Appeal No. UKEAT/0247/16/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 & 20 November 2017

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MR H O FOX (FATHER OF MR G FOX (DECEASED)) APPELLANT

BRITISH AIRWAYS PLC RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM COGHLIN (of Counsel) Instructed by: David Parry Employment Law Witney Business & Innovation Centre Windrush House Burford Road Witney Oxfordshire OX29 7DX
For the Respondent	MR AKASH NAWBATT (One of Her Majesty's Counsel) Instructed by: Harrison Clark Rickerbys Thorpe House 29 Broad Street Hereford HR4 9AR

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

The Appellant was dismissed with notice on the ground of capability arising from long-term medical absence. His claim for unfair dismissal was dismissed by the Employment Tribunal after a Full Hearing in 2014. The Employment Appeal Tribunal in 2016 concluded that, in its consideration of the reasonableness of the decision to dismiss (**Employment Rights Act 1996** section 98(4)), the Employment Tribunal had not taken account of evidence relating to his medical condition received between the date of the dismissal and the date of termination of employment. That issue was remitted to the same Employment Tribunal. By its further decision upon the remittal the Employment Tribunal again concluded that the dismissal was fair. The Employment Appeal Tribunal accepted the Appellant's submission that the Employment Tribunal had not expressly or implicitly addressed the specifically remitted issue concerning the intervening medical evidence. The claim of unfair dismissal was remitted to a new Employment Tribunal for the whole claim to be considered afresh.

THE HONOURABLE MR JUSTICE SOOLE

1. This is the appeal by Mr Henry Fox, father of Mr Gary Fox deceased, against the Decision of the Employment Tribunal dated 22 June 2016, whereby, on a hearing remitted to them by the Employment Appeal Tribunal it dismissed his son's claim of unfair dismissal against the Respondent (BA).

2. Mr Gary Fox tragically died on 16 October 2010, aged 44, just a few weeks after the termination of his employment on 21 September 2010. That termination was in consequence of a letter of dismissal with notice, dated 29 June 2010. The reason for dismissal was capability, arising from his medical condition and consequent long absence from work.

3. Between the letter of dismissal and the date of termination, there was a material change of circumstance as to his medical condition and prospect of a return. Mr Fox's claims of unfair dismissal, disability related discrimination and failure to make reasonable adjustments, were dismissed by the ET on 5 February 2014.

4. By Order of Her Honour Judge Eady QC, dated 2 September 2015, the EAT allowed the appeal against the dismissal of the unfair dismissal claim on the essential basis that in considering the reasonableness of the decision to dismiss, as required by section 98(4) of the **Employment Rights Act 1996** (ERA), the Tribunal had failed to engage with the material change in circumstances in the intervening period between 29 June 2010 and 21 September 2010. It was, and remains, common ground that the reasonableness of the employer's action is to be judged as at the effective date of termination.

5. HHJ Eady QC ordered the claim to be remitted to the same ET for the purpose of engaging with that issue. The essential contention on this appeal is that, by its Decision dated 22 June 2016, the Tribunal failed to do so. On behalf of the Appellant, Mr Tom Coghlin asks for the Decision to be set aside and for the claim of unfair dismissal to be remitted to a freshly constituted ET. This is opposed by BA, who appear by Mr Akash Nawbatt QC.

6. As is apparent this case has a long procedural history. The claim was issued on 11 December 2010. An important question on quantum was taken as a preliminary issue, and finally resolved in favour of the Appellant by the Court of Appeal in 2013: [2013] ICR 1257. The first hearing of the claims took place on 28 to 30 January 2014. Judgment was given on 5 February 2014 and Reasons sent to parties on 4 April 2014. Following HHJ Eady's Order of 2 September 2015 the remitted hearing took place on 4 and 5 May 2016 and lead to the Decision under appeal. At a Preliminary Hearing on 16 February 2017 HHJ Peter Clark ordered that the appeal be set down for this Full Hearing.

