Appeal No. UKEAT/0151/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2018

Before

THE HONOURABLE MR JUSTICE SWIFT

(SITTING ALONE)

CAMDEN AND ISLINGTON NHS FOUNDATION TRUST	APPELLANT
MISS N UDDIN	RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2019

APPEARANCES

For the Appellant	MISS REHANA AZIB (of Counsel) Instructed by: Kings Orchard 1 Queen Street Bristol BS2 0HQ
For the Respondent	MR DANIEL MATOVU (of Counsel) Direct Public Access

SUMMARY

UNFAIR DISMISSAL – Reason for dismissal including substantial other reason

UNFAIR DISMISSAL – Contributory fault

UNFAIR DISMISSAL – Reasonableness of dismissal

UNFAIR DISMISSAL – Procedural fairness/automatically unfair dismissal

The Appeal Tribunal allowed the employer's appeal against the conclusion that the employee had been unfairly dismissed, and remitted the claim to the Employment Tribunal for reconsideration.

The Employment Tribunal had taken a correct approach to deciding whether or not the employee had committed acts of gross misconduct. Whether such conduct had occurred was a question of fact on which (absent any provision to the contrary in the contract of employment) the Tribunal had to reach its own conclusion. However, the Tribunal had incorrectly assumed that if the employer had not been entitled to dismiss summarily, it necessarily followed that the decision to dismiss was unfair for the purposes of section 98(4) of the **Employment Rights Act 1996**. That was wrong. So far as concerned the unfair dismissal claim, the Employment Tribunal had also failed properly to identify the employer's reason for dismissal.

On that basis, the unfair dismissal claim, would be remitted for further consideration. On the remittal, it would be open to the Employment Tribunal to consider all points on the unfair dismissal claim, including any issues going to procedural fairness and (if necessary) the appropriateness of any contributory fault reduction to compensation.

A

THE HONOURABLE MR JUSTICE SWIFT

1. Miss Uddin, the Respondent to this appeal, was employed by the Camden and Islington NHS Foundation Trust ("the Trust"), between 16 July 2012 and 5 July 2016. She was employed as a Night Telephonist and was part of the Trust's switchboard team. She worked with three other telephonists; the telephonists worked in pairs to cover the Trust's emergency Out of Hours number. The telephonists worked under the supervision of the Conference Centre Manager, John Davis. Mr Davis reported to Helen Flynn, the Trust's Head of Facilities Management. Both Mr Davis and Ms Flynn ordinarily worked daytime hours, and so were not usually at work when Miss Uddin was at work.

B

C

D

2. I can take the facts of the case in short summary from the Tribunal's Decision. In summer 2015 a new working arrangement known as the E-Rostering System was put in place. The intention behind that arrangement was to formalise any arrangements that might otherwise be made between employees to the effect of swapping shifts between them. Under the E-Rostering System any change to hours on the rota had to be authorised by management. In September 2015, a Security Guard noticed that Miss Uddin was not always at work on the days she was scheduled to work, and sometimes when she was at work, that she left early. This led to an investigation. Over four months, between September 2015 and January 2016, Miss Uddin's attendance was monitored, this included consideration of CCTV footage from cameras located at the point of entry to the Trust's site.

E

F

G

3. The investigators compiled a report. The key point emerging from the report was that a series of disciplinary allegations were made against Miss Uddin. In total five allegations were made:

H

A

"(1). That in September 2015 there was one incident when NU did not attend a shift that she was rostered and paid to work.

(2). That in October 2015 there was one instance when NU did not attend a shift and [one] instance she left a shift early that she was rostered and paid to work.

(3). That in November 2015 there were eight instances when NU did not attend a shift, there were 10 shifts in which she left her shift early and 4 instances where she was late to shift that she was rostered and paid to work.

B

(4). That in December 2015 there were 2 instances where she did not attend a shift, there were 7 shifts in which she left her shift early and 3 instances where she was late to a shift that she was rostered and paid to work.

(5). That in January 2016 there were 2 instances in which she left her shift early that she was rostered and paid to work."

C

In total, I am told that this meant that the Claimant had failed to work a total of 159 hours she had been scheduled to work, and that she had received payment for those hours.

