

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

At the Tribunal
On 3 August 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR S J BURDIS

APPELLANT

DORSET COUNTY COUNCIL

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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For the Respondent

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SUMMARY

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Reasonableness of dismissal

Unfair dismissal – reason for dismissal – fairness – **Employments Rights Act 1996** section 98 (1), (2) and (4).

The Claimant was a long-standing employee of the Respondent who became Director of the Dorset Waste Partnership (“the DWP”). When problems arose, external bodies raised criticisms of the DWP’s financial management and ultimately disciplinary proceedings against the Claimant ensued, culminating in his dismissal for what was said to be a reason relating to his conduct. On his claim of unfair dismissal, the Claimant complained that he had been held accountable for events that were not the result of misconduct on his part; his dismissal could not be for a reason relating to his conduct. The Employment Tribunal dismissed his claim, explaining the reasons for its Judgment chronologically, starting with the investigation which it considered in the light of the guidance provided in **British Homes Stores Ltd v Burchell** [1978] IRLR 379. It went on to find that the Claimant had been dismissed for his failure to implement proper management systems and that this had led to £1.5 million of inappropriate hiring costs. The ET was satisfied that this was the Respondent’s genuine belief and that it was based on reasonable grounds.

The Claimant appealed, arguing: (1) the ET had failed to determine the reason for his dismissal, alternatively (2) to the extent it had assumed the reason was conduct, that was impermissible given that this was really a case akin to “ministerial responsibility” and, therefore, a “some other substantial reason” (SOSR) or capability dismissal.

Held: dismissing the appeal.

Although the ET's reasoning was unhelpfully expressed (adopting a chronological approach rather than addressing the statutory questions in order), reading the Judgment as a whole, it was apparent that it had found the dismissal had indeed been for a reason relating to the Claimant's conduct. That, moreover, was a conclusion the ET was entitled to reach given that it had found that conduct in issue was the Claimant's fundamental failure to initiate rigorous financial management systems within the DWP; the ET did not thereby err in allowing that misconduct might encompass serious neglect, omission or carelessness. In the circumstances, it had not been bound to find that this was a SOSR or capability dismissal.

A HER HONOUR JUDGE EADY QC

B Introduction

C 1. This is an appeal against a Decision of an Employment Tribunal (“ET”) on an unfair
D dismissal claim; it raises issues relating to the interplay between the establishment of the reason
for dismissal, under section 98(1) and (2) of the **Employment Rights Act 1996** (“ERA”), and
the assessment of fairness of the dismissal, having regard to that reason, for the purposes of
section 98(4). I refer to the parties as the Claimant and Respondent, as below. This is the Full
Hearing of the Claimant’s appeal against the Judgment of the ET sitting at Southampton
(Employment Judge Kolanko, sitting alone over 11 days in May and June 2017, with a further
two days in Chambers), by which the ET rejected the Claimant’s claims of unfair dismissal and
holiday pay. The current appeal relates only to ET’s finding on unfair dismissal. Ms
Cunningham, of counsel, represented the Claimant before the ET, as she does today. The
Respondent was also represented by counsel below, albeit not by Mr Stone who now appears.

E 2. The Claimant’s appeal was permitted to proceed (after a hearing under Rule 3(10) of the
F **Employment Appeal Tribunal Rules 1993**) on two grounds: (1) whether the ET had failed to
determine whether the Respondent had shown that the dismissal was for a reason relating to
conduct, and (2) whether the ET erred in proceeding as if it had found that the Respondent had
established that the dismissal was for a reason relating to conduct. The Respondent resists the
G appeal, essentially relying on the reasoning provided by the ET.

H The Factual Background

3. The Claimant’s employment with the Respondent went back to September 2006. From 1
March 2011, he took up position as Director of the Dorset Waste Partnership (“DWP”). DWP

A was an entity based within the Respondent and without separate legal identity, but was formed as the result of a partnership between the Respondent and various District and Borough Councils within the county, with a view to achieving efficiency and cost savings in respect of their waste management responsibilities.