7. I should set out the essential narrative which I derive from the various Judgments. Mr Fox was employed by BA for 22 years, from 1988 until the termination of his employment on 21 September 2010. Initially he was employed as a tradesman refurbisher. In 1995 he had a serious accident and was in hospital for nearly 11 months before he could return to work. In 1998 he had an operation on his hip. In December 2007, in the light of a poor attendance record related to sickness absences, he was dismissed with effect from 31 January 2008. That decision was rescinded and he was transferred to a job as a data entry analyst in the Data Entry Unit (DEU). By this time, as is common ground, he was disabled within the meaning of the **Disability Discrimination Act 1995**. The work of the DEU was important, time critical and

had to be carried out on site. Mr Fox worked night shifts, which were unpopular and depended on volunteers.

8. Mr Fox had substantial sickness absences whilst at the DEU. Between 1 September 2008 and 31 August 2010, he was absent on 170 days out of 320 rostered. From 21 March 2010 until the termination of his employment, he was absent from work due to calcium on his hip. This meant he was in considerable pain and was unable to sit or stand for any length of time.

9. The contractual procedure for dealing with lengthy absences from work was contained in section 4 of the BA Policy EG300. That section is headed "*Managing Absence which exceeds 21 consecutive days, or absence which affects an employee's ability to work for medical reasons*". That policy required BA to seek Occupational Health advice from its BAHS (British Airways Health Service) division in cases of long-term absence.

10. Section 4.3 was headed "*Medical Incapacity and Unable to do their Job*". The actions that BA might take thereunder included "*termination of employment on the grounds of medical incapacity*".

11. The next relevant section was 4.7 which I need not read. Section 4.8 provided that where employment has been terminated under section 4, the employee may be entitled to an ill-health pension if they belong (as Mr Fox did) to the company's occupational pension scheme.

12. At the date of the letter of dismissal - 29 June 2010 - the medical and Occupational Health evidence was to the effect that Mr Fox would be unable to resume his job in the

A foreseeable future. Furthermore, there was, as he accepted given his medical condition, no other suitable job for him. The letter from BA's Mr Coomber gave 13 weeks' notice of dismissal and advised Mr Fox: (1) of his right under section 4 to appeal the decision within the next 7 days, (2) that the matter would be referred to BAHS "*to consider whether ill health retirement should be awarded*", and (3) that "*During the period of notice I may ask you to revisit BAHS to see if your health has improved, and if so, I may revoke this decision. I will only revoke this decision if you were able, through treatment, to return to your contracted role and hours*".

13. Mr Fox did not submit an appeal at this stage. On 14 July 2010, BAHS' Ms Williams informed Mr Coomber that Mr Fox would be having a hip operation in 3-6 weeks' time. It would require a short hospital stay and post-operative recovery time scales were unknown. At a meeting in August 2010 Mr Coomber encouraged Mr Fox to lodge an appeal against the decision to terminate his employment. They also discussed the possibility of an ill-health pension.

14. In consequence, Mr Fox made an application to BAHS for ill-health retirement (IHR). This led to a report dated 6 September 2010 from BAHS' Dr Muir which referred to his pending operation and stated "*It is anticipated that this treatment will alleviate his condition within the foreseeable future and hence he does not meet the eligibility criteria for IHR under NAPS*". "NAPS" is the New Airline Pension Scheme.

15. The ill-health condition in NAPS depended on medical evidence that the member is "*and (will continue to be) incapable of carrying on the member's occupation because of physical or mental impairment*". It is common ground that there is no material difference

between that test and the test in EG300 section 4.3 that "*the employee is incapacitated and is unable to do their job to the standard reasonably required by British Airways in the foreseeable future*". Mr Coghlin submits that Mr Fox was thus placed in a position whereby he (1) had been dismissed on the basis that he would not be able to work for the foreseeable future, but (2) was refused ill-health retirement on the basis that he would be able to work in the foreseeable future.

