Appeal No. UKEAT/0268/17/DA
UKEAT/0269/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 September 2018
Judgment handed down on 13 December 2018

Before

THE HONOURABLE LADY WISE

MS K BILGAN

MR T STANWORTH

ASDA STORES LIMITED — APPELLANT

MR D RAYMOND — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS RACHEL BARRETT (of Counsel) Instructed by: Addleshaw Goddard LLP 3 Sovereign Square Sovereign Street Leeds LS1 4ER
For the Respondent	MR GARY LEE (Solicitor) Premier Solicitors LLP Premier House Lurke Street Bedford MK40 3HU

SUMMARY

UNFAIR DISMISSAL: DISABILITY DISCRIMINATION: REMEDY

The Claimant was dismissed for urinating in a loading yard, the Respondent employer alleging that this was a breach of (unspecified) Health and Safety Regulations and serious and wilful neglect of company property. The Tribunal found that the dismissal was unfair and that the dismissal arose from the Claimant's disability. A subsequent Judgment in relation to Remedy ordered re-instatement. The Respondent appealed both Decisions.

Held:

(1) The Tribunal was entitled to conclude that the evidence, including the CCTV evidence, did not establish that the Claimant had urinated on the pallets and so the arguments on perversity and substitution mindset failed.

(2) The Respondent's fall-back position of objective justification for section 15 discrimination had been addressed adequately by the Tribunal in the Remedy Judgment, the matter having been initially overlooked. The decision on this was not perverse.

(3) The Tribunal had not erred in its approach to re-instatement. It had considered the particular circumstances of the Claimant and found that the operative cause of the dismissal was his disability but that he considered trust and confidence could be restored. The Respondent's contention that trust and confidence had broken down was not rationally based.

Appeal dismissed.

THE HONOURABLE LADY WISE

1. These two appeals relate to (1) a Liability Judgment and (2) a Remedy Judgment of the Employment Tribunal ("the ET") at Huntingdon (Employment Judge Moore sitting with Members) dated 26 May 2017 and 11 September 2017 respectively. The Respondent employer appeals both Judgments. I will refer to the parties as "the Claimant" and "the Respondent" as they were in the Tribunal below.

2. Both before the Tribunal and on appeal the Claimant was represented by Mr G Lee, Solicitor with an assistant. The Respondent was represented by Ms R Barrett of Counsel, both at the Tribunal Hearings and on appeal.

3. The Claimant worked as a lorry driver for the Respondent, a food retailer, between October 2001 and 18 April 2016 when he was summarily dismissed in connection with an incident on 29 March 2016. On that date, the Respondent received information that the Claimant had been seen urinating in a loading yard used by companies operating in the Harlow shopping centre. The details of the incident, the disciplinary charge made against the Claimant and the procedure that followed are all detailed in the Liability Judgment. The Tribunal concluded that the Claimant was unfairly dismissed and that his dismissal arose from his disability. Reinstatement was granted on the Claimant's application in the Remedy Judgment, which also dealt with was the Respondent's application for reconsideration in relation to the issue of objective justification.

4. I will summarise the relevant parts of each Judgment separately.

The Liability Judgment

5. The Tribunal's Reasons record the dates of the Claimant's employment and the fact that he was 60 years old when he was summarily dismissed. He suffers from diabetes mellitus (Type 2) and is disabled within the meaning of section 6 of the **Equality Act 2010**. Insofar as material to this appeal, the Tribunal made the following further findings in fact:

> **"2. On the 29th March 2016 the Claimant had driven to the Respondent [']s shop at Harlow and parked his lorry close to the loading bay in the adjacent yard. On leaving his lorry he felt an urgent need to urinate and relieved himself in what he describes as a discreet part of the yard. It appears that a security guard at Harlow had telephoned a Mr Norton (a transport manager at the Respondent's Bedford Depot) to say that Mr Raymond had done this. No statement was taken from this witness and no verbatim record of the telephone call was ever made.**
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> **3. In due course Mr Godliman was assigned to investigate the matter. He was provided with a copy of the CCTV footage taken on the day in question. He approached the Claimant on the 4th April 2016 without prior warning and commenced an investigation meeting. On learning that the Claimant wished to have a representative present he adjourned the meeting to the 8th. The minutes of that meeting are at pages 112-115 of the bundle. Mr Godliman has, as is entirely proper and conventional in cases of this nature been cross examination [sic] on the question of how he approached his task. His answers to those questions have led us to conclude that he did not conduct a fair and impartial investigation of the kind prescribed in Sovereign Business Integration Ltd v Trybus EAT0107/07. He did not consider himself to be under any duty to carry out any investigations from the Claimant's perspective. He admits that he did not consider it necessary to look into the reasons why the Claimant had urinated and he didn't consider it necessary to obtain any medical evidence despite the relevance of the Claimant's diabetes being urged upon him by the Claimant's representative Mr Hall. He did not visit the scene of the incident and carried out no investigation into the question of the distance between the yard and the nearest available toilet. We can conclude this point by quoting his answers to two questions put to him in cross examination; 'All I did was get the CD with the E-Mail and interview Raymond. I did no further investigation. He admitted urinating that is gross misconduct.' Although the notes purport that the e-mail was from the security guard it appears to have been the one from Mr Norton at Page 110.**
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> **4. The Claimant gave his account in terms that he has maintained throughout. He said he had urinated in the yard. He was desperate he had to he said he was really sorry and had just got caught short and desperate.**
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> **5. On the 13th April 2016 the Respondent wrote to the Claimant requiring him to attend a disciplinary hearing on the 13th April 2016, the date having been brought forward by 1 day to accommodate the Claimant's representative. The letter is at page 123 of the bundle. It frames the charge in these terms: -**
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> **'At the hearing you will be asked to respond to the allegation that on the 29th March you were witnessed urinating in the Harlow shopping centre's yard outside the Asda loading area. This is a serious breach of trust and confidence resulting in a breakdown in working relationship. A deliberate and serious breach of H&S (Health and Safety Regulations) that could endanger self or others or bring the Company's name into disrepute. A serious or willful neglect to Company property. These are all deemed to be a gross misconduct offence and if proven may result in your summary dismissal.'**
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> **The letter goes on to explain that the purpose of the hearing was to: -**
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> **(1) Explain the allegation and present all the available evidence.**
>
> **(2) Allow the Claimant to respond to the allegation and provide any mitigating circumstances.**
>
> **(3) Allow the claimant to put forward any suggested questions for Mr Carter (the author of the letter who was to conduct the disciplinary hearing) to explore with the relevant witnesses.**

(4) Decide what disciplinary action might be appropriate in accordance with the company disciplinary procedure.

