Appeal No. UKEAT/0105/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 February 2018

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR P CHOKSI APPELLANT

ROYAL MAIL GROUP LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR JESSE CROZIER (of Counsel) Instructed by: Matwala Vyas LLP 3 Electric Parade Seven Kings Road Ilford Essex IG1 8BY
For the Respondent	MR STEVE PEACOCK (Solicitor) Weightmans LLP 100 Old Hall Street Liverpool L3 9QL

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

PRACTICE AND PROCEDURE - Disposal of appeal including remission

The Appellant argued that the ET had failed to comply with an Order by which the EAT remitted the case to the ET for it to consider the issues set out in that Order. The EAT held that the ET had erred in law by misinterpreting the EAT's Decision remitting the case, and by embarking on its own inquiry, rather than by considering the issues which the EAT had required it to consider. The EAT remitted the case to a different ET for it to consider the issues originally remitted to the ET by the EAT.

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THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

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1. This is an unusual appeal. It is from a Decision of the Employment Tribunal sitting at London (Central) ("the ET"). The ET consisted of Employment Judge Professor Neal ("the Employment Judge"). In a Judgment sent to the parties on 10 January 2017, the Employment Judge decided that the Claimant had been fairly dismissed by the Respondent.

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2. The case is unusual because there has already been an appeal in it. The Claimant's appeal to the Employment Appeal Tribunal ("the EAT") succeeded. The EAT remitted the case

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to the ET by an Order dated 21 January 2016, for the reasons given in the Judgment of that date. The remittal has led to a further appeal by the Claimant, as I will explain.

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3. The effect of the EAT's Order was that the ET should decide who actually dismissed the Claimant, a Mr O'Donovan or a Mr Miranda, and, if the latter, whether the appeal process allowed a more severe sanction to be imposed on the Claimant without notice and whether, in all the circumstances, including the Respondent's Code of Conduct and the ACAS Code, and

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further evidence on those issues, the dismissal was fair in accordance with section 98(4) of the **Employment Rights Act 1996** ("ERA") and if not, to consider the various issues that might arise in relation to remedy including the issue of contribution and compensation.

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4. I will refer to the parties as they were below. I will refer to the Decision which was first appealed to the EAT as "Decision 1", to the Decision of the EAT on the first appeal as

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"Decision 2", and to the Decision of the ET on the remittal as "Decision 3". Paragraph references are to the paragraph numbers in the relevant Decision unless I say otherwise.

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5. On this appeal, the Claimant has been represented by Mr Crozier, of counsel. He has not appeared at any of the earlier stages of this case. The Respondent is represented by Mr Peacock, a solicitor. I am grateful to both representatives for their very helpful oral and written submissions. Mr Peacock, unlike Mr Crozier, appeared in the first EAT hearing which led to Decision 2 and in the remitted ET hearing which led to Decision 3. He did not however appear before the ET in the first ET hearing which led to Decision 1.

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The Facts

6. I have taken this summary of the facts from Decision 2. The Claimant was an Operational Support Manager. He was dismissed, after a career lasting 27 years, for gross misconduct. On 10 October 2013, 28 files containing obscene material were found in a folder in the Claimant's cloud storage account which was provided for him by the Respondent for work purposes. It seems that the Respondent found them and then told the police. The Claimant was arrested at work, interviewed at the police station, charged and bailed. It was apparently well known at his workplace that this had happened.

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7. Access to cloud accounts is protected by a personal password. An employee can get into his cloud account at work or remotely. Anyone who tried to log onto an account is warned that access must be authorised. In Decision 1, the ET described the warning as graphic. Use of the Respondent's computer system is governed by a Code of Conduct. This forbids the sharing of personal passwords and getting access to pornographic material, storing it or publishing it.

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8. The Claimant accepted that he knew about those rules. The Claimant's case was that he did not know about the 28 files in his cloud storage until he was arrested. He had not put them there and did not know how they had got there. His case was that there was a widespread

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practice of password sharing among employees, which was essential to facilitate efficient working.

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9. Mr O'Donovan was the head of the Claimant's department, but not the Claimant's line manager. He was asked to investigate and if necessary to carry out the disciplinary procedure. Mr O'Donovan suspended the Claimant and interviewed him. The Claimant said he did not know the files were in his cloud storage account and did not know how they got there.

