Appeal No. UKEATS/0009/17/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 13 February 2018
At 10:30am

Before

THE HONOURABLE LADY WISE

(Sitting alone)

BLUEBIRD BUSES LIMITED — APPELLANT

MR PIOTR BOROWICKI — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr A Hardman Advocate instructed by Kippen Campbell LLP Solicitors 48 Tay Street PERTH PH1 5TR
For the Respondent	Mr K McGuire Advocate Quantum Claims Compensation Specialists Ltd 70 Carden Place ABERDEEN AB10 1UL

SUMMARY

UNFAIR DISMISSAL; WRONGFUL DISMISSAL; REASONABLENSS OF DISMISSAL PERVERSITY

The claimant, a bus driver, was dismissed by the respondent after he had driven into a patch of flooded road and his bus started to fill up with water. The Tribunal concluded that he had been both unfairly dismissed and wrongly dismissed. The respondent appealed, contending that both decisions were perverse and, *separatim*, that in relation to the unfair dismissal claim the Tribunal had fallen into a "substitution mindset".

Held :

1) **The high hurdle for perversity set out in Yeboah v Crofton [2002] IRLR 634 had not been overcome by the respondent. There was a sufficient basis in the findings in fact for the Tribunal's conclusions. The judge was entitled to reject the evidcne of the respondent's managers' when the claimant had given contrary evidence. The focus of the argument was an expression that was not part of the tribunal's findings.**
2) **The tribunal understood and applied the different legal approaches to unfair dismissal and wrongful dismissal. There were appropriate self-directions on section 98(4) ERA 1996 and the test was correctly applied. Only by reviewing the respondent's analysis of the claimant's actions was the tribunal able to characterise the respondent's decision as reasonable or not.**

Appeal dismissed.

THE HONOURABLE LADY WISE

Introduction

1. The claimant, Mr Borowicki is a Polish National. He was employed by the respondent as a bus driver between 28 April 2007 and 14 January 2016 when he was dismissed following an incident that had taken place on 8 January 2015. In essence he had driven a bus into a patch of flooded road and the bus started to fill up with water. No passengers were on board and the claimant eventually left the bus safely with the assistance of the police, who advised him to break a window to escape. The respondent had initially suggested that the claimant had been instructed not to go to Methlick, where the incident happened, due to known flooding, but the tribunal accepted that he had not received any such instruction.

2. Following a two day hearing the tribunal concluded that the claimant had been both unfairly dismissed and wrongly dismissed and made a monetary award. The respondent appeals that decision. Before the tribunal the claimant was represented by Mr F H Lefevre, Solicitor and on appeal by Mr McGuire, Advocate. The respondent was represented before the tribunal by Mr S G McLaren, Solicitor and at the appeal by Mr Hardman, Advocate. I will refer to the parties throughout as claimant and respondent as they were in the tribunal below.

The Tribunal's Judgement

4. The tribunal recorded (at paragraph 7) that there were very few differences between the parties in relation to the material facts and circumstances of the incident of 8 January 2015. On the issues pertinent to this appeal the tribunal made the following findings in fact: -

> **"23. The Claimant arrived at work at 6.55am. He telephoned Mr Goodall as normal. Mr Goodall was aware that the claimant was Polish. They knew each other. Mr Goodall was aware that the Claimant would occasionally ask for instructions to be repeated to him if he did not understand them. Mr Goodall told him that the road between Pitmedden and Methlick was closed. The claimant asked where it was closed and Mr Goodall indicated**

that he didn't know but that he would call the Claimant back. The claimant telephoned Mr Goodall again a short time later and there was a discussion about the road after Tarves being closed.

24. The Claimant began his route. He drove from Fyvie into Methlick. There were no passengers in the vehicle. The road was wet and he often encountered puddles and wet areas. When he arrived at the outskirts of Methlick there were no warning signs on the road to indicate that the road ahead was closed. There were street lights on his left leading someway into the distance. He was aware that the River Ythan was off to his right. He was unaware that the river had burst its banks as it was still dark. Although the road looked wet in front of him he thought that this was shallow lying water. He reduced his speed from 30 to 17mph. As soon as the bus entered the water the size of the bus and its speed caused water in the front to well up and splash the windscreen. Water almost immediately began coming in the bus door. The Claimant was shocked at what had happened. He had misjudged the depth of the water. Before he could take any other action the bus began floating.

