Appeal No. UKEATS/0019/17/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 11 September 2018
At 10.30am

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

MRS CATHERINE BEATTIE — APPELLANT

CONDORRAT WAR MEMORIAL AND SOCIAL CLUB & FOUR OTHERS — RESPONDENTS

RESERVED
JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr N. McDougall (Advocate) Instructed by bto Solicitors 48 St Vincent Street Glasgow G2 5HS
For the Respondent	Mr L. Anderson (Solicitor) Jackson Boyd Lawyers Centenary House 69 Wellington Street Glasgow G2 6HG

SUMMARY

UNFAIR DISMISSAL

The claimant was dismissed for misconduct following an earlier final written warning for a different type of misconduct. While she succeeded in an unfair dismissal claim before the Tribunal on the basis of procedural unfairness, her compensatory award was reduced to nil on the basis of a *Polkey* assessment that, had a fair procedure been followed there was a 100 per cent chance that she would have been dismissed anyway.

On appeal the claimant contended that the Tribunal had erred in concluding that the earlier final written warning was valid and so the *Polkey* deduction could not stand.

Held ;-

1) **Following *Wincanton Group plc v Stone and Another UKEAT/0011/12/LA*, the overriding issue was whether, absent oblique motive or bad faith, there had been *prima facie* ground for issuing the warning**
2) **It is not part of the general function of the appellate tribunal to re-open the issue of whether the final warning should have been issued or not – *Bandara v BBC UKEAT/0335/15/JOJ***
3) **That there was a sufficient basis in the evidence for the Tribunal's findings and conclusion on the issue of the earlier written warning and it was not for the appellate tribunal to interfere even if it took a different view of the facts**

Appeal dismissed.

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THE HONOURABLE LADY WISE

Introduction

1. The claimant commenced employment with the first named respondent, a Social Club within which there are three bars and where events and functions are held, on 25 July 2008 as a Bar Steward. She was dismissed on 29 December 2015. Her claim of unfair dismissal succeeded before the Tribunal but, in a Judgment dated 7 November 2016 (Employment Judge L Wiseman) the Tribunal found that, had a fair procedure been followed, there was a 100% chance that the claimant would still have been dismissed and so the compensatory award was reduced to nil. The claimant appeals against that part of the decision. Before the Tribunal the claimant was represented by Mr N McDougall, Advocate, who continued to represent her on appeal. The respondent was represented by Mr K McGuire, Advocate, before the Tribunal and by Mr L Anderson, Solicitor, on appeal. I will continue to refer to parties of claimant and respondent as they were in the Tribunal below.

Summary of facts found by the Tribunal

2. The claimant's duties as Bar Steward included carrying out all bar work duties, paperwork and the banking and ordering of stock. In the respondent's Employee Handbook, the rules covering unsatisfactory conduct and misconduct included a failure to carry out all reasonable instructions or follow the respondent's rules and procedures and unauthorised use or negligent damage or loss of the respondent's property. The term "serious misconduct" was defined in the handbook as being where one of the unsatisfactory conduct or misconduct rules had been broken and where, upon investigation, it was shown to be due to the employee's extreme carelessness or had a serious or substantial effect on the respondent's operation or reputation (paragraph 8 of the Judgment). In such circumstances, the employee could be issued with a final written warning in the first instance.

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3. In May 2015, during an external stocktaking exercise, a stock shortage comprising two cases of vodka, (twenty-four bottles), and two bottles of brandy was identified. The claimant was asked to carry out a thorough premises check but that did not resolve the issue. She was asked to meet with the respondent's Executive Committee to discuss the matter on 2 July 2015. At that meeting, the claimant could offer no explanation as to why the stock had gone missing. She was unsure whether she, or one of the chargehands, had been on duty for the relevant delivery. The Committee decided to issue the claimant with a final written warning and did so on 9 July 2015. It took the view that the unsatisfactory conduct, (negligent loss of property), had a serious and substantial effect on the club's operation because the club simply could not have stock go missing and measures were required to ensure it did not happen again, given the cost of lost revenue from the missing stock.

4. The claimant appealed against the final written warning. In doing so she accepted "part responsibility" for the stock shortage and offered to pay back to the respondent, together with a Ms MacIntosh, (the other employee who could have taken the delivery), the cost of the missing order. In the event Ms MacIntosh declined to pay any money and the offer was not taken up. On 21st July 2015 the claimant was advised that her appeal had been unsuccessful and the final written warning would remain on her record for twelve months.

5. In November 2015 an issue arose in relation to tickets for a December function. The claimant informed members of the Executive Committee that she would not sell tickets behind the bar for that. She explained that she was concerned about what would happen if money went missing when she was responsible for the tickets. When the claimant was asked several times to sell the tickets but continued to refuse, she was suspended on full pay to allow investigations to be carried out into the matter.

