Appeal No. UKEATS/0029/18/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 12th November 2020
Handed down
28TH January 2021

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

NORTHBAY PELAGIC LIMITED — APPELLANT

MR COLIN ANDERSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr P A Grant-Hutchison (of Counsel) Instructed by: Nash & Co Solicitors Beaumont House Beaumont Park Plymouth PL4 9BD
For the Respondent	Mr K McGuire (of Counsel) Instructed by: Quantum Claims 70 Carden Place Queens Cross Aberdeen AB10 1UL

SUMMARY

TOPIC NUMBER: 11 Unfair Dismissal

The Respondent appealed the Tribunal's decision that the Claimant had been unfairly dismissed. The Tribunal had concluded that having regard to s. 98 of the **Employment Rights Act 1996** the Respondents decision to dismiss fell outside the band of reasonable responses. On Appeal the Respondent argued that the Tribunal had fallen into a substitution mind-set. **Held** (1) that the Respondent had not adopted a substitution mind-set but in respect of one of the grounds of dismissal had failed to recognise that the Claimant who was both an employee and director of the Respondent, had participated in a meeting with fellow directors where a decision had been taken that he should not take a particular course of action and that such a decision was in law binding on him. In this situation it was not open to him to disobey the instruction notwithstanding his personal wish to do so; (2) that while there were dangers in relying on a written statement given by a witness in lieu of attending the tribunal such evidence was in principle admissible even when it had been taken by the HR consultant who conducted the disciplinary hearing. Where, as here, the statement had been taken for the purposes of another disciplinary matter the statement could not be said to transgress the ACAS Code and in any event the circumstances did not disclose any risk of unfairness; (3) that while the Tribunal's conclusion that the outcome of the disciplinary process had been pre-determined by a senior manager of the Respondent might be thought open to doubt, in the absence of any challenge to the Tribunal's conclusion it was not open to the EAT to disturb the Tribunal's conclusion to that effect; and (4) that the Tribunal was entitled to reject the Respondent's conclusion that the Claimant had breached the law in installing a covert camera in his office while he was suspended from duty.

THE HONOURABLE LORD SUMMERS

1. In this case I heard an appeal from the Employment Tribunal sitting in Aberdeen. The Claimant had been dismissed from his employment because of misconduct. He was dismissed at the same time as two other employees. The Respondent had hired three HR consultants to investigate and dispose of their cases. In the Claimant's case one, Ms Bailey, conducted the investigation another, Ms Newton, conducted the disciplinary hearing and the third, Ms Flattery, heard the appeal. Ms Newton upheld five allegations of misconduct (hereafter "the Grounds") and on behalf of the Respondent dismissed the Claimant. Ms Flattery refused the Claimant's appeal. The Claimant applied to the Tribunal and claimed that he had been unfairly dismissed. The Tribunal was not satisfied that the Respondent was entitled to dismiss under s 98(2)(b) of the **Employment Rights Act 1996**. The Tribunal held that the Claimant had been unfairly dismissed and made a suitable award of compensation. The Respondent appealed to the Employment Appeal Tribunal.

2. **The Employment Rights Act 1996** section 98 provides (so far as relevant) as follows -

> **98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it—**
>
> **(a) -**
>
> **(b) relates to the conduct of the employee,**
>
> **(c) -**
>
> **(d) -**

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

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

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

3. While the appeal was at avizandum I asked the parties to supply me with copies of the Investigation Report, the Decision Letter and the Appeal letter compiled by the HR consultants. Copies were supplied to me via my clerk. Unlike the documents in the Core Bundle which are referred to by page number in the judgement below, these documents are unnumbered.

The Background

4. The Respondent is a limited liability company. It was set up to acquire the business of a company called Fresh Catch Ltd. (hereafter Fresh Catch). The acquisition took place in January 2014. Three companies had shareholdings in the Respondent. Interfish Ltd (hereafter "Interfish"), Altaire Fishing Company Ltd. (hereafter Altaire) and Cool Seas (Seafood) Ltd. (hereafter "Cool Seas"). Interfish held 35% of the voting rights and Altaire held 25% of the voting rights in the Respondent. Cool Seas held 40%. The Respondent was managed by a board of five directors supported by a management team. Three directorships were associated with Interfish and Altaire. Mr Jan Colam was one of those directors. He controlled Interfish and Altaire. The Judgement does not disclose who held the other two directorships associated with the companies under Mr Colam's control. It appears from the Decision Letter however that they were corporate directorships. Thus Interfish held a directorship and IF Ltd held a directorship. Both of these companies were under the control of Mr Colam. Cool Seas, which held the minority interest, was owned by the Anderson family. The Claimant and his father Mr. Chris Anderson had, prior to its

A acquisition by the Respondent, owned and controlled Fresh Catch. Both were directors of the Respondent at the time of the events narrated below.

B

5. At some point after the acquisition the relationship between Mr Colam and the Andersons began to sour and by the end of 2015 it had completely broken down. This led to the dismissals referred to above. The Claimant was suspended on 16 March 2016 and dismissed from the C Respondent's employment on 30 June 2016. He was also removed as a director of the Respondent. Mr Chris Anderson, the Claimant's father, was suspended at the same time and dismissed as an employee on 29 April 2016, the day before the Claimant. He too was removed D as a director of the Respondent. Another member of the family Jimmy Anderson was dismissed at the same time. I have little information about the circumstances of his dismissal.

E

6. There were originally seven grounds of complaint against the Claimant (paragraph 14). Five were upheld. For simplicity I have followed the numbering adopted by the Tribunal and discuss the grounds of dismissal 1-5. The Tribunal rejected each of these grounds of dismissal F and the Claimant was held to have been unfairly dismissed. The Respondent has appealed the Tribunal's judgement.

G

The First Ground of Dismissal

7. The first ground upon which the Respondent based its dismissal was an allegation that the H Claimant failed to act in the best interests of the Respondent. The Claimant had intervened so as to prevent a contractor working at the Respondent's site in Peterhead from using certain building

materials. The Claimant had done so because he understood the building materials to belong to Anderson Construction Ltd, a company owned by the Claimant's father. Anderson Construction Ltd had recently been put off site by the Respondent. It was asserted that in doing so the Claimant had acted contrary to the interests of the Respondent and acted in the interests of his father's company. This ground of dismissal was upheld at the disciplinary hearing convened by Ms Newton on behalf of the Respondent and on appeal therefrom by Ms Flattery.

8. The Tribunal did not accept that the Claimant's conversation with Mr Good constituted a sufficient ground for dismissal and held that his dismissal on Ground 1 was unfair. Before me the Respondent submitted that in rejecting the Respondent's decision to dismiss, the Tribunal had adopted a substitution mind-set. It submitted that the Tribunal had failed to acknowledge that on the facts found proved, dismissal lay within the band of reasonable responses open to the Respondents. The Respondent submitted that the decision to dismiss on this ground was open to the Respondent.