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10. Mr O'Donovan had a technical report which the Claimant did not get until a late stage in the disciplinary process. The ET did not think that that report helped very much. Mr O'Donovan had formed the mistaken impression that the report told him about computer transactions linked with the Claimant. The Respondent accepted at the hearing in front of the ET that all that the report showed was that the files were present in the Claimant's cloud storage account.

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11. Mr O'Donovan formed the view early on that the Claimant had breached the rules by, as he asserted, sharing his password with others. The Claimant gave the names of eight such employees or former employees who he said would confirm that this was a widespread practice. Mr O'Donovan contacted six of them. He did not try to contact the two former employees, one of whom, the Claimant said, had a grudge against him.

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12. HHJ Hand QC summarised Mr O'Donovan's interviews with various employees at paragraphs 13 to 16 of Decision 2. Mr O'Donovan decided both that the Claimant had shared his password (he had admitted as much), and that he had been responsible for downloading the pornographic material into his cloud account (see Mr O'Donovan's letter to the Claimant of 18

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March 2014). Part of Mr O'Donovan's own reasons for that decision is set out in paragraph 21 of Decision 2. He considered that password sharing was a serious offence, but would not on its own justify dismissal: "*Of itself, I would consider this a serious matter, but one which could be dealt with using action short of dismissal*".

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13. The Claimant appealed to Mr Miranda. Mr Miranda conducted a re-hearing, but he did not do any fresh investigation. Mr Miranda's view was that if he had found that the Claimant

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had shared his password, that would have justified dismissal. Mr Miranda took a dim view of the Claimant's credibility. He said that there never been a practice of sharing login details. Managers, especially at the Claimant's level, are absolutely clear on the consequences of sharing login details.

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14. The ET decided that the Respondent had an honest belief that the Claimant was

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responsible for downloading the files in the cloud account and that he had broken the Code of Conduct by sharing his password. The ET decided that the investigation for the password allegation was adequate. Indeed, it seems to have thought that little investigation was necessary in relation to the allegation that the Claimant had shared his password.

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15. The ET considered that dismissal was a harsh sanction, but that it was not outside the bounds of reasonable responses, given the Claimant's position in middle management. In the

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alternative, the ET decided that there should a 100% reduction in any compensation to reflect the Claimant's contributory fault. The ET also decided, and there was no appeal against that part of the decision, that the Respondent had not acted reasonably in deciding that the Claimant had downloaded files in his cloud account and dismissing him for that.

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16. On appeal, the EAT permitted the Claimant to amend his Notice of Appeal to rely on the difference of view between Mr O'Donovan and Mr Miranda about the seriousness of the allegation that the Claimant had shared his password. In paragraph 41 of Decision 2, the EAT recorded that Mr Peacock had initially submitted that the inconsistency between Mr Miranda and Mr O'Donovan had never been raised in the ET, but on reflection, having considered paragraph 11(37) of Decision 1, he accepted that perhaps the ET had been alert to that point.

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17. The EAT further recorded that Mr Peacock was prepared to accept that the grounds of appeal should be amended to include, in ground 8, the following:

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> **"The Employment Tribunal failed to consider that the dismissing officer, Mr O'Donovan, would not have dismissed for password sharing alone whereas Mr Miranda, the appeals officer, would have done so; this is relevant to the reasonableness of the Respondent in adopting a sanction of dismissal."**

I note that that is the ground of appeal which succeeded in the EAT.

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The EAT's Decision (Decision 2)

18. In paragraph 45, the EAT held that if the Claimant had not appealed, the Claimant's dismissal would have been unfair. I interpolate that this is because the ET had held (ex post facto) that the Respondent would not have acted reasonably in dismissing for the allegation about the Claimant's cloud storage account, and because Mr O'Donovan had made it clear, in the EAT's view, that he would not have dismissed the Claimant for the allegation that he shared his password, if that allegation had stood alone (see ground of appeal 8 which the EAT gave permission to the Claimant to rely on).