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4. Initially, the DWP was seen as a success and as a model for other authorities - something for which the Claimant was given credit. By mid-2013, however, issues had started to be raised regarding appropriate procurement procedures. These were not raised with the Claimant until October that year but at that stage it seemed that matters were satisfactorily resolved.

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5. Further problems then arose in 2014 and matters started to escalate when, in November 2014, a significant overspend was uncovered. The investigation into this reported serious weaknesses in the financial management processes at DWP and, at around the same time (that is, by late 2014 or early 2015), reports started to appear in the press calling for Senior Management figures to step down over what was described as a “*fiasco*”.

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6. In the meantime, the Respondent had commissioned a report from the Local Partnerships Team of HM Treasury who, on 22 January 2015, identified a number of areas that needed to be addressed, describing the financial management of DWP as “*very poor*”. Similar criticisms were made in a further report in February 2015 from another external organisation, which observed that there was very little evidence of robust processes to manage finances within DWP.

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7. Given the seriousness of the position, matters within the Respondent were escalated further, ultimately leading to the instigation of disciplinary proceedings against the Claimant for what was described as gross misconduct on his part. The disciplinary investigation was carried

A out by Mrs Houlden, Chief Executive of South West Councils, who reported in September 2015.
Mrs Houlden found that the Claimant had a case to answer in respect of three specific matters:
B (1) fundamentally breaching the Respondent’s contract procedure rules; (2) fundamentally
breaching his obligations under the Respondent’s code of conduct by failing to use public funds
in a responsible and lawful manner and as a consequence placing the Respondent at risk of legal
challenge; and (3) failing to exercise due care, identify risks and ensure effective risk
management.

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8. These matters were then considered at a disciplinary hearing before a panel of
D Councillors, chaired by Councillor Wharf – a witness at the ET hearing. The disciplinary hearing
took place over some five days. Ultimately, the disciplinary panel found the charges against the
Claimant had been made out. Specifically, the panel concluded that the lack of monitoring
E systems in place had contributed to an unlawful procurement and there had been a financial
overspend when effective financial procurement monitoring would have allowed the situation to
be effectively managed in an appropriate way, which is what had happened in other areas within
the Respondent when there had been overspend issues. These, it was held, amounted to breaches
F of the Respondent’s scheme of delegation and financial management and the Claimant was found
to have been grossly negligent and to have brought discredit to the DWP and to the Respondent
more generally. The letter of dismissal explained:

G **“We did however consider you grossly negligent in your “strategic responsibilities” as you failed to establish effective frameworks and controls for financial and procurement matters to ensure you were made aware of any important management issues in a timely manner. It is not necessary to be a financial or procurement expert to ensure basic controls were in place within DWP. Neither was it sufficient to rely on service functions to inform you about your finances or procurement situations retrospectively. You needed to know this information considerably earlier than you did to guide your decision making.” (ET Judgment, paragraph 19.85).**

H It was duly determined that the Claimant should be dismissed on 13 weeks’ contractual notice.

A 9. The Claimant sought to appeal against that decision. His appeal was heard by another panel of Councillors, chaired by Councillor Croney (who also gave evidence before the ET), which concluded that the decision to dismiss should be upheld.

B **The ET's Decision and Reasoning**

C 10. The Full Merits Hearing of the Claimant's claims took place, including reading days and the ET's deliberations in chambers, over 13 days. The ET heard evidence from four witnesses for the Respondent, and from the Claimant and a witness on his behalf, the Respondent's former Chief Executive. It was provided with a bundle comprising some nine lever arch files, containing in excess of 2,396 pages. Both sides submitted lengthy written submissions and also addressed the ET orally in closing, closing arguments occupying an entire day of the hearing.