16. In the meantime Mr Fox had lodged an appeal against the dismissal decision. The appeal went to BA Casualty Operations Manager, Mr Fraser. His email appeal included the following:

> **"… As you know I am waiting for an operation of calcium formation of the hip. I feel a lot better now as I think the bone has stopped growing on the hip. I can walk a lot better and can sit down now and I feel I am able to come back to work."**

17. Mr Fraser initially responded that he could not hear the appeal because it was outside the 7 day time limit. However on 6 September 2010 his further letter stated:

> **"If you can clearly show me the reason why you did not appeal within 7 days and stating your reasons for appeal I could reconsider my decision. At this present time I am not prepared to hear this appeal."**

18. Mr Fox did not reply to that communication. However on 8 September 2010 his trade union representative Mr Clarke informed Mr Coomber and Mr Fraser that his operation had been fixed for 26 September 2010. Noting the pending termination date of 21 September, Mr Clarke asked for the termination date to be put back so as to allow Mr Fox to have the treatment while still retaining his job.

19. Later that day, 8 September 2010, Mr Coomber replied stating:

> **"After due consideration to the events surrounding Gary's absence from work, I do not intend to change my decision and the termination date of 21 September stands."**

20. On 13 September 2010 Mr Coomber and Mr Fraser met with Mr Kemp (the head of Mr Fox's trade union) to discuss the decisions not to extend the termination date and, in the absence of response to Mr Fraser's communication of 6 September, not to allow an appeal out of time. Mr Kemp confirmed that the union would not challenge these decisions, noting Mr Fox's poor sickness record over the years.

21. The ET's Decision of 2014 substantially set out this narrative, albeit not the final meeting of 13 September. The Decision correctly set out the agreed issues on section 98(4) namely:

> **"5.3. Did the respondent act reasonably in all of the circumstances (considering equity and the substantial merits of the case) when treating the claimant's capability as a reason to dismiss him? Specifically:**
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> > **5.3.1. Did the respondent follow a fair procedure in accordance with the terms of its Absence Management Policy, EG300?**
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> > **5.3.2. Was the decision to dismiss the claimant within the range of reasonable responses?**
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> > **5.3.3. Was it unreasonable for the respondent to refuse the claimant's request for an appeal when:**
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> > > **5.3.3.1. such request was submitted 56 days after the notice of termination was given; and**
> > >
> > > **5.3.3.2. the claimant failed to provide reasons why his request for an appeal was submitted out of time notwithstanding the respondent's wish for him to do so?"**

22. The 2014 Decision found for BA on each of the three sub-issues in paragraph 5.3, with reasons given under issues 5.3.1 and 5.3.3. In respect of issue 5.3.2, the Tribunal simply answered "*We consider that the decision to dismiss was within the range of reasonable responses*" (see paragraph 55). In particular there was no consideration of the potential impact of Dr Muir's evidence on the decision to dismiss. It had been part of Mr Fox's case that this change in medical circumstance rendered his dismissal unfair.

23. HHJ Eady QC concluded that the Tribunal had failed to deal with that issue, which was encompassed within issue 5.3.2. She described the change of circumstance as follows:

> **"65. By the date of the Claimant's dismissal, however, the position was somewhat different. What the relevant decision-takers within the Respondent knew then was that the Claimant had a date fixed for an operation that might well enable him to recover so as to return to his employment. Certainly, they were aware of the more recent opinion of BAHS on the Claimant's application for ill-health retirement, which had concluded that the Claimant did not meet the relevant criteria as it was anticipated that his forthcoming operation ("treatment") would alleviate his condition within the foreseeable future. As the Respondent accepts, the relevant criteria for the purpose of determining the ill-health retirement application were essentially the same as those allowing for a dismissal on grounds of capability under the Absence Management procedure.**
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> **66. It was (unsurprisingly) part of the Claimant's case before the ET that this change in circumstances rendered his dismissal on 21 September 2010 unfair. It is, however, difficult to discern a straightforward engagement with this point in the ET's Reasons."**