6. The Club Convener, (Mr Patrick), carried out the investigation. He met with the claimant, who confirmed her position in relation to her refusal to sell tickets from behind the bar, even although a secure cash box would have been provided. Her concern was taking on any additional responsibility whilst on a final written warning. Mr Patrick interviewed other relevant staff and prepared an investigation report. He recommended that formal action was required. Ultimately, at a meeting of the Executive Committee on 24 December 2015, it was resolved that the claimant should be dismissed. She was advised of the decision on 29 December. She pursued an internal appeal which was unsuccessful.

The Tribunal's Judgment

7. Having made relevant findings in fact, as summarised above, the Tribunal made findings on credibility. The respondent's witnesses were found to be credible and reliable. Where there were discrepancies on two specific matters between the evidence of the claimant and of Mr Patrick, the Tribunal preferred Mr Patrick's evidence. That said, apart from her evidence in relation to those two isolated points, which are not material for the purposes of this appeal, the claimant was found to be a generally credible and reliable witness. The Tribunal's reasoning, insofar as relevant to the issues in this appeal is in the following terms:

> "83. **Mr McDougall invited the Tribunal to find the final written warning invalid because it was manifestly inappropriate for three reasons: (a) the provisions of the respondent's disciplinary procedure; (b) the lack of investigation and (c) the facts and circumstances of the case. I examined each of those reasons in turn.**
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> 84. **The respondent's disciplinary procedure permitted the issue of a final written warning in cases of serious misconduct (page 151), with serious misconduct being defined as requiring the unsatisfactory conduct/misconduct rules to have been broken and the breach to be due to extreme carelessness or to have a serious and substantial effect on the respondent's operation or reputation.**
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> 85. **The alleged breach of the unsatisfactory conduct/misconduct rules in this case related to the "negligent damage or loss of our property". Mr McDougall invited the Tribunal to interpret this clause as meaning "negligent damage or negligent loss of our property" and on that basis he submitted there was no evidence upon which to conclude the claimant had been negligent. I accepted the clause is open to interpretation, and I also noted the respondent made no submissions regarding the interpretation to be attached to this clause.**
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> 86. **I accepted Mr McDougall's submission that if the clause was interpreted as meaning negligent loss of property, there was no evidence to support a finding the claimant had been**

negligent and that this negligence had resulted in the loss of the stock. However, I considered that had to be balanced by the fact the claimant admitted part responsibility for the loss of the stock and provided no explanation to the respondent to allow them to understand how the stock had gone missing.

87. I could not accept Mr McDougall's submission that it had been completely unreasonable to elevate the misconduct to serious misconduct because there was a system in place for taking delivery of stock, and this was the first time in seven years there had been any issue. Mr McDougall attached weight to his calculation that approximately 1400 cases of vodka would have been delivered during the claimant's employment and the loss of two cases could not be classed as a negligent loss of property.

88. I was satisfied that the loss to the respondent could not simply be limited to the cost of two cases of vodka. Twelve 1.5 litre bottles had gone missing, and I considered it not unreasonable for the respondent to have calculated the number of sales from each bottle, plus mixers, and calculating. The overall loss to them.

89. I was also satisfied that the buck stopped with the claimant: she was the Bar Steward and she had put systems in place for the delivery of stock. The claimant had trained the charge hands to take deliveries. The claimant was, in short, responsible for ensuring the delivery of stock which had been ordered. The claimant admitted she was partly responsible for the missing stock and I considered that admission was made because the claimant recognised that the buck stopped with her.

90. There was no dispute regarding the fact stock did go missing. I considered the respondent was entitled to conclude there had been unsatisfactory conduct because of "negligent damage or loss of our property" and, furthermore, they were entitled to conclude, given the value of lost sales, that the misconduct was serious misconduct because it had a serious or substantial effect on their operation.

91. I next considered the submission that there had been a lack of investigation. I noted there was some confusion regarding the evidence of the respondent's witnesses: Mr McGarvie told the Tribunal the claimant had been asked to carry out an investigation into the missing stock. Mr McGarvie considered the claimant best placed to carry out the investigation because she knew the systems in place. Mr Patrick told the Tribunal he had, at the time of proposing a final written warning be issued, 'assumed' an investigation had been done. This confusion was compounded by the claimant's evidence that she had carried out an investigation, but made no mention of it at any time to the respondent.

92. I was satisfied the investigation referred to by Mr McGarvie and Mr Patrick was an investigation into what had happened to the missing stock: it was not an investigation into any wrongdoing by the claimant. I was further satisfied the respondent did not carry out any investigation into whether the claimant had, by her actions or omissions, negligently, or otherwise, lost the club's property.

93. I accepted an investigation is an important part of the disciplinary process in order for the employer to discover the relevant facts and give the employee an opportunity to state their side of the story. I also accepted however that where an employee accepts the allegation of misconduct, the importance of carrying out an investigation is reduced. If, for example, an employee alleged to have clocked off early, admits to having done so, the need for the employer to investigate the situation is removed.

