Appeal No. UKEAT/0192/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 September 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

AQUATRONIC GROUP MANAGEMENT LIMITED — APPELLANT

MR C R MACE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MIKE MAGEE (of Counsel) Instructed by: Messrs Metcaffe Copeman & Pettefar Solicitors 8 York Row Wisbech Cambridgeshire PE13 1EF
For the Respondent	MR JESSE CROZIER (of Counsel) Instructed by: Thompson Smith & Puxon Stable 6 Stable Road Colchester CO2 7GL

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

UNFAIR DISMISSAL – Contributory fault

The decision that the Claimant was unfairly dismissed and had not contributed through his fault to his dismissal was a judgment that the Tribunal was entitled to make on the facts before it. Although it had perhaps veered towards the substitution mindset in its analysis of the misconduct of the Claimant that led to his dismissal there were several features that entitled the Tribunal to conclude that the dismissal was unfair and outside the band of reasonable responses. Those included the failure of the Respondent to consider the Claimant's 27 years' service, his personal mitigation and health problems and steps he was taking to address the issues that led to the outburst that amounted to bullying behaviour and the insight he had shown into the incident. The Tribunal had also found the appeal process to have been a charade and on the evidence, there could be no appeal from that finding **Newbound v Thames Water Utilities Ltd** [2015] IRLR 734 CA followed.

The decision not to make a reduction for contributory fault was the Tribunal's to make in accordance with section123 **ERA** and **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, CA. Whilst other Tribunals might have taken a different view, the Tribunal has a wide discretion and the Tribunal's Judgment did not clear the high hurdle of perversity.

HER HONOUR JUDGE STACEY

1. In this appeal the Respondent at the Employment Tribunal seeks to challenge both the Tribunal's finding that the Claimant (as he was below) was unfairly dismissed and the Tribunal's Judgment on Remedy, in particular contributory fault. I shall continue to refer to the parties as they were before the Tribunal.

2. The case was heard in the East London Hearing Centre before Employment Judge Tobin sitting alone over two days on 6 December 2016 and 20 January 2017. In a Decision that was promulgated on 27 March 2017, it was found that the Claimant had been both unfairly and wrongfully dismissed. The Claimant was initially awarded £38,130.40 compensation, but that figure was revised upwards on a reconsideration in order to correct mathematical errors, so that the final sum awarded was £68,254.63. The compensatory award was calculated by reference to a period of approximately 18 months loss of earnings from the date of dismissal.

3. The matter first came to this Tribunal on a Rule 3(7) sift, when Her Honour Judge Eady QC saw sufficient force in some of the Respondent's arguments to direct an Appellant-only Preliminary Hearing, with the Claimant's observations. The Preliminary Hearing was heard by His Honour Judge Martyn Barklem on 15 December 2017, who permitted the grounds that are now called 1 to 4 to proceed. Two grounds were not proceeded with: the Respondent was not permitted to argue that the Tribunal was wrong to conclude that there had been no failure to mitigate; and, an appeal alleging procedural failings was dismissed on withdrawal.

4. The overarching theme of the grounds put forward are that the ET fell into what is commonly referred to as the "substitution mindset trap" of the unfair dismissal provisions of

section 98(4) of the **Employment Rights Act 1996** ("ERA"). Secondly, that the ET's treatment of the reliance upon a previous warning was said to be an error, and two matters of perversity were argued: (1) the Tribunal's finding concerning the timing of the Claimant's suspension relative to the timing of the obtaining of the statements from the witnesses to the incident complained of, and (2) in relation to the Tribunal's decision not to make any contributory fault deduction.

5. The case was permitted to proceed to a Full Hearing, with a time listing of one day before a Judge sitting alone (category B). It was clarified today that there is no appeal against the Tribunal's finding of wrongful dismissal and the award of £10,617.99 recorded in the Tribunal's Reconsideration Judgment.

The Background Facts

6. The history and background of the case, much of which is not in dispute is as follows. The Respondent company is a specialist engineering company, part of the AGM Group of companies, involved in the manufacture, installation and maintenance of water booster pump systems and pressurisation units with approximately 146 employees across three to four sites. The Claimant had worked for the Respondent since 1989 working his way up from a Service Engineer to the position of Engineering Director, a post he was appointed to in October 2009. At the time of his dismissal, his gross annual salary was very approximately £80,000 and both he and his wife were also shareholders in the company. He was aged 57 at the date of his dismissal.