D 11. It was the Claimant's case before the ET that his dismissal had really been due to problems within the DWP arising from the procurement issues and budgetary overspend, which raised issues of performance rather than conduct. In her closing submissions on behalf of the Claimant, Ms Cunningham put his case as follows:

F **"The case has involved a mass of detail, but the question at the heart of it is stark. The Respondent says the dismissal was for gross misconduct. The Respondent's counsel has confirmed that its case rests on a concept analogous to individual ministerial responsibility. So the question is this: can a senior employee be fairly dismissed for gross misconduct over failings that are laid at his door by virtue of his seniority, without demonstration of his personal culpability? ... The Claimant's primary contention is that such a dismissal is not a dismissal for a reason relating to conduct at all, and so the Respondent's case falls at the first hurdle: the Respondent has failed to establish its chosen reason for dismissal.**

G **But even if the Respondent is taken to have established that the decision to dismiss flowed from its perception that deficiencies in the manner in which the Claimant personally did his job caused or contributed to the overspend and the unlawful procurement, that still isn't a reason relating to conduct; it is a reason relating to capability." (From paragraph 10 of the Claimant's skeleton argument).**

H 12. In recording the Claimant's case below, the ET duly noted Ms Cunningham's submission that the Respondent had failed to identify the precise act or omission constituting misconduct on the part of the Claimant, recording the Claimant's contention that the most the Respondent relied

A on was what was said to have been a “*failure to establish effective financial budgetary*
B *frameworks, adequate internal control structures, and procedures for management and financial*
C *reporting*” (paragraph 22). If these were failings by the Claimant, Ms Cunningham submitted,
D these were matters that had been evident throughout his appointment but never raised as
E performance issues with him; there was nothing that could be identified as misconduct on the
F Claimant’s part.

G 13. Although the Claimant had thus put the reason for his dismissal very much in issue, the
H ET did not start its conclusions by expressly identifying the Respondent’s reason; it moved
I instead straight into the questions identified in **British Homes Stores Ltd v Burchell** [1978]
J IRLR 379. That said, at a later stage in its reasoning, the ET acknowledged that in the internal
K process the Claimant - both at the initial dismissal hearing and on his appeal - had argued that his
L actions could not properly be characterised as misconduct rather than capability; the ET then
M addressed this point in terms, as follows:

“58. ... It is clear that the concept of gross misconduct is not confined to wilful acts or omissions,
but can in certain circumstances cover serious neglect, omission, or carelessness. It is clear from
Mrs Houlden’s investigation report that she judged the level of inaction on the part of the
claimant in failing to implement policies and procedures, that she considered would have
averted the problems encountered at the DWP constituted serious misconduct.”

F 14. The ET further recorded that what was in the mind of the dismissing panel of Councillors
G (the disciplinary panel) was the Claimant’s conduct in terms of the “*Failure to implement proper*
H *management systems that led to £1.5 million of inappropriate hiring costs which should not have*
I *taken place. He was ultimately responsible*” (see paragraph 60).

J 15. Having thus determined what had been the facts in the minds of the relevant decision-
K takers when deciding to dismiss the Claimant, the ET asked whether these amounted to genuine
L beliefs; it was satisfied that they did.

A 16. The ET further noted that both parties had urged that it should hear substantial evidence relevant to an assessment of culpability, something that might be necessary for any Remedy Hearing. Having reminded itself that it had to guard against the risk of substitution, the ET again recorded the Claimant's case that his actions could not possibly constitute conduct, let alone **B** misconduct, for the purposes of section 98(2) ERA. The ET disagreed, finding that the relevant decision-takers had reasonable grounds for their belief:

C "64. ... there was evidence before the panel that entitled them to reach a conclusion, and believe that the claimant had primary responsibility for ensuring the DWP was run properly and efficiently, and for ensuring that the policies checks and procedures were put in place to ensure proper financial and budgetary functioning of the Department, and that the failure in consequence of not implementing such policies checks and procedures were in place or ensuring the delegation was properly undertaken amongst subordinates was sufficiently serious to conclude that this constituted serious misconduct and not simply a capability issue. ..."