94. The claimant in this case admitted part responsibility for the missing stock. I concluded on that basis that the failure of the respondent to carry out an investigation was partly mitigated by the admission of responsibility for what had happened.

95. The third submission related to a consideration of the facts and circumstances of the case and Mr McDougall noted the fact the claimant had been good at her job and had no prior instances of stock losses. The fact the claimant was good at her job was not in dispute. I noted the respondent's witnesses were not asked whether matters such as length of service

and clear disciplinary record had been considered when deciding to issue a final written warning.

96. I, having considered the claimant's submissions, stood back and asked myself whether it could be said the final written warning was issued for an oblique motive, or was manifestly inappropriate, or not issued in good faith with prima facie grounds for making it. I noted there was no suggestion the warning had been issued for an oblique motive; neither was it suggested the warning had been issued in bath faith. The focus of the claimant's position was that the warning was manifestly inappropriate. I decided, having regard to the points set out above, that it could not be said the warning was manifestly inappropriate. I concluded that in circumstances where the claimant was the Bar Steward and responsible for deliveries of stock, and where she could offer no explanation for what had happened, but accepted part responsibility for it, it could not be said that issuing a final written warning was manifestly inappropriate.

97. I decided the earlier warning was valid."

The Tribunal then turned to explore the circumstances of the second instance of misconduct that ultimately led to the dismissal and concluded that the claimant's refusal to comply with the instruction given to her was unreasonable. Having reached conclusions on both the final written warning and the fairness of the decision to dismiss the Tribunal returned to the matter of the final written warning in the following way:

"114. I next asked whether dismissal in those circumstances had been reasonable or unreasonable in terms of section 98(4) Employment Rights Act. I, in considering this matter, had regard to the six factors identified in the Wincanton case. I had regard to the fact there was a valid final written warning in place at the time of the misconduct concerning the unreasonable refusal of a legitimate and reasonable instruction.

115. I noted the claimant had an opportunity to appeal against the decision to impose a final written warning. Mr McDougall invited me to have regard to the fact the appeal was heard by Mr McGarvie, who had been party to the decision to impose a final written warning. I return to this matter below.

116. I had regard to the fact the final written warning was issued for serious misconduct involving the loss of stock and the fact the second alleged act of misconduct was for the different matter of refusing to obey a legitimate and reasonable instruction. Mr McDougall submitted the two incidents were very different and this therefore favoured the imposition of a lesser sanction. The judgment in the Wincanton case makes clear that a degree of similarity "may" tend to favour a more severe penalty, whereas a degree of dissimilarity "may" tend the other way.

117. Mr McDougall submitted the respondent's decision to impose a final written warning lacked consistency in circumstances where the charge hand, Ms McIntosh, could also have been guilty of misconduct, yet the respondent had taken no action against her. I could not attach weight to this submission in circumstances where the claimant was the Bar Steward, responsible for stock orders and deliveries and where she was unable to confirm who had been on duty at the time. The claimant did suggest she and Ms McIntosh pay back the cost of the missing stock, but Ms McIntosh declined to do so. There was no other suggestion that Ms McIntosh could have been involved in the missing stock and, for all of these reasons, I rejected Mr McDougall's submission."

8. At paragraph 119 the Tribunal then correctly identified that the overriding question was whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. Insofar as relevant to this appeal the Tribunal made the following further conclusions and decisions:

> **"120. I had regard to the procedure followed by the respondent when issuing the final written warning and the dismissal. Mr McDougall submitted there had been a lack of investigation prior to the decision to impose a final written warning. This matter is dealt with above and not repeated here: I was satisfied that in circumstances where the claimant admitted part responsibility for the stock loss, the requirement for an investigation was mitigated.**
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> **121. The claimant had an opportunity to appeal against the final written warning. The claimant had met with John Morton, President and Mr McGarvie, to discuss the stock loss on the 3rd July. The Executive committee members (Mr Morton, Mr McGarvie, Mr Patrick, Mr McLean and Ms Barbour) decided to give the claimant a final written warning. The appeal hearing was heard by Mr Morton, Mr McGarvie and Ms Barbour and, following a meeting of the Executive committee, the appeal was rejected."**

Having found that the procedure followed by the respondent was fundamentally flawed at the time of the final dismissal the Tribunal expressed the following view:

> **"128. I next returned to the question of the fairness of the dismissal, and I reminded myself the question is not whether I would have dismissed the claimant: the question is whether the decision of the employer fell within the band of reasonable responses which a reasonable employer might have adopted. I concluded, above, that the final written warning was valid and, during its currency, the claimant unreasonably refused to follow a legitimate and reasonable instruction. I decided the decision of the respondent to dismiss in those circumstances was fair. However, the respondent failed to follow a fair procedure when dismissing the claimant, and the procedural flaws were such as to render the dismissal unfair.**
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> **129. The claimant was unfairly dismissed.**
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> **130. I turned to consider the remedy of compensation, however before doing so I must decide the percentage chance of dismissal had a fair procedure been followed (Polkey). I was entirely satisfied that if the respondent had put in place a procedure whereby a disciplinary hearing had taken place, followed by an appeal to an independent person (thus removing all decision making from the Executive committee), there was a 100% chance the claimant would still have been missed. I reached that decision having had regard to the fact the final written warning was valid and "live" at the time of the second incident of misconduct. Further, Mr Patrick carried out a comprehensive investigation into the claimant's refusal to carry out the instruction. He interviewed a number of people, looked into the points raised by the claimant and produced a report recommending further action."**

The claimant's arguments on appeal

9. For the claimant, Mr McDougall identified what he regarded as the key issue namely whether the Employment Tribunal erred in holding that the final written warning imposed by the respondents upon the claimant was valid at the time of the second incident of misconduct. If it was

not, then he contended that no **Polkey** reduction could competently be made and so the compensatory award should be reinstated. The first ground related to the respondent's disciplinary procedures and whether these limited the imposition of a final written warning. The disciplinary rules of the respondent were before the Tribunal (although not lodged in the bundle for this appeal) and provided that "you will only be disciplined after careful investigation of the facts." Mr McDougall contended that the respondents did not carry out an investigation for the purposes of disciplinary procedure that led to the final warning. Even if there was an investigation it was not a relevant investigation because it did not relate to the issue of whether the claimant had been negligent.

10. Under reference to paragraph 92 of the Judgment, counsel pointed out that the Tribunal had accepted that the matter of whether the claimant had acted negligently in losing the stock had not been investigated and so there was no evidence to support a finding of negligence. Mr McDougall submitted that the claimant's partial acceptance of responsibility was not enough to infer negligence as taking responsibility was distinct from and admission of *culpa* or blameworthiness. Accordingly, while the factors that the Tribunal relied on in terms of the claimant's position of responsibility and that his explanation might amount to misconduct, they could not amount to serious misconduct without the negligence required by the respondent's own disciplinary procedures.

11. The respondent's code provided also that an act of unsatisfactory conduct or misconduct could be elevated to "serious misconduct" only in certain circumstances. The one which the Tribunal found the respondents were entitled to make was the finding that the loss of stock had "a serious or substantial effect upon our operation" i.e. the operation of the respondents (paragraph 90). It was simply not open to the Tribunal to make a finding that it had such an effect. There was no evidence on which it could do so. For these reasons, the final written warning was

not valid as there was no evidence that the claimant was guilty of serious misconduct as that term was set out in the employer's own code.

12. The second ground of appeal advanced contends that the Tribunal erred in making material judgements for which there were no finding in facts and were contrary to the evidence. This ground related to paragraph 90 of the Judgment where the Tribunal concluded that the misconduct was serious given the "value of lost sales". Mr McDougall submitted that there was no evidence nor were there any findings in fact confirming that the loss of stock had in fact resulted in the loss of sales at all. Secondly, there was no evidence as to the value of any loss. The loss of stock had to be distinguished from the loss of sales. It could only be contended that there was a loss of sales if there was a demand for the stock which the respondents were unable to supply, i.e. if there was insufficient stock to serve customers as a function. In any event, in the absence of evidence of the differential between the cost of the stock and the revenue it would generate if sold in units of alcohol there was simply no basis for the Tribunal's findings. There was no evidence and so no findings in fact about the business's monthly or annual turnover. And even if there had been evidence of the value of the stock itself that could only have a serious effect on the operation if that was proved on an objective basis. The absence of any evidence of lost sales as against turnover made it impossible for the Tribunal to reach any conclusion as to the "serious and substantial" effect on the operation.

13. Further, the Tribunal had fallen into error in relation to the basis on which to assess the respondent's loss. It is indisputable that the basis of assessment of loss in Scots Law was *restitutio in integrum.* The loss was the loss of stock not of sales. Accordingly, the Employment Judge had erred at paragraph 88 where she had stated "I was satisfied that the loss to the respondent could not simply be limited to the cost of two cases of vodka." In fact, there had been no evidence of quantities at all and no evidence of what proportion of either the total delivery or the total of the

respondent's stock that the lost stock represented. It was the reliance placed on the loss of sales rather than stock which amounted to a major error. In fact, on one view the respondents had not needed to suffer loss at all as the claimant had offered to pay back half of the cost of the missing order if Ms MacIntosh paid back the other half.