She concluded:

> **"77. The point arose in any event, on the question of the application of the range of reasonable responses test. The issue raised by the Claimant's case was whether the changed circumstances were such as to require the Respondent to re-visit its original decision: was the dismissal rendered unfair by its failure to do so? On this question, there was a real issue before the ET but its reasons fail to demonstrate any engagement with it. I suspect that is because the ET wrongly confined its focus to the fairness of the initial decision rather than the fairness of the dismissal (the statutory question). …"**

24. The appeal was allowed on the subsequent Disposal Hearing. HHJ Eady QC identified "the remaining question" as "*whether the dismissal was fair, given a material change in circumstance between the taking of the decision to dismiss and the dismissal itself*" (paragraph 15). It was common ground that the question potentially permitted of more than one answer and accordingly had to be remitted. Mr Coghlin's submission that it should be remitted to a freshly constituted ET was not accepted.

25. The 2016 Tribunal Decision first identified the agreed issue as "*was the claimant's dismissal on 21 September 2010 within the band of reasonable responses?*" (paragraph 2). The Tribunal then set out five paragraphs of HHJ Eady's first Judgment, including paragraphs 65 to 66 cited above, with would their focus on the change of medical circumstances between 29 June and 21 September 2010.

26. The Tribunal then made further findings of fact, of which two need mention. The first (paragraph 4.4) was the finding as to the Coomber /Fraser/Kemp meeting of 13 September 2010 as noted above. The second (paragraph 4.5) was that section 4.3 of BA's EG300 Policy was not relevant in this case as it only applied where BAHS had advised that an employee was incapacitated and unable to do their job to the standard required by BA in the foreseeable future. The Tribunal stated: "*That was not the case here*". They cited sections 4.1 and 4.7 of the Policy and also the provisions of the NAPS Occupational Pension Scheme.

27. The Tribunal then summarised Mr Coghlin's contentions on the remitted issue:

> **"5. … no reasonable employer would have dismissed the claimant in the light of Dr Muir's report. Mr Coomber, on receipt of that report, should have taken into account the following facts:**
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> > **5.1. that the claimant was awaiting the outcome of an operation which was to take place very shortly**
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> > **5.2. it was clear from the report of Dr Muir that the previous information supplied to him by Ms Williams on 14 July 2010 was now out of date, and**
> >
> > **5.3. he should have allowed the claimant to be heard about these matters in respect of the assertion that the termination date should be put back until the respondent had an assessment of the result of the operation."**

28. The Tribunal next set out seven agreed propositions of law:

> **"6.1. In cases where dismissal follows a period of long term incapacity, it is essential to consider the question of whether the employer can be expected to wait any longer: see *BS v Dundee City Council* [2013] CSIH 91 para 27.**
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> **6.2. In considering that question, the employment tribunal must apply the range of reasonable responses test, ie was the decision to dismiss on grounds of incapacity within the range of reasonable responses which an employer in the circumstances could adopt: see *Elmbridge Housing Trust v [O'Donoghue]* [2004] EWCA Civ 939 para 43.**
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> **6.3. The employment tribunal must consider, from a common sense point of view (using their industrial experience), the impact that the claimant's absence had upon the respondent and to engage with the question whether the respondent should be required to wait longer, and if so, for how long: see *Bolton St Catherine's Academy v O'Brien* EAT Unreported 18 September 2015.**
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> **6.4. The employment tribunal must guard against being carried along by sympathy for a longstanding employee whose employers have concluded that he is not fit to return to his job and resist the temptation to test matters according to what they would have concluded and decided if they had been in the employer's shoes: see *DB Schenker Rail (UK) Ltd v Doolan* (EAT) Unreported 13 April 2011, paras 36-37.**
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> **6.5. Length of service may be a relevant consideration in ill health dismissal cases. The critical question in every case is whether the length of the employee's service, and the manner in**

which he has worked during the period, yields inferences that indicate that the employee is likely to return to work as soon as he can: *Dundee City Council* at para 33.