7. The Claimant had an unblemished record until November 2015, when he was spoken to about a disagreement between himself and a colleague, which had constituted aggressive and abusive behaviour by the Claimant. An investigation was undertaken and the Respondent

decided that although no further formal action was required, the Claimant was informed at a meeting that that did not dilute the seriousness of the incident. The Respondent explained that it trusted that no future incidents of a similar nature would take place. The Claimant signed a note of the meeting confirming his understanding. It did not constitute a warning under the Respondent's disciplinary procedure and the ACAS code in relation to disciplinary matters was not followed.

8. On 5 February 2016, however, there was a further incident with a different colleague. Again, the facts of the incident were not in dispute and the Claimant accepted, or rather did not dispute, the allegation contained in the statements put forward by those involved and those who witnessed it. The Claimant had upbraided and reprimanded a Service Engineer, Chris Larner, for having classified a job as being suitable for two people - referred to as man and mate - when the Claimant and Mr Larner had discussed it the previous day as having been suitable for just one person. The Claimant told Mr Larner that he might as well "*fuck off*" and raised his voice at him in front of a number of colleagues. The Claimant was aggressive in his tone and intimidating and accused Mr Larner of ruining the company. Mr Larner was embarrassed, felt belittled and angry and told the Claimant that it was "*bullshit*". The Claimant accepted that he had lost his temper with Mr Larner, but did not appreciate he had upset Mr Larner. At the time the Claimant considered that the incident had only lasted a few minutes, Mr Larner had effectively countermanded his instruction following an agreed assessment of the requirements of the job the previous day, and that he was able to be direct as Mr Larner was the nephew of the Claimant's best friend and he considered that he got on with him and had a good working relationship.

9. Mr Larner, on the other hand, considered that risk assessments needed to be dynamic and that his assessment was appropriate and that two people were required for the job,

notwithstanding the Claimant's opinion. Mr Larner was a Service Engineer with five years' service with the company. The Claimant ended the altercation by telling Mr Larner that he was a "damn good engineer" but should not make stupid requests, as it would jeopardise his future with the company. Mr Larner felt like handing in his notice as a result but did not do so.

10. The incident occurred in the service office at about 7.45am when colleagues were congregating for the day's work. Those who witnessed it felt uncomfortable and did not agree with how the Claimant had handled the situation. They considered that the Claimant had not listened and his behaviour and choice of words was inappropriate and unnecessary. They described the Claimant as being very aggressive. Mr Larner's line manager, Tim Lister, who is line managed by the Claimant, was also present. He felt guilty at not defending Mr Larner but equally felt uncomfortable in questioning his line manager. From the Claimant's perspective, Mr Larner had sought to override an earlier instruction concerning how a job should be done in contradiction of the Claimant's more experienced assessment and the Claimant considered Mr Larner's behaviour to almost amount to a matter of insubordination.

11. On 25 February 2016, Mr Larner made a statement setting out what happened. There were no findings by the Tribunal as to how he came to make that statement but the Tribunal found that he had reported the incident on 25 February, some 20 days after the incident. Statements were then taken from four other employees identified by Mr Larner as witnesses some time during 26 February 2016. The ET found that the investigation was complete at that stage.

12. The Claimant was called into a meeting some time during 26 February 2016, and suspended. The ET was critical of the Respondent's explanation of the suspension being "*to*

enable us to investigate a complaint made against you by Chris Larner" (paragraph 54) since the Tribunal found that the investigation had already been completed by then.

13. The allegations that were formed against the Claimant were three aspects of the same matter. Firstly, the actions on 5 February amounted to bullying and a breach of company policy. Secondly, they amounted to aggressive behaviour and excessively bad language. Thirdly, it was behaviour not expected of a Director.

