternative conclusion.

70. Finally, I turn to ground 6 which is a discrete ground challenging the Employment Tribunal's finding that the repayment agreement was not valid. Mr Sethi submits that the terms of repayment were unambiguous and were accepted by the Claimant unconditionally and on a

voluntary basis. The finding of duress is vitiated by error of law in circumstances where the Claimant continued to work having entered into the repayment agreement, without protest, and did not take any steps to set it aside after the alleged pressure applied by the Respondent had ceased. His will cannot have been overborne in those circumstances.

71. Ms Reindorf does not resist the appeal on the basis of duress, properly accepting that defence was not made out on the facts. Instead, she submits that the Employment Tribunal dealt with the point in relation to unlawful deductions at paragraph 91, making no reference whatever to duress. She contends that the Employment Tribunal's finding that the agreement was not valid so that the deduction was made unlawfully is as consistent with a finding under section 13(6) of the **Employment Rights Act 1996** as it is with a finding of duress.

72. Section 13(6) provides that an agreement or consent signified by a worker authorising the making of a deduction from wages "does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified".

73. Ms Reindorf submits that the findings satisfied the exception in section 13(6) which requires the agreement or consent of a worker to a deduction to be obtained before the conduct or other event which is said to give rise to the deduction has occurred. The provision is designed to prevent any pressure being placed on an employee to agree to deductions of whatever nature which can only be avoided if the agreement or consent is signified by the worker before the happening of the event which causes the dispute between employer and employee. She relies, in particular, on **Discount Tobacco and Confectionery Ltd v Williamson** [1993] ICR 371 at 375E. Since the deduction in the present case was part of the

disciplinary sanction applied to the Claimant, his consent was invalid by reason of that subsection.

74. Mr Sethi resists this argument on the basis that it was not relied on below, nor is there any reference to it in the Respondent's Answer to this appeal and nor has any Respondent's Notice been served in accordance with the **Employment Appeal Tribunal Rules**. The discretion to allow a new point of law to be raised should be exercised in exceptional circumstances only, given the strong public interest in finality in litigation. He submits that there are no exceptional circumstances here, and in light of the serial procedural failures by the Claimant to raise these points, the points should not be permitted to be argued.

75. I fully accept there is a strong public interest in finality in litigation and that the discretion to allow a new point of law to be raised should be exercised only in exceptional circumstances and for compelling reasons. The point at issue here is a pure point of law and it is common ground that it does not depend on any examination or investigation of issues of fact in light of the findings of facts made by the Employment Tribunal.

76. There is, it seems to me, no prejudice to the Respondent in dealing with this point. Furthermore, the point is advanced in resisting an appeal against a finding in the Claimant's favour rather than by way of advancing an appeal. It is advanced by way of reasoning to explain a conclusion of the Employment Tribunal which is silent as to the basis on which that conclusion is reached, save to the extent that there is a clear finding that the agreement was not valid. The Employment Tribunal does not expressly refer to economic or other duress. Rather that has simply been inferred. The Employment Tribunal's findings and reasoning are entirely consistent with section 13(6) and with the rationale given for that subsection in **Discount**

Tobacco and Confectionery. It would be unjust to refuse to allow this argument to be run in the circumstances. Accordingly, I consider that there are exceptional circumstances that justify permission for this new point of law to be relied on, notwithstanding the fact that it was not raised below and notwithstanding the failure by the Claimant to plead it by way of Respondent's Notice.

77. Mr Sethi contends that the repayment agreement was not on account of the Claimant's conduct before the agreement was signed, but rather was on account of the Claimant's wish for the Respondent to make deductions from wages rather than paying upfront for a sum he had earlier agreed to pay. Mr Sethi relies on the findings of fact reflected by paragraphs 46 to 48 of the Judgment inclusive. In particular, the disciplinary sanction imposed on the Claimant was a requirement to attend a training course and to contribute 50% of the cost of the course up to a maximum of £1,000. When the Claimant was asked how he would reimburse the Respondent for the costs incurred, he replied on 31 October that he was content for a reasonable sum to be deducted from his salary each month. Having made that offer, the Claimant was pressed to complete the paperwork and threatened with further disciplinary action if he did not do so, ultimately signing the repayment agreement on 10 December.

78. Persuasively as those submissions are advanced by Mr Sethi on behalf of the Respondent, I consider that it is artificial to distinguish between the prior conduct in imposing a disciplinary sanction and the Claimant's conduct in proposing that deductions be made instead of upfront payments in the context of this case. The cause of the dispute between the Claimant and the Respondent was the requirement imposed on him by way of disciplinary sanction to pay for training. The agreement to deductions was made after that event, and consequent on it.

79. The Claimant was put under pressure to sign the agreement, and was threatened with disciplinary action if he did not do so. In the circumstances, I consider that the exception in section 13(6) is made out on the facts and supports the Employment Tribunal's conclusion that the repayment agreement was invalid. The Employment Tribunal's conclusion can and should, accordingly, be upheld on this basis. Ground 6 which challenges that conclusion accordingly fails.

Conclusion

80. For all those reasons, and notwithstanding the forceful submissions made by Mr Sethi on behalf of the Respondent in this case, the appeal fails and is dismissed. I am grateful to both counsel for their assistance.