6.6. A reasonable employer will take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him and inform themselves of the medical position: *East Lindsey District Council v Daubney*.

6.7. The tribunal must always have regard to the words of s.98(4) Employment Rights Act 1996 which read as follows:

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

29. It is necessary to set out the conclusion section of the Judgment in full:

"7. Having considered the provisions of the Absence Management Policy of the respondent it is clear to the tribunal that this policy does not specifically deal with the situation which arose in this case. As the tribunal has already determined, Mr Coomber had carried out the policy correctly and had justifiably come to a decision to dismiss on 29 June 2010. However a new issue had arisen, namely Dr Muir's report (page 174) and Mr Clarke's email (see paragraph 36 of the 2014 judgment). Dr Muir had stated that it was anticipated that the treatment would alleviate the claimant's condition within the foreseeable future. Mr Clarke had requested the termination date be moved from 21 September 2010 to a later date to take account of the operation fixed for 26 September (and which actually took place on 28 September 2010).

8. The question therefore is: what in those circumstances taking into account the provisions of s.98(4) of the ERA 1996 and the legal authorities set out above would be a reasonable act by Mr Coomber given the information before him?

9. In the tribunal's view Mr Coomber had all the necessary information before him to make a decision. No further information from Gary Fox could have been of assistance because he had not had the operation. The claimant was clearly suffering from a serious condition and the proposed operation was not a minor one. The claimant had an extremely poor attendance record, a significant amount of which was not related to his disability and had already been absent for six months which, as set out at paragraph 27 of the 2014 judgment, was a growing problem in the nightshift team to which Gary Fox was attached.

10. In those circumstances in our view on a neutral burden or proof the decision of Mr Coomber that he could not wait any longer was within the band of reasonable responses. We are fortified in that view in that in the meeting of 13 September 2010 the claimant's trade union informed Mr Coomber they would not challenge his decision.

11. In those circumstances the tribunal confirms the claimant was not unfairly dismissed on 21 September 2010."

30. The Notice of Appeal contains two grounds. Ground 1 is that:

"The tribunal erred in finding … that paragraph 4.3 of EG300 was not relevant since that paragraph only applied where BAHS advised that an employee was incapacitated and incapable of doing his job to the standard reasonably required by BA in the foreseeable future, and BAHS had not so advised."

A Ground 2 is that:

> **"The tribunal did not properly engage with the claimant's case."**

B 31. In my judgment the meat of this appeal is in ground 2. As to ground 1, I accept Mr Coghlin's submission that the whole of section 4 of the EG300 Policy was potentially irrelevant. However, I do not read the Tribunal's conclusion as having been affected by its excision of section 4.3.

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32. Ground 2 requires a close analysis of paragraphs 7 to 10 of the Judgment, but set against the agreed propositions of law and the recorded and unrecorded submissions of each party. D Paragraph 7 makes appropriate reference to the opinion of Dr Muir dated 6 September 2010 and the consequential changed medical circumstances between the decision to dismiss and the termination date; and to Mr Clarke's email of 8 September 2010 requesting a postponement of the termination date.

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33. Paragraph 8 then frames the section 98(4) question by reference to "those circumstances" and to "the information before" Mr Coomber. I think it clear that "those F circumstances" and "the information" must refer to the matters identified in paragraph 7. The changed medical circumstances likewise reflect HHJ Eady's identification of the issue in paragraphs 65 and 66 of her Judgment, as cited in paragraph 3 of the Tribunal's Decision.

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34. The problem with the Decision arises from paragraphs 9 and 10. On the face of it, and with the possible exception of the third sentence in paragraph 9, those paragraphs take no account of the information which is at the heart of the changed medical circumstances, namely H Dr Muir's report of 6 September 2010.