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19. The EAT then asked, in paragraph 46 of Decision 2, what affect the appeal had on that position. Mr Miranda did not act unreasonably in having a different view from Mr O'Donovan,

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but it seemed to the EAT that it did "*seem a very odd situation that [the Claimant] is worse off by having appealed than he would have been had he not appealed*".

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20. In paragraphs 47 and 48 of Decision 2, the EAT said this:

> **"47. This is a matter that strikes me as something that ought to have been taken into account by the Employment Tribunal in terms of whether or not this really was a sanction that fell within the band of reasonable responses. It was considering the dismissal; the dismissal took place in March 2014. It is of course correct that in some circumstances one should look more widely than the dismissal itself. The dismissal for some purposes is a process that includes the appeal - this was established in *West Midlands Co-operative Society v Tipton* [1986] ICR 192 - but it does not seem to me that must be so in all cases. The dismissal either substantively or procedurally could have a defect that was cured on appeal, a concept accepted by Hale LJ in the *Whitbread* case, but does that mean that a decision that would have been unfair because the dismissing officer had relied upon evidence that was not capable of proving that which he thought it proved, and in respect of the other aspect of the case he would not have dismissed, be turned into a fair dismissal because on appeal the appellate manager took a different view of the second matter.**

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> **48. In my judgment, that should have been explored by the Employment Tribunal and ought to have been considered first of all in terms of the band of reasonable responses and secondly as to whether or not if on appeal a dismissing officer takes a different and more extreme view then one can say that the dismissal that occurred earlier therefore is a fair dismissal. In my judgment, that is a concept that requires a good deal more thought than was given to it by this Employment Tribunal. Accordingly, I have reached the conclusion that there was an error of law and that this is a matter that must be remitted."**

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21. The EAT's summary of its Decision read as follows:

> **"*UNFAIR DISMISSAL - Reasonableness of dismissal***
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> **How should section 98(4) Employment Rights Act 1996 be viewed when conduct gives rise to two allegations (grounds A & B), both of which the dismissing officer finds proved but only one of which (ground A) is regarded as justifying dismissal, when on appeal the manager conducting the appeal disagrees and regards both as justifying dismissal and then the Employment Tribunal concludes that dismissal on ground A was not reasonable but accepts that the appeal manager was acting reasonably to conclude that the dismissing manager was wrong to think that ground B did not justify dismissal? What constitutes the dismissal in those circumstances? Is the situation analogous to a rehearing appeal curing a defect in the dismissal process? Because the Employment Tribunal had not considered these questions the matter was remitted to the same Employment Tribunal to do so."**

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22. The EAT's Order, which, it appears, was agreed by counsel (see page 44 of the bundle), recited that Mr O'Donovan had decided that the password allegation on its own would not have justified dismissal, and that Mr Miranda thought that it did justify dismissal on its own. The Order required the ET to decide who dismissed the Claimant, Mr O'Donovan or Mr Miranda, and if it was Mr Miranda, whether the appeal process permitted a harsher sanction to be

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imposed without notice to the Claimant, and whether in all the circumstances, having regard to the Respondent's Code of Conduct and to the ACAS Code, the dismissal was fair, and if not, to consider if appropriate section 122(2) and section 123(6) of the **ERA** and the issue of remedy.

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23. I note at this point that it is clear from the recital to the EAT's Order, to which I have just referred, that the EAT had held that Mr O'Donovan had decided that the password allegation on its own would not have justified dismissal.

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The ET's Decision on the Remittal (Decision 3)

24. The ET in Decision 3 recited the history of the claim. It recorded (in paragraph 2(7)) its view that there was "*some residual lack of clarity as to precisely the issue being remitted to the Employment Tribunal*". This led the ET to convene a pre-hearing review on 24 June 2016, which was attended by counsel who had appeared for the Claimant in the EAT and by, I think, Mr Peacock. It was agreed at that hearing that the issue related to the application of section 98(4) of the **ERA** and that no new evidence was needed.