25. Once the bus had entered the water the Claimant did not seek to brake. The water slowed the bus down. The fact that he was no longer accelerating and the weight of the water steadily reduced the bus's speed until it came to a halt more than 100 metres into the flooded road.

26. The Claimant was aware that there was a poor telephone signal in the area of Methlick. It was obvious to him that he could not drive forward or reverse. He called Mr Goodall but did not get through because of the lack of signal. He then attempted both to phone and to text that he was stranded in water. He eventually got through to Mr Goodall who asked him if he could move. He said no. It was suggested that he went to the back of the bus which was the safest place to be as it was higher than the front. He contacted his wife by text. Mrs Borowicki was still at home. She was very concerned when she heard that her husband was stranded in flood water. She telephoned the Police and they relayed the advice that he should stay where he was and go to the highest point on the bus. They noted the incident and indicated that they would send someone when they could.

27. In the meantime, shortly after the Claimant's bus became stranded a local resident wearing fishing waders approached the bus and asked him if he was okay. The Claimant indicated that he was okay and waiting for help. Around 10am the local resident returned. The Police had also arrived and shouted over to the Claimant that he should break a window and exist the bus. This the Claimant did. He safely left the bus. Shortly after this bus employees arrived to see if they could recover the bus.

28. The claimant had been concerned not to break the window and leave the bus at an earlier point in case he got into trouble for breaking the window. He travelled to the depot in Aberdeen. He met Ian Bell, a Manager there. Mr Bell had already spoken to Mark Goodall who had told him that he had advised the claimant not to go to Methlick. Mr Goodall put this to the claimant who responded "*No. He told me to go via Tarves."* Mr Bell then

recorded *"PB explained in broken English the route he planned to take. Entered carefully a few metres and lost traction and then couldn't get out."* He was asked why he went into the water and responded that he didn't know it was so deep."

5. Having summarised the submissions made on behalf of each party the tribunal noted (at paragraph 70 and under reference to the case of *Weston Recovery Services v Fisher* [UKEAT0062/10] that, in addressing the question of whether the dismissal was fair or unfair, what mattered was whether the conduct was "sufficient for dismissal" according to the standards of a reasonable employer and also whether dismissal accorded with equity and the substantial merits of the case. In reaching its decision the tribunal considered all of the circumstances known to the respondent at the time of dismissal. A summary of those, together with the tribunal's conclusion and reasons on the unfair dismissal claim are expressed in the following paragraphs:-

"78. We must look at all the circumstances. The Claimant was surely aware that the weather was bad. He was aware that there was a flooded part of the road later in his journey. He should have realised that there could be other flooded areas. His position was that he came across the flooded road as he entered the village and there were no warnings. There were no road closed signs which he expected. Relying on his understanding of what the controller said he thought that he had been told about the flooded part of the road and by implication this part was not flooded. The flooded road here was unexpected. He had moments to decide what to do. He looked ahead and saw water on the road as he could see the reflections of the street lights in that water. He could see the road ahead delineated on the left by street lights. He thought that he could safely drive through it as it did not look deep. It may have been that the water disguised a dip in the road but in the event he did not realise how deep the water was.

79. In retrospect, especially having seen the later photographs (JB 46), it is clear that he was wrong. However, he did not see the road as we see it in those photographs but as it looked in the CCTV footage (JB 47). The footage gives no clear indication of depth. Indeed with the street lights shining on the water it is as consistent with a very wet road as it is with what we know now to be deeply flood road. It is clear that the Claimant made an error of judgment. He should have slowed down further and made a better assessment of the situation including if necessary driving forward slowly using the 'step rule'.

83. Mr Leslie took the first appeal. The Claimant's Trade Union representative stressed that it wasn't obvious how deep the water was. This seems to have been accepted. Similarly he was asked about water entering the bus and

said that by that time it was coming in it was too late to do anything. It seemed that what concerned Mr Leslie and the deciding factor that he chose in rejecting the appeal was the fact that the Claimant had not braked once the bus entered the water. But by that time the bus was already in deep water and braking would have been likely to be ineffective. At the very first disciplinary hearing the Claimant had described the bus becoming a boat.

86. I reiterate that the Tribunal should be careful not to substitute its views for that of Mr Carmel or indeed the other Managers. They were all PCV qualified drivers. They heard the Claimant's evidence first hand. Their clear position was that the Claimant should have acted differently as a professional driver and that he had made a serious mistake and should be dismissed. They concluded that he had badly misjudged the situation and had failed to own up sufficiently to his fault.