D

4. A disciplinary hearing took place over two days in June 2016. It was conducted by Mr Phil Wisson, the Trust's Associate Director for Estates and Facilities. His decision was set out in a letter dated 5 July 2016. He upheld Allegations 1-3 and 5 in full, he upheld Allegation 4 in part. The part not upheld was in respect of one shift which he concluded Miss Uddin had swapped with another Telephonist.

E

5. Having set out those conclusions the letter stated as follows, under the heading "Conclusion":

F

"Having hear all the evidence, I have decided to uphold the disciplinary allegations 1,2,3 and 5. Allegation 4 is partially upheld as there was evidence that you swapped one contracted shift during that month and therefore made up some of the time of our contracted hours in December 2015. Whilst there clearly was a system of shift swaps and time management in place amongst the night telephonists, this came to end with the introduction of the new e-restoring system in the summer 2015. Communications issued at the time made it clear that management had to be advised of any proposed alterations to shifts. The statements made by your three colleagues both in writing and orally at the hearings indicate that they understood this. For three evidenced swaps since September 2015 your colleagues stated they had expected you to inform management as you had requested swaps.

G

You have indicated that you made the time up on other days and or by coming in early or leaving late on other occasions. You said that this was evidenced by placing loose sheets in the 'swap diary' (which by this time was no longer being used as it was for calendar year 2014 only) but these could not be found. There is no other evidence supporting your attendance at other times other than the text and WhatsApp message relating to two occasions covered within the allegations.

H

A

> **You have indicated that there was an agreement enabling you to leave early to undertake university studies. However, no evidence has been produced to confirm this and it has been denied by management notwithstanding that they were clearly aware that you were undertaking this activity.**
>
> **Accordingly, I consider that you have not attended shifts and or have arrived late and or left early for which you were rostered and paid. I believe you may have made up a small amount of the total time through two swaps and the odd occasion of staying past your rostered end time. I do not believe on balance that you did make up all of the time on the time on the dates you stated that you did and there is a lack of evidence to support these claims. Given the evidence of your colleagues I did not believe that shift swapping after the implementation of eRostering was a prevalent as you stated.**
>
> **I found that you did not act in a transparent manner to management. I consider that the number of shifts not worked and the amount of time for which you arrive late and or left early to be excessive and unreasonable without clear evidence that time has been made up or management approval to these alterations to rostered shifts. In addition I believe you took the opportunity to not attend work and to be paid for that time when you knew another colleague was rostered on to work meaning your absence could go unnoticed by management as switchboard would be covered. I also found this to be the case for occasions when you left work at 5am as you only did this when another member of the team was at work and I also found it curious that this occurred also at sometimes outside what I would understand to be traditional university term times without evidence.**
>
> **In summary I found your behaviour to amount to fraud as you received pay for work you did not do."**

B

C

D

6. There was an appeal against the decision to dismiss. It took place on 23 September 2016 and was conducted by Andy Stopher, the Trust's Deputy Chief Operating Officer. The decision letter on the appeal was dated 27 September 2016. It is, in places, at least to my mind, hard to follow but two important points are clear. First, that the appeal was dismissed and second, that the appeal itself had not been by way of rehearing. The consequence of this is that the substantive reason for dismissal remained the reason, or reasons, relied on by Mr Wisson.

E

F

7. Miss Uddin then brought claims of unfair dismissal and wrongful dismissal to the Tribunal. Both claims succeeded before the Tribunal although the unfair dismissal finding was accompanied by a further finding of 50% contribution. One point that was key to the Employment Tribunal's conclusions concerned the reason for dismissal. At the Hearing Mr Wisson gave evidence. At paragraphs 9.1 to 9.3 the Tribunal's Decision states as follows:

G

> **"9.1. I find that the claimant was dismissed for a reason relating to her conduct, namely her failure to attend shifts as rostered and not working the entirety of her shifts. This is a potentially fair reason.**

H

A

9.2. The respondent, in its dismissal letter, sets out the failure to work shifts as rostered without obtaining authorisation for changes and concludes that this amount to fraud. The respondent's assumption that the claimant received pay for shifts she did not work.

9.3. The respondent has, during the course of the hearing, sought to emphasise the breach of its internal procedures rather than the claimant's alleged financial gain and accepts that the issue is not one of fraud or financial gain but of disregarding instructions and wilfully failing to comply with procedures."