9. I consider that the tribunal was correct to reject this ground for dismissal. I accept that the Tribunal was obliged to afford the Respondent considerable latitude in forming its view of the misconduct alleged. I accept that tribunals should if possible respect the view of the employer. I also accept that the Claimant was not entitled to put his father's interests before the Respondent's interests. The difficulty for the Respondent is that it is not clear that he did so or that the Respondent's interests were harmed in any way by the Claimant's actions. Anderson Construction Ltd had a claim over the materials in question. Although its precise nature was not explored in evidence, there was no dispute that Anderson Construction Ltd had a claim over the building materials. After the Claimant's intervention, Anderson Construction Ltd reached an

agreement with the new contractor and in return for payment the new contractor was allowed to use the materials. Thus while it is true that the Claimant's intervention served Anderson Construction Ltd's interests, it also served the Respondent's interests in that it ended up using materials that it was entitled to use. It might be argued that he should not have assumed that Anderson Construction Ltd's claim was lawful and that he should have checked to see whether those who were responsible for the works at the Respondent agreed with his father's assertion. It might also be said that because of his personal connection to Anderson Construction Ltd. he had a conflict of interest. All round however his intervention has the appearance of being a minor matter. It is clear that his intervention did not cause the Respondent any harm and indeed seems to have been for their benefit. His intervention was at worst a technical infringement of his duty as an employee to serve the interests of the Respondent.

10. In these circumstances I am unable to uphold this challenge. The facts support the Tribunal's decision. In the final analysis the new arrangement for the use of the materials on the site was the best outcome for everyone. I accept that the Tribunal was entitled to hold that the Respondent's decision to dismiss on this ground was outside the band of reasonable responses. On the facts found established and the Tribunal's reasoning I am unable to accept that the Tribunal substituted its assessment for that of the Respondent. In any event the Tribunal considered the disciplinary process to be under the control of Mr Colam. No challenge was brought by the Respondent to this finding by the Tribunal. In that peculiar circumstance I consider the Tribunal was entitled to take a narrow view of the Respondent's factual conclusions. The Tribunal's reasoning in this connection is discussed in more detail at paragraph 87 under the heading "The Fairness of the Process".

The Second Ground of Dismissal

11. On 14 March 2016 those responsible for the management of the Respondent held a telephone conference. During the call there was a discussion about a landing of capelin at Peterhead from a Norwegian vessel, the Haugagut. Capelin is a small fish found in the North Atlantic. It is used to make fish meal and is used in oil industry products. It is an edible fish and is occasionally sold to the food industry or for gastronomic purposes.

12. The landing had occurred in February 2016, the month before the meeting. Although neither side gave an account of the statutory framework that governs landings of fish in Scottish fishing ports, it was common ground that the Respondent had a statutory duty to provide information about such landings to Marine Scotland and to HMRC. Such data is necessary for the purpose of marine conservation and to enable in this case the correct assessment of import tax. In this case, it would appear, the fish were caught in Icelandic waters by a Norwegian vessel, sold to a UK company and landed at a Scottish port, Peterhead.

13. It was common ground that the Respondent had reported the wrong weight of capelin to HMRC. Landing declarations are closely monitored by the Scottish and UK Governments. Criminal penalties attach to mis-declarations. It is within judicial knowledge that in the years prior to 2016 there had been a number of high profile prosecutions of both skippers and fish processing companies over their failure to declare what were colloquially known as "black fish".

14. Prior to the conference call the Claimant there had been discussion between the Claimant and the Respondent about the erroneous landing figures. He indicated to the Respondent that he wished to assume personal responsibility for correcting the figure. In order to establish whether he was entitled to make the correction he spoke to his own solicitors. They communicated with the Respondent's management shortly before the conference call of 14 March 2016 as follows -

> **That landing fell under Customs Warehouse rather than IPR authorisation. Colin Anderson is dealing with the situation… he will report to HMRC… there was no deliberate mis-recording of the catch.**

The fact that the Claimant was communicating with the Respondent to set out his position on the legal status of the landing, his right to liaise with HMRC over the catch and the question of whether the figures had been deliberately mis-reported fits with the account given by Mr Ritchie in a written statement discussed more fully hereunder. Mr Ritchie indicates that Mr Anderson senior had deliberately mis-recorded the catch. He explains that the Claimant was aware of the fact that "Plymouth" where the Respondent was headquartered wished to handle the mis-reporting themselves. The Claimant was obviously entitled to take independent legal advice on any matter that affected his personal interests or those of Cool Seas. It is not so clear what independent interest he had in connection with the landing of capelin. His decision to communicate with the Respondent though his own solicitors is indicative of a dispute between the majority interest in the company and the Andersons who held the minority interest over how the Respondent should handle the capelin landing.

15. The Conference Call (paragraph 31) on 14 March 2016 was a formal meeting. Minutes were taken and were produced to the Tribunal. Three directors of the Respondent, at least, were present. Mr Colam, Mr Anderson, senior and the Claimant. As noted above the two other

directorships were corporate directorships in the hands of IF Ltd and Interfish. Mr Pillar, a senior manager based at Interfish's Plymouth office was a director of IF Ltd. He appears to have led the discussion in the Conference Call. The Minutes show that the need to correct the erroneous landing figure on the agenda. There is no discussion of the Claimant's wish to correct the figure. Mr Pillar simply told the Claimant that the Respondent's solicitors would deal with the matter on behalf of the Respondent. The minutes state -

> **To protect NB they've taken steps to put it in writing to protect from Marine Scotland and HMRC. The solicitor is taking action to make sure the company is protected and reduce the risks.**

Mr Pillar stated -

> **But for now Colin you don't been (sic) to pursue HMRC as it's being dealt with.**

"Colin" is Mr Colin Anderson, the Claimant. There is no indication in the Minutes that the matter was discussed. There is no indication that the Claimant expressed a contrary view. The reason for this is obvious. The issue had already been the subject of discussion prior to the conference call. The email sent by the Claimant's solicitors before the meeting set out the Claimant's position and represented the course of action he wished to follow. See also Mr Ritchie's written statement. Mr Pillar's direction took the form it did because it represented the view of the controlling interest. The lack of dissent in the Minutes reflects the fact that the Andersons were not in a position to overrule the view conveyed by Mr Pillar. It is evident from the timing of the communications that the Claimant contacted his solicitors to see whether he was bound by the "decision".

16. His solicitors emailed the Respondent later the same day as follows -

> **We understand that your clients have told Colin Anderson that he is not to report any matter arising from the alleged declaration of the capelin catch from 9/10 February…**

The solicitors for the Claimant went on to state that the Claimant and his father had a duty to report the true figure under the Customs Warehouse Regulations (paragraph 34). The solicitors presented an ultimatum to the Respondents. They stated that if the Claimant did not explain why he should not report the position to HMRC by 11am the next morning he would proceed to correct the figure himself. No reply was received and at 12.59 on 15 March 2016 he emailed HMRC stating that he needed to amend "import no. weight 410-900965- 16.02.216 due to miscount on production stock". He advised that the true weight was 78 909 kg and that the value of the landing had not changed.