6. The notes of the hearing are at pages 125-131. Those notes do not indicate compliance with the terms of the letter. On page 125 we can see that Mr Carter announced the purpose of the meeting as being 'To go through the main points of your investigation listen to your responses and make points if any[']. We are in no doubt as to what he meant by his reference to investigation since he explains that it was Mr Godliman's efforts on the 4th April 2016. It is also clear that there was no explanation of the multifaceted charge. The notes and his evidence show that Mr Carter simply read or quoted them as written in the letter. His evidence at paragraph 10 of his witness statement that he discussed the terms of the ASDA health and safety policy with the Claimant is not true. He made no mention of the policy's terms other than to ask the Claimant if he had breached it. To that question he received the reply that the Claimant did not know what the policy was on urinating. He did not produce a copy of any policy and has not referred to the terms of any such policy either then or before us. In terms of a review of the evidence Mr Carter confirmed in cross examination that the only evidence he had was the Claimant's and Mr Halls (The Claimant's representative who did not give evidence but did advance arguments on the Claimant's behalf). The notes indicate that in fact the substance of the hearing was Mr Carter questioning the Claimant. The Claimant's version was consistent with his earlier account that upon stepping out of his lorry he was overcome with a desperate urge to urinate. He admits that the question of the Claimant's diabetes was raised with him but that he neither had nor sought evidence to inform the question of whether the Claimant's diabetes was relevant. He accepted that if the diabetes had had an effect it would have been mitigation.

7. At pages 132 and 133 we have a typed note of Mr Carter's decision. In the second paragraph he recognises the Claimant[']s point that it was only when he stepped out of his cab that he felt the sudden urge to urinate and yet one of the grounds he finds against the Claimant was that he had waited in his cab for 20 minutes before deciding not to go to the store[']s toilet. This we find to be inconsistent with the evidence before him. He was exercised by the belief that the Claimant's action was illegal. This appears not to have been the product of any research since he has not explained the basis of this belief. The notes of the hearing show that when the Claimant asked (through his representative) Mr Carter to explain the policies he was referring to his reply was 'It comes under Health and Safety'. He was asked again for specifics and replied 'It's the general policy included in the contract - it's an illegal act by law, you can be arrested for it unless you're pregnant'. We are satisfied that he had not acquainted himself with the specific terms of the regulations referred to in the charge or the policies or contractual provisions he latterly referred to and did not know what they were. That position has prevailed and he has not addressed them before us. He found that the Claimant had urinated on trays stored in the yard and relies on the security video to support this contention. That idea evidence has been played to us and we find it to support the Claimant[']s contention in that that it does not establish this at all. It shows that the Claimant did seek a spot that was relatively (screened partially by his lorry a wall and what we were told were pallets) but it does not show him urinating on any specific object. He relied on the fact that colleagues had told him that the store[']s toilets were two minutes away, he had not obtained statements to that effect and whilst the subject of why the Claimant did not use the store toilets did feature in his questioning of the Claimant he did not explore the Claimant's contention that staff toilets could only be accessed through locked doors and that public toilets were further away. He has not given a rationale of how this point relates to the Claimant[']s contention that his urge was sudden and urgent.

8. At page 134 we have the letter of dismissal which Mr Carter sent to the Claimant on the 19th April 2016. Again he correctly records the Claimant[']s case; that the sudden urge overcame him when he left his cab, that he went to the back of the lorry to open the doors but was unable to control his bladder any longer, that he could not wait long enough to reach the facilities and that he thought this might be instrumental in his predicament. There was no evidence before Mr Carter capable of rebutting the Claimant[']s contentions. There had been no investigation into the Claimant's medical position. Mr Carter found that it was not relevant on the ground that the Claimant had said he had not experienced such a sudden uncontrollable urge before. We have concluded that a reasonable employer would have made appropriate enquiries and would have recognised that in respect of any symptom of a medical condition there has to be a first time. He repeats his finding that the Claimant had waited in his cab for twenty minutes but neither at the time or before us has he been able to indicate what this was probative of given that the only evidence before him was of the Claimant suffering an urgent need to urinate later in time than this. He has not addressed the details of the charge or correlated the evidence to them. He has simply recorded that the main points of the allegation are proven and that this is regarded as a gross misconduct offence. Neither then nor before us has sought to rationalise

why summary dismissal was reasonable and we conclude that he regarded it as a fait accomplish [sic] and did not turn his mind to the question. We do not find him to have held a genuine or reasonable belief that the Claimant was guilty of the alleged misconduct. We address this point further in our conclusions.

9. The Claimant appealed and the appeal was heard by Mr Mackay on the 7th June 2016. The Claimant submitted a letter from his General Practitioner with his grounds of appeal (P139). That letter confirms in unambiguous terms that the Claimant suffered from uncontrolled Diabetes Mellitus and that this condition increases hunger, thirst and the passing of urine. Patients could experience sudden urges to urinate and suffer stress incontinence. We note that this accords with the Claimant's consistent account of his experience on the day in question. Mr Mackay was aware that a Ms Knight a 'people co-ordinator['] had e-mailed an occupational health consultant Kwasi Opoku. The Respondents have been unable to say whether this person has any medical qualifications but insofar as their input is concerned they are entirely consistent with Claimant's GP's account. We do not accept Mr Mackay[']s assertion at paragraph 17 that it did not support the Claimant's contention. The e-mail in question is at page 153, it expressly confirms that frequency of urination is one of the key symptoms of the Claimant's condition, that if the condition was poorly managed nerve damage and a propensity to urinary tract infections could add to this problem. There can be no doubt that Mr or Ms Opoku is saying that he or she cannot associate a sudden urge to urinate with the side effects of Metaformin (medication taken by the Claimant) [Tribunal's emphasis]. It does not contradict the assertion that such an urge could arise from the Claimant[']s condition. The brief not also contains a reference to the fact (perhaps a matter of common sense and common knowledge) that a sudden and urgent need to urinate is part of the human condition and may be experienced by anyone for any number of reasons not necessarily medical.

10. Mr Mackay found that the Claimant could have avoided the situation by going to the toilet earlier. This finding was contrary to the only evidence on the point which was that the Claimant suffered an urgent need only when he stepped out of his lorry. He has stated that there were obvious contradictions between the account that he gave to Mr Carter and himself. As we have observed the Claimant was subjected to questioning by Mr Carter it was not a situation where he was advancing his account in the manner of someone giving their considered account. In any event it was one of his grounds of appeal that Mr Carter had misunderstood his evidence on the particular point in question. It related to the fact that the Claimant is noted as saying that he had never suffered an urgent need to urinate prior to the event in question. The point he raises is that he does suffer from an increased need to urinate both at work and in his private life but that he had never before been forced into the position of having to urinate in a delivery yard before. Mr Mackay did not conduct any investigation into the matter and appears to have proceeded on the assumption that Mr Carter was not mistaken. He conducted no further enquiries into the facts of the matter. His conclusion that the Claimant had breached health and Safety Regulations by urinating on trays was, like Mr Carter[']s earlier finding not established by evidence. He has not, in the course of his evidence been able to specify the terms of any regulations that featured in his conclusions. We do not find the appeal to have remedied what we find to have been an inadequate investigation into the facts of the matter."