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25. I pause here to say that Mr Peacock produced a skeleton argument for the remitted ET hearing, which he showed me in the course of the hearing today. At pages 5 to 6 of that skeleton argument under the heading "*Questions for consideration*" four questions are listed. They read as follows:

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> **"[Question 1]: Was the dismissal effected by Mr O'Donovan or Mr Miranda?**
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> **[Question 2]: If by the latter, whether the appeal process allowed for a different and graver sanction to be imposed without notice having been given to [the Claimant] that he was at risk of imposition of a more severe sanction;**
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> **[Question 3]: Whether, in all the circumstances, including further consideration of the Royal Mail Code of Conduct, the ACAS Code of Conduct and further evidence limited to these issues, the dismissal was fair in accordance with s98(4) ERA; and, if not**
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> **[Question 4]: To consider, if appropriate, s122(2) & s123(6) ERA (Contribution);**
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> **[Question 4 [sic]]: If appropriate, to consider the issue of remedy."**

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26. The ET set out paragraphs 45 to 48 of the EAT's Judgment. It was agreed, the ET said, that the issue had been remitted on the basis that Mr O'Donovan thought that password sharing was not serious enough to warrant dismissal and thus dismissed the Claimant *solely* for mis-use of his cloud account (see paragraph 4, Decision 3). I emphasis the word "solely" for reasons which will become clear. In paragraph 5, the ET summarised paragraph 48 of the EAT's Decision that Mr Miranda had taken a more extreme view of the allegation about password sharing so that the Claimant was worse off than he would have been had he not appealed.

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27. In paragraph 6 of Decision 3, the ET said this:

> **"6. Were that to have been the case, the question of law arises in the context of whether such a situation is capable of satisfying the "test of reasonableness" in Section 98(4). The starting point for this remitted hearing, therefore, has been to ascertain what evidence was given, and what findings of fact were made, in relation to what Mr O'Donovan did at that stage of the internal proceedings."**

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28. The ET then said that it had sought to clarify the source of the EAT's view (expressed in paragraph 45 of its Decision) that Mr O'Donovan would not have dismissed the Claimant for the allegation that the Claimant had shared his password, if that allegation had stood alone.

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29. The ET then, in paragraph 8, set out some of its findings about the investigation. Essentially, these showed that there were two strands to the Respondent's investigation; the allegations about password sharing and about downloading video files. In paragraph 9, the ET said that Mr Robison, who represented the Claimant at the EAT and at the remitted ET hearing, explained that the source of the EAT's view that Mr O'Donovan would not have dismissed for the password sharing allegation alone was a passage in Mr O'Donovan's written explanation for the dismissal. In paragraph 10 of Decision 3, the ET said this:

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> **"10. This, it had been submitted, indicated that Mr O'Donovan had decided that the password sharing was not serious enough to warrant dismissal, and that the eventual dismissal must, *therefore*, have been *solely* for the misconduct in relation to the obscene images". (My emphasis)**

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Again, I emphasise the word "solely" and the word "therefore".

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30. In paragraph 11 of Decision 3, the ET said that it had invited submissions to help with the question whether there was any material in the case which "*excluded*" dismissal as a possible sanction for the password sharing element of the Claimant's misconduct.

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31. The ET then recited material from the documents and from the ET's notes of evidence which supported the view that Mr O'Donovan had dismissed the Claimant for two allegations, not just for the allegation that he had downloaded video files into his cloud account (paragraphs 11 to 17). The ET then said at paragraph 18 of Decision 3:

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> **"18. It follows clearly from the Bundle documents and from the record of the witness's responses during cross-examination by the Employment Judge that Mr O'Donovan dismissed the Claimant/Appellant for two acts of misconduct. There is nothing to suggest that Mr O'Donovan considered the password sharing as not being sufficiently serious as to invite a sanction of dismissal. Nor is there anything in the documentation and the letter of dismissal [at page 146 of the Bundle] to displace that as being the case."**

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32. The ET then quoted the letter of dismissal which said that the Claimant had been dismissed for the two allegations as the ET explained in paragraph 20 of Decision 3.

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33. Its analysis of the evidence led the ET to say in paragraph 21 of Decision 3 that, as both representatives agreed, the EAT's view expressed in paragraph 47 of Decision 2 was "*ill-founded*". In paragraph 22 the ET said that it also followed, as the representatives agreed, that "*on the clearly established facts of this case*" the inquiry which the EAT ordered the ET to carry out "*did not … fall to be made*" and that "*the "concept" which it was considered '… requires a good deal more thought than was given to it by this Employment Tribunal …' did not arise for consideration at all*".