B

8. Those paragraphs reflect an earlier observation made by the Tribunal at paragraph 7.2 of the Decision. There the Tribunal recorded that submissions had been made on behalf of Miss Uddin that in cross-examination, Mr Wisson had accepted, *"that he should not have used the word 'fraud' in his dismissal letter."* He stated that the issue was not about financial loss but about not working the rostered shifts.

C

D

9. At this point I should also mention paragraphs 9.9 and 9.14 of the Tribunal's Decision. At paragraph 9.9 the Tribunal says,

"9.9. Having found that the respondent was entitled to conclude that the claimant had committed misconduct in relation to her repeated failure to notify management of changes to shifts, I go on to consider whether dismissal was an appropriate sanction."

E

Paragraph 9.14 repeated that the Respondent was no longer pursuing an argument that the Claimant had been receiving pay for work that she had not carried out.

F

10. Drawing these matters together it seems to me that two conclusions can be stated. First, that in his evidence Mr Wisson must have modified his position as to the reason for dismissal. He departed from the statement in the letter of dismissal, to the effect that Miss Uddin had committed a fraud by receiving and retaining pay for work she had not done. What remained as the reason for dismissal, certainly included that Miss Uddin had not attended for work, and that on occasions, she had arrived late or left early. It also included the observation that she had not acted in a *"transparent manner"* in respect of the occasions when she was working and those when she was not.

G

H

A

11. Was there anything more that remained in terms of the reason for dismissal? What is not specifically clear from the ET's findings is whether the concession that appears to have been made by Mr Wisson in his evidence, related only to the narrow question of fraud – i.e., had Miss Uddin intended to take wages without working – or whether it went wider and extended to the proposition to the fact that wages had been paid for work that was not done, was not a matter of importance to the Trust for the purposes of deciding whether or not Miss Uddin should be dismissed?

B

C

12. The second conclusion is that the ET itself seems unclear as to what finding it had made as to the reason for dismissal. I have already recited paragraphs 9.1 and 9.3. They are to the effect that there had been a disregard for instructions, and a wilful failure to follow procedures. By contrast, paragraphs 9.9 and 9.11 are formulated in terms of a failure to notify management of shift changes and the rearranging of shifts.

D

E

13. These matters together provide for a rather unsatisfactory starting point for the Tribunal's consideration of an unfair dismissal claim. They are not themselves, points raised in the Trust's grounds of appeal, but they do provide the premise for Miss Uddin's cross-appeal and they also figure in the Respondent's Notice that she has served.

F

14. The position is perhaps further muddied by paragraphs 9.4 and 9.5 of the Decision.

G

> **"9.4. Applying the test in *BHS v Burchell*, I find that the respondent did not genuinely believe that the claimant had committed fraud. I base this on the evidence of the respondent's witnesses who agreed that fraud was not the correct label for this misconduct.**
>
> **9.5. However, I find that the respondent genuinely believed that the claimant disregarded its policies and instructions in relation to changing shift times and swapping shifts. I find that the respondent had reasonable grounds for reaching this conclusion and that a fair investigation had been carried out."**

H

A

There are it would appear then, alternative findings on the first stage of the well-known test in **British Home Stores Ltd v Burchell** [1978] IRLR 379. The first, at paragraph 9.4 on the basis that the first stage of the **Burchell** test had not been met. The second, at paragraph 9.5 on the basis that it had been met by reference to a dismissal on the ground that Miss Uddin had failed to follow policies and had swapped shifts with other workers without authorisation. I should point out that both these paragraphs appear in the Tribunal's Decision under the heading, "*Did the Respondent follow a fair procedure in dismissing the claimant*?"

B

C

15. All these points taken together suggest, it seems to me, a lack of appreciation by the Tribunal of the possible significance of Mr Wisson's evidence at the Tribunal hearing and perhaps also, how the consequences of that evidence needed to be addressed.

D

16. In this appeal the Trust advances three grounds. All are directed to the findings on the unfair dismissal claim. The Trust did originally also challenge the conclusion on wrongful dismissal, but that challenge fell away following a ruling by the Appeal Tribunal that that appeal against the wrongful dismissal conclusion did not disclose any arguable error of law.

E

F

17. The Trust's first two grounds are directed to the Tribunal's conclusion on section 98(4) of the **Employment Rights Act 1996** ("**ERA**"). The first ground is to the effect that the Tribunal improperly substituted its own view for that of the Trust when deciding whether the Trust had acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason. The second ground is that the Tribunal erred in its application of section 98(4) **ERA** by failing to consider all the circumstances of the case. The Trust's third ground of appeal is directed to the Tribunal's further conclusion that Miss Uddin contributed to the extent of 50%

G

H

to the cause of the dismissal. The Trust contends, on this point, that the conclusion that the contribution was only 50% is a perverse finding.