17. The Respondent reacted swiftly. The Claimant was suspended the following day. When disciplinary proceedings were taken it was alleged he had disobeyed a management instruction. This was the basis of Ground 2. The allegation was upheld and the Claimant was dismissed. The Tribunal came to the conclusion that he should not have been dismissed on this ground. The Tribunal's reasoning appears in my discussion below.

Instruction or Advice?

18. The Tribunal was not confident that a management instruction had actually been given. Thus at paragraph 151 the Tribunal says

> **The "instruction" *such as it was*, was given at the Management Meeting on 14 March 2016. (my italics)**

The reasons for the Tribunal's scepticism are set out at paragraph 152 where the Tribunal states

> **It was arguable that what Mr Pillar said to the claimant at that meeting did not even constitute a proper management instruction, Mr Pillar was not an employee of NBP; he did not hold a position senior to the claimant, only Jan Colam did and although he participated in the conference call he gave no direct instruction to the claimant. Further what Mr Pillar said to the claimant could be viewed as "advice" rather than a formal instruction…. Further the "instruction" was given at the end of the Management Meeting which was attended by a number of members of staff and not a board meeting.**

19. The Tribunal does not however go on to decide whether Mr Pillar's direction was a management instruction. At paragraph 153 after setting out the arguable points the Tribunal stated -

> **When I considered this, and set the allegation in context, I was driven to the view that in all the circumstances no reasonable employer acting reasonably could have taken the view that by advising HMRC of the correct weight of the landing the claimant had failed to follow a reasonable management instruction, that he had not acted in the best interests of NBP and that this constituted misconduct on his part, let alone gross misconduct.**

At paragraph 154 the Tribunal concluded that the Respondent was not entitled to decide that the Claimant's actions constituted misconduct. The Tribunal does not refer to the direction given by Mr Pillar or the various points referred to in paragraph 152. There is no analysis of the Minutes or whether Mr Pillar's words should be treated as an instruction. Thus although paragraph 153 opens with a reference back to the arguable points listed in paragraph 152, it is not clear what the Tribunal made of the suggestion that the Claimant had not been given a management instruction.

20. In order to assess the position it is necessary to examine the Minutes. The relevant part reads -

But for now Colin you don't been to pursue HMRC as it's being dealt with.

The word "been" does not make grammatical sense. The author probably meant "you don't [need] to pursue HMRC" or something similar. At this stage of the meeting Mr Pillar is responding to the Claimant's contention that he should be allowed to correct the erroneous landing figure. The Claimant was told that the Claimant did not need to "pursue" HMRC and that the issue of the mis-declaration was "being dealt with". The Claimant's solicitor's email to the Respondent's solicitor on 14 March 2016, later the same day makes it clear what the Claimant understood Mr Pillar to mean.

We understand that your clients have told Colin Anderson that he is not to report any matter arising from the alleged declaration of the capelin catch from 9/10 February…

The solicitor's understanding was that "your clients" had told the Claimant not to report the mis-declaration. "Your clients" may refer to the Respondent or to Interfish and/or Altaire, who held the majority interest.

21. The solicitor's email shows that the Claimant understood Mr Pillar to mean that he should "not report any matter arising from the alleged declaration of the capelin catch from 9/10 February". If the Claimant did not understand these words as an instruction it is difficult to see why his solicitors disputed the right of the Respondent to deal with the matter through the company solicitors. The email goes on to set out factors which the Claimant's solicitors considered entitled him to report the correction to HMRC despite Mr Pillar's words. Had he thought that Mr Pillar's words were advisory the solicitors would not have expressed themselves

as they did. In my judgement it is clear that the Claimant was instructed to leave the task of correcting the landing figures to the Respondent's solicitor.

22. The other factors mentioned by the Tribunal in support of the proposition that Mr Pillar merely advised the Claimant not to correct the declaration are of little weight. Mr Colam's silence is neither here nor there. Mr Pillar was a director of a company under Mr Colam's control. Mr Colam was present during the conference call. The natural implication to be drawn from Mr Pillar's instruction is that Mr Colam agreed that the Claimant should not report the true figures. Nor am I able to accept that anything turns on the fact that the instruction was given at the end of the meeting. The Tribunal does not explain why that circumstance was capable of altering the meaning or significance of Mr Pillar's words. I am equally unable to accept that the presence of members of staff along with the directors diminished the authority that lay behind the message delivered by Mr Pillar. The Andersons did not object to the instruction being issued at the meeting or ask for a meeting of the directors to reconsider the matter. In the Decision Letter I note that the Claimant appears to have accepted in the disciplinary hearing that he was instructed not to speak to HMRC.

23. I am conscious of the fact that it is not for the EAT to decide issues of fact. That is the province of the Tribunal. The difficulty I have encountered in this connection is that the Tribunal fails to answer the questions it raises over the status of Mr Pillar's direction. I consider the answer to the various points raised by the Tribunal could have been dealt with. I consider that the Tribunal is merely expressing its doubts. Had it sought to answer them it would have concluded there was an instruction. That is consistent with the tenor of the remainder of the Tribunal's judgement. The Tribunal went on to hold that an unreasonable management instruction had been issued. It is

A evident therefore that it accepted an instruction was given. The Tribunal implicitly rejects the notion that Mr Pillar's words were a request rather than an instruction. I consider that in light of the considerations outlined above this was the correct conclusion.

B

Was the Claimant Entitled to Correct the Landing Weight?

C 24. At paragraph 153 the Tribunal held -

> **…no reasonable employer acting reasonably could have taken the view that by advising HMRC of the correct weight of the landing the claimant had failed to follow a reasonable management instruction**

D

At paragraph 154 then explains why it reached this conclusion.

> **As a director he had a legal obligation to ensure that HMRC was advised of the correct weight. The Tribunal accepted the Claimant's evidence that he had instructed the Factory Manager Mr Chris Ritchie to report the full weight but he had not done so.**

E

25. Unfortunately the Tribunal does not explain why being a director entitled the Claimant to F ignore the decision conveyed to him by Mr Pillar. It is possible that the Tribunal considered that the "Customs Warehouse" regulation referred to by the Claimant's solicitor obliged the Claimant as a director to correct the figure reported to HMRC. If so the relevant provision is not referred to in the Judgement. No such regulation and was cited to me. In this situation I am unable to G conclude that the Claimant had authority to correct the weight if his authority is said to rest on a regulation whose identity and contents were never made clear. Given that one would expect that responsibility for the declaration would lie with the purchaser of the capelin it seems implausible H that an independent right to correct the landing figure should arise from any regulation.