D 17. The ET did not ignore the other side of the argument, noting the disciplinary panel had heard evidence from former Senior Directors who had supported the Claimant on this issue. It concluded, however, that the Respondent had been entitled to prefer other evidence to the **E** contrary. The ET further considered that there had been a fair investigation with permissible conclusions being reached as to the Claimant's primary responsibility and was unable to see that there were any procedural flaws in the process that could render the decision unfair. The ET also rejected the Claimant's argument that there was any inconsistency of approach between his case **F** and that of other officers or employees of the Respondent. As for the sanction of dismissal, the ET noted the senior position held by the Claimant and the findings of significant overspend and unlawful procurement; in the circumstances, it considered that dismissal had fallen within the **G** range of reasonable responses of the reasonable employer and was thus fair.

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The Appeal

18. For the purpose of this hearing, the Claimant’s two grounds of appeal are put as follows:

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(1) First, he contends the ET erred in law in failing to determine the reason for his dismissal. Specifically, he argues that the ET failed to determine whether the Respondent had shown that the dismissal was for a reason relating to conduct, ignoring both (a) his primary submission that he was dismissed without proof of personal misconduct (for a reason analogous to ministerial responsibility), *and* (b) his alternative submission that he was dismissed for actual or perceived deficiencies in the manner in which he did his job (a reason relating to capability, not conduct).

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(2) Second, the Claimant contends the ET erred by relying on a tacit finding that was wrong in law: the ET proceeded as if it had found the Respondent had established that the dismissal was for a reason relating to conduct but that was impermissible (a) the Respondent’s counsel had confirmed the dismissal was for a reason analogous to ministerial responsibility, and (b) even if dismissal was by reason of actual or perceived deficiencies in the manner in which the Claimant did his job, it was not open to the ET to accept that as a reason relating to conduct without identifying any concrete act or acts or omissions said to comprise the conduct relied on.

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The Relevant Legal Principles

19. In addressing these grounds of appeal, it is common ground that the starting point must be the statute. By subsections 98(1), (2) and (4) **ERA**, it is (relevantly) provided:

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“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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(2) A reason falls within this subsection if it -

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(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

...

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(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

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20. An ET's decision-making process under section 98 ERA can thus be seen to involve three stages:

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(1) establishing what was the reason for dismissal;

(2) asking whether that was a reason capable of being fair for the purposes of section 98(1) and (2);

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(3) determining whether or not the dismissal of the employee for that reason was fair in all the circumstances of the case.

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21. Save where an employee has insufficient service to pursue a standard unfair dismissal claim, the burden of proof at stages 1 and 2 remains firmly on the employer. The reason for the dismissal will be the set of facts known to or beliefs held by the employer, which caused it to dismiss the employee (see Cairns LJ in Abernethy v Mott Hay and Anderson [1974] ICR 323 CA, and more recently per Underhill LJ, at paragraph 30, Beatt v Croydon Health Services NHS Trust [2017] ICR 1240 CA).

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22. By section 98(2)(b) a dismissal is capable of being fair if it was for a reason, which “relates to the conduct of the employee”. The reference to conduct is in general terms; it does

A not have to amount to gross misconduct (albeit the ET used that language in the present case), it does, however, have to relate to the particular employee - it imports a notion of personal culpability. Moreover, as I observed in **Burdett v Aviva Employment Services Ltd**

B UKEAT/0439/13:

C **“30. The characterisation of an act as “gross misconduct” is thus not simply a matter of choice for the employer. Without falling into the substitution mindset warned against by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see *Eastland Homes Partnership Ltd v Cunningham* UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as a sufficient reason for dismissing the employee summarily.”**

D 23. If a Respondent is able to establish a potentially fair reason for dismissal, at the third stage - determining whether the dismissal of the employee for that reason was fair - the burden of proof is neutral. Moreover, while the reason for dismissal is a subjective matter (what was in the mind of the employer at the time the decision was taken), the question whether the dismissal for that reason was fair imports a degree of objectivity, albeit to be tested against the standard of a reasonable employer and allowing that there is a margin of appreciation in range of reasonable responses rather than any absolute standard.