6. A final tier of appeal was available within the Respondent's organisation and took place, but it added nothing in terms of further investigation.

7. In a section headed "**Conclusions"**, between paragraphs 12 and 22, the Tribunal first makes appropriate self-directions in relation to section 98 of the **Employment Rights Act 1996** and the approach to be taken to a conduct case. It concluded that there had been no reasonable investigation, pointing out that Mr Godliman's express and repeated evidence was that he had

not carried out an investigation at all and Mr Carter's evidence was that he had relied on Mr Godliman's investigation. The Tribunal noted (at paragraph 13) that:

> **"13. … Mr Godliman questioned the Claimant who admitted that he had urinated in the yard on the day in question, showed him the CCTV footage and concluded that he was guilty of the act in question. On his own admission he did no more."**

8. Having then analysed some of the case Authorities on reasonable investigation, at paragraphs 14, 15 and 16, the Tribunal's Judgment continues as follows:

> **"17. I It [sic] is well established that before the disciplinary hearing commences the employee must know the full allegations against him[.] Disciplinary charges should be precisely framed and evidence used during [the] hearing should be confined to those charges. (Strouthos v London Underground Ltd (2004) IRLR 636 CA) Charges must be squarely put London Ambulance v Small (2009) UKCA Civ 22 [sic]. The Claimant was not charged with simply urinating in the delivery yard. The charge against him was that by doing so he had breached certain regulations, policies and his contract of employment. We have found as a fact (paragraph 7 of our findings) that Mr Carter embarked on the task of determining these allegations of breaches of policies without knowing what those policies said and whilst unable, when asked by the Claimant, to do so. This we find to be evidence that he approached his task with significantly less than a reasonable degree of care. He chose instead to substitute his own view that the Claimant could be arrested for an illegal act as he was not pregnant. If he was charged with the mere act of urinating in the yard the charge should have made this clear, if he was suspected of a criminal act this should have been squarely put and if it stood as drafted the referred [sic] to regulations should have been made known to the claimant and of course Mr Carter and examined carefully and considered at the hearing. We have found the hearing to be unreasonable and manifestly unfair. Given the lack of reasonable investigation we find Mr Carter not to have held a reasonable belief in the Claimant's guilt and given his failure to address the subject matter of the charge and the fact that he was influenced by his own opinion that the claimant had committed a criminal offence we are not persuaded that he had a genuine belief that the claimant was guilty of the charge.**
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> **17A. The Claimant's case was not difficult to understand. His contention that he was overcome by a desperate and uncontrollable urge to urinate upon leaving his cab is not a complex assertion. Mr Carter noted that this was the point in issue and yet he did not address it in the terms of his decision; finding that the claimant should have gone sooner or gone in search of a toilet in the store/shopping precinct. We have found the hearing to be unreasonable and manifestly unfair. Given the lack of reasonable investigation we find Mr Carter not to have held a reasonable belief in the Claimant[']s guilt and given his failure to address the subject matter of the charge and the fact that he was influenced by his own opinion that the claimant had committed a criminal offence we are not persuaded that he had a genuine belief that the claimant was guilty of the charge.**
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> **18. The two appeals did not remedy the failure to investigate the factual matrix of the case and did not rectify the failure to ascertain the terms of the regulations referred to in the charge or address the question of breach. It is clear that the appeals addressed the question of whether the Claimant could prove that his medical condition caused his sudden and urgent need to urinate. As we have indicated we have concluded that a reasonable employer would address the question of whether he genuinely found himself in that position. Medical evidence was available to them from the Claimant's General Practitioner which established that his condition was capable of resulting in this position and their own evidence from their occupational health adviser both supported this and went further by pointing out that it could be attributable to a great many reasons not just medical ones. Neither of the appeals was a full re-hearing, as we have stated neither addressed the inadequacies of the investigation. We therefore find the dismissal to be unfair. With regard to the Claimant[']s account of the matter we do not find dismissal to fall within the band of reasonable responses. Given that at the request of the parties we have put over all matters pertaining to remedy we have not at this juncture addressed the**

> **questions of whether his conduct (as described by himself) was culpable and contributed to his dismissal.**
>
> **19. We then turn to the question of whether the dismissal was unfavourable treatment arising in consequence of the Claimant's disability. Section 15 of the Equality Act 2010 provides that;-**
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> **A discriminates against a disabled person B, if A treats B unfavourably because of something arising in consequence of B's disability. And A cannot show the treatment is a proportionate means of achieving a legitimate aim.**
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> **As we have indicated the Claimant had declared his condition to the respondent in official documentation relating to night working and thus the Respondent knew or could be reasonably be expected to have known that the Claimant had the disability. That exemption from liability does not therefore apply in the present case. The question of whether dismissal satisfies the requirement of unfavourable treatment has not exercised the parties in submissions and we are satisfied that it does.**
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> **20. The question of objective justification has not featured in the case and thus the principal point is whether the claimant's act of urination which resulted in his dismissal was in consequence of his dismissal [sic]. In Basildon v Thurrock NHS [F]oundation Trust v Weerasingh[e] the EAT advanced a two stage test; we should ask what the something is and then ask if it is because of that that A treated B less favourably. In Hall v Chief Constable of West Yorkshire the EAT address the point in different (but we find not inconsistent) terms that something arises if it is a significant influence on the unfavourable treatment. We accept Ms Barrett[']s point (based on Weerasingh[e]) that we should not adopt the approach of just seeking a link and should bring the facts.**
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> **21. Unlike the Claim of unfair dismissal which focuses essentially on the reasonableness of a decision made by the employer at a historical point of time, it is for us to consider whether the complaint of disability discrimination is proved. We are there not only entitled but obliged to take our own view of the medical evidence. We have before us the two documents that were available to the respondent at the time of the internal appeals also the medical report at pages 266-268 of the bundle. We note that all three confirm that urinary problems of the type experienced by the claimant on the day in question are known effects of his condition. The latter report confirms that it is highly likely that any patient (with the Claimant's condition) would have urge incontinence (ie a sudden and immediate need to empty their bladder. The Claimant[']s evidence [(]both to us and to his employer throughout) has been that this was his experience. On a balance of probabilities we conclude his disability placed him in the predicament that he found himself on the day in question. He gave a full account of his uncontrollable urge to his employers and on the strength of that account he was dismissed. Accordingly we find his dismissal to be unfavourable treatment which arose in consequence of his disability."**

I note in passing that the Judgment contains two paragraphs numbered 17 and if both are referred to, they will be numbered as 17 and 17A respectively.