18. By a Respondent's Notice, Miss Uddin seeks to uphold the finding of unfair dismissal on the grounds stated by the Tribunal and on two further grounds. The first is that a dismissal was, in any event, procedurally unfair by reason of failings in the investigation that preceded the disciplinary hearing. For this purpose, it should be noted that for the purposes of its investigation the Trust had regard to CCTV evidence, but only to CCTV evidence for the days on which Miss Uddin had been scheduled to work and not to the CCTV evidence for other days. Miss Uddin contended that if regard had been had to the CCTV evidence for those other days, that might have supported her contention that even though she had not worked her rostered days, she had made up time by working on other occasions. The second point in the Respondent's Notice is made by reference to paragraph 9.4 of the Tribunal's Decision, set out above. It is said that that finding alone, that is, to say that there had been no honest belief on reasonable grounds that Miss Uddin had committed a fraud, should have been a sufficient basis for a finding of unfair dismissal, notwithstanding any further consideration of the matter by reference to section 98(4) **ERA**.

19. Miss Uddin also cross-appeals against the finding of 50% contribution. She contends that no finding of contributory fault should have been made. This submission rests on the premise that in the light of Mr Wisson's evidence, evidence I have already referred to, the ET should have concluded that the reason for dismissal had not been made out and therefore there was no room for any reduction in the level of contribution payable by reason of a finding of unfair dismissal.

A

20. I will deal first with the Trust's first and second grounds of appeal. The entirety of the ET's reasoning on section 98(4) **ERA** was at paragraphs 9.9 to 9.13 of the Decision. This reasoning is to the effect: (a) the Tribunal concluded that what Miss Uddin did (at this point in the Decision being described in terms of a "repeated failure" to notify management of changes to shifts), did not amount to gross misconduct; "therefore" (b) the sanction of summarily dismissal was outside the range of reasonable responses.

B

C

21. The Trust contends that at paragraph 9.11, the finding of the Tribunal that there was nothing amounting to gross misconduct was made because the Tribunal improperly substituted its own judgement for that of the Trust. I disagree with the Trust's submission that there was an impermissible substitution. Whether or not an employee's misconduct amount to gross misconduct is a contractual question. Nothing in Miss Uddin's contract of employment displaces the usual position that if there is a dispute whether conduct amounts to gross misconduct, resolving that dispute is a question of fact for a court. When the question is whether or not what has happened amounts to gross misconduct, absent provision in the contract to the contrary, there is no place for an "impermissible substitution" submission. The court – in this instance the Tribunal – must decide the question for itself.

D

E

F

22. However, is clear to me from paragraph 9.11 and paragraph 9.12 that, the Tribunal's approach to the question of whether or not the dismissal was an unfair dismissal under the **ERA** was incorrect.

G

23. First, the Tribunal should have clearly set out its conclusion on what was the reason for dismissal. Looking at the Tribunal Decision in the round, it is not possible to know with certainty what that conclusion was. The question of financial gain seems to have fallen out of

H

A

the picture (see the finding at paragraph 9.3), although as I have mentioned, there is a possible ambiguity arising from that matter (see above, at paragraph 11). But even if that matter is put to one side, it is still the case that what remained, in terms of Miss Uddin's conduct was characterised differently by the Tribunal in different places in its Decision. At paragraph 9.3 the matter was put in terms of disregarding instructions and a wilful failure to comply with procedure; by paragraph 9.9, it was put in terms of a failure to notify shift changes; and by 9.11 the matter was described in terms of Miss Uddin's absence from work. One particular point that is not clear from paragraph 9.11, is whether the Tribunal in that paragraph was only addressing occasions when Miss Uddin said she had swapped shifts with another worker or whether it was also dealing with occasions when it was apparent that she had arrived late to work or had left early from work.

B

C

D

24. All this may seem a little pedantic, but in a case such as this where it appears that the Respondent's position on the reason for dismissal changed as a result of evidence given during the hearing, it is important that there is a clear and consistent finding by the Tribunal on what was the reason for dismissal.