14. At an investigation meeting with the Claimant, the Claimant gave a statement explaining that his actions were borne out of frustration because he thought Mr Larner had accepted his assessment of the job requirements being just for one person. However, the Claimant readily accepted he had overreacted and overstepped the mark and wanted to apologise. He stressed it was a one-off incident but he did not consider that it had amounted to bullying and that whilst he accepted his behaviour was inappropriate, he said he had learnt from it and said there would be no repetition.

15. There was some discussion in the Tribunal Decision as to whether that meeting was an investigation or a disciplinary meeting. The parties today have agreed before me that little turns on it. In any event, the matter proceeded to a disciplinary hearing on 18 March 2016, before the Director of the company, Mark Taylor; (paragraph 58 of the ET Judgment). The meeting lasted for approximately an hour and the Claimant continued to assert that he was not a bully, notwithstanding that his actions fitted the definition of bullying within the company policy.

16. Mr Mark Taylor raised the earlier November 2015 incident and expressed his concern that if the Claimant received a final written warning, others would see it as the Claimant "having

got away with it yet again". However, he agreed to await a medical report to be obtained by the Claimant at the Claimant's request as he had been diagnosed with depression and was starting a course of Cognitive Behaviour Therapy ("CBT"). The Claimant explained to Mr Mark Taylor that three weeks at home on suspension had had a massive impact on him and that he had learnt his lesson.

17. The third disciplinary hearing took place on 13 May 2016. Mr Mark Taylor considered the medical report from the Claimant's GP and from his CBT therapist. It confirmed the diagnosis of moderate symptoms of depression and moderate symptoms of anxiety, and stated that the Claimant had engaged well. The CBT therapist was positive for the Claimant's improvement. Mr Mark Taylor decided, however, to dismiss the Claimant at that meeting:

> **"61. Mr Mark Taylor explained that the incident of February 2016 amounted to abusive behaviour, bad language and bullying and that it amounted to gross misconduct. Mr Mark Taylor said that this was the second incident within three months, notwithstanding an assurance from the claimant in November that there would be no repeat. Mr Mark Taylor said that he read the medical report and CBT report and said that there was nothing within those reports that could give him any confidence that there would not be a further repeat of the claimant's behaviour. Mr Taylor proceeded to dismiss the claimant with immediate effect."**

18. The Claimant appealed against his dismissal and set out a number of points. Firstly, that the decision was out of proportion to the seriousness of the incident. Secondly, that he had accepted his conduct was inappropriate and was now receiving help for the stress and anxiety and his behaviour should have been seen in that light. Given that he now understood that it amounted to bullying, he should have a chance to correct his behaviour. Thirdly, that he had not been given sufficient credit for 27 years of loyal service and reiterated that he had learnt his lesson and that the course of therapy would ensure nothing happened again.

19. The appeal was heard by Mr David Taylor - who is the father of Mr Mark Taylor. The appeal lasted 14 minutes and was by all accounts a very cursory affair which upheld the dismissal decision.

20. The ET, I should add, was highly critical of the appeal describing it as a rubber-stamping exercise and that the statement prepared by Mr David Taylor was described as "*a work of fiction and bore no relation to [his] role at the appeal*" (paragraph 78). There is no attempt by the Respondent to challenge that finding of the Tribunal. The Tribunal found that Mr David Taylor's oral evidence before them was honest in that he readily accepted that he made no attempt to justify his non-engagement with the appeal process and accepted that he had failed to take seriously the grounds of appeal put forward by the Claimant.

The Tribunal's analysis of the Facts and Legal Directions to itself.

21. In paragraphs 64 to 80 of its Judgment, the Tribunal analysed the facts as it had found them. The issue here is whether in doing so it failed to follow what is universally accepted was an impeccable self-direction as to the applicable law. The Tribunal took the trouble to set out verbatim the wording of section 98(4), noted that for the Respondent to establish a conduct-related reason for dismissal, the issue was whether there was a genuine belief based on reasonable grounds after a reasonable investigation. The ET accurately reiterated the task that it had set itself at paragraphs 41, and the well-known line of authorities from **Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden** [2000] ICR 1283, and more recently **Sainsbury's Supermarkets Ltd v Hitt** [2003] ICR 111 and reminded itself that "an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer, in fact, chose. Consequently, the question for me

to determine is whether the Respondent's decision to dismiss the Claimant fell within the band or range of reasonable responses of a reasonable employer."