The Remedy Judgment

9. The Remedy Judgment deals first with the issue of objective justification and then with reinstatement. On objective justification, the Tribunal said this:

> **"1. The Respondents invited us to reconsider our judgment asserting that we had not considered the question of objective justification. Our unanimous conclusion was this was not a matter which featured in the case we heard. It is correct to say that the point is mentioned in the**

> **pleadings but none of the Respondent's witness turned their attention to the point in their evidence.**
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> **2. The point pleaded at paragraph 49 of the particulars was that they had discriminated because of a legitimate aim of maintaining good conduct, preserving the Respondent[']s reputation and Health and Safety reasons. We found their belief that the Claimant had committed misconduct to be wholly unreasonable. There was no reasonable investigation and material facts were not established.**
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> **3. There was no evidence before us to show that the Respondent's reputation was or was likely to be damaged. We found that a disabled man, by reason of his disability found himself in the unfortunate circumstance of needing to urinate urgently.**
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> **4. There was no evidence of a Health and Safety risk. There was no evidence that the Claimant urinated on the Respondent's pallets and in any event they were stored in an open yard accessible to animals."**

10. Turning to the issue of reinstatement, having confirmed that the Claimant wanted to be reinstated, and so the first relevant factor was satisfied, the Tribunal's reasons for acceding to that request are stated as follows:

> **"8. The second factor is practicability. The Respondent closed their advertisement for lorry drivers on the 22nd April having heard it confirmed that the Claimant sought re-instatement on the 21st April. They say that they have made offers and filled all vacancies. However Ms Dwerryhouse confirmed during her evidence that there were vacancies for drivers at certain depots, there were vacancies for retail drivers and widespread use was made of agency drivers. We were not persuaded that the Respondent's manager had reasonably lost trust and confidence in the Claimant. Ms Dwerryhouse accepted that he had been honest and straightforward throughout the disciplinary process. We found the Respondent's belief that the Claimant was guilty of misconduct to be unreasonable and the Claimant is willing to put the Respondent's culpability behind him.**
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> **9. There is no evidence before us of conduct on the part of the Claimant that would amount to a contributory factor in his dismissal. He did apologise in interview, but we accept that it is commonplace for people to apologise in embarrassing circumstances notwithstanding that they arose from an involuntary act.**
>
> **10. S:116(5) requires us to disregard the fact of a permanent replacement. The Claimant (Respondent?) has not shown that it was not practicable for the Claimant's work to be carried out without employing a replacement. Indeed in the light of Ms Dwerryhouse's evidence about the regular use of agency drivers we are satisfied that it was entirely possible for them to have done so.**
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> **11. We are satisfied that it was practicable to make the order. The sum of money ordered in conjunction with the reinstatement order was the sum calculated and agreed between the parties."**

The Respondent's Arguments on Appeal

The Pallets Issue

11. The central theme running through this appeal, and to some extent that against the Remedy Judgment, was that the Tribunal's reasoning and conclusions cannot stand in light of

what Counsel described as uncontroverted CCTV footage played to it showing the Claimant urinating on trays used for the delivery of customers' shopping. It is important to record at this stage that the dismissal proceeded on the basis that the Claimant had urinated on the pallets and not near them, above them or over them and any proposed alteration to that was not permitted to proceed to this hearing (see HHJ Richardson's note following the Preliminary Hearing on 6 April 2018).

12. Ms Barrett invited this Tribunal to view the CCTV at the outset of her submissions and, in the absence of any opposition, that was done.

13. Counsel contended, both in her written argument and orally, that there had effectively been no dispute between the parties that the Claimant had urinated on the pallets. Accordingly, it had not been open to the Tribunal to find (at paragraph 7) that this fact had not been established. Based on that error, the Tribunal had gone on to find that the appeal manager's conclusion that the Claimant had breached Health and Safety Regulations by urinating on trays was not established by the evidence (paragraph 10). The Remedy Judgment was said to be even more explicit on this where it states (at paragraph 4), "*There was no evidence that the Claimant urinated on the Respondent's pallets*".

14. Ms Barrett referred to the Claimant's evidence as supportive of her position that this "crucial fact" had not been disputed. She accepted that his witness statement did not admit urination on the pallets in terms, but she had produced agreed notes of cross-examination from which, she contended, such an admission could be inferred. Ms Barrett submitted that this "crucial error" infected the Tribunal's reasoning throughout. There were four particular matters in which this was so. First, in relation to genuine belief, she submitted that at paragraph 17 of

the Judgment the Tribunal had failed to engage at all with the Respondent's stated reasons for the dismissal. Secondly, in relation to causation for the purposes of the section 15 claim, it was important that the Respondent would have not dismissed but for the urination on the home shopping pallets; urination simply in the yard would be a different matter. Thirdly, in relation to objective justification, she submitted that no reasonable Tribunal, on the basis of the CCTV evidence, could have reached the conclusions contained in the Remedy Judgment on that matter. She anticipated that Mr Lee, for the Claimant, would cite the case of **Akerman-Livingstone v Aster Communities Ltd** [2015] UKSC 15 on this matter. She submitted, however, that the case did not assist the Claimant, as in the present proceedings the Respondent's reasons on legitimate aim had been simply rejected out of hand by the Tribunal. Fourthly, she addressed the issue of contributory fault where this appears at paragraph 9 of the Remedy Judgment. This issue was only relevant to Remedy; she submitted that a different finding on the urination on the pallets issue would open the issue of reinstatement, such that the Tribunal's Decision could not stand.

15. Ms Barrett submitted that the Tribunal had failed to take into account in dealing with this matter that the charge against the Claimant was not just urinating but also the Health and Safety aspects of that conduct. The Claimant might argue that the charge should have been clearer but if the pallets issue had been properly understood by the Tribunal and addressed, none of the above errors would have occurred. Accordingly, the Tribunal's reasoning was fatally flawed throughout.

16. It was submitted further that the error in relation to the pallets infected also other matters, such as the substitution mindset that Counsel contended had been adopted in relation to the relative gravity of the alleged misconduct. She referred to the case of **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387 as authority for the proposition that all the Tribunal must do

is assess the reasonableness of the decision against the objective standards of the hypothetical reasonable employer, measured by reference to the band of reasonable responses. She submitted that the Tribunal had failed to address adequately whether it was within the reasonable range of responses for the Respondent to conclude, on the basis of the CCTV evidence and the Claimant's own admission, that he urinated on the pallet of trays. If such a finding by the Respondent was reasonable, the Tribunal then had to address whether it was within the range of reasonable responses for the Respondent to conclude that such conduct was sufficiently serious to justify dismissal. Although the Tribunal had correctly identified the test, it had gone ahead and substituted its own conclusion that the Claimant did not urinate on the pallets. That the Tribunal had fallen into the substitution mindset was best illustrated at paragraph 18 of the Liability Judgment where it stated that "*With regard to the Claimant[']s account of the matter we do not find dismissal to fall within the range of reasonable responses*", rather than focusing on the Respondent's stated reasons for viewing the Claimant's actions as serious misconduct. Those reasons were reputational and hygiene risks, which were serious concerns in the food retail sector.