14. The third ground related to a contention that the Tribunal erred in holding that the alleged misconduct could found a basis for a final written warning by generally accepted standards. There were six reasons in which this was so contended. First, it was not in dispute as that was the first time any stock had gone missing during the claimant's employment as Bar Steward. Secondly, over that seven-year period she had taken delivery of approximately fourteen hundred cases of vodka. Thirdly, the claimant had a procedure in place to safeguard against the loss of stock which had not failed before. Fourthly, the respondent did not carry out any investigation into the loss of stock. Fifthly, the claimant accepted responsibility for the loss of stock and offered to pay half of the amount which illustrated she was not trying to shirk her duties or being difficult. Finally, there was no evidence that the loss of stock had any impact on the respondent's business. The only safe assumption was that two cases of vodka and two bottles of brandy had to be purchased but that was not sufficient. No reasonable employer could have held that a one-off loss of this sort constituted serious misconduct meriting a final warning after seven years of the claimant working in a managerial position. The approach of the Employment Judge was that the loss of stock had happened on the claimant's watch and so "the buck stopped with her" and she had to be regarded as responsible. That was an insufficient basis for such a conclusion.

15. The fourth ground was that it was perverse of the Tribunal to reach a conclusion in all the circumstances that the imposition of a final warning was not "manifestly inappropriate". For the warning to be valid the Tribunal would have to be satisfied first that the claimant was guilty of unsatisfactory conduct and in the absence of an investigation or evidence of negligence it could not

be so satisfied. Secondly, it would have to be able to elevate the act to one of serious misconduct and there was no evidence of any serious or substantial effect on the respondent's business. Thirdly, it could not be satisfied that it was not manifestly inappropriate to impose a final written warning, on the authority of **Wincanton Group plc v Stone** UKEAT/0011/12/LA at paragraph 37. The fact that the Tribunal could not be so satisfied meant that the final written warning could not be taken into account in the dismissal.

16. In all the circumstances Mr McDougall contended that if the final written warning was not valid then no **Polkey** reduction could competently be made because the first incident could not be classified as serious misconduct and there was no finding to the effect that the second incident of misconduct would have been sufficient on its own to dismiss.

Reply on behalf of the respondent

17. Mr Anderson for the respondent responded to each of the four grounds advanced on behalf of the claimant in turn. First in relation to the disciplinary procedure, Mr Anderson noted that it was not accurate to say that there was no investigation at all in this case. While at paragraph 92 the Tribunal had recorded that while there was no investigation into whether it was the claimant who had by her actions or omissions lost the club's property, there had of course been an investigation into what had happened to the missing stock. The reason that mattered was if there was no dispute that the stock did go missing and the claimant was in charge then the lack of explanation was unsatisfactory. In any event, the admission of responsibility on the part of the claimant was important. Reference was made to the decision in **RSPB v Croucher** [1984] IRLR 425 at paragraph 612 where Waite J in the EAT confirmed that where dishonest conduct was admitted there was very little scope for the kind of investigation required by **British Home Stores v Burchell** 1980 ICR 303. While there was no dishonesty alleged in this case, the claimant's role in stocktaking and her partial acceptance of responsibility had a significant bearing

on whether the duty to investigate was mitigated. Further, it could not be said that the Tribunal had erred in finding that the claimant's conduct had been unsatisfactory because of the negligent damage or loss of property. The Tribunal had been entitled to reach that conclusion because there were sufficient findings in fact in relation to (i) the claimant's responsibilities, (ii) the extent of the missing stock and (iii) the lack of explanation provided by the claimant. Reference was made to **Sheridan v BT** [1990] IRLR 27 CA at paragraph 26 in relation to the circumstances in which errors of fact could become errors of law. In the present case there were no discrepancies across the line from fact to law and so no error of law. It should also be borne in mind that the Employee Handbook in question gave no specific examples of what serious misconduct was, simply that it had to fall within one of two categories and so was not a case where the particular circumstances were outlined as serious misconduct or not. It had been for the Tribunal to decide that issue on the facts.

18. Turning to the second ground and the contention that the Tribunal reached conclusions for which there were no findings in fact, the claimant's argument had centred on paragraph 88 of the Judgment and the reference to being satisfied that the loss to the respondent could not be limited to the cost of two cases of vodka. The reference in that paragraph is to the respondent having calculated the number of sales from each bottle plus mixtures, which was a record of something the respondent's witnesses may have said that they did. Whether they were right or wrong to do so could not be said to be perverse as there was some evidence to support the judge's conclusion. In any event, the nub of the Tribunal's reasoning on the issue of the final written warning was in paragraph 96 of the Judgment where the points in favour of a conclusion that the warning was not manifestly inappropriate are given. Under reference to the standard test in **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93, Mr Anderson submitted that this was not a case where even grave doubts could be present about the Tribunal's overall decision.