22. Interestingly, their self-direction favours the Respondent since no mention is made of **Newbound v Thames Water Utilities Ltd** [2015] IRLR 734 CA, which encourages Tribunals not to consider the band of reasonable responses as one which is infinitely wide, and to focus on the statutory language and the words "in accordance with equity and the substantial merits of the case in section" 98(4)(b). **Newbound** is also authority for the importance of considering unblemished long service.

23. The Tribunal reiterates its self-direction in paragraph 44, where it notes that the Judge reminded the parties during the hearing on a regular basis that an ET hearing was not a re-run of the disciplinary hearing, nor was it an appeal, but rather a review process. Again, the Tribunal stated that they assessed the employer's action in disciplining and dismissing the employee and the process followed against that of a reasonable employer, and referred again to the range of reasonable responses open to an employer of the size and type of this Respondent.

24. In its analysis there are a number of wide-ranging criticisms of the Respondent. The Tribunal was concerned about the suspension of the Claimant which they considered had been made without proper cause or reason and was dubious about the ostensible reason given being to investigate the complaint since all the statements from the witnesses were taken before the Claimant was suspended, and there was therefore nothing more to investigate. That aspect of the decision is under challenge as a perverse finding.

25. The Tribunal was also clearly concerned about the delay in the suspension given that it was 20 days after the incident. This Tribunal was critical of the investigation itself and referred to the Respondent "*building a case*". Interestingly the Tribunal noted that it did not believe for itself some of the statements put forward by the witnesses to the incident even though they were not in dispute.

26. The Tribunal did not consider that the incident constituted gross misconduct or meet the Respondent's own definition of bullying, which they considered to be imprecisely wording. Against that background the Tribunal made the following determination:

> **"64. I accept the claimant's evidence that he was no "shrinking violet". The claimant described himself as "direct … firm but fair". He had a robust management style. He had risen through the ranks and had been a foreman for a number of years. He knew all of the ruses and dodges of junior staff. I accept that in the 27 years up until the November 2015 incident there had never been any criticism of the claimant's conduct or behaviour, and I reject the notion that he was a bully. The claimant displayed a robust management approach which arose from his background, his rise within the company and path into management. It also displayed an understanding of commercial pressures and a commitment to the respondent company of which he was a director.**
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> **65. I accept the claimant used *industrial language* when he challenged Mr Larner. The claimant said "*what the fuck is this?*" Given Mr Larner took so long to report the incident and given that he could not recount the precise word used leads me to conclude that, while such language may not have been normal for the workplace, such language was not unusual. Indeed, Mr Larner, in his statement made almost 3 weeks after the incident reported that the claimant said that he was "*a dam good engineer and that I shouldn't keep making stupid requests as its fucking up my future at the company*". Mr Larner also reported that he said to the claimant "*no, this is bullshit*". So clearly Mr Larner appeared to be quite used to such language and I reject any contention that the language, of itself, was a factor to cause such grave offence.**
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> **66. I accept the claimant shouted and moaned about the commercial viability of making this two-man job, but I do not accept that this implied that the claimant was threatening Mr Larner with dismissal. The claimant was senior and it was within his authority to determine the work as a one-man job. The claimant was well able to assess this job and he was aware that Mr Larner had received the correct training to do this sort of work, including lifting and moving pumps.**
>
> **67. The respondent's policy in respect of bullying at work is widely drawn. The definition provides for flexibility. However, the definition is so flexible that it lacks certainty. According to the respondent's policy, a whole range of employee-employee exchanges or manager-employee exchanges could amount to bullying. Therefore, the application of this policy requires some common-sense. I have carefully considered this matter; the claimant's exchange with Mr Larner did not reach a common-sense threshold of bullying. The claimant was a senior manager with extensive experience of having done the job of a Service Engineer. He attended the site and gave an assessment which Mr Larner accepted at the time. Mr Larner subsequently reported this as a two-man job. He did not speak to the claimant about his re-evaluation and he reported in such a way that the claimant saw this as a challenge to his authority. The claimant reacted in an intemperate manner. Such reactions are commonplace in the industrial workplace. Matters quickly flare-up and then are quickly forgotten about. This is precisely one of those matters. After the matter died down, it seems [to] have been resurrected almost 3 weeks later in a rush to adversely fudge the claimant. Much regard was taken of Mr Larner's upset at having been told off, but little or no regard was taken of how this incident was provoked**

by a more junior employee apparently unwilling to undertake a difficult fob and then unwilling to accept the assessment of a senior and experienced manager.