F 24. If an employer dismisses for a reason characterised as misconduct, the ET will thus need to determine whether the conduct in issue was capable of amounting to misconduct – something that implies an element of culpability on the part of the employee – and also to decide whether there were reasonable grounds for the employer’s belief that the employee was indeed guilty of that conduct. Assuming reasonable grounds for the belief that the employee committed the act in question, the ET will thus still need to consider whether there were reasonable grounds for concluding that she had done so in a wilful or grossly negligent way.

A **The Parties' Submissions**

The Claimant's Case

B 25. It is the Claimant's case that - the question of the reason for dismissal having been firmly put in issue - the first task for the ET was to identify the facts or beliefs that caused the Respondent to dismiss the Claimant, and then determine whether those facts or beliefs were properly to be characterised as a reason relating to conduct. The ET had, the Claimant submitted, either failed to make that determination or erred in doing so.

C 26. In its self-direction on the law, having set out the relevant provisions of section 98 **ERA**,
D the ET had moved straight to consideration of the case law relevant to subsection 98(4) without any direction as to the way it should approach its task under subsections 98(1) and (2). Consistent with that omission from its direction on the relevant legal principles, in its reasoning under the heading "*Conclusions*" the ET omitted any consideration of the nature of the Respondent's reason for dismissal, proceeding straight to the guidance laid down in **BHS v Burchell** and stating the starting point was the investigation. That was wrong: the starting point was the question whether the Respondent had shown an admissible reason for the dismissal; if it had not, there was no reason for consideration of the **Burchell** test.

E 27. Rather than itself determining the question what was the actual reason for the dismissal, and how that should be characterised for the purposes of subsection 98(1) and (2), the ET had
F assumed the answer and had then proceeded to determine the question of fairness on the basis of
G that assumption. Although the ET had subsequently referenced the Claimant's challenge on the question of reason (see for example at paragraphs 57, 58 and 64), it had not itself identified in
H concrete terms what act or omission on the part of the Claimant had amounted to gross misconduct. Moreover, it was notable that in these paragraphs the ET was considering the

A Claimant's case through the prism of subsection 98(4), careful not to fall into the error of
substituting its view for that of the employer. As a prior step, however, under subsections 98(1)
and (2) ERA, the ET had been required to itself find what had been reason for the Claimant's
B dismissal (the set of facts and/or beliefs in Respondent's mind that led it to dismiss) and then
determine whether that was properly to be characterised as a reason relating to the Claimant's
conduct or some other potentially fair reason under section 98. This primary step was significant
C in the present case as the Claimant did not accept the Respondent had demonstrated any set of
facts or beliefs that amounted to a finding that the Claimant's personal conduct had been culpable
or blameworthy; a necessary pre-condition for a conduct dismissal (and see Burdett v Aviva).

D 28. In the alternative, if the ET had found that the dismissal had been for a reason relating to
conduct, the Claimant contended that its finding had been wrong in law, the Respondent's case
having been put on the basis that the reason for the dismissal was analogous to ministerial
E responsibility. This is a point upon which Ms Cunningham has focused at this hearing, going so
far as to characterise this as effectively a concession of liability, albeit she accepts it was not
formally such a concession. She says, however, that this was consistent with the ET's findings
F on the Respondent's reason for dismissal - in particular, the ET's reasoning at paragraph 64
accepted that characterisation of the Respondent's reason for its decision to dismiss.