19. Turning to the third ground of appeal and whether the alleged misconduct could found a basis for a final written warning by generally accepted standards, Mr Anderson contended that some of the six factors relied upon were contentious findings that did not assist the claimant. It was not in dispute that this was the first time that stock had gone missing and any calculation by the claimant of how many deliveries she had undertaken did not matter. Paragraph 87 of the Judgment made clear that the Employment Judge had considered but rejected the submission on behalf of the claimant that the misconduct in question could not be elevated to serious misconduct because of some of the factors relied upon. The limited investigation referred to in the fourth point had to be seen against the partial acceptance of responsibility on the part of the claimant. So far as the loss of stock was concerned, there was evidence of the missing cases of vodka and bottles of brandy. Mr Anderson was not certain of the extent to which the respondent had relied upon an impact on its business in issuing the warning, but accepted that reading the Employment Tribunal Judgment as a whole it did seem that the Tribunal accepted that had been a factor.

20. In response to the fourth and final ground on whether the Tribunal had erred in finding that the imposition of a final written warning was not manifestly inappropriate, Mr Anderson also referred to **Wincanton v Stone**. In addition, he referred to a more recent decision of the Employment Appeal Tribunal, **Bandara v British Broadcasting Corporation** UKEAT/0335/15/JOJ in which **Wincanton** had been approved. The claimant could not succeed on a perversity ground unless no other Employment Judge would have reached the same conclusion. The various factors already referred to, namely the loss of stock, the claimant's role, her acceptance of "part-responsibility" for the shortage and her lack of explanation all led to a conclusion that there was sufficient for the respondent to impose a final written warning and for the Tribunal to accept that it was not manifestly inappropriate to do so. The loss of stock for which she was responsible as Bar Steward was itself arguably sufficient to warrant a final written warning. The test of perversity was a high one and it could not be said that the Employment

Judge's conclusion was not one that no other reasonable Tribunal properly directed would have made.

21. On disposal, Mr Anderson submitted that even if the appellant succeeded on one or more of the grounds, that did not lead inevitably to reinstatement of the compensatory award as some account had to be taken of the second incident that led to dismissal. Even if the final written warning was invalid in some way, there had still been a relevant incident prior to the second incident. In that event, the case should be remitted back to the same Tribunal for a rehearing of the issue of the **Polkey** deduction on the findings in fact already made.

The claimant's response on disposal

22. Mr McDougall addressed the issue of disposal on the hypothesis that the appeal succeeded to the extent that the final written warning was invalid. He submitted that in the absence of a valid final written warning there was no initial act of misconduct to be taken into account because unless the loss of property was negligent in terms of the Handbook, there was no misconduct at all. Accordingly, all the Tribunal would be left with would be the second incident and it could not be said that the failure to follow the reasonable instruction was gross misconduct capable of summary dismissal. It was clear from **Wincanton v Stone** that the Tribunal could not look behind the validity or invalidity question and determine whether a lesser sanction would have been more appropriate. If the warning was invalid the chance of the claimant being dismissed because of the refusal to sell bar tickets alone was zero. The appeal should be allowed.

Discussion

23. The parties were agreed that the key issue in this appeal was the validity of the final written warning imposed by the respondent on the claimant in July 2015. Had the final written warning not been "live and valid" in December 2015, the decision on whether the claimant would still have

been dismissed but for the unfair procedure (the "Polkey" issue) would have been approached differently.

24. The context in which the final written warning was considered was in determining the reasonableness or otherwise of the respondent having treated the claimant's conduct as a reason for the dismissal in terms of section 98(4) of the Employment Rights Act 1996. In the case of **Wincanton Group plc v Stone and Another** UKEAT/0011/12/LA the EAT (Langstaff P presiding) set out the test on the relevance of an earlier written warning to a decision to dismiss in the following way:

> **"A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently."**

Both sides to this appeal accept that **Wincanton** provides a correct statement of the law in this issue. Mr Anderson referred also to the more recent decision in **Bandara v BBC** UKEAT/0335/15/JOJ in which HHJ Richardson in the EAT, having referred to the summary of the law by Mummery LJ in **Davies v Sandwell Metropolitan Borough Council** [2013] IRLR 374, including the reminder there that it is not the function of the Tribunal to reopen the final warning and rule on an issue raised by the claimant as to whether it should or should not have been issued stated the following:

> **"Generally speaking, earlier decisions by an employer should be regarded by an Employment Tribunal as established background that should not be reopened. It should be exceptional to do so ... An earlier disciplinary sanction can of course only be opened to criticism if it was unreasonable by the objective standard of the reasonable employer, but that is not enough, otherwise the employment Tribunal would have to reopen and reinvestigate previous disciplinary sanctions whenever an employee was aggrieved by them. A threshold has to be set. An allegation of bad faith that has some real substance to it, as in Way (Way v Spectrum Property Care Ltd [2015] IRLR 657) will be one example. So will the absence of any prima facie grounds for the sanction. So will something that makes the sanction manifestly inappropriate. I think a sanction will only be manifestly inappropriate if there is something about its imposition that once pointed out shows that it plainly ought not to have been imposed."**

25. It seems to me that, before embarking on any scrutiny of the disciplinary rules and procedures contained in the respondents' Employee Handbook, it is necessary to consider the test set out above and focus the scope of the appeal as being to determine whether the Tribunal erred in failing to categorise the final warning in question as issued for an oblique motive, was given in bad faith or was made without there being any *prima facie* grounds for doing so. No suggestion of underhand motive or bad faith is in contention. The overriding issue, then, is whether the findings in fact made by the Tribunal were sufficient to allow the Employment Judge to conclude that the respondents had at least *prima facie* grounds for issuing the warning or whether the evidence illustrates that it plainly ought not to have been imposed.