68. This flare up was not a particularly serious incident. Mr Larner said in his subsequent statement that he left the yard, but that he wanted to return and hand in his notice - which he did not do. He said he felt worthless and like a child being told off for being naughty. Having considered all the circumstances, this seems an overly sensitive reaction by someone who was told off by a senior manager in circumstances that appeared, on the face of it, to be warranted. I am not at all convinced by the statements by the witnesses. The report an incident [sic] that appears commonplace in plants, factories and offices."

27. Mr Magee advances the argument that what one can see here is that the Tribunal has failed to follow its own self-direction. It appears to be that the Tribunal is assessing for itself whether the Claimant was a bully; whether language of the type used by the Claimant on 5 February was unusual for that employer; whether Mr Larner was used to such language; whether the Claimant was implicitly threatening Mr Larner with dismissal; whether the language met the definition of bullying; and whether the flare-up was a serious incident. Nowhere in those paragraphs does the Tribunal mention its earlier direction that it is considering what a reasonable employer would think, not what it - the Employment Tribunal - would think.

28. There is some force in Mr Magee's criticism and I agree that they do appear to be largely the Tribunal's own views, notwithstanding their immaculate self-direction, if the paragraphs are read in isolation. Mr Crozier, for the Claimant, says that given the very detailed and meticulous self-direction, it can be implied into those paragraphs that the Tribunal is directing itself by reference to a reasonable employer and not its own view. However, I find that hard to accept, since nowhere in those important paragraphs (64 to 68) does the Tribunal make that clear. Mr Crozier's submission would run counter to an ordinary reading of those paragraphs.

29. That, however, is not the end of the matter. The Tribunal had many other criticisms of the Respondent's behaviour. They were troubled by the reliance on the November 2015 incident for which the Claimant had not had the protection of a proper disciplinary procedure. They were

troubled by the Respondent's dismissal of the Claimant's health issues and the progress that the Claimant was making with his CBT therapist and his oft-repeated and seemingly heartfelt remorse. The scepticism of Mr Mark Taylor is repeated at several places in the Judgment which was seen as particularly disappointing given the Claimant's sophisticated degree of insight. The appeal process was subject to particularly ferocious criticism by the ET and the failure to take any of the grounds put forward into account. There is a further element to the criticism of Mr Mark Taylor's conclusion, which is his assumption that the Claimant's behaviour constituted gross misconduct without any further consideration and his complete failure to consider anything other than dismissal in the Tribunal's Decision at paragraph 61. They were also very concerned that no account had been taken of the Claimant's 27 years of unblemished service and that he was protecting the Respondent and its resources by criticising Mr Larner doubling the labour cost when he changed the job to man and mate.

30. The Tribunal, then drew the threads together at paragraph 79, and concluded the following: that the Respondent had not followed a fair procedure; there was no proper investigation; the Respondent had put together a case to determine the Claimant's guilt; Mr Mark Taylor had inflated the Claimant's chastisement of an employee into a serious incident (which it was not); had failed to take on board the health condition and the steps taken to obtain therapy; and, finally the rubber-stamping exercise that was the appeal. The Tribunal found that "To treat any employee in such a manner was unacceptable; but to treat an employee with 27 years' service, a history of hard work and unswerving commitment to the company was deplorable. Given that the Claimant had a legitimate basis of appeal merely added insult to injury." The Tribunal concluded that the Respondent's decision was fatally flawed and based on "fundamental and profound" defects.

31. The Tribunal then reached the conclusion that the Respondent's process adopted and its decision to dismiss was outside the range of reasonable responses open to the Respondent in light of the Claimant's conduct. On the basis of those findings, the Tribunal found that the dismissal was both unfair and wrongful. There is no criticism of the Tribunal's Decision that the dismissal was wrongful.