26. Another possibility is that the Tribunal considered the Claimant had authority to correct the figure by virtue of his status as director of the Respondent. The usual position however is that companies are governed by the directors acting as a board (see e.g. **Haycraft Gold Reduction & Mining Co, Re** [1900] 2 Ch. 230 per Cozens-Hardy, J at p 235). As one might expect this principle operates at both formal board meetings and informal gatherings of the directors (Palmer's Company Law paragraphs 8.2125 and 8.2128) provided it is clear that despite the informality, company business is being transacted and there is a quorum. Decisions taken by the board are a form of collective decision making. I am unable to say with certainty that the decision taken on the conference call was a decision of the Board without seeing the Respondent's Articles of Association and its provisions about board meetings. But on the evidence presented I consider that the conference call was a meeting of the directors of the company. Although the words of Mr Pillar take the form of a direction or instruction in substance they represent a collective decision by the board of directors. The direction or instruction emanates from the power of the directors to bind one another when they reach a decision on a matter affecting the company. From the perspective of employment law it was not as such a management instruction. The Claimant was a manager as well as a director. I consider that the conference all can be considered as a meeting of the managers of the company. The authority to decide any matter that was in dispute between managers lay with those who Mr Pillar spoke for. I prefer to regard this as an example of a collective management decision rather than an instruction from one manager to another. Although the Claimant disagreed with Mr Pillar's direction, he was bound to follow it. He was not at liberty either as director or employee to "do his own thing". No doubt the Claimant appreciated that Mr Colam was in a position to get his way. The direction should be seen in the context of a debate that had preceded the meeting as to what course of action should be adopted. Mr Pillar's direction settled the argument. But it would appear to me that he is to be

regarded as having participated in the decision taken at the meeting and to be bound by it as an employee. The decision had collective effect. Secondly, I consider that it bound him in his capacity as director. I consider that Mr Pillar's words should be taken to represent a board decision given the presence of the company's directors. While Mr Pillar's words took the form of a direction, this was no doubt because there was no point in having a discussion. He was expressing the will of the majority interest. But his direction in law nevertheless is to be regarded as the decision of the board. The lack of dissent may simply represent an acknowledgement that Mr Colam's wishes would carry the day whatever the Claimant thought. I consider therefore that the decision was a decision taken by the board on behalf of the Respondent. It is clear at least three directors were present. On balance t seem likely that four were present since Mr Pillar was also a director of IF Ltd which held a corporate directorship in the Respondent (see paragraph 4). He appears to have led the discussion and exercised authority consistent with that of a director. In my opinion therefore it is not possible to accept that the Claimant was entitled to correct the figure because he was a director. In fact the reason he was not entitled to correct it was because he was a director.

27. I recognise that I must proceed with caution where, as here, there was not attempt to explore the Claimant's position from the point of view of company law at the Tribunal. However it would appear to me that the facts that guide my conclusion are established. Although the Claimant wished to take matters into his own hands the upshot of the meeting that morning was that the Respondent decided that the company solicitors would deal with the matter. He was not in a position to get his own way.

28. The Judgement refers to the Claimant's belief that if they did not correct the figure the Respondent might lose its "Customs Warehouse authority" (paragraph 28). I am sure this was a legitimate concern. The Claimant however was not the sole arbiter of commercial risk.

29. Mr Colam controlled Interfish and Altaire and was in a position by virtue of his majority shareholding to vote down any motion that the Claimant or his father might have tabled authorising him to make the correction. This may explain why Mr Pillar's instruction was not disputed by the Claimant. The minutes of the conference call do not record any challenge to Mr Pillar's instruction. It would appear that the Claimant left the meeting and took legal advice from his own solicitors. He was entitled to take independent legal advice. But it does not follow that the Respondent was obliged to follow the advice the Claimant received. The Respondent was entitled to follow the advice given to it.

30. I note that the Tribunal after expressing its conclusion that the Claimant had a legal obligation to report the true figures, refers to the evidence of Mr Ritchie, the manager of the fish factory and whether the Claimant instructed Mr Ritchie to correct the weight. It is not clear to me what relevance this has for the Claimant's authority to correct the weight (paragraph 154 lines 31-34). If he did instruct Mr Ritchie to correct the figure he did so without authority. A written statement from Mr Ritchie was provided to the Tribunal (p 67 Core Bundle). The tribunal was not willing to consider his statement (see below). According to the statement Mr Ritchie he had a discussion with the Claimant before the conference. He told the Claimant that "Plymouth" did not want the Claimant to make the correction. If that is so it is understandable why Mr Ritchie did not obey the Claimant's instruction. The Claimant may have been a director of the Respondent. But he was one of five directors. Cool Seas, the company he and his family owned, held a minority stake in the Respondent. While no doubt his role as Sales Director was important the authority to decide this sort of issue did not lie with him.

31. I see no basis in the evidence for the proposition that he could act independently of his fellow directors and managers and determine an issue of this nature. The weekly conference call indicates that the directors and managers operated collectively, as I would expect. It is moreover perfectly obvious from the context that he knew that the erroneous reporting of the capelin landing was a serious matter. There is nothing in the Judgement to suggest that he had personal authority to deal with reporting issues. The dialogue with the Respondent and his personal solicitors before and after the conference call indicates that he was aware that correcting the capelin figure was a matter that affected the company's interests and not the sort of decision that would be taken without consultation. I accept that directors have a discretion to decide matters within their sphere of authority but there is no indication in the Findings in Fact that liaison with HMRC and Marine Scotland over mis-declarations was his peculiar responsibility. Given the nature of the issue one would expect this to be a matter for the company's directors.

32. It is possible the Tribunal thought that he had a duty to report the correct figure because it considered that the Respondent was not going to correct the capelin figures. Although I heard no submissions on the point it may be that a duty to act could have come into existence if he had reason to believe that a criminal offence would be committed by the Respondent. But no basis is laid for such a duty in the Findings in Fact. There is no finding that Mr Colam or any other manager did not wish to report the true figure or that the Claimant was entitled to believe that they did not intend to report the true figure. Such indications as there are suggest the contrary. The minutes indicate that the company solicitors had been given the task of dealing with the correction. The Core Bundle at p 67 contains a letter from HMRC dated 5 April 2016 acknowledging a letter of 24 March 2016 from the Respondent's accountants, RSM. Nothing

turns on the fact that accountants rather than solicitors made contact with HMRC. This conclusion disposes of the Tribunal's reasoning at paragraph 156.

Was the Claimant relieved of his obligation to obey the instruction?

33. The Tribunal's further reasoning is at paragraph 157. The Tribunal observes that the Claimant warned the Respondent that he intended to disobey the instruction. He took advice from his solicitors. They said he was entitled to report the true figure. He gave the Respondent a deadline and told them that if they did not respond by that deadline he would ignore the instruction and report the weight personally.