17. On perversity, Ms Barrett accepted that the threshold was a high one and that the test set out in **Yeboah v Crofton** [2002] IRLR 634 applied. However, she contended that the Tribunal's conclusion in respect of the pallets issue was one that no reasonable Tribunal could have reached on the basis of the evidence presented. The perversity ground was dependent on this Tribunal accepting that the evidence of the Claimant urinating on a stack of customer home shopping pallets was incontrovertible. It was submitted that this was a case where a crucial finding of fact was contrary to the undisputed evidence.

18. The consequences of the Tribunal's failure to deal properly with the pallets issue were, as already indicated, 1) that the Tribunal then inevitably fell into a substitution mindset when it held

that there was no genuine belief in the Claimant's misconduct and 2) that the dismissal conclusion - that dismissal was because of something arising from disability - was illustrative of the same error. An uncontrollable urge to urinate as a result of diabetes might explain urination in the public yard but not on the home shopping pallets.

Objective Justification

19. The first ground of the Liability Appeal and the second ground of the Remedy Appeal both relate to the issue of an alleged refusal on the part of the Tribunal to deal with the issue of whether or not the Respondent's treatment of the Claimant was a proportionate means of achieving a legitimate aim or at least failing to give adequate reasons for its conclusions on that point. The relevant Rule (**ET Rules 2013** Rule 62) required the Tribunal to give reasons on all issues and the Liability Judgment did not comply with that on the issue of objective justification. This was illustrative of an error of law – **Meek v City of Birmingham District Council** [1987] IRLR 250. Ms Barrett submitted that the Remedy Judgment had not rectified that error.

20. Counsel relied on various documents to illustrate that an objective justification defence had been before the Tribunal including, but not restricted to, three witness statements, the agreed list of issues and both sides' written closing submissions to the Tribunal. Against that background, it was wrong for the Tribunal to state at paragraph 20 of the Liability Judgment that "*The question of objective justification has not featured in this case*". The Tribunal had followed that error through to the Remedy Judgment by stating that objective justification "*was not a matter which featured in the case we heard*" and that none of the Respondent's witnesses had addressed it. Ms Barrett submitted as the issue had actually been before the Tribunal in evidence and in submissions, it was not necessary for the Respondent's witnesses to have set out their evidence on objective justification as a hypothetical alternative, standing its denial that the

Claimant had been discriminated against at all. The basis for the alternative that he was discriminated against but with objective justification could be gleaned from their evidence without their statements having to use that language. She contended that the reasons ultimately given in the Remedy Judgment did not address the genuine concerns of the Respondent to pursue legitimate aims of Health and Safety requirements and avoiding reputational damage.

Reinstatement

21. Counsel contended that the Order made in the Remedy Judgment to reinstate the Claimant was flawed. So far as the contributory fault issue was concerned she referred to the Remedy Judgment at paragraph 8. This did not address whether the Respondent had in fact lost trust and confidence in the employment relationship and so whether dismissal was reasonable. Ms Barrett referred to the case of **British Airways plc v Valencia** [2014] IRLR 683 and the EAT Decision of Simler J at paragraphs 9 to 12 of that Decision: it is clear that where there was contributory fault, the reinstatement was unlikely to result.

22. Similarly, in the case of **United Lincolnshire Hospitals NHS Foundation Trust v Farren** [2017] ICR 513, at paragraph 40 HHJ Eady QC had confirmed that the Tribunal was required to ask whether an employer genuinely believed that the Claimant had been guilty of the misconduct in question (in that case, dishonesty) because it was that employer, and not some other employer or even the ET, that was to re-engage the Claimant. The issue of trust and confidence had to be tested as between the parties in order to determine, even on a provisional basis, whether an Order for re-engagement was practicable and capable of being carried out. The Tribunal in this case, it was submitted, had disregarded the Respondent's genuine view of a loss of trust and confidence.

23. Ms Barrett referred also to the case of **Johnson Matthey plc v Watters** UKEAT/0236/06, which she anticipated would be relied on by Mr Lee. She pointed out that the reference in that case was simply an example of the Employment Appeal Tribunal citing a passage in a Tribunal Judgment and so it did not provide any relevant authority. The law is as stated in **Valencia** and **Farren** and the Tribunal failed to apply it.

The Claimant's Submissions

The Pallets Issue

24. In this aspect of the appeal, Mr Lee submitted that the Respondent had sought to divide the issue of 1) urinating in a public place and 2) urinating on the pallets that would be handled by other employees giving rise to a Health and Safety issue. However, he pointed out that the original allegation of misconduct (set out at paragraph 5 of the ET's Judgment) did not divide the issue that way but stated a number of different matters that were all taken together deemed to be gross misconduct. In light of that, the significance of the CCTV evidence had been overstated by the Respondent in this appeal.

25. The original misconduct charges had to be taken together and the Tribunal had decided, correctly, that the Respondent had failed to provide any evidence to show a reasonable basis for its belief that the Claimant was guilty of gross misconduct in terms of the whole charge levelled against him. The focus of the Respondent's belief at time of the dismissal was that the urination in the yard was illegal but the basis of that belief was never explained. Further, the charge linked to the act of urination to a breach of regulations, policies and the Claimant's contract of employment, but again no evidence of what provisions were said to be breached was ever led. The Tribunal had, in those circumstances, been entitled to conclude that the whole investigation was so flawed that there simply could not have been a reasonable belief of the Claimant's guilt

on the charge levelled against him. This was all covered in paragraph 17 of the Judgment. The real reason for dismissal at the time was the alleged committing of an illegal act and a claim of breach of Regulations and Policies.

26. It was clear from the Claimant's witness statement and the Tribunal's Judgment (at paragraph 4) that urination in the yard was not in dispute. The investigation that was required on the part of the Respondent was as to why that had occurred and the Respondent had singularly failed to carry out such an investigation.

27. On substitution mindset, the Tribunal had reminded itself of the test on substitution and it had found that the Respondent's mind was closed to the underlying reasons as to why the Claimant had been in this situation. Under reference to the case of **Sovereign Business Integration plc v Trybus** UKEAT/0107/07, at paragraph 15 the Tribunal had relied on the Respondent's own conduct in concluding that dismissal was outwith the band of reasonable responses. In any event urination on the pallets was not a crucial fact for the Tribunal: it was something that Mr Godliman had relied on, but in the disciplinary process the references had been to urination "in the yard". If there had been a lack of clarity or misinterpretation in relation to this matter, that could only exacerbate the issue of whether and to what extent any breach of Health and Safety Regulations arose. Indisputably, if the Respondent's case was that the Claimant had urinated on trays, that would be a lot more serious than if the charge was simply urinating in the yards. Accordingly, if urination on the trays was a crucial fact it would have to have been set out by the Respondent much more than by inference; which is what the Respondent now sought to do. In a situation where it was open to the Tribunal to conclude one way or another on any issue, that matter was not open to appeal. The CCTV shows that the matter of where exactly the Claimant urinated and on what was inconclusive and so was not open to be overturned

on appeal. It was the investigation point that was unanswerable and had led to the Tribunal's conclusions. It was important in this context that in the case of **Turner v East Midlands Trains** Ltd [2013] IRLR 107 at paragraph 17 the Court of Appeal had confirmed that the range of reasonable responses test applies not only to the result but also to the investigation.