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34. The ET heard further submissions. In paragraph 25 it said that the ET and the parties had discussed each of the matters raised by the EAT, "*although, for the reasons set out above, those matters lay outside the scope of the issues raised by the facts of the present case*".

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35. In paragraph 26, the ET said that:

> **"26. … the misconception as to the factual circumstances, which appears to have led [the EAT] to remitting this case, would not have arisen if the parties on appeal had had access to the Judge's Notes …"**

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The ET said that:

> **"26. … no criticism is to be directed to [the Claimant's representative, Mr Robison] or to the learned judge in the [EAT] for having engaged in oral argument on a basis limited to the documentation prepared for the appeal hearing."**

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Submissions

36. Mr Crozier relied on four grounds of appeal:

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(1) The ET, in failing to comply with the EAT's Order for remission, has acted without jurisdiction, and unlawfully.

(2) If the scope of the remittal was not clear, the ET should have asked the EAT for guidance.

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(3) The finding that Mr O'Donovan would have dismissed for the password allegation is perverse.

(4) The ET failed to consider issues which were relevant to the fairness of the dismissal.

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In his oral submissions and reply, Mr Crozier accepted that the fourth ground was not a freestanding ground of appeal and was really tied up in the first three grounds of appeal.

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37. In his helpful skeleton argument, Mr Peacock for the Respondent submitted that the ET was right to hold, on the evidence, that Mr O'Donovan did not dismiss the Claimant for one reason alone. He made the attractive submission in his skeleton argument that if sharing a password in breach of policy is an apple and having obscene material in a cloud account is an orange, Mr O'Donovan's approach was to put both fruit in a blender; he did not treat them as two separate fruit, so that if you took the apple away he could still eat the orange; his approach left him with a puree comprising both fruit.

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38. He further submitted that the ET clearly dealt with the question of who dismissed the Claimant and clearly held that Mr O'Donovan had dismissed him, and that Mr Miranda had upheld that decision on appeal. There was, he submitted, no escalation in sanction because the primary sanction had been dismissal and that sanction had been upheld on appeal.

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39. In any event, Mr Peacock submitted that the Claimant's argument that his dismissal was unfair could not possibly succeed. Mr O'Donovan had dismissed the Claimant and Mr Miranda had upheld that dismissal. The Claimant was deemed, by appealing, to have consented to a process by which his appeal might or might not succeed. He could have been reinstated or his dismissal could have been upheld. No more severe sanction was imposed. The sanction which was at issue was dismissal, and that sanction had been upheld. In summary he submitted that the ET did not err in law in its approach to the scope of the remittal and, in any event, the Claimant could not succeed in showing that his dismissal was unfair.

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40. He also submitted that the Claimant had no chance of succeeding in an appeal against the finding that he contributed 100% to his dismissal. Finally, he submitted for the legal process to continue any further would be disproportionate and not in the interests of justice.

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41. In his oral submissions, it seemed to me that Mr Peacock was in effect inviting me to go behind the EAT's interpretation of Mr O'Donovan's written explanation for dismissing the Claimant. He submitted that on its true construction, that passage showed that Mr O'Donovan was saying not that he would not have dismissed the Claimant for the password allegation, but that he might not have dismissed the Claimant for the password allegation alone. He submitted rather, that Mr O'Donovan had dismissed the Claimant for "the whole scenario".

42. I pressed Mr Peacock in his oral submissions with questions about where in Decision 3 the ET had answered the questions which he, fairly, in his skeleton argument for the ET hearing to which I have already referred, drew to the ET's attention. He said that it was obvious from paragraphs 18 to 20 of Decision 3 that the ET had held that Mr O'Donovan had dismissed the Claimant, and that the answers to the other questions posed in the EAT's Order implicitly flowed as a matter of logic from the ET's answer to the first question. He did accept that there was no trace of the list of the questions which the EAT had remitted to the ET in its Order, and he accepted that there was no express consideration in Decision 3 of the Respondent's Disciplinary Code or of the ACAS Code.