32. Next, the Tribunal considered remedy. There is no criticism of the Tribunal's Decision not to make any reduction under the **Polkey** principle (**Polkey v A E Dayton Services Ltd** [1987] IRLR 503) but there is criticism of the failure to make any reduction for contributory fault. Mr Magee today accepts that the Tribunal correctly directed itself in paragraph 83 that there were three matters to consider. Firstly, was the relevant action culpable or blameworthy? Secondly, did it actually cause or contribute to the dismissal? Thirdly, would it be just and equitable to reduce the award by whatever proportion is decided? The Tribunal made its analysis at paragraph 84:

> **"84. The most typical form of blameworthy conduct is "misconduct" in the conventional sense. I have not found misconduct by the claimant in this instance sufficient to fall within the range that a reasonable employer would or could dismiss the claimant. However, s123(6) can cover wider forms of conduct where, for example the employee manages to aggravate the situation by his conduct through the disciplinary process. The claimant was respectful and constructive through the disciplinary proceedings. Indeed, he accepted that he has been guilty of some form of misconduct where many employees would not have made such a concession. This was because he was desperate to keep his job and he wanted to avoid aggravating his employer. There has to be then a causal link between the conduct and the dismissal. I find that causal link between the claimant's exchange with Mr Larner was blown out of proportion. [T]his is not sufficient to convince me to exercise my discretion and make a deduction under either s123(2) or s123(6) ERA."**

33. The Tribunal found in effect that there was misconduct, but minor misconduct rather than gross misconduct. There was a causal link between the misconduct and the dismissal but that it was blown out of proportion. Therefore, in relation to the third question to be answered, the Judge found that it was "*not sufficient to convince me to exercise my discretion and make a*

deduction under either s123(2) or 123(6) ***ERA***", referring to both the basic and compensatory awards.

The Grounds of appeal

Ground 3

34. Dealing with ground 3 first – the date of the investigation, the issue is whether the Tribunal was perverse in concluding that the investigation had been completed before the Claimant was suspended. It does not seem to me to be a particularly material point either one way or the other. Mr Crozier considers it was a finding of fact open to the Tribunal to make, and I tend to agree because it is more likely that the Claimant's interview on the 26 February took place after the other statements had been obtained, which were typed up that day. But even if the Respondent's submission is right, very little turns on it. If the statements had not already been taken, the Tribunal was still entitled question the Respondent's decision to suspend the Claimant, which was a factor the Tribunal was entitled to take into account in its conclusion that the Respondent had been seeking to build a case against the Claimant. So either way it was a minor detail that does not fatally undermine the Tribunal's decision, but I will return to the Tribunal's approach to the investigation in considering ground 1 below.

Ground 2

35. The criticism of the Tribunal's approach to the informal warning is not well founded. The Tribunal was entitled to conclude - as it did at paragraph 72 - that the Respondent's failure to deal with the altercation with a work colleague in November 2015 formally through the disciplinary procedure meant that there were no clear findings nor facts established, the Claimant had not had the benefit of the protection provided by the Respondent's procedure and the Acas Code had not been followed placing him at a disadvantage. One consequence was that there had been a

fundamental misunderstanding between the two parties about the altercation that had taken place between the Claimant and a colleague: the Claimant believing that there had been equal fault on both sides and both he and his colleague had been spoken to about it, whilst the other party to the incident and the Respondent considered the Claimant to have been more at fault. The Tribunal was entitled to conclude that the Respondent was not entitled to rely on it as a formal warning nor a concluded view of what had occurred.

36. But in some ways, it may be a minor point, since Mr Mark Taylor concluded that the incident of February 2016 itself amounted to gross misconduct (see paragraph 61) and the Tribunal does not analyse what part the November 2015 incident played in the dismissal decision. It is certainly correct that the Respondent could not rely on it as a formal warning and could not use it as the central plank of its dismissal decision.