Objective Justification

28. Mr Lee submitted that the Tribunal was correct in determining that the Respondent's treatment of the Claimant was not a proportionate means of achieving a legitimate aim. It had not failed to give adequate reasons for its conclusions on that point in the Remedy Judgment. If an employer seeks to rely on an objective justification defence, it is the employer who must show that its unfavourable treatment of the disabled person was a proportionate means of achieving a legitimate aim. That was a matter for the Tribunal to decide on the facts of the case.

29. The necessary four-stage approach to this issue was laid down by the UK Supreme Court in the case of **Akerman-Livingstone v Aster Communities Ltd** [2015] UKSC 15. The Tribunal in the present case, having accepted that the reason for the Claimant's dismissal emanated from his disability (as opposed to conduct), addressed the various strands of evidence that could possibly have formed the basis of an objective justification defence. These included reputational risk and perceived Health and Safety dangers. However, the Respondent was found to have failed to have provided sufficient evidence in support of those factors. The focus of the Respondent's case was on conduct and the witnesses had not set out what was proportionate in terms of an objective justification defence. In the absence of any evidence that the Respondent's legitimate aims were in fact compromised by the Claimant's actions, any objective justification defence had to fail. It was noteworthy that the Claimant had worked on for two weeks after the incident without being suspended from duty. While suspension might have been a proportionate response

as that had not been done, the Respondent could not argue that dismissal was somehow proportionate. In any event, the Claimant had given unchallenged evidence that he had taken care not to be overlooked when urinating and so it was difficult for the Respondent to plead that there was any risk of reputational damage.

30. In the context of objective justification not having been presented as a stand-alone argument to the Tribunal, certainly by the witnesses, the Tribunal had not erred in the way it dealt with it and the reasons given were sufficient.

Reinstatement

31. Mr Lee submitted that on the facts of the case the Tribunal found that the Claimant had carried out the act he did by virtue of his disability. It was his disability that placed him in the predicament he was in. Accordingly, if disability was the operative cause then the Tribunal had been correct to conclude that there was no contributory fault. The approach approved by the UK Supreme Court in **McBride v Scottish Police Authority** [2016] UKSC 27 at paragraphs 36 and 37 had been complied with. The Supreme Court had in that case upheld an Order reinstating an employee to the role that she had held before her dismissal which recognised that she was on restricted duties at that time. Mr Lee analysed paragraphs 8, 9 and 10 of the Remedy Judgment and contended that these all illustrated that the Tribunal had taken the relevant material factors into account.

32. In relation to the issue of trust and confidence the Tribunal was entitled, having found that the dismissal was unfair as there had been no reasonable investigation on the subject of the disciplinary charge, to conclude that there could be no genuine and reasonable belief that trust and confidence was lost. On the relevant Authorities, he submitted that the recent Decision of

A the EAT in **United Lincolnshire Hospitals NHS Foundation Trust v Farren** [2017] ICR 513 was in point. There HHJ Eady QC had confirmed that in this context the Tribunal had to be satisfied not only that the employer genuinely believed that trust and confidence had broken down, but also that its belief in that respect was not irrational.

B

33. In the circumstances of the present case, any asserted belief was irrational because as already indicated throughout the 14-day period following the commencement of the

C investigation, the Claimant was not suspended by the Respondent and was working and going back to the same depot where the incident had arisen. The Respondent had acted inconsistently with its stated belief that trust and confidence had broken down and so could not simply assert

D that it had.

34. Further, under reference to **British Airways plc v Valencia** [2014] IRLR 683, it was clear

E on the facts of that case that the interrelationship between contribution and trust and confidence is such that if contribution towards dismissal is high that mitigates against reinstatement. In the present case, that argument was hopeless as no contributory fault could be established in circumstances where the disability was the cause of the issue. The t's act was not a deliberate

F one and everything flowed from that.

Discussion

G 35. I will deal with each of the three main categories of argument in the order in which they were addressed at the Hearing.

H

The Pallets Issue

36. The Respondent's contention that the Tribunal's findings on this have no foundation in the evidence, as indicated, central to the appeal. The context in which the Tribunal considered the Claimant's act of urinating in the yard was as part of an examination of his conduct being characterised by the Respondent as gross misconduct justifying summary dismissal. The approach to a conduct dismissal is well established. In relation to a serious charge of misconduct, the charge must set out what the employee is accused of, as Hill LJ put it in **Strouthos v London Underground Ltd** [2004] IRLR 636 at paragraph 12:

> **"12. It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge. …"**

37. In this particular case it is important to note that the charge against the Claimant was not simply one of urinating in the yard, or even of urinating on the pallets, it was that by urinating in the yard outside the Asda loading area he had (1) breached trust and confidence to the extent that the working relationship had broken down, (2) committed a deliberate and serious breach of Health and Safety Regulations that could endanger himself and others and bring the company into disrepute, and (3) had seriously or wilfully neglected company property. Those were the terms of the charge against him which the Tribunal was required to analyse and assess the Respondent's acting against before concluding whether there had been (at the material time) a reasonable belief that the Claimant had committed the various aspects of it which were all deemed to be gross misconduct. It was clear that the Respondent was convinced, initially, that the Claimant had urinated on the pallets. The issue surrounded whether the belief that the Claimant was guilty of the charge against him was reasonably and rationally based.

38. The next stage is to consider what evidence there was in support of the charge and how well that was investigated. At the material time the Respondent had CCTV evidence available and the investigating officer, Mr Godliman, viewed it. He formed the view that it showed the Claimant urinating on the pallets. He accepted in evidence that he did not carry out any further investigation. In particular, he did not explore whether the act he understood the Claimant to have committed was in fact a breach of his contract or of Health and Safety Regulations, far less a criminal act. (I pause to note that criminal illegality is not contended in the Respondent's charge against the Claimant, but it is a matter that in evidence was accepted as something that had exercised the Respondent at the time.) Neither Mr Godliman nor Mr Carter investigated the precise circumstances in which the Claimant found himself in the situation of having to urinate in the yard and the relationship between those circumstances and his medical condition. It is clear from paragraphs 3 and 13 to 16 inclusive of the Judgment, that the lack of any reasonable investigation was a critical issue in the ultimate decision that the dismissal was unfair, because no reasonable care at all had been taken by the Respondent during the disciplinary process. In considering whether the Respondent's actions were within the range of reasonable responses, the Tribunal was entitled (and required) to look at the whole process of the investigation and disciplinary procedure and not just the outcome; that is clear on the Authority of **Turner v East Midland Trains Ltd** [2013] IRLR 107 at paragraph 17.