43. In the course of his submissions, he was disposed to dispute HHJ Hand's view that the Claimant was in effect worse off by appealing than he would have been had he not appealed. He submitted that "the overall sentiment" of the EAT in Decision 2 and in its Order was that the EAT wanted clarification and that the ET had provided such clarification. He accepted, I think, that the rationalisation of the ET's approach on which he relied was not expressed anywhere in the terms of Decision 3.

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44. On the question of unfairness, Mr Peacock drew my attention in his oral submissions to the views of the ET expressed in Decision 1 about the fairness of the dismissal. That was despite the fact that the ET in Decision 3 had not revisited that question in the light of the document which the EAT's Order required it to consider.

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The Law

45. Mr Crozier, in his skeleton argument and in his oral submissions, referred me to the decision of the EAT in **LTRS Estates Ltd t/a Orwells v Hamilton** UKEAT/0230/12. That was a decision of Langstaff J. Langstaff J analysed the ET's jurisdiction on remittal. He said that that jurisdiction is statutory. If there is a dispute before the ET about the scope of a remittal, the ET should adjourn the remitted hearing and ask the EAT for clarification (paragraph 13). In the **LTRS** case, the Appellant had appealed on three points. The EAT allowed the appeal and remitted the case to the ET for a full re-hearing. The EAT held that it was not open to the ET to decide afresh on the remittal other issues, on which the ET had already made findings, which had not been appealed to the EAT.

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46. On well-established principles a statutory jurisdiction cannot be expanded or confined by the agreement of the parties or by an analogous doctrine, such as estoppel (see **Globe Elastic Thread Co Ltd v Secretary of State for Employment** [1980] AC 506 and see, for example, **Radakovits v Abbey National plc** [2010] IRLR 307, to which Mr Crozier also referred in his skeleton argument).

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47. **Smith v Glasgow City District Council** [1987] ICR 796 HL establishes that if an employer has more than one reason for dismissing an employee and the ET finds that an

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important part of the composite reason for dismissal is neither established in law nor believed on reasonable grounds to be true, that an ET errs in law in holding that the dismissal is fair.

Discussion

48. It is clear from the EAT's Decision that it concluded that Mr O'Donovan dismissed the Claimant for two reasons. The ET in Decision 1 had held that one of those reasons did not pass the section 98(4) test and the EAT held that Mr O'Donovan's rationale for his decision was that the other reason would not have passed the section 98(4) test on its own. That, in my judgment, is what the EAT held in Decision 2.

49. The clear thrust of the EAT's reasoning in Decision 2 is that if Mr O'Donovan had dismissed (and there had been no appeal), the only possible conclusion would have been that the dismissal was unfair (Decision 2, paragraph 45). That was clearly right. See **Smith v Glasgow City District Council**. The EAT was concerned with the question whether an internal appeal could or should change that outcome (see paragraph 46). Mr Miranda's conclusion, the EAT held, was not inherently unreasonable but it seemed odd to the EAT that the Claimant could be worse off because he had appealed. What the EAT was requiring the ET to do was to reflect on the question whether, on the particular facts of this case, the fact that Mr Miranda took a different view of the seriousness of the password allegation could make what would otherwise be an unfair dismissal, not unfair. The EAT's Order was clear. It required the ET to find which of Mr O'Donovan and Mr Miranda dismissed the Claimant and, if it found that Mr Miranda had dismissed to consider in all the circumstances of the case that dismissal against the test in section 98(A) **ERA**, and then issues relating to remedy, if they arose.

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50. In my judgment, it is also quite clear that the ET did not do what it was required by the EAT's Order to do. What the ET did instead was to take its own course and to recruit each party's representative to that course. The ET records in a number of different places in Decision 3 that the parties had agreed to various propositions put forward by the ET. In my judgment, it is clear that the ET cannot enlarge its statutory jurisdiction on remittal by agreement. The fact that the representatives are recorded as having agreed with the ET's approach is therefore, in my judgment, irrelevant.