34. I remind myself again of the EAT's responsibility to defer to the Tribunal on matters of fact. Looking at matters generally however I am struck by the failure of the Tribunal to take account of the Claimant's responsibility as a director and employee, to obey an instruction and to co-operate with decisions of the directors and managers. A warning that he intended to act unilaterally and report the figure to HMRC could not elide the instruction or convert his actions from unlawful ones to lawful ones. Likewise the fact that he took advice is of no relevance. The advice came from solicitors representing his personal interests. He was not at liberty to ignore decisions he disagreed with merely because solicitors told him he could. Nor was he entitled to use the ultimatum procedure to challenge and overturn decisions. The ultimatum did not alter the instruction. The instruction could only be altered if the Respondent rescinded the decision. The Respondent did not respond to the ultimatum. It is impossible to argue that its silence should be understood as consent.

35. There may be other possible grounds for the decision of the Tribunal. The Tribunal may have thought that the Respondents had not given any good reason why the Claimant should not make the correction. It may have thought that all that mattered was that the correction was made. But if these factors informed the Tribunal's decision they are not made explicit. In light of the fact that the duty to provide accurate figures lay on the Respondent and that it had decided that the Claimant should not make the correction, it would be unwise to speculate why the Respondent did not wish the Claimant to make the correction and unwise to speculate as to why the Claimant was determined to do so personally. It is sufficient that the instruction was given and deliberately disobeyed. The accuracy of landing declarations was admitted by the Claimant's counsel to be an important matter. A failure to report accurately was potentially a criminal offence. In these circumstances I do not consider the Tribunal's absolution of the Claimant's decision to disobey the instruction has a sufficient basis in law.

Mr Ritchie's Written Statement

36. In the Notice of Appeal the Respondent submitted that the Tribunal had erred in refusing to take cognisance of a written statement from Mr Ritchie, the factory manager (see Notice of Appeal (b)(i)). Its position was that the Tribunal had taken this approach because it had adopted a substitution mind-set. The Notice of Appeal however does not actually address the Tribunal's reasons for refusing to have regard to the written statement (paragraphs 29 and 54). The Respondent does not explain why the use of the statement in the case against the Claimant was not a "fatal flaw" (paragraph 155). Instead the Notice focusses on the consequences of the Tribunal's decision, namely the failure of the Tribunal to look at the evidence the Respondent relied on in making its decision to dismiss. But I do not think that this can be attributed to a substitution mind-set. It declined to do so because it considered the statement should not have

been before Ms Newton. In effect it regarded the statement as inadmissible evidence. I will analyse the Tribunal's view in due course.

37. Mr Ritchie's evidence took the form of a written statement based on an interview with Belinda Newton, one of the HR consultants hired by the Respondent, on 17 March 2016 (p 67 Core Bundle). The statement was taken up in connection with the disciplinary proceedings against Mr Anderson, senior. It supplies a detailed account of the capelin landing on 9 and 10 February 2016 and events thereafter. Mr Ritchie in summary stated that there were two problems with the landing. First the flow scale in the factory was not reading accurately. Second, the skipper of the Haugagut, the Norwegian vessel, wanted to land "black fish", that is fish that was in excess of his entitlement and was as a consequence not recorded on the landing declaration or in the Respondent's record of purchase. It is alleged that he approached Mr Ritchie and explained how he had by misadventure managed to catch more fish than he was entitled to land. He wanted the Respondent to purchase the "black fish". Mr Ritchie stated that he would not co-operate. According to Mr Ritchie, the skipper then spoke to Mr Anderson, senior. He agreed to take the excess fish. The statement makes it clear that these extra fish were not recorded in the Respondent's record of the purchase. The critical part of the statement for the purpose of the Respondent's case is as follows (Core Bundle p 190).

> **(*Mr Ritchie*) said that... he was speaking to (*the Claimant*) and (*the Claimant*) asked how the overweight landing had happened and he had explained the sequence of events to him. (*The Claimant*) said he wanted Vanj, who is responsible for the HMRC returns at Northbay Pelagic, to report the matter to the HMRC. (*Mr Ritchie*) explained to him that Plymouth (*the Respondent's head office*) were dealing with it and had told him not to do anything but (*the Claimant*) said he would still be reporting it. (*The Claimant*) told (*Mr Ritchie*) that he would ask Vanj to amend the IPR declaration figures. (*Mr Ritchie*) said he got hold of her and told her not to change the figures and reported the matter to Mr Andy Pillar in Plymouth on 11 March and he told (*Mr Ritchie*) to tell Vanj again not to change the figures. (*Mr Ritchie*) said that he told both (*the Claimant*) and Vanj that Andy had said not to change the figures. On the morning of 14 March there was the usual conference call between Peterhead and Plymouth and everyone**

> **was told that none of them should be doing anything as the matter was in the hands of the Scottish Protection Agency and HMRC. (my italics)**

38. Mr Ritchie's statement exonerates the Claimant from participation in the landing of "black fish". Mr Ritchie largely confirms the Claimant's position before the Tribunal. It states that the Claimant wanted to correct the erroneous figures. In one respect however Mr Ritchie's evidence differs from the Claimant's. Mr Ritchie states that he told the Claimant "how the overweight landing had happened". The natural reading of this evidence in light of his earlier disclosure that Mr Anderson, senior had agreed to take the "black fish", is that he told the Claimant that his father had agreed to land "black fish". On its face this indicates that the Claimant knew that whatever complications had been caused by the flow scale, "black fish" had been landed. The erroneous figure on this version of events was caused both by the difficulty with the flow scale and Mr Anderson, senior agreeing to acquire fish caught in excess of the Haugagut's entitlement.

39. I accept of course that this evidence does not go to the core issue of the Claimant's authority to correct the figure reported to HMRC. But it is evidence relevant to the Claimant's reliability and credibility. The Tribunal records the Claimant's evidence in this connection at paragraph 28. The Claimant acknowledged that Mr Ritchie had told him that they had purchased more capelin than had been declared to HMRC and Marine Scotland. The Claimant explained to Mr Ritchie that because the capelin had been caught by a Norwegian vessel the fish should be treated as an import and that they could not be sold in Europe. The critical piece of evidence was as follows -

> **The claimant instructed Mr Ritchie to report the full weight to HMRC as recorded by the scales. However Mr Ritchie advised him that this would mean that the invoice would not match as the scales "were over".**

40. Mr Ritchie's statement however indicates that the mismatch was not just due to a problem with the flow scale. If Mr Ritchie's evidence had been regarded as admissible it would have opened up the question of whether Mr Ritchie should be believed and whether, if he was to be believed, it was credible that the Claimant did not know that his father had agreed to take the "black fish".

41. The Tribunal appears to have been under the impression that there was a dispute as to whether the Claimant had instructed Mr Ritchie to report the correct weight (paragraph 29 line 8). There was no such dispute. Mr Ritchie accepted that the Claimant instructed him to tell Vanj, the member of staff at the factory who was responsible for liaison with HMRC, to correct the weight. Whether he expected Mr Ritchie to make the correction personally or to do so through Vanj, does not alter the fact that the fact that Mr Ritchie accepted that the Claimant had been trying to get the landing figure corrected. This although there are minor differences in detail between the Claimant's evidence in this connection and the evidence of Mr Ritchie in the statement, the main point was not in dispute. Mr Ritchie accepted that the Claimant had wanted the figure corrected.