39. On the issue of whether it was reasonable for the Respondent to conclude that the Claimant had urinated on the trays, the Tribunal had the evidence of the Claimant that he had urinated in the yard (Liability Judgment paragraph 4) and the associated CCTV evidence; whoever reported the Claimant, there was no other eye witness evidence. The Tribunal viewed the CCTV evidence and formed the view that it did not actually show the Claimant urinating on

the trays. Only if that was not a view that could possibly have been reached, would any issue of perversity arise.

40. Having viewed the CCTV, I have no hesitation in concluding that the Tribunal was entitled to make the finding that it did on this issue and that view is shared by the Lay Members of this Tribunal. It may be that views could differ on what the CCTV shows, but all that matters for the purposes of this appeal, is whether the Tribunal was entitled to find that the CCTV did not obviously support the contention made on the part of the Respondent. More importantly, the evidence did not all point the same way on this issue and I reject the Respondent's submission to that effect. Whether the Claimant urinated on the pallets as opposed to in the yard in the area of or even next to the pallets, was an issue of fact that was for the fact-finding Tribunal to determine. Taking the available evidence as a whole, there were a number of different accounts given.

41. In particular, the Claimant's statement is silent on the issue of whether he urinated on the pallets and the notes of cross-examination of him by Counsel at the Tribunal Hearing (pages 80 to 81 of the court bundle) do not establish where exactly he urinated – i.e. on, near to or over them. There are passages in that which refer to the Claimant facing the pallets and some Health and Safety issue arises, but there is no note that urinating on the pallets was directly put to the Claimant. Even if it was, there were other adminicles of evidence before the Tribunal that support the Claimant's contention at this appeal that urination on the pallets was not the focus: for example, Mr Carter's witness statement (at paragraph 16) refers to the Claimant having urinated "*next to food pallets*". The notes of the disciplinary hearing (at page 162) contained only a brief reference to the Claimant having been asked at his disciplinary hearing whether he was aware of the "*process involving trays at the [Asda service centre]*", in answer to which the Claimant

apologised. It was not specifically put to him at the disciplinary hearing that he urinated on the trays themselves. Further, in the dismissal letter sent to the Claimant (page 168), in the part that gave reasons for the dismissal, it is contended that the Claimant "*went in the corner*" and urinated. Accordingly, whatever Mr Godliman's conviction on the issue, the employer's complaint against the Claimant was not that he urinated on the trays but that he urinated in the area at all. This is further confirmed in the notes of the internal appeal hearing (page 173), where there is a reference to the Claimant having been dismissed for "*urinating in a shared access yard*".

42. Accordingly, I reject the contention that the evidence that the Claimant urinated on the pallets was somehow uncontroverted. In any event, the conclusion of the Respondent was that (a) the Claimant had urinated on the trays, and (b) had thereby breached Health and Safety Regulations. The Tribunal was just as troubled by the lack of any information gathered in the disciplinary process about the second matter in considering the reasonableness of the Respondent's approach as it was about the first issue. It is clear from all the material before the Tribunal that the Claimant was dismissed "*for urinating in a shared access yard*"; whether he urinated on the pallets or adjacent to them was not treated as a critical fact before the Tribunal, or it would no doubt have been proved and the Claimant questioned very directly about it. The CCTV was inconclusive, yet the Respondent leapt to conclusions about unnamed and unspecified Health and Safety Regulations. The Tribunal was entitled to decide that the Respondent's belief of such breaches was not reasonable. Had the Respondent been genuinely concerned about a serious breach of Regulations, they would have had to know what provisions were being breached in order to know how serious the charge was.

43. No issue of substitution mindset arises. The Tribunal's finding that the Respondent's response was unreasonable is unassailable. The whole process was tainted by that unreasonable

response. In **Turner v East Midland Trains Ltd** [2013] IRLR 107, the Court of Appeal confirmed that:

> **"...the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc v Hall* [2001] IRLR 275 CA; and whether the pre-dismissal investigation was fair and appropriate: see *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 CA."**

44. Similarly, I have concluded that there is simply no basis for a perversity challenge. The Tribunal's view of the various strands of evidence was one that it was well entitled to reach. The Respondent's approach to this appeal appears to overlook the central conclusion of the Tribunal on the disability issue. The unfavourable treatment of the Claimant - a disabled person - was the dismissal. The Tribunal acknowledged (in the Liability Judgment at paragraph 21) the difference between the disability discrimination claim and that of unfair dismissal. As for the former, it required to form its own view for the purposes of section 15 on the medical evidence. Having done so, it concluded on balance that the operative cause of the Claimant's act of urination in the loading yard was his disability. That conclusion is not challenged in this appeal and is relevant to both the issue of objective justification and reinstatement to which I now turn.

Objective Justification

45. This ground of appeal contends that the Tribunal ought to have dealt with objective justification on the basis that there was evidence in support of it and a reference to it in written submissions, albeit that it was not formally presented as a fall-back position at the Hearing on disability discrimination.

46. Section 15 of the **Equality Act 2010** provides:

> **"(1) A person (A) discriminates a disabled person (B) if -**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

47. The issue under this head then was whether, on the basis that unfavourable treatment of the Claimant (dismissal arising from his disability) was established, the Respondent had done enough to show that such treatment was a proportionate means of achieving a legitimate aim. At the Liability Hearing, no concession of any kind was made in relation to unfavourable treatment and of course one of the unreasonable aspects of the Respondent's process was a failure to investigate the relationship between the Claimant's condition and an act of urinating in the loading bay.

48. I consider that the first complaint of the Respondent on this issue is well-founded to the extent that objective justification was highlighted in the list of issues for the Tribunal and in the parties' written submissions. While the focus of the Respondent's case was that it had not treated the Claimant unfavourably at all, the Tribunal ought to have dealt with objective justification at least insofar as submissions were made about it. However, the Tribunal's view that it had not featured at the Liability Hearing may be a comment on whether it was addressed properly in evidence. Having looked at the relevant material relied on by Counsel for the Respondent, it seems that the witness statements were all directed at the misconduct issue and did not address whether, even if the Claimant had been treated unfavourably in connection with disability, that was, on balance, outweighed by the Respondent's pursuit of legitimate Health and Safety aims and a desire to avoid reputational damage. The Claimant's own evidence was that he was not seen by anyone other than the security guard; a matter to which I will return.

49. In **Akerman-Livingstone v Aster Communities Ltd** [2015] UKSC 15 the UK Supreme Court addressed the concept of proportionality in this context as follows:

> **"28. The concept of proportionality contained in section 15 is undoubtedly derived from European Union law, which is the source of much of our anti-discrimination legislation. Three elements were explained by Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, at para 165:**
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> > **"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?**
>
> **…. However, as Lord Reed explained in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, para 68 et seq, this concept of proportionality, which has found its way into both the law of the European Union and the European Convention on Human Rights, has always contained a fourth element. This is the importance, at the end of the exercise, of the overall balance between the ends and the means: there are some situations in which the ends, however meritorious, cannot justify the only means which is capable of achieving them…."**

50. The Tribunal having overlooked that there was, as a fall-back position, at least a legal argument that the Respondent wanted to advance on objective justification, an application was, quite properly, made for that to be dealt with at the same time as Remedy. Although in the Remedy Judgment it is clear that the Tribunal remained unconvinced that this defence had been focused at the Hearing, it gave its conclusions on the point at paragraphs 2 to 4 of that Judgment. The issue in this appeal is whether those constitute sufficient reasons, but that must be viewed against the view that this Tribunal has now reached on the pallets issue.