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51. It is also clear to me from the ET's use of the word "*solely*" in paragraphs 4 and 10 of Decision 3 that the ET misunderstood the EAT's Decision. The EAT did not hold, contrary to the facts, that Mr O'Donovan had dismissed the Claimant solely for the allegation that he had downloaded obscene images into his cloud account. What the EAT said rather, was that Mr O'Donovan on his own admission would not have dismissed for the password allegation alone ("proposition 1"). It is a *non sequitur*, and a *non sequitur* not committed by the EAT, to deduce from proposition 1 a second proposition ("proposition 2"), that Mr O'Donovan dismissed solely for the obscene images allegation. That *non sequitur* is exclusively the product of the ET's own reasoning. The *non sequitur* then provoked the ET to devote its attention to disproving proposition 2, which had played no part at all in the EAT's reasoning. In paragraph 11, the ET then examined with the parties the question whether there was any evidence which excluded dismissal as a possible sanction for the password allegation (which is not a very different exercise from disproving proposition 2). This was not a question which was remitted by the EAT to the ET.

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52. The ET concluded, irrelevantly, that Mr O'Donovan had said nothing that excluded the password allegation from his thinking. In paragraph 18, the ET said "*There is nothing to*

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suggest that Mr O'Donovan considered the password sharing as not being sufficiently serious as to invite a sanction of dismissal". That appears to be wrong on its face, which is what Mr Crozier submitted, as it seems to me that Mr O'Donovan had clearly stated in his reasons supporting the dismissal that he would not have dismissed for the password allegation alone.

53. Further, in my judgment, if and in so far as it might be argued, that that was not what Mr O'Donovan stated, I cannot revisit that question and nor could the ET, because it is clear to me that that is how, in Decision 2, the EAT interpreted Mr O'Donovan's rationale for dismissal. Decision 2 was not appealed and no application for reconsideration of Decision 2 was made. I am therefore bound by the way in which the EAT interpreted Mr O'Donovan's rationale for the dismissal and the ET was equally bound by that interpretation.

54. In my judgment, the ET's criticisms of the EAT's Decision and reasoning were misplaced, because the ET did not understand the EAT's Decision and reasoning. I further record my concern that the ET felt able to describe the view of the EAT as "*ill-founded*", that it felt able to say that the question posed by the EAT "*did not arise for consideration at all*", and that it criticised the EAT for "*a misconception*" which, in the ET's view, led to the EAT remitting the case.

55. In my judgment, it was wholly inappropriate for the ET to express criticisms of the reasoning of the EAT in that way. The Decision of the EAT was not the subject of an appeal or of an application for reconsideration. The ET's duty, therefore, was to follow the EAT's reasoning, because it was bound by the EAT's reasoning. It was not legitimate for the ET to depart from it, or to criticise it in the way that it did.

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56. In my judgment, the ET erroneously thought that it followed from the EAT's statement that Mr O'Donovan would not have dismissed for the password allegation alone, that the EAT had held that Mr O'Donovan had dismissed for the images allegation alone. As I have already said, there is no trace of this *non sequitur* in the Decision of the EAT. It is perhaps unsurprising that the ET was able to have disproved proposition 2 so readily, but in doing so, in my judgment, it was tilting the windmill entirely of its own making. In doing so, it answered a question of its own - for what reason did Mr O'Donovan dismiss? - which was not a question which had been posed by the ET and it simply failed to answer the questions which had been posed by the EAT.

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57. There is simply no trace in Decision 3 of any express engagement by the ET with the questions which the EAT had required the ET to answer. In those circumstances, I have no hesitation in holding that the ET erred in law.

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58. The fundamental error from which the rest flowed, was to infer a *non sequitur* in the EAT's Decision which was not present, expressly or by implication. There is a more fundamental underlying error, which was the ET's view that it was open to it to decide for itself the issues which had been conclusively decided by the EAT and by which Decision it was bound. That approach led in turn to the further error or law, which was to ignore the EAT's instructions and instead to carry out an enquiry of its own. For those reasons, I allow this appeal.