35. In order to understand paragraph 9 it is necessary to refer back to the submissions submitted on behalf of Mr Fox, as recorded in paragraph 5 of the Judgment, and to the submissions on behalf of BA, which appear in Mr Nawbatt's skeleton argument for that hearing.

36. The first sentence of paragraph 9 is uncontroversial. The second sentence is evidently a response to the point, recorded at paragraph 5.3, that Mr Coomber should have allowed Mr Fox to be heard. The third sentence appears to be a response to the point recorded in paragraph 5.1. The terms of that response strikingly reflect paragraph 19 of Mr Nawbatt's skeleton argument of 4 May 2016. Following a reference to Dr Muir's opinion, that paragraph concluded:

> **"19. … Mr Coomber had advice from BAHS that the operation would involve a short hospital stay and that post-operative recovery timescales were not known … In this regard, it is significant that this was not a minor operation or condition."**

However, that "advice from BAHS" is a reference to Ms Williams' advice of 14 July 2010 (see also paragraph 26 of the Tribunal's 2014 Decision). As paragraph 5.2 of the Judgment records, that information was rendered out of date by Dr Muir's report.

37. The remainder of paragraph 9 deals with factors adverse to Mr Fox's position that, as is not in dispute, Mr Coomber and BA were entitled to weigh in the balance.

38. Paragraph 10 contains no reference to the remitted issue of changed medical circumstances. Although not a ground of appeal, I would observe that the reference to "*the decision of Mr Coomber that he could not wait any longer*" does not appear to be reflected in any finding of fact in the 2014 or 2016 Decisions, nor in Mr Coomber's witness statement, which was supplied at my request in the course of argument. Mr Nawbatt rightly accepted that the second sentence of paragraph 10 formed no part of the ET's reasoning.

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39. In the course of argument Mr Nawbatt was compelled to accept that the Tribunal's Decision did not expressly deal with the point identified in paragraph 5.2 of its Judgment, namely Dr Muir's report. However he submitted that the Tribunal must have implicitly taken it into account in reaching its conclusion on the remitted section 98(4) issue. In particular he submitted that: (1) the evidence on that point was expressly referred to in paragraph 7; (2) the relevant law was accurately and sufficiently identified in paragraph 6; (3) the Tribunal must have proceeded on the basis that, when making his decision on 8 September, Mr Coomber must have had in mind the report of Dr Muir dated and received only two days earlier.

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40. Mr Nawbatt warned against the risk of an appellate Tribunal exposing a Judgment to undue textual analysis, and emphasised the need to review the 2016 Judgment in the context of the 2014 Judgment. Those submissions reflected the similar self-direction of HHJ Eady QC in her Decision, and I have had them very much in mind.

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41. However I am not persuaded that the Tribunal did engage with the critical part of the remitted issue. That was the changed medical circumstances, arising from Dr Muir's report, as they might affect the reasonableness of the decision to dismiss. When such a clear and specific matter is remitted to the ET it must be answered clearly and explicitly. In my judgment it was not. In any event I am not persuaded by Mr Nawbatt's submission that the Tribunal can be taken to have done so by implication.

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42. Accordingly I conclude that the appeal must be allowed and the finding of unfair dismissal set aside. As to disposal, both counsel submitted that in the event that the appeal was successful, there should be remission to a freshly constituted Tribunal (by Employment Judge sitting alone) and that the Tribunal should consider the unfair dismissal claim entirely afresh.

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43. The Employment Judge has now retired. The claim now being limited to unfair dismissal, there is no continuing imperative for lay members. The considerations of "second bite", identified in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 in any event compel a fresh start. It is inappropriate for a fresh Tribunal to be picking its way through findings contained in two separate ET Decisions and/or in directions and/or observations contained in two EAT Decisions on appeal. I agree with the submissions of counsel as to disposal.

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44. Whilst it is inherently unattractive for a claim of unfair dismissal to be considered afresh, more than seven years after the events in question, I am quite persuaded that this is the only just course in these particular circumstances.

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