42. The Respondent also seems to have got the wrong end of the stick. In the Notice of Appeal (b)(ii) the Respondent complains that the Tribunal found that the Claimant instructed Mr Ritchie to make a correction and that the Respondent was entitled to come to a different view in light of the written statement. But as I have demonstrated the statement supports the Claimant's evidence that he told Mr Ritchie to make the correction. The Respondent has therefore no ground of complaint about paragraph 154 -

> **His position from the outset and one which he stated repeatedly was that he had instructed Chris Ritchie, the Factory Manager, to report the full weight of the landing to HMRC, but he had failed to do so and, of course, I have made a finding in fact that the claimant so instructed Mr Ritchie.**

43. This attack on the Tribunal's reasoning in the Notice of Appeal is therefore wide of the mark. The Notice of Appeal then adds "It is not explained what relevance this (i.e. the finding that the Claimant told Mr Ritchie to report the tree weight) has for the failure to follow a management instruction". As I explain above I accept that the Tribunal did issue a management instruction. The Notice of Appeal however fails to address the Tribunal's conclusion about Mr Pillar's words in the conference call. It was only during oral submission that Mr Grant Hutcheson dealt with this issue. In the Notice of Appeal the Respondent simply asserts that there was a management instruction and questions what relevance the Claimant's protestation that he told Mr Ritchie to amend the landing figure has in light of that instruction. I agree it is irrelevant to that issue. As I have explained however the Tribunal is not at this stage in its reasoning addressing the question of whether the Claimant was issued with an instruction. It is addressing the question of whether in light of the fact that Ms Newton had taken the statement in the investigation of Mr Anderson, senior, she should have had regard to it in the course of the disciplinary hearing in respect of the Claimant.

44. I note that there is a variance between the "fatal flaw" found established by the Tribunal and the flaw asserted by the Claimant. At paragraph 108 the Tribunal records the Claimant's submission as follows –

Although the claimant said on a number of occasions that he had instructed Chris Ritchie to report the true weight that was never put to him at any stage in the claimant's disciplinary procedure. It was submitted that this was a "fatal flaw".

45. But the "fatal flaw" referred to by the Tribunal at paragraph 155 is not based on a failure to ask Mr Ritchie whether the Claimant had instructed him to report the true figure. It is based on the proposition that Ms Newton should not have had regard to the statement she took from Mr Ritchie when conducting the Claimant's disciplinary hearing.

46. I do not see why the fact the failure of Ms Newton to ask Mr Ritchie whether the Claimant had instructed him to report the true figures matters. Although the Judgement at times gives the impression that the Claimant's desire to correct the landing figures was an important issue, in reality it seems to me that nothing turns on it. It is clear that he did wish to change the figure. It does not follow that he was entitled to do so. Nor does it follow that his desire to put the record straight meant that he had no knowledge of the allegation that his father had co-operated with the landing of "black fish".

47. The Tribunal considered that there was a "fatal flaw" (paragraphs 29 and 155) in the disciplinary hearing because Ms Newton had access to a statement she had compiled in the course of investigating the dismissal of Mr Anderson, senior. Ms Bailey had conducted the investigation against the Claimant and included the statement Ms Newton had taken from Mr Ritchie in her report to Ms Newton. There is a slight air of unreality about this complaint. Even if Ms Bailey had not included the report Ms Newton would inevitably have been aware of its contents. She had after all only just compiled it in connection with the investigation of the case against Mr Anderson, senior. The key issue is not whether the statement should have been included in the

papers Ms Newton considered but whether Ms Newton should have heard the disciplinary proceedings in light of her involvement in the investigation of the case against Mr Anderson, senior and whether possessing that knowledge acquired through interviewing Mr Ritchie rendered the disciplinary hearing unfair.

48. As I have indicated the objection made by the Claimant at paragraph 29 was that Ms Newton did not ask Mr Ritchie when she took the statement whether or not the Claimant had told him to report the true weight. The Claimant was entitled to submit that the failure to lead Mr Ritchie in evidence exposed his written statement to the objection that it failed to deal with important matters or to the extent that it did, that the Tribunal should not attach much weight to his evidence because unlike the evidence of the Claimant it had not been tested in cross examination. But as I have sought to demonstrate Mr Ritchie's statement acknowledges that the Claimant had tried to get Mr Ritchie to change the data. This may suggest that (contrary to the Claimant's submission) Ms Newton did ask about the Claimant's attitude to changing the data or it may suggest that there was no need to follow up the point. Whatever the position there is no merit in the Respondent's submission in the Notice of Appeal ((b)(ii)) that by criticising the Respondent's failure to lead Mr Ritchie, the Tribunal showed that it wished to "re-hear the disciplinary process rather than apply the test in Burchill". I accept that the Tribunal was obliged to consider the evidence available to the decision maker as opposed to the evidence available to the Tribunal. But the criticism here arises from the Tribunal's concern that the HR consultant Ms Bailey had not done her work properly. The Tribunal thought that she should have pursued the issue of whether the Claimant had asked him to report the true figure to HMRC. I do not consider that its concern indicates that it wished to re-hear the disciplinary process. I am satisfied however that its concern was misplaced. The statement did corroborate the Claimant's evidence. In any

event his desire to get the figure changed was irrelevant to the question Mr Newton had to decide viz. had he authority to correct the figure and did he know that the reason the figure was wrong was because his father had co-operated in the landing of "black fish".

49. The "flaw" that was on the Tribunal's mind was rather different. The Tribunal thought that the objection to Mr Ritchie's evidence was that it had been obtained by Ms Newton, the same person who heard the case against the Claimant. At paragraph 154 the Tribunal points out that the interview with Mr Ritchie was part of a separate process. The Tribunal took the view that Ms Newton was not allowed to take into account evidence gained in the course of a separate investigation. Although the Tribunal does not refer to British Home Stores Ltd v Burchell [1980] ICR 303, at paragraph 154 or 155 I take it that it was concerned that there had not been a reasonable investigation of the sort desiderated by Arnold, J at p 304.

50. Section s. 201 of the **Trade Union and Labour Relations (Consolidation) Act 1992** required the ACAS Code on Disciplinary and Grievance Procedures to be taken into account. Paragraph 6 of the Code indicates that where practicable the same person should not conduct both the investigation and the disciplinary hearing. The purpose of this provision is so that the decision maker brings an open mind to the task of deciding the issues raised at the hearing and is not influenced by considerations that may be relevant to the investigation but are irrelevant to the hearing. But in this case Ms Bailey investigated the Claimant and Ms Newton conducted the disciplinary hearing. The ACAS code does not address the situation that arose in the present case. Here three persons were subject to disciplinary procedures. On the reasonable assumption that the Tribunal would not have had any objection to a group of HR consultants conducting three entirely separate disciplinary procedures where there was no connection between the cases, the

concern in this case would appear to emerge from the fact that the cases were inter-connected. The employees were all from the Anderson family, although I do not think their family connection of itself makes any difference. The crucial issue is whether the allegations were sufficiently connected that to investigate Mr Anderson, senior was in effect to investigate the Claimant.