G 29. Dismissal of an employee where something had gone badly wrong on their watch, but
where there was no proof of personal culpability, might justify dismissal in certain circumstances
but it would be wrong to characterise that as a reason relating to the conduct of the employee.
More than that, the ET would need to identify the specific conduct for which the employee had
H been dismissed. The nearest this ET came to making such a determination was at paragraph 64,
but that seemed to amount to a finding that the conduct relied on was the Claimant "not

A *implementing such policies checks and procedures” that would “ensure proper financial and*
B *budgetary function of the Department”*; that was insufficient to amount to a finding that this was
C a dismissal that related to the Claimant’s conduct. More specifically, while such a dismissal
D might be characterised as for “some other substantial reason” - the need for public accountability
E - or as relating to capability (potentially fair reasons for dismissal), the ET would then need to go
F on to assess the fairness of the decision to dismiss in the light of that particular reason; an exercise
G that might give rise to different considerations and a different result from the treatment of this as
H a conduct dismissal.

The Respondent’s Case

D 30. For the Respondent, it was observed that it would be wrong for an appellate Tribunal to
E engage on an overly fussy and pernicky critique of the ET’s reasoning (per Mummery LJ in
F **Fuller v London Borough of Brent** [2011] IRLR 414 CA, at paragraph 30). The questions
G raised by the Claimant’s claim of unfair dismissal were for the ET to determine and the
H Employment Appeal Tribunal should be loath to interfere unless it could properly be said there
was an error of law.

F 31. In the present case, the ET had heard from the Councillors who took the relevant
G decisions. It had accepted that the Respondent genuinely believed the Claimant to be guilty of
H the conduct alleged (see paragraph 61) and found as a fact that the disciplinary panel had
concluded that the Claimant bore primary responsibilities for the failings in the DWP (paragraph
65). The ET had not erred in referring to the **Burchell** test at the outset of its reasoning on the
unfair dismissal claim. That guidance could be seen as primarily focused on the first stage of the
task under subsection 98(1) and (2), see per Lord Wilson JSC at paragraph 20 **Reilly v Sandwell**
Metropolitan Borough Council [2018] ICR 705 SC. Certainly, the first element of the **Burchell**

A test required the ET to ask whether the employer had established the reason for dismissal - the subjective fact of the decision maker's belief that the employee was guilty of misconduct. The ET then had to go on the next stage identified in **Burchell** - to determine whether the employer had reasonable grounds for that belief - a question requiring an objective assessment by the ET.

B Here the ET had addressed both elements of the test and specifically recorded, and then rejected, the Claimant's submission that his acts and omissions were not capable of amounting to misconduct justifying dismissal.

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32. It was not open to the Claimant to assert that the ET failed to determine that the reason for dismissal related to the Claimant's conduct or to suggest that it had proceeded on an (erroneous) assumption in this regard. Reading the ET's Reasons in full - as the EAT was bound to do - it was apparent the ET had addressed its mind to the reason for dismissal in this case and had found that the Respondent had satisfied the burden of showing the reason related to the Claimant's conduct and that there were reasonable grounds for that belief. Those were conclusions open to the ET on the facts of the case and evidenced a correct self-direction on the law and application of the relevant test to the primary findings of fact made. Ultimately, the grounds of appeal were really perversity challenges. They did not meet the high threshold required and should be dismissed.

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Discussion and Conclusions

G 33. In this case, the reason for the dismissal had been firmly put in issue by the Claimant. Although he accepted that the Respondent had reasonable grounds for believing there were significant problems within the DWP - that things had gone very seriously wrong on his watch - the Claimant did not accept that the Respondent had ever identified anything for which he was personally culpable, such as to render this a dismissal that related to his conduct rather than a

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A matter of performance or capability, or something for which he had to accept ultimate responsibility in terms of public accountability.

B 34. Given that the question of the characterisation of the reason for dismissal had been so clearly identified as an issue, it is somewhat surprising that the ET's reasoning did not expressly start with that point, and expressly answer that question, before going on to consider the fairness of the decision to dismiss in the light of the reason thus found. The first issue raised by this appeal is whether this discloses an error of law on the part of the ET – an error at a fundamental level in terms of its approach?