26. I turn now to consider the arguments it made that are said to support a conclusion that the respondents had no basis for issuing the warning and that it was invalid, albeit not issued in bad faith. Although the employee handbook that was the subject of submissions was not lodged for the appeal there was no objection from the respondents to it being provided at the close of the appeal hearing. I have already paraphrased some of the material parts but there are two separate sections of relevance to the argument made. The first is under a heading "Wastage" and includes the following two provisions as express written terms of the claimant's contract of employment:

> **"a. any damage to vehicles, stock or property (including non-statutory safety equipment) that is the result of your carelessness, negligence of deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement.**
> **b. any loss to us including till shortages that is the result of your failure to observe rules, procedures or instruction, or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to re-imburse to us the full or part of the cost of the loss. Till shortages will be split between all bar staff involved..."**

In the section listing examples of what the respondents would regard as misconduct there is included:

> **"h. failure to carry out all reasonable instructions or follow our rules and procedures.**
> **i. unauthorised use or negligent damage or loss of our property."**

So far as serious misconduct is concerned the handbook provides as follow:

> **"1. Where one of the unsatisfactory conduct or misconduct rules has been broken and if, upon investigation, it is shown to be due to your extreme carelessness or has a serious or substantial**

effect upon our operation or reputation, you may be issued with a final written warning in the first instance.

2. **You may receive a final written warning as the first course of action if in an alleged gross misconduct disciplinary matter, upon investigation, it is shown to have some level of mitigation and is treated as an offence just short of dismissal."**

27. The first contention on behalf of the claimant is that the respondents had failed to investigate whether the claimant had acted negligently in losing the stock and so the Tribunal had erred in making a finding of negligence. This argument was made before the Tribunal and is dealt with at paragraphs 91-94 inclusive, reproduced above. The Tribunal faced up to some of the deficiencies in the evidence of the respondents' witnesses, and although satisfied overall that there had been an investigation into what happened to the missing stock, found that there had not been an investigation into the claimant's wrongdoing as such. However, the Tribunal regarded this as a case where an employee had accepted the allegation of misconduct, at least to some extent, and so the importance of the investigation was reduced. Bearing in mind that the argument about the investigation is relevant only to the validity of the earlier written warning, not the subsequent dismissal, I consider that the absence of investigation into the conduct is insufficient to support a conclusion that there were no *prima facie* grounds for issuing such a warning. The case of **RSPB v Croucher** [1984] IRLR 425 is of general application to conduct cases involving an admission on the part of the employee (see for example **CRO Ports London Ltd v Wiltshire UKEAT/0344/14/DM**). In my view, against a background of an investigation into the detail of the missing stock, including information about who could have been responsible, the Tribunal did not err in characterising the claimant's acceptance as sufficient for the respondents to draw an inference of negligent loss of the club's property without further inquiry.

28. I consider also that the term "negligence" in the employee handbook should not be interpreted in the strict legal sense as it could cover any situation where there was sufficient information from which an inference of an employee's failure to carry out the duties of her employment with care could be drawn. Accordingly, where the evidence disclosed that the

claimant was by her admission partially responsible for the loss of stock and could provide no explanation, the Tribunal's conclusion (at paragraph 90) that the respondents had been entitled to conclude that her actions fell within the general ambit of unsatisfactory conduct was a permissible one. It is noteworthy that the examples of unsatisfactory conduct and misconduct in the employee handbook are specifically stated to be examples only and not an exhaustive list. Accordingly, the distinction between taking responsibility and an admission of *culpa* or blameworthiness is an artificial one. The first issue for the respondents and subsequently the tribunal in assessing their actions was whether there were sufficient established or admitted facts giving rise to an inference of unsatisfactory conduct and that was satisfactorily addressed.