E

F

25. Second, even if the above matters are disregarded, it is clear from paragraph 9.13 of the Decision that the Tribunal simply equated an absence of gross misconduct with an existence of an unfair dismissal. That was an error in the application of section 98(4) **ERA**. Once a Tribunal reaches its conclusion on the reason for dismissal, the question for the Tribunal is not simply, *"Did the reason constitute gross misconduct?"* but rather, whether the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissal.

G

H

A

26. Even in a case such as this one where the decision to dismiss was framed in terms of gross misconduct, and the Tribunal concluded there had been no gross misconduct, the Tribunal still had to consider whether the reason it found to be the reason for dismissal was, or was not, reasonably treated by the Employer as a sufficient reason for dismissal. That exercise is totally lacking from this Decision.

B

27. I have asked myself whether paragraph 9.11 of the Decision formulated as it is by reference to gross misconduct, could be regarded simply as an inelegantly-worded application of section 98(4) **ERA**. I do not think that it can. As formulated, it is clear that the Tribunal was considering for itself whether what had happened was gross misconduct. It was not asking itself whether the Trust had acted reasonably or unreasonably in the section 98(4) **ERA** sense. This conclusion is underlined by paragraph 9.23 of the Tribunal's Decision. There the Tribunal, addressing the wrongful dismissal claim, simply refers back to its reasoning at paragraph 9.11.

C

D

E

28. For these reasons, my conclusion is that grounds one and two of the appeal must succeed.

F

29. Since that is so, it seems to me that the only course available to me is to remit the unfair dismissal claim to the Tribunal for reconsideration from scratch. The Trust contends, as part of its second ground for appeal, that the conclusion on section 98(4) **ERA** was perverse. If that submission were correct, I accept that it would be open to me to substitute a finding that the decision to dismiss was fair. I see some force in the submission. But for the apparent modification of Mr Wisson's evidence as to the reason for dismissal, it might have been a submission that was difficult to refuse. However, as things stand, I do not accept the

G

H

submission. I have already explained that I am not content with the apparently different ways the Tribunal has successively, in its Decision, formulated the reason for dismissal and the significance of Mr Wisson's evidence on this point. That is a matter that really ought to be looked at again. Quite apart from that, the Tribunal's reasoning, whether looked at overall or whether the focus is paragraphs 9.9 to 9.16, displays a complete absence of consideration of circumstances relevant to the overall appraisal that is required by section 98(4) **ERA**. That being so, I am not in a position to substitute a conclusion for that of the Tribunal, and the questions that arise under section 98 **ERA** must be remitted to the Tribunal for proper consideration.

30. As that is the case, this somewhat overtakes the remaining grounds of appeal, the points in the Respondent's notice and the argument on the cross-appeal. None, strictly speaking, arises for consideration. I will therefore consider each of these points only briefly.

31. First, the Trust's third ground of appeal. I agree that the Tribunal's reasoning (at paragraph 9.20), appears to rest on the question of shift changes rather than the failure by Miss Uddin to work her contracted hours, and in that regard the reasoning seems to miss the true gravamen of Miss Uddin's significant failings as an employee. However, it is important to recognise that when the question is one of contributory fault, the characterisation of conduct as contributory and the weight to be attached to such conduct, are both matters of evaluation for the Tribunal. Such conclusions are not easily disturbed. In this case, had the third ground of appeal stood alone, I suspect it would have failed. However, given that the Tribunal's flawed approach to the section 98(4) **ERA** question and the need to remit for reconsideration of section 98 **ERA** generally, when this case is remitted it will be for that Tribunal to assess the question (assuming it arises), whether or not any reduction to compensation payable for any unfair

dismissal should be reduced by reason of the provision of section 123(6) **ERA**, that is to say, the contributory fault matters. When it comes to that issue, should it arise, the new Tribunal must consider matters for itself unhindered by the conclusions reached by the Tribunal to date.

32. Second, I turn to the points in Miss Uddin's Respondent's Notice. As to the first of those points, concerning the approach to the CCTV evidence in the course of the investigation, if that matter is looked at on its own terms, I do not consider that it identifies any error of law by the Tribunal. In substance, it comes to an argument that the investigation could have been conducted differently, and perhaps in a way that was more favourable to Miss Uddin. I note in particular, the Tribunal's findings at paragraphs 5.12, 5.13 and 5.17 which indicate the problems that arose in the course of the disciplinary process by reason of the way in which the CCTV evidence was treated.