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D 35. It is the Respondent's case that no error is disclosed: the ET essentially addressed the characterisation of the reason for dismissal by immediately referencing the guidance in **BHS v Burchell**.

E 36. It is right to say that the **Burchell** guidance requires the ET to first determine what the employer believed to be the case and then to assess whether there were objective grounds for that belief. The difficulty is that **Burchell** applies to conduct dismissals. So, while the first question identified in the guidance is whether the employer has established that it had a genuine belief that the employee was guilty of the conduct in issue, that assumes the ET has already determined that the set of facts or beliefs in the mind of the relevant decision taker relate to some form of misconduct (a reason relating to the employee's conduct).

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H 37. In the present case, it is tolerably clear that the reference to the **Burchell** guidance was made because the ET considered this to be a conduct dismissal. In setting out its reasoning, however, it did not first ask what was in the mind of the relevant decision takers but, rather,

A identified the starting point to be the investigation; it went to the question whether there were reasonable grounds for the employer’s belief before clearly identifying what that belief actually was.

B 38. That said, the ET’s reasoning subsequently returns to this issue, expressly recording the Claimant’s submission that the Respondent had failed to demonstrate how his dismissal related to some form of misconduct.

C 39. In addressing this issue, the ET first identified that which had been in the mind of the investigator, Mrs Houlden. It held that it was clear that:

D **“57. ... the conduct complained of related to the fundamental failure to initiate rigorous financial management in particular an effective financial framework provided for the proper budget delegations and oversight processes, as well as a failure to treat the management of the budget as a key personal responsibility, and failing to put in place comprehensive business information monitoring systems which reported on a regular accurate and timely manner to the SMT amongst other failings ...”**

E 40. Having thus identified the facts or beliefs operating upon on Mrs Houlden’s mind at the end of her investigation, the ET rejected the argument that this could not properly be characterised as relating to the Claimant’s conduct. Holding that a dismissal on this ground was not limited to *wilful* misconduct but could also encompass serious neglect, omission or carelessness, the ET **F** accepted that Mrs Houlden had judged that the Claimant’s inaction constituted serious misconduct (see the ET at paragraph 58).

G 41. The ET then turned to the set of facts or beliefs in the minds of the relevant decision takers (the members of the disciplinary panel) after the disciplinary hearing had taken place, when reaching the decision to dismiss. Noting that Councillor Wharf had not been an entirely **H** satisfactory witness, the ET concluded that the facts operating on the disciplinary panel’s (collective) mind were that there had been a failure to implement proper management systems

A leading to £1.5 million of inappropriate hiring costs, which should not have taken place and for which the Claimant was ultimately responsible (see the ET at paragraph 60).

B 42. The ET then went on to address the questions arising under subsection 98(4) **ERA**, but again returned to the issue of the reason for the dismissal when urged by the Claimant to make a finding that his actions, relevant to the matters that motivated the Respondent's decision, could not properly be characterised as relating to his conduct (let alone, misconduct) for the purpose of
C subsection 98(2).

D 43. Undertaking that task, the ET disagreed with the Claimant, concluding that there *was* evidence before the disciplinary panel that had entitled it to find that the Claimant bore primary responsibility for the failings within the DWP, which had led to the problems in issue. In addition, the ET found that the Claimant's personal failings were sufficiently serious to justify the panel's
E determination that this was a conduct, rather than a capability, issue (see paragraph 64).

F 44. Although the ET thus approached its assessment on chronological lines, rather than following the structure of the statute (dealing first with the investigation, before turning to the facts or beliefs that had caused the Respondent to dismiss the Claimant), I am satisfied that – taking the ET's reasoning as a whole – it carried out the task required of it under subsections 98(1) and (2), expressly finding that the Respondent had established that its reason for dismissing
G the Claimant related to his conduct.