87. The question becomes whether a reasonable employer *in these circumstances,* acting reasonably, could have reached that conclusion. This is not an easy question. On the one hand there is no regard given to the Claimant's belief that he might have expected to have been told by the controller if the road was closed and that he would have expected to see road closed signs. He had to make up his mind what to do very quickly. He braked but did not stop having made the incorrect judgment that the water wasn't deep. These circumstances would have provided any reasonable employer with some mitigation to consider. The Claimant had slowed down, in other words he had reacted to the danger, but not by enough in the Respondent's view. The matter is examined I believe, despite protestations to the contrary, with the benefit of hindsight in that the Managers were aware that the road was deep flooded. A reasonable employer would have judged the Claimant's actions on what he would have encountered that morning and the time he had to react to the circumstances before him.

88. Insufficient attention was paid to what the Claimant encountered when he drove into the village namely evidence of some lying water but no obvious indication to him in the short time he had to assess the situation that the water was as deep as it turned out to be. The Respondent had not ensured that the Claimant had seen the advice given by them to drivers on the first notice and more generally at this time of severe flooding ensured that every driver including those who spoke Polish had been warned about the risk of roads becoming flooded and what actions they should take. The employers also failed acknowledge that part of the picture was that the Claimant had not been given training or advice about the factors he should consider when encountering a flooded road apart from the application of the 'step rule'. In addition it was not recognised that the Claimant had accepted that he had made an error (JB p62). In all these circumstances looking at the matter in the round I am not persuaded that a reasonable employer would have characterised the error, given the surrounding circumstances I have described, as being evidence of 'gross incompetence' or sufficient to summarily dismiss.

6. Separate consideration was given to the wrongful dismissal claim. On that issue and on the different approach to be taken to it the tribunal put matters as follows:

> **"89. It is suggested that when there are two such claims as we have here the findings in fact should be separated to distinguish the different role the Tribunal has. In relation to wrongful dismissal where the Tribunal requires to find the facts from the evidence and apply the law to those facts found by it whereas in unfair dismissal claims it is what is in the employer reasonably believes to have occurred that determines the 'facts' on which they rely. In the present case there is virtually no difference in that the facts known at the time by the employer and the facts that have emerged in evidence are the same. The only exception is that while the Respondents Managers did not come to a view on what had been said between the Claimant and Mr Goodall preferring to say there was a misunderstanding of some sort I have found that the Claimant was not told that the Methlick road was flooded and impassable.**
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> **90. As I indicated the rules applying to the two claims are different. It was put this way in Cossington by H.H. Judge Richardson:**
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> ***'There is nothing inherently contradictory in upholding a claim of wrongful dismissal while rejecting a claim of unfair dismissal. They are separate types of claim subject to different legal rules'.***
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> **95. I would state that I accept the argument put forward very ably by the Respondent's solicitor in his Supplementary Submissions, following a close examination of the authorities, when he suggests that not all cases of gross misconduct require some wilful behaviour although that is commonly an aspect of such behaviour. It must be correct that some very serious negligence could itself amount to gross misconduct and this is consistent with the cases of Alidar and Kempsill the latter being a case where a PCV driver was held to have fallen asleep at the wheel. Her also suggested that Cossington could be distinguished as there had been fault on the part of others. This was, I accept, an important background matter but even if you do not describe Mr Goodall's failure to communicate that the Methlick road was flooded, the failure to ensure that the Claimant saw the Notice warning staff about flooding or the failure by the local authority to put up road closed signs, and it might be overly harsh to do so these are still factors that give the context to the error of Judgment and cannot be simply discounted.**
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> **96. I consider that all that can be said about the details and the essential character of the Claimant's conduct in this case has already been said above in the context of the complaint of unfair dismissal. To set it all out here would be unnecessary repetition. It is sufficient to say that that conduct by its nature was readily distinguishable from the kind of objective behaviour that constitutes gross negligence. I could not conclude that what the Claimant did met the contractual test of amounting to a repudiation of the fundamental terms of the contract, and thus could not be described as "gross misconduct". Indeed, as the conduct essentially amounted to an error of judgment on his part, although a serious one, it would be wrong to do so.**
>
> **97. It follows that the general rule that notice of termination requires to be given applied to the circumstances of this case. The respondents were in breach of contract in failing to do so and are liable in damages.**

The Parties' Argument on Appeal

7. For the respondent Mr Hardman contended that both the decisions on unfair dismissal and wrongful dismissal were perverse conclusions. He argued also that the tribunal had fallen into a substitution mindset in reaching its conclusion on whether the dismissal was reasonable.