33. Yet none of that is to say that what actually happened in the course of the investigation was unreasonable. Given that the role of the Tribunal, on this question, is not to second guess the precise course of an employer's investigation but rather to consider whether, looked at overall, the investigation actually carried out was part and parcel of fair process, I see no error in the Tribunal's reasoning on this specific point. In my view the conclusions reached by the Tribunal on this issue were ones that were reasonably available to them. Clearly, as the case is now to be remitted to a Tribunal for reconsideration, it will be for that Tribunal to look again at the CCTV issue and the question of the investigation. It will do so unhindered by the conclusions reached by this Tribunal.

A

34. The second point in the Respondent's Notice relies on paragraph 9.4 of the Tribunal's Decision. The submission is to the effect that that paragraph is, of itself, a sufficient basis for a conclusion that the dismissal was unfair, regardless of any need to consider section 98(4) **ERA**.

B

35. If paragraph 9.4 is considered in isolation, I can see that there is some force to that submission. I say, "some force" rather than putting the matter any higher simply because, if one looks at paragraph 9.4, it is possible that the point being made there by the Tribunal relates only to the label of "fraud" that was applied in the context of the dismissal letter; and perhaps it does not relate to any matter of substance underlying the actual acts of misconduct relied on by the Trust as the reasons for dismissal (see above at paragraph 11).

C

D

36. But paragraph 9.4 does not stand alone. At paragraph 9.1 there is a finding that there was a potentially fair reason for dismissal; there is a further finding at paragraph 9.5 that by reference to that potentially fair reason for dismissal, the first limb of the **Burchell** test was satisfied by the Trust in this case. The short conclusion is, if all those elements of the Tribunal's Decision are taken together, the overall picture is simply far too confusing to make any clear sense of it, to the extent of reaching any certain conclusion that paragraph 9.4 would, on its own, be a sufficient basis for a finding that Miss Uddin had been unfairly dismissed.

E

F

37. Thirdly, I consider the cross-appeal. The premise for this is the Tribunal's conclusion that the reason for dismissal, as stated in the dismissal letter, was not fully made out following the evidence. The difficulty in respect of this point is the ambiguity in the way in which Mr Wisson's evidence on the matter is recorded. As I have said earlier in this Judgment, was it no more than abandoning any suggestion that Miss Uddin had acted intentionally and for gain, or did the concession he made indicate that the Trust did not consider overpayment of wages to be

G

H

important? The submission on the cross-appeal assumes the latter and, based on that, says that any finding on contribution must therefore be flawed.

38. It seems to me that this ground of appeal is really concerned with the ET's approach to section 98(1) **ERA**, rather than being truly related to the question of contributory fault. If Mr Wisson's evidence amounted to a material failure to make good the reason for dismissal, then the unfair dismissal should have succeeded on that point alone, with no need for consideration of section 98(4) **ERA**.

39. However, that is not the way the point is put, and I must address it on its own terms. The Tribunal's conclusion that the fraud or financial gain were not parts of the reason for dismissal did not require it to ignore the findings that it did make as to why the dismissal took place, or to ignore the obvious fact that whether or not those reasons raise sufficient reason for dismissal, they certainly constituted some form of misconduct on the part of Miss Uddin. The submission that the Tribunal should have proceeded on the basis that no misconduct had taken place at all, amounts to an attempt to rewrite history. There were, even on the findings made by the Tribunal, obvious and serious failings on Miss Uddin's part. Had it been necessary for me to determine the cross-appeal in order to dispose of these proceedings, I would have had little hesitation in dismissing it.

40. I turn, finally to the question of the disposal of the appeal. It follows from what I have already said, that the Trust's appeal must be allowed, and in those circumstances the finding of unfair dismissal should be set aside, and the claim be remitted to a Tribunal for reconsideration. I do not consider it necessary for the claim to be remitted to the same Tribunal. There is no reason why this claim could not be heard by any Tribunal that is available to consider it.

A

41. For the avoidance of doubt, none of the conclusions reached by the Tribunal Decision that has been the subject of this appeal should be taken to be binding on the new Tribunal. The new Tribunal should form its own independent judgement on all issues going to whether or not the unfair dismissal claim succeeds, and if it does succeed to the remedy that should be afforded in those circumstances.

B

C

D

E

F

G

H