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Disposal

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59. Mr Peacock's subsidiary argument on paper was that if the appeal were to succeed, there would be no point in sending this case back to the ET as it was obvious what the answer

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should be and, in any event, it would be disproportionate to do so as the ET had made an unappealable finding that the Claimant had contributed 100% to his dismissal. Those may be arguments which might have applied after the first appeal to the EAT. The problem is that this is a second appeal to the EAT and it has been necessary because of what I have held to be a wrong approach on the remittal by the ET. But, in any event, I reject the submission that there was an unappealable finding that the Claimant had contributed 100% to his dismissal, because it is clear from the EAT's Order that the question of contribution, if it arose, had been remitted to the ET for it to consider again.

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60. The EAT is not in a position of a primary fact finder and, in my judgment, issues of fact should be decided by the ET and not by the EAT. They would have been decided by the ET in Decision 3 had the ET not misinterpreted the EAT's Decision. It is not apparent to me that there could only be one answer on remittal, and it is clear that the EAT on the first appeal did not think so either.

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61. Further, I have no jurisdiction not to remit the case again to the ET on the grounds that it would be disproportionate to do so. For those reasons, it seems to me, that I have no alternative but to remit the case again to the ET.

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62. The next question which arises is whether I should remit the case to the same ET or to a new ET. Mr Peacock submitted that I should remit the case to the original ET and Mr Crozier submitted that I should remit the case to a new ET. Both parties relied to some extent on the decision of the EAT in **<u>Sinclair Roche & Temperley v Heard & Another</u>** [2004] IRLR 763 and to the well-known passage in paragraph 46 of Mr Justice Burton's judgment, in which he

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A summarises the factors which are relevant to the exercise of the discretion in choosing whether or not to remit to the same ET or to a fresh ET.

B 63. Mr Peacock submitted, in summary, that the neat and proportionate solution was to remit the case to the same ET. He submitted that the ET was familiar with the case and familiar with the issues on remittal. He referred me in that context to paragraph 25 of Decision 3. He said that it would be very easy for the Employment Judge to pick up the case again and that he C would be helped by the fact that he already expressed views on the question of contribution. He submitted further that it was in the interests of justice for the case to be resolved as quickly and proportionately as possible. His second point was that it would be difficult for another ET to D decide the question of contribution if it arose. He submitted that it would be necessary to hear evidence on that, whereas the Employment Judge had already dealt with these questions. Because of that, really, the question had to go back to the Employment Judge.

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64. Mr Crozier, by contrast, submitted firstly that Decision 3 was totally flawed, which gave rise to questions whether the Employment Judge could be seen to be capable of approaching the case with an open mind. He made a second linked point, which was that if the case went back F to the same Employment Judge, this would be not be even a second bite of the cherry, but a third bite of the cherry, for the Employment Judge. There would be a fear that he had already made up his mind and that he had, in effect, in Decision 3, said that he was right and the EAT G was wrong in relation to the remitted issues. Mr Crozier's third point was that while there was an obvious logic in Mr Peacock's argument that remittal to the same Employment Judge was a neat and proportionate solution, it would not be difficult for a new ET to grasp the issues raised H by the EAT's Order and to resolve it on the basis of the findings in Decision 1 and the further documents which are referred to in the EAT's Order. Finally, he submitted that the

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Employment Judge had made his mind up on the question of contribution but that this was not a case, unlike many cases in which the issue of contribution arises, where the ET would have to decide on the basis of the evidence whether the Claimant was guilty of the misconduct alleged.

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This was a case where it was clear that he was guilty of some misconduct, as he had admitted it, and the importance of the Respondent's policies about password sharing was abundantly clear from the findings which had been made in Decision 1. In all those circumstances, he submitted, a new Employment Judge would be in a good position to assess contribution, if that issue arose.

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65. I have summarised the parties' submissions on remittal in some detail and I can state my conclusions quite shortly. In brief, I prefer Mr Crozier's submissions.

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66. I consider that the ET erred in law in revisiting the Decision of the EAT in Decision 3 and in simply refusing to answer the questions which had been posed by the EAT. I consider

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that the EAT, never mind the parties, may not have full confidence that the ET will do, on remittal, what it was required to do the first time around. I consider in those circumstances, there is a real risk that the Claimant would be troubled by this history and would be in some doubt as to whether the ET, in all the circumstances of this case, would be able to approach the

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remitted issues with an open mind. For those reasons, I remit the case to a new ET.

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