51. While succinct, the Tribunal's reasons in the Remedy Judgment on this point highlight that there was no significant evidence from which a conclusion that the Respondent's reputation was or was likely to be damaged by the Claimant's action was available and that there was no evidence of a Health and Safety risk. The Claimant, as indicated, had given evidence that he was not seen, apart from by a security guard, and as already indicated the Respondent's witnesses were not addressing legitimate aim in the context of balancing that against unfavourable treatment of the Claimant as a disabled person. That point was eloquently made by the Claimant in his witness statement at paragraph 22.

52. The Respondent's case on this issue is predicated upon the Tribunal having reached a perverse conclusion in stating that there was no evidence that the Claimant urinated on the pallets and that central argument has been rejected. It is noteworthy that even where the Respondent's position is stated at its highest, the Tribunal adds that the pallets were, in any event, "*stored in an open yard accessible to animals*" (Remedy Judgment paragraph 4). It is not part of this appeal that such a finding is perverse or not based on the evidence. It is the sort of issue that would be relevant to any Health and Safety argument if the Respondent stored pallets in an enclosed hygienic area, with restricted staff access, or in the sort of open yard discussed in the evidence in this case.

53. The real issue on objective justification is that the Respondent's evidence did not address how any legitimate aim would justify dismissal in a proportionality assessment between established unfavourable treatment on the one hand and the legitimate aims of Health and Safety requirements and risks to reputational damage on the other. That these might well be legitimate aims is not sufficient. There would have to be evidence that, even allowing for the Claimant's disability being the operative cause of his actions, the Respondent would have considered it justifiable to have dismissed him anyway.

54. Such submissions as were before the Tribunal on objective justification at the Liability Hearing were brief and contained statements such as that dismissal was the appropriate sanction given the severity of the misconduct and that the Claimant's diabetes could only have, at most, been a small part of the cause. The Tribunal having rejected both of these assertions, there was not much before it on this issue. Accordingly, the error in overlooking objective justification initially has, in my view, been properly rectified in the Remedy Judgment. The reasons given

A there are adequate in light of the absence of any relevant evidence led that might support a proportionality assessment being decided in the Respondent's favour.

Reinstatement

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55. On this issue there was a discussion of the relevant Authorities on reinstatement, particularly those where contribution may be a factor. In **British Airways plc v Valencia** [2014] IRLR 683, the Tribunal had found that a member of the cabin crew of British Airways had made an 80% contribution to his dismissal. An Order for reinstatement would have required him to be treated as though he had never been dismissed, and so the high level of contribution to his dismissal rendered reinstatement unjust. At paragraphs 10 to 12 of the Judgment in that case Simler J stated the following:

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> **"10. Loss of the necessary mutual trust and confidence between employer and employee may render re-employment impracticable. For example, where there is a breakdown in trust between the parties and a genuine belief of misconduct by the employee on the part of the employer, reinstatement or re-engagement will rarely be practicable: see *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680 at [10] (Lord Johnston) in the context of misconduct involving drugs and clocking offences:**
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> > **'in this case it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations … when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist … can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee.'**
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> **11. Similarly in *ILEA v Gravett* [1988] IRLR 497 (albeit on very different facts) the EAT accepted that a genuine belief in the guilt of an employee of misconduct, even if there were no reasonable grounds for it, was a factor that had to be weighed properly in deciding whether to order re-engagement:**
>
> > **'21. The tribunal ordered re-engagement and are criticised by the appellant employer for what they submit is a wholly perverse decision upon all the facts of this case. It is a possible view of that decision, but we do not seek nor do we need to go that far. An** G **essential finding in the present case was that the authority had a genuine belief in the guilt of the applicant. It is said with accuracy that this is the largest education authority in the country and that it has a vast area to cover and a vast variety of posts into which the applicant could be fitted. It is, however, a common factor in any of those posts that the applicant would have the care and handling of young children of both sexes. Bearing in mind the duty of care imposed upon the authority and the very real risks should they depart from the highest standard of care, we take the view that this tribunal failed adequately to give weight to those factors in the balancing exercise carried out in order to reach their decision on re-engagement.'**
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> H
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> **12. So far as contributory conduct is concerned, this is relevant to whether it is just to make either order and in the case of a re-engagement order, on what terms. In cases where the contribution assessment is high, it may be necessary to consider whether the level of**

> **contribution is consistent with the employer being able genuinely to trust the employee again: *United Distillers & Vintners Ltd v Brown* UKEAT/1471/99, unreported, 27 April 2000, at paragraph 14."**

56. It can be seen then from that case that a central factor in the decision making was the high contributory element by the employee and **Valencia** is accordingly not in point on the established facts of the present case.

57. Similarly, the case of **ILEA v Gravett** [1988] IRLR 497, cited in the above passage of **Valencia**, involved a genuine belief in misconduct; something that the Tribunal found did not exist in the present case. Accordingly, it too can be distinguished.

58. The most recent and helpful authority on the issue of reinstatement is that of **United Lincolnshire Hospitals NHS Foundation Trust v Farren** [2017] ICR 513. There, HHJ Eady QC reviewed the various Authorities and made the following point at paragraph 42:

> **"42. … The tribunal was thus entitled to scrutinise whether the trust's stated belief was genuinely and rationally held, tested against other factors the tribunal considered relevant. It was, however, still a question to be tested from the perspective of the trust, not that of another employer, still less that of the tribunal: was it practicable to order *this* employer to re-engage *this* claimant? …"**

59. That was indisputably the question for the Tribunal in this case, namely the particular circumstances of the Claimant in question and whether it was reasonable to reinstate him. That is, in my view, the very issue that the Tribunal addressed and found that in the circumstances of this case it was unreasonable on the part of the Respondent to refuse to re-instate the Claimant. It was simply not reasonable for the Respondent to claim that trust and confidence was lost in a situation where the Claimant's disability was the operative cause of the dismissal. The Tribunal also had the Claimant's evidence in relation to re-instatement and could take into account that he felt that now that the Respondent knew of his disability and accepted it, trust and confidence

A could be restored. The Tribunal in this case simply could not be satisfied that the Respondent had any rational belief that trust and confidence had broken down. Accordingly, the Respondent's arguments in relation to the pallets issue and on contributory fault having failed, I conclude that the Tribunal's Decision on reinstatement is also unimpeachable.

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60. For all the reasons given above the appeals fail; both against the Liability Judgment and the Remedy Judgment.

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