51. The Judgement does not explore this issue and there are no findings in fact that indicate that the Tribunal knew what allegations were levelled against Mr Anderson, senior, although it is clear that he was being investigated for his role in the capelin landing. It seems to me however that while the statement of Mr Ritchie covers Ground 2, the overlap does not give rise to a reasonable concern about the fairness of the process. Ground 2 ran as follows

> **Mr Anderson contacted HMRC in relation to the Capelin landing despite having been informed that this was being dealt with. Whilst Northbay Pelagic fully support making reports where concerns of wrongdoing are genuine and need to be raised, his correspondence with HMRC was, on the information available to the business and that he was aware of, misleading as it suggested that the landing recording was in error whereas Northbay are concerned that an attempt had been made to mislead the authorities by not recording the full landing. It is important in such a serious situation that they are entirely up front with the authorities as to our concerns and do not provide information which may not be accurate and could be deemed misleading.**

52. Mr Ritchie's statement mentions the conference call and what the Claimant was told on 14 March 2016. But his evidence in that connection is negligible. It could have no significance since an authoritative record of the conference call is contained in the Minutes. It does not seem to me that Ms Newton would have any reason to be influenced by Mr Ritchie's account of what had been said on the call. It was peripheral evidence. The minutes determined what had been said and whether it could properly be said to be an instruction not to contact HMRC. Ground 2 asserted that the Claimant misled HMRC in maintaining that the incorrect figure was the result

of an innocent mistake. Mr Ritchie only touches on this issue peripherally. He depones that he told the Claimant about the circumstances in which the "black fish" came to be landed. By inference this explanation must cover the matters related earlier in his statement where he states that Mr Anderson, senior agreed to take "black fish". Thus it might be objected Ms Newton had obtained a statement inferring the guilt of Mr Anderson, senior while investigating the case against Mr Anderson, senior. If so, it might be argued, she should not have had regard to it when conducting the disciplinary meeting. I have come to the conclusion that this is not a significant issue and does not give rise to any appearance of bias. The issue of whether the Claimant knew what was going on disappears at this stage of the process. Ms Newton's decision is centred on whether he had disobeyed an instruction.

53. Given the fact that Ms Newton had not investigated the allegation against the Claimant and given that the information she had gathered from her investigation of Mr Anderson senior was peripheral to Ground 2, I do not consider that there was a procedural flaw in the process. In my view it would not have been reasonable to expect the Respondent to hire a separate team of HR consultants to investigate each set of allegations. The HR consultants were independent from one another. They did not belong to one business. While I do not know exactly how the HR consultants divided up their responsibilities, it would appear that Ms Newton investigated the case against Mr Anderson senior. He did not appeal his dismissal. The Claimant was investigated by Ms Bailey, his disciplinary hearing was conducted by Ms Newton and his appeal by Ms Flattery. I do not know what arrangement was made for their uncle.

54. Although the Tribunal focusses on Ms Newton's use of the statement from Mr Ritchie, the real issue is not the written statement but the fact that she interviewed Mr Ritchie. It is her involvement in the investigation of Mr Anderson, senior and her role as decision maker in the

complaint against the Claimant that is the issue. Ms Bailey could have interviewed Mr Ritchie separately and supplied Mr Ritchie's evidence to Ms Newton in that way. But it is reasonable to assume that she would have covered the same ground and received the same evidence. This would appear to me to be an unnecessary duplication of effort. The interests of accuracy and coherence were best served if Mr Ritchie explained the whole episode in one statement. I do not see any need for the investigation of the Claimant's case to be sealed off from the investigation of the case against Mr Anderson, senior. I am satisfied that this arrangement was not procedurally flawed or productive of actual unfairness.

55. The effect of the Tribunal's decision on procedural unfairness was that Mr Ritchie's statement was not considered in connection with the substance of Ground 2. There is no reference to the contents of the statement in the Judgement. I accept that had the Tribunal examined the evidence it would have been entitled to reject Mr Ritchie's evidence and prefer the Claimant's evidence that there was no deliberate mis-reporting. Mr Ritchie's evidence after all was in the form of documentary hearsay. He had not been brought to the Tribunal and exposed to cross-examination so his evidence could be seen as having lesser weight than that of the Claimant. In addition the Tribunal had formed a favourable impression of the Claimant's reliability and credibility. These factors might well have led the Tribunal to reject the statement and to prefer the evidence of the Claimant.

56. I have come to the conclusion that the Tribunal erred in law when it concluded that the availability of Mr Ritchie's evidence to Ms Newton when she made her disciplinary decision was

a "fatal flaw". I consider that the process of investigation, decision making and appeal was procedurally fair. I consider the decision maker was entitled to look at the statement. I accept that tribunals are entitled to prefer oral evidence over written statements. But I do not accept that the Tribunal was entitled to disregard Mr Ritchie's statement. It should have considered its contents and it should not have rejected Ms Newton's decision because she had considered its contents.

57. These errors of law are not mentioned in the Respondent's Notice of Appeal. I have come to the conclusion that I should nevertheless have regard to them. My reasons for doing so are as follows. First of all although the points emerged in the course of oral argument the Claimant had ample opportunity to consider them and make appropriate submissions. There was a considerable gap of time between the first and second day of the appeal, when the Claimant came to address me. Second, the Claimant did not submit that I should confine myself to the points raised by the Notice of Appeal. I circulated a draft of this judgement so that the parties would have an opportunity to make submissions about my proposed order and the judgement. Both parties supplied me with helpful Notes. The Claimant indicated that he had taken the point that the submissions and oral discussion had strayed beyond the boundaries set by the Notice of Appeal and that the appeal was confined to the points raised in the Notice. I am sure that the Claimant is correct. I have however no note of this submission and no recollection of it. Mr McGuire may have made a general submission to that effect. But he made no attempt to persuade me that the submissions and discussion that surrounded the true understanding of Mr Pillar's instruction were beyond the scope of the appeal. It may be that there is an explanation for this. It seems to me that there is a blurred line between material that is apt to demonstrate a substitution mind-set on the part of the Tribunal and errors of law that are said to evidence that substitution mind-set. At times

it seemed to me Mr Grant Hutcheson seemed to be suggesting that because the Tribunal resolved all the key legal issues in favour of the Claimant, I could be satisfied that there was a substitution mind-set. I reject that submission. I accept however that in submitting that there has been a substitution mind-set it may be difficult to distinguish substitution when it emerges from an assessment of what the tribunal considers is reasonable and the issues of law that in some situations underlie what is reasonable. Given the potential for overlap in Ground 2 I am not disposed to interpret the Notice of Appeal strictly against the Claimant. Third, I consider it preferable to dispose of the appeal on a true understanding of the legal issues, provided of course the Claimant is not disadvantaged thereby. Fourth the points raise issues of law that do not depend to any material extent on the Tribunal's assessment of the evidence. Fifthly I consider that having regard to the ultimate aim of doing justice between the parties, it is desirable that I should have regard to the legal issues outlined above.