29. The next argument in relation to the employee handbook is that it provides that an act of unsatisfactory conduct or misconduct could be elevated to "serious misconduct" only in certain circumstances, the relevant one in the claimant's case being the respondents' finding that the loss of stock had "a serious or substantial effect upon our operation". Counsel for the claimant argued that it was not open to the Tribunal to make that finding. The tribunal deals with this at paragraphs 87 and 88 of the Judgment. Counsel sought to focus on the lack of evidence of the value of any loss suffered by the respondents. The Tribunal is said to have erred in concluding that the loss to the respondent could not simply be limited to the cost of two cases of vodka as any loss could have been fully remedied by replacing those cases and the missing brandy. Having considered this matter, I accept that in legal terms, a calculation of loss to the respondent would, in the absence of evidence that the cost of vodka and brandy had risen significantly or the lost cases had been secured for a discounted sum no longer available, be the replacement cost. The context, however, is that the loss of the stock was elevated to a serious misconduct matter because of its effect on the "operation or reputation" of the respondents. What the respondents appear to have done at the time of considering whether to impose the written warning, is to calculate the sales that would have been made from the lost stock, in order to characterise the severity of the conduct

standing the activity in which the club was engaged. If missing stock went unnoticed, the club would be unable to provide that stock to customers and lost revenue would ensue. It seems that neither side sought to lead detailed evidence of the value of the lost sales or indeed the value of the missing stock. Counsel for the claimant appears to have made a calculation of how many cases of vodka might have been delivered during the claimant's employment in order to show that the number lost on this occasion was *de minimis*. That rather misses the point, as the respondents' committee was faced with an absence of explanation for the loss of 24 bottles of vodka and two bottles of brandy, items of stock which were central to the core business of supplying alcohol to customers. The respondents' witnesses appear to have given evidence of some of the calculations that they had made about the sales that could have been derived from each missing bottle. There was accordingly some evidence upon which the Tribunal appears to have based its findings at paragraph 88.

30. More fundamentally, however, the Tribunal's task was to review the respondents' actings in issuing the final written warning taking into account the general rule that earlier decisions made by employers should not be re-opened. In that context, any deficiencies in the evidence were for the Tribunal to assess and there does appear to have been a basis in the evidence for the conclusion reached. The Tribunal was not engaged in calculating loss in a damages action; it was looking to see whether there had been a *prima facie* case for the issuing of the written warning. I cannot conclude that no other reasonable Tribunal could have reached the conclusion on this point on the basis of the evidence led.

31. The third ground of appeal related to whether the alleged misconduct could found a basis for a final written warning by generally accepted standards. Of the six points made on behalf of the claimant on this ground, some were a repetition of points already made in relation to for example, the lack of investigation. There had been an investigation into the missing stock, the

issue was the claimant's responsibility for it. The claimant was the Bar Steward and her duties included stock taking and so it was hardly surprising that she had accepted at least some responsibility. It was suggested that the fact that no such incident had occurred before in the claimant's employment was significant, but that was a submission considered and rejected by the Tribunal (at paragraph 87). Counsel sought to rely on the fact that the claimant had a procedure in place to safeguard against the lack of stock which had not failed before, but that was contentious and not supported by any finding in fact. In any event, if true, such a fact might just as easily support that the missing stock was an unusual and serious event that could not reasonably pass without identification of responsibility. Put simply, a not insignificant amount of stock went missing and the claimant, who had responsibility for the stock taking procedures, had accepted at least partial responsibility. On the undisputed facts, the seriousness of the situation for the respondents was that there was lost stock rather than the consequences of that loss. It was for the respondents to decide whether the conduct was sufficiently serious to merit the issue of a final written warning. It was a matter within the judgement of the respondents as employers over which the Tribunal had oversight only if the earlier warning was so unreasonable on the known facts that it stood out as manifestly inappropriate to have issued it.

32. Having considered the other matters raised, I do not consider that this is a case of the Tribunal traversing from any perceived error in fact to one of law. This Tribunal cannot allow an appeal just because it may take a different view of the facts from the Employment Tribunal - **Sheridan v British Telecommunications [1990] IRLR 27,** per McCowan LJ, at paragraph 24. The argument in relation to the calculation of the loss of stock is little more than an attempt to open up and dissect issues that were squarely within the province of the first instance fact finding Tribunal. Finally, the perversity argument fails to meet the very high hurdle set by Mummery J in **Yeboah v Crofton [2002] IRLR 634.**

33. In conclusion, while there were clearly some aspects of the way in which the respondents dealt with the later incident that led to the claimant's dismissal that were unsatisfactory, such that it was ultimately held to be procedurally unfair, I have reached the view that this is not one of those rare situations in which the earlier final written warning could be treated as invalid as manifestly inappropriate as plainly without foundation. A serious issue of missing stock was identified; the claimant could offer no explanation and took partial responsibility for it. Her actings provided a sufficient *prima facie* basis for the imposition of a final written warning, judged against the objective standard of the reasonable employer. There was no dispute that the consequences of such a conclusion are that the **Polkey** reduction was both competent and appropriate. It may be difficult for the claimant to understand fully why there is a finding of unfair dismissal yet the whole of the compensatory award was reduced to nil. It was not unreasonable of her to seek to have the Tribunal's reasoning on the issue scrutinised on appeal. However, the Tribunal's conclusion on the validity of the final written warning was one that it was entitled to reach and so the appeal must fail and will be dismissed.