H 45. The question then arises as to whether the ET erred in law in reaching this conclusion. Accepting that subsection 98(2) requires that the reason must relate to the conduct of the employee - so there must be some personal culpability – I do not consider that the ET erred in

A finding that this might arise not solely from some *wilful* act but also from serious neglect, omission or carelessness. That much is not really in issue: in fairness, the Claimant's argument does not seek to criticise the ET's reasoning in that respect. What the Claimant says, however, is that this was a case where he was being held responsible for the problems within the DWP *not* due to any personal failing on his part but because the problems in question had arisen on his watch; he was seen as ultimately accountable. More specifically, it is the Claimant's belief that he was essentially being scapegoated, so the Respondent could be seen - in a very public way - to be holding someone accountable. Allowing that this might still constitute a fair reason for dismissal, the Claimant says this would properly fall to be characterised as 'some other substantial reason, such as to justify the dismissal of an employee in his position', and, as such, it would give rise to very different questions when approaching the ET's task under section 98(4).

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46. To some extent, I am not unsympathetic to the Claimant's point. Taken at face value, Councillor Wharf's apparent characterisation of the disciplinary panel's reasoning as holding the Claimant ultimately responsible might suggest that his personal conduct was not in issue - it was enough that he held the position he did at the time when the problems arose. To stop at that stage of the ET's reasoning, however, would be to disregard its further findings; specifically (see paragraph 64), that the panel had been entitled to hold that the Claimant had primary responsibility for ensuring that measures were in place such that the problems in question did not arise. That finding - seen in the context of the ET's earlier findings about the disciplinary investigation, and viewed against the Respondent's reasoning as set out in its dismissal letter - entitled the ET to conclude that this was, indeed, a dismissal for a reason relating to the Claimant's conduct, in the sense of his grossly negligent failure to ensure that the appropriate checks were in place to avoid the problems in issue. In the circumstances, the ET was not obliged to find that this was a 'ministerial accountability' dismissal in the sense the Claimant suggests.

A 47. The Claimant further objects that, in any event, this still could not properly be
characterised as a conduct dismissal: the focus was on his overall accountability; neither the
B Respondent nor the ET specifically identified the ways in which the Claimant could be said to
have personally misconducted himself; neither detailed precisely what it was that he should have
done but grossly negligently failed to do.

C 48. I do not consider that this is an objection that withstands scrutiny. The Claimant was
employed in a Senior leadership role. As such, the ET permissibly accepted that his failure to
ensure there were effective financial frameworks in place and his failure to establish proper
monitoring systems were matters that gave rise to personal culpability on the Claimant's part.
D The failings in question related to his conduct in terms of his personal failure to meet the
requirements of his role.

E 49. To the extent that the Claimant (in the further alternative) seeks to argue that the ET ought
properly to have found that this was a capability dismissal, that argument fails to engage with the
ET's conclusion that the Respondent was entitled to find that the Claimant bore primary personal
responsibility to undertake the various measures described by Mrs Houlden (as summarised by
F the ET at paragraph 64). Ms Cunningham says this cannot be right: ultimately, the Respondent
was saying that the Claimant was not capable of doing the job, not that he misconducted himself
in doing so. As the ET found, however, the Respondent was saying more than that: it was the
G Respondent's conclusion that the Claimant had neglected a fundamental part of his job in terms
of ensuring appropriate controls and monitoring processes and procedures were in place. It had
found that he had prioritised changes to service delivery at the expense of ensuring appropriate
H checks and balances were in place. Having accepted that the Respondent genuinely held this

A belief, the ET permissibly concluded that this went beyond a question of capability and constituted serious misconduct.

B 50. While I consider the structure of the ET's reasoning is unhelpful, taking the decision as a whole, I am satisfied that the ET carried out the correct assessment required under section 98 **ERA** and reached a permissible conclusion that the Respondent had dismissed the Claimant for a reason relating to his conduct. I am therefore bound to dismiss the appeal.

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