8. On the issue of perversity, Mr Hardman submitted that there was no evidence to support the employment judge's comment that the respondent's managers who considered the claimant's conduct did so with the benefit of hindsight. He focussed on the sentence in paragraph 87 of the judgment which reads :

"The matter is examined, I believe, despite prosecutions to the contrary, with the benefit of hindsight in that the managers were aware that the road was deeply flooded."

In the employment judge's mind, the decision of these managers, qualified drivers themselves, was unfair because they used hindsight. However, as Mr Hardman pointed out, only those managers had given evidence and although they were challenging cross-examination they had not waivered in their position that no such hindsight had been used. Mr Hardman submitted that the use of the expression "I believe" suggests that it is only the employment judge's view rather than anything founded in evidence. The matter was important because the subsequent decision on reasonableness was predicated upon this assumption or speculation. In essence the tribunal had formed a view without any evidence to support it. The view expressed was not obiter, it was part of the tribunal's reasoning. The same argument applied equally to the wrongful dismissal aspect of the case. The tribunal took the same view on reasonableness in reaching both parts of its decision. That is clear from paragraph 89 of the judgment. Accordingly, the conclusion was one which applied both to the subjective decision of the managers and to the objective decision of the tribunal. Both relied on the unfounded belief in

the mind of the tribunal that the matter was examined with the benefit of hindsight and consequently, if it had not been, then no fundamental breach of the contract of employment would have occurred. Again there was no basis for that conclusion without "second guessing" the opinion of experienced and qualified managers. There was no evidence that their managers did take a view based on hindsight. There was no evidence to suggest someone else with experience would have reached a difference conclusion. Accordingly the tribunal reached a view of fundamental breach without any future basis for it.

9. Mr Hardman accepted that the hurdle was high in presenting an appeal on the ground of perversity. He accepted that the classic test of perversity was that there remained as set out by Mummery LJ *in Yeboah v Crofton* [2002] EWCA Civ. 794. He submitted that the hurdle was cleared in the present case. The tribunal had made a finding in fact in relation to how the managers had approached the issue of the claimant's actings that did not have any basis in evidence. Standing the importance of the particular finding made, it went to the heart of the judgment and so the decision could not stand.

10. Counsel addressed the issue of falling into a "substitution mindset" separately as this related only to the unfair dismissal finding. He submitted that there were four examples of the employment judge having fallen into this mindset in paragraph 88 of the judgment. These were:

"Insufficient attention was paid to what the claimant encountered when he drove into the village

…The respondent had not ensured that the claimant had seen the advice given to them by drivers

…The employers also failed [to] acknowledge that part of the picture was that the claimant had not been given training or advice

…it was not recognised that the claimant had accepted he had made an error"

These passages were all indicative of the employment judge having taken a view himself on whether the respondent's actions were reasonable or unreasonable which, albeit that he was entitled to do for the wrongful dismissal claim, he was not entitled to do so far as unfair dismissal was concerned.

11. Reference was made to the decision in **Leeds Teaching Hospital NHS Trust v Blake [UKEAT/0430/14/BA].** In that case the EAT (H. H. J. Richardson sitting alone) indicated (at paragraph 60) that there are two particular features that may contribute to a conclusion that the employment tribunal does not apply to section 98(4) test. First, if there is an indication that the employment tribunal has in effect made and proceeded from its own findings in fact and secondly, where a tribunal's criticisms of an employer apply an extremely high standard without recognising that there is a range of acceptable ways of investigating and deciding a disciplinary matter. In the present case the employment judge had accepted that four managers had all taken the view that the claimant's actions were gross misconduct. This supported the contention that he had substituted his own mindset in relation to the claimant's actions for those who had been tasked with deciding whether or not that conduct justified dismissal. Mr Hardman accepted that the employment judge had a difficult task in this case of requiring to decide both an unfair dismissal claim and a wrongful dismissal claim where two separate approaches were required. However there was sufficient in the decision to indicate both that he had made his own findings of fact in dealing with the unfair dismissal claim and also that he rejected without good reason the unanimous views of the respondent's managers taken at the time. Counsel submitted that the appeal should be allowed and the claims of unfair and wrongful dismissal dismissed.