The substitution mind-set

58. The main line of attack in the Notice of Appeal in connection with all Grounds is that the Tribunal had substituted its view of the decision to dismiss for the Respondent's view and had failed to attach sufficient weight to the factors that the Respondent had relied on in making its decision. This line of attack on the Tribunal's reasoning is based on what is sometimes called a "substitution mind-set". Since this submission was particularly prominent in the connection with Ground 2 I shall at this point refer to the main authorities cited by the Respondent.

59. I was referred to **Iceland Frozen Foods v Jones [1983]** ICR 17 where the EAT, presided over by Browne-Wilkinson, J pointed out that in deciding whether or not an employer has acted

reasonably in dismissing an employee, the tribunal must focus on the employer's conduct and not on the abstract question of whether the tribunal considers the dismissal to be fair. Browne-Wilkinson, J put it this way (pp. 24H-25B).

> **In judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer… in many, though not all cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;… the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.**

60. The Tribunal had regard to the guidance in **Iceland Frozen Foods** at paragraphs 179-183. I consider therefore it was aware of the risk of substituting its view for that of the Respondent. The Respondent argued that the substitution mind-set could be inferred from the failure of the Tribunal to refer to the reasons given by the company for the dismissal and its preoccupation with factors which undermined the Respondent's decision to dismiss. While there may be some force in the latter point, it does not appear to me that the Tribunal ignored the Respondent's reasons for dismissal. I consider that the decision depended on the proposition that the Claimant was not authorised to contact HMRC. The Tribunal disagreed. The Tribunal held that he was entitled to contact HMRC. I consider that this was the principal reason for rejecting the Respondent's decision to dismiss. That does not involve the substitution mind-set.

61. That said I note that the reasons for dismissal that appear in the Decision Letter and Appeal Letter are not given much prominence. The only submission recorded by the Tribunal in support of the proposition that the Claimant should not have corrected the figure is at paragraph 152 line 10 where the Tribunal refers to the argument that the Respondent was justified in

insisting that the Respondent's solicitors should be left to make the correction because of the risk of two contradictory figures being submitted. With respect this is not a great argument. In any event it is beside the point. The true issue was whether the company had given the Claimant an instruction and if it had, whether he had any legal justification for disobeying it. If not he was bound to submit to the company's decision whatever his personal feelings on the matter. While no doubt the Respondent would have wished to avoid the risk of conflicting signals, that issue should never have arisen. In any event it presupposes that there was an actual risk that different figures might be transmitted to HMRC. As far as I am aware the true figure was known to both the Respondent and the Claimant so there was no risk of conflicting data. In these circumstances I am not inclined to attach much significance to the factors that the Respondent submitted supported the Respondent's decision to dismiss.

62. I was referred to **Linfood Cash and Carry Ltd v Thomson** [1989] IRLR 235 for the proposition that if an employer came to the conclusion that an employee was not telling the truth the tribunal should be slow to overturn that conclusion. Provided the employer could reasonably have formed the view that the employee was untruthful, the tribunal should not interfere (p 236 and 238). But in this case the Decision Letter and Appeal Letter do not offer an opinion on the truthfulness of the Claimant's assertion to HMRC that an innocent mistake had been made. Thus while Ground 2 states that "his correspondence with HMRC was…. misleading as it suggested that the landing recording was an error; whereas Northbay are concerned that an attempt has been made to mislead the authorities" (see Investigation Report), the Decision and Appeal Letters do not refer to the question of whether the Claimant had misled HMRC. Thus although the Claimant did represent to HMRC that the mistake was due to a "miscount" and although the Investigation

Report did raise this issue, the Respondent's decision mediated through the two HR consultants did not rely on the Respondent's initial allegation of untruthfulness. This is not therefore an issue.

63. I was also referred to **Morgan v Electrolux Ltd** [1981] IRLR 89, a decision of the Court of Appeal following **Linfood** (above) and to **London Ambulance Services NHS Trust v Small** [2009] IRLR 563 at 567, another case in which the Court of Appeal discusses the risk of the substitution mind-set; see also **Royal Free Hampstead NHS Trust v Shah** UKEAT/0505/12/DA and **JP Morgan Securities plc v Ktorza** UKEAT/0311/16/JOJ.

The Third Ground of Dismissal

64. The Respondent also dismissed the Claimant because he failed to disclose the password for his computer to the Respondent. The password was not an email or internet password but the password that gave access to the computer he used at work and hence to information stored on it. The reasoning in the Decision Letter and Appeal Letter pay little heed to the context of the request. It was made at the conference call on 14 March 2016 (paragraph 40). The request was confirmed by Mr Colam on 16 March 2016 the day the Claimant was suspended. Ms Newton and Ms Flattery were aware that this request came at a time of heightened tension between the Claimant and Mr Colam where there was mistrust on both sides (paragraph 42 line 32). I consider the Respondent should have taken account of this context in evaluating the gravity of his refusal to co-operate. As will become evident from the discussion of Ground 4 he had a computer in his private office. Although the Judgement does not state that it contained information confidential to the Claimant (as opposed to the Respondent) it is legitimate to infer that he had an interest in refusing to give access to his computer. The Claimant was not just another employee. He was a director of the company and his family company, Cool Seas, was a major shareholder in the Respondent. To dismiss him because he did not wish to give Mr Colam access to his computer

given the context of hostility between the parties and his commercial interest in the company was heavy handed in the extreme. Although it is not mentioned in the letters the Tribunal records that his refusal to disclose his password had little practical consequences for the Respondent. By the time of the management meeting on 29 March 2016 the "matter had been sorted out" (paragraph 164). In any event the Respondent had the means of recovering the password without his co-operation (paragraph 41) so it was an act of defiance which caused no damage to the Respondent's interests.

65. In light of this the Respondent's decision to dismiss was based on the Claimant's bare refusal to disclose his password. I accept the Tribunal's conclusion that this was insufficient to justify the Respondent's decision. I do not consider that he was obliged to co-operate if he had reasonable grounds to be suspicious of Mr Colam's intentions. I consider that the Tribunal's decision in this connection ought to be left undisturbed. Contrary to the submissions made to me I see no evidence of a substitution mind-set. Once again I refer to paragraph 87 and the Tribunal's findings on the fairness of the disciplinary process. As indicated above the Tribunal was entitled to take a narrow view of the Respondent's conclusions.

The Fourth Ground of Dismissal

66. In most cases involving covert surveillance the complaint is that the employee has been covertly monitored by the employer. In this case it is the other way round. The employee, the Claimant, tried to monitor his employer. He set up a web enabled camera in his office because he thought that someone had entered his room and accessed his computer. His suspicions had been aroused because about two weeks before his suspension, on entering his office he found a USB

drive and his computer keyboard lying on the floor