Ground 1: The Substitution Mindset Trap

37. The Respondent's concern that the Tribunal has succumbed to the substitution mindset trap in its analysis at paragraph 64 to 68 (set out above) has resonance as explained above. There is a legitimate allied concern in relation to the Tribunal's criticism of the investigation. The Respondent asks: how can it be said that there was an insufficient investigation when the findings of that investigation have been accepted by the Claimant as accurate? I agree with Mr Magee that it is inconsistent for the Tribunal to have concluded that the investigation was flawed when the Claimant accepted its findings. But what the Tribunal has decided in those paragraphs is more nuanced than at first appears, and where the Tribunal says that it was "not at all convinced by the statements by the witnesses" it must surely mean that it is not rejecting the accuracy of the statements, but whether the Respondent could reasonably conclude that the incident was as serious as it said it concluded it to be.

38. I am troubled by paragraphs 64-68 of the Tribunal's Judgment, but I draw back from reaching the conclusion invited by the Respondent.

39. If the Tribunal has strayed into expressing its own views in paragraphs 64-68, inspite of having directed itself correctly, those paragraphs form only part of the Tribunal's Judgment. So, let us accept that it was the Tribunal view that the February 2016 incident was not so serious and whilst the outburst was an incident of bullying in its proper context and in the circumstances it was not serious, but the employer's view was that it was a serious incident. Notwithstanding those criticisms however the Tribunal was still entitled to conclude that the Respondent could not reasonably conclude that the incident itself was gross misconduct given the full context and circumstances of the incident.

40. Furthermore, even if the Tribunal had deferred more to the Respondent's view of the matter, it was still entitled to find the dismissal was unfair for all the reasons it lists: the Claimant's 27 years unblemished service, his loyalty to the company and perception that Mr Larner was insubordinate in countermanding the instruction that it was a one man job; the failure to consider the Claimant's remorse or the steps he was taking to address his behaviour in CBT; his diagnosis of depression and so on. The Tribunal was entitled to conclude that Mr Mark Taylor had approached matters with a closed mind and not been fair in rejecting the Claimant's powerful mitigation.

41. The second is that the procedural flaws identified in disciplinary process, such as the suspension of the Claimant and the charade of an appeal entitled the Tribunal to conclude that the dismissal was unfair in any event.

42. **Newbound v Thames Water Utilities Ltd** [2015] IRLR 734 reiterates the importance of the wording in section 98(4)(b) of the **ERA**, which directs ETs to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss in accordance with equity and the substantial merits of the case and reminds us that the band of reasonable responses is not infinitely wide. The statutory cause of action of unfair dismissal did not intend the Tribunal's consideration of the case of the present kind to be a matter of procedural box ticking. **Newbound** also stressed the importance of unblemished long service in considering whether a dismissal is fair.

43. Furthermore, it is important not to apply too fine a toothcomb to a Tribunal Decision. **Fuller v London Borough of Brent** [2011] IRLR 414 per Mummery LJ bears repetition:

> **"31. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the ET, but then overlooked or misapplied at the point of decision. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

44. Looked at in the overall context of the Tribunal's Judgment the legitimate concerns about paragraphs 64-68 lead me to conclude that the Respondent has not demonstrated that there was an error of law that is fatal to the Tribunal's Judgment and it would be wrong to interfere with the Tribunal's overall judgment. It would risk my falling into the substitution mindset.

Ground 4

45. Mr Magee accepts today that the challenge to the contributory fault finding is parasitic to the liability challenge.

46. In light of my finding that the unfair dismissal decision can stand, the contributory fault challenge falls too. Other Tribunals might have taken a more critical view of the Claimant's behaviour and decided that some reduction for contributory fault would be in order. But the Tribunal directed itself appropriately in paragraph 83 and on the critical question of causation was entitled to conclude that it would not be just and equitable to find contributory fault as its view was that the exchange with Mr Larner was "blown out of all proportion." Even if it was slightly surprising, it was a decision open to the Tribunal that had heard all the evidence and seen the witnesses give their evidence and in the exercise of its wide discretion. The decision of whether there was contributory fault was the Tribunal's to make – it does not require deference to the Respondent's judgment (see **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, CA) and a wide discretion is conferred on Tribunals by section123 **ERA**. The decision is not perverse and I do not consider I can interfere with this aspect of the Tribunal's Judgment.

47. For the above reasons the appeal is dismissed.