12. For the claimant Mr McGuire made three relatively uncontroversial general propositions in relation to appeals of this nature. He submitted that an appellant tribunal should be slow to

interfere with the findings of a specialist tribunal which had the benefit of assessing the witnesses. Secondly he reiterated that a perversity appeal presented a very high hurdle for the appellant in this case the respondent. Thirdly, he relied on the case of **Newbound v Thames Waters Utilities [2015] IRLR 734** as authority for the proposition that the band of reasonable responses on the part of an employment was not infinitely wide.

13. In relation to the issue of perversity, Mr McGuire submitted that the decision of the tribunal in this case has to be read "in the round". He accepted that the expression "I believe" was a problematic phrase but, on its own was not enough to justify interference with the overall decision. The sole issue was whether no tribunal, properly directed, could have reached the same conclusions on unfair dismissal and wrongful dismissal. He emphasised that no point was or could be taken with the tribunal's initial findings in fact. The discussion and decision section of the judgment begins at paragraph 62. The tribunal self-directs correctly on the law at paragraphs 62 and 66. At paragraphs 78 and 79 the background to the "hindsight issue" is set out. In essence it was clear that the claimant had made an error of judgment in this case but the flooding that he ran into looked worse on the CCTV than it had done to him at the time. Mr McGuire pointed out also that paragraph 81 of the judgement makes clear that the respondent would have given the claimant a written warning if he had conceded that he had made a mistake. It was also important that the claimant was not asked whether the written notice that he had not seen would have altered his actions if it had been brought to his attention. Under reference to paragraphs 83 to 85 of the judgment it seems to have been accepted in the internal appeal that it was not obvious how deep the water was. The deciding factor on the appeal was the claimant's failure to apply the brakes, although there was no evidence before the tribunal from the manager who reached that decision "after viewing the CCTV". Accordingly, the issue that emerged is that the respondent was primarily concerned with the claimant's perceived failure to accept fault.

14. On the crucial paragraphs in the judgment (86, 87 and 88) these start with a clear self-direction on substitution mindset. There is no challenge to the summary that the tribunal gives itself at paragraph 86. In paragraph 87 the employment judge recognised that the question of what a reasonable employer would have done in the known circumstances was the central issue. He decided that the problem in the case was the respondent's failure to take account of the known mitigation. Accordingly it was clear that the employment judge was aware of the test, he was aware of the danger of the substitution mindset and that he went on to look at the available mitigation that would and should have been taken account by a reasonable employer. His conclusion then appears in relation to what a reasonable employer would have done.

15. In paragraph 88 the employment judge recognises that he could not step into the employer's shoes but he knows that he is entitled to make findings to the effect that no reasonable employer would have dismissed on the basis of those. Throughout this passage is a recognition by the employment judge that any reasonable employer taking the relevant facts into consideration would not have dismissed the claimant. If the controversial "I believe" sentence was ignored, then the judgment still made sense on its own. In any event, that sentence, including the expression "with the benefit of hindsight" was not a finding of fact as such. Even if it was it did not go so far as to fall foul of the perversity rule. It could not be seen in isolation. The context was that there were a number of factors that should have led to something other than dismissal. The appeal on this point was a focus on a few words in a decision in an attempt to overturn an otherwise sound judgment.

16. Insofar as wrongful dismissal was concerned, Mr McGuire agreed that this involved an objective test requiring the tribunal to find the facts and see if there was a fundamental breach of contract. The issue of whether any such breach took place is an issue of fact. The findings

on this could not be overturned simply because the respondent was unhappy with it. There was no error of law in the way in which the employment judge had approached the matter for the reasons already discussed.

17. Turning to the substitution mindset argument on the unfair dismissal claim Mr McGuire submitted that the tribunal did not fall into this error. Reference was made again to the case of **Newbound v Thames Water Utilities[2015] IRLR 734** at paragraph 61. The exercise the tribunal was engaged in was not one of procedural box ticking. The tribunal had to decide whether the responses of the employer were reasonable or not and that is exactly what had happened in this case. The decision in this jurisidiction of **Sneddon v Carr-Gomm Scotland Limited [2012] IRLR H20** (paragraph 14) was in line with the English authorities.

18. Mr McGuire submitted that it was difficult to see that anything other than the expression "I believe" gave any indication that the employment judge had gone outside his responsibility to apply section 98. Having made findings in fact, the employment judge is entitled to conclude that the respondent's decision fell out with the range of reasonable responses. The appeal should be dismissed which failing there should be a remit to the same tribunal for a decision on substitution mindset under proper directions.

Discussion

19. I should note at the outset that this is not a case in which it can be suggested that the tribunal misdirected itself in law. The issues are first whether the conclusions reached were properly open to the tribunal on the available evidence (the perversity ground) and separately whether the tribunal failed to follow a correct self-direction on not substituting its own view for that of the respondent on the issue of unfair dismissal.

20. The law in relation to perversity appeals is well established. As *Mummery L J* put it in *Yeboah v Crofton* [2002] IRLR 634 at paragraph 93:

> *"Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the appeal tribunal has "grave doubts" about the decision of the employment tribunal, it must proceed with "great care": British Telecommunications plc v Sheridan [1990] IRLR 27 at paragraph 34"*

The focus of the perversity ground in this case is that there was no basis for the conclusion (at paragraph 87) that the respondent's managers, who considered the claimant's conduct, had done so "*with the benefit of hindsight".* The use of the expression *"I believe"* and the rejection of *"protestations to the contrary*" were said to be indicative of the employment judge making assumptions or speculating without there being any foundation in the evidence for that view. The matter was said to be important because it forms the basis for the conclusion that the managers took an unreasonable view of the claimant's conduct in deciding to dismiss him.

21. It is unfortunate that the employment judge chose to use the expression "*I believe"* in paragraph 87 in referring to this matter. However I am not persuaded that there was no basis in the evidence from which the tribunal could draw the inference that the respondents' managers had failed to take account of what the claimant faced at the time of the incident, as opposed to what might have been shown later on CCTV. There was evidence from the claimant that it was not obvious on approach how deep the water was. Mr Leslie, the respondent's operations director, who conducted the internal appeal, placed considerable emphasis on the CCTV by acknowledging that it was using hindsight (paragraph 38 of the judgment). The employment judge analysed the relationship between the claimant's evidence on this point (both at the internal disciplinary stage and before the tribunal) and the CCTV footage at paragraphs 78 and

79 of the judgment. He then records, at paragraph 83, that it appeared to have been accepted at the internal appeal before Mr Leslie that it was not obvious (to the claimant immediately before he entered the water) how deep the water was. Further, there is reference at paragraph 85 to conclusions reached by Mr Walker, who conducted the second internal appeal, only after viewing the CCTV.

22. No issue was taken at the appeal hearing with any of those earlier findings. They are the findings that form a sufficient basis from which it could be concluded that there was a difference between the conditions as they appeared to the claimant when he was approaching the water and what was later seen on CCTV. There was a tension between the evidence of the respondent's witnesses, who claimed that they had not examined the matter using the benefit of the CCTV viewed after the event and the claimant's position to them at the time about the difference between what the CCTV showed and what he saw. The respondent's witnesses' position on this point was not accepted by the employment judge, who was best placed to consider all of the evidence. The context of his statement of belief is clearly that of a resolution of the tension in the evidence, with reference back to what the respondent's managers had before them at the time of the dismissal. In any event, it is clear from the employment judge's conclusion in the statement that follows the challenged sentence, where he states that **"A reasonable employer would have judged the claimant's actions on what he would have encountered that morning and the time he had to react to the circumstances before him".** In my view, it is clear from this that it was the claimant's own evidence of what he encountered that the respondent's managers had failed to rely on and so reached a conclusion that was outside the range of reasonable responses. As there was a difference between what the claimant saw and what the CCTV footage showed, known at the time to the respondent's managers, the employment judge was entitled to resolve the conflict between that prior knowledge and what they had later stated in evidence and that by rejecting their later position. In short, the tribunal

rejected the evidence on what had influenced the manager's decision at the time. Looking at the findings in relation to the internal disciplinary process, it was clear that the tribunal required to form a view on this point. The claimant would have been unable to do more than challenge the managers in cross-examination and that was done. The employment judge had the material available to him and was able to make an assessment of how the respondents had approached the matter at the time of dismissal as compared with what they now stated in evidence had influenced them or not. Contrary to the submission made on behalf of the respondent, the sentence under challenge is not a finding in fact as such. It is a conclusion or inference drawn from a variety of material, all of which was adequately referred to in the preceding findings and discussion. In the circumstances, I reject the contention that the tribunal's conclusions had no basis in the evidence or that they were perverse, both in relation to unfair dismissal and wrongful dismissal.

23. Turning to the separate ground relating to a "substitution mindset" the contention is that the employment tribunal has not applied the test set out in section 98(4) of the **Employment Rights Act 1996.** That subsection is in the following terms:

> **"Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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 determined in accordance with equity and the substantial merits of the case."**

24. The tribunal accepted first that the reason for the dismissal was a potentially fair reason and that misconduct was the real reason for the dismissal. The central issue was of course whether the dismissal was a reasonable response from the standpoint of a reasonable employer.

That required consideration of what the established conduct was, its character and its effect. Having done that, the tribunal clearly reminded itself (at paragraph 86) not to substitute its views for that of the relevant decision makers in the respondent's organisation.

25. It is well established that an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer. In **Newbound v Thames Water Utilities Limited [2015] IRLR 734,** Bean LJ emphasised that the band of reasonable responses is not infinitely wide and that it was important not to overlook section 98(4)(b) and the need to consider whether the employer has acted reasonably in deciding to dismiss "*in accordance with equity and the substantial merits of the case"*. It was clear, his Lordship went on, that "*Parliament did not intend the tribunal's consideration in a case of this kind to be a matter of procedural box ticking*".

26. It seems to me to that the tribunal in this case was well aware of the different approaches required in assessing the distinct claims of unfair dismissal and wrongful dismissal. Having stated the difference in approach in terms in paragraph 89, there would require to be something more substantial than the references relied on by the respondent before I would be inclined to interfere with the decision on the basis that the tribunal had substituted its own view for that of the employer. The tribunal goes no further than to explain why a reasonable employer, assessing the circumstances known at the time, would have regarded the mitigating circumstances as sufficient to stop short of dismissing the claimant. It is clear from the judgment that the context of the statements made by the tribunal and challenged in this ground all related to the established circumstances known to the employer at the time of the dismissal. Only by reviewing the respondent's analysis was the tribunal able to characterise the respondent's decision as reasonable or not. The references to the respondent having paid insufficient attention to what the claimant had encountered on entering the village and his

acceptance of having made an error must be viewed against the background of what the tribunal had found. These are matters that in the tribunal's view a reasonable employer would regard as mitigation and so would militate against dismissal being a reasonable outcome. Similarly, the absence of proper training or advice to the claimant about how to respond in the situation he was faced with and the failure to ensure that he saw the advice given in the notice were matters known to the respondent at the time of the decision to dismiss. All the tribunal was doing was concluding that these facts, known to the employer at the time, also indicated against dismissal being a reasonable response. In short, the claimant's conduct was, taking account of known mitigating circumstances, simply not a sufficient reason to dismiss had the decision been taken reasonably by a reasonable employer.

27. The decision in **Leeds Teaching Hospital NHS Trust v Blake UKEAT/0430/14/BA** adds little to the discussion in this particular case. There require to be signs that the employment tribunal has proceeded from its own findings of fact rather than from the employer's findings and in this case there is very little difference between those two sets of findings. In fact, an example of the tribunal being live to that difference can be found at paragraph 89 where the exception to there being no difference in the facts known at the time by the employer and the facts that emerged in evidence is noted. That related to whether there was a misunderstanding in relation to the flooding of the Methlick Road and the tribunal favoured the claimant's evidence that he had not been told that it was flooded and impassable. Standing that example and the correct self-direction on the distinction in approach between section 98(4) and a wrongful dismissal claim, I am satisfied that the employment judge was not just aware of the need to avoid proceeding from his own findings in fact but that he applied that requirement in reaching his decision. Further, I do not consider this a case where the tribunal subjected the employer to an extremely high standard without leeway on the matter of reasonable responses. As already indicated, the whole focus of the tribunal's criticism was the failure of the

respondent's managers to acknowledge and take account of the known mitigation. It is that failure that translated this dismissal from one that might have been within the band of reasonable responses to one clearly outside the permitted parameters. Accordingly, for the reasons given, this second ground of challenge also fails.

Decision

28. For the reasons given I am not persuaded that the employment judge in this case made any errors such as would vitiate the conclusion reached. Accordingly, I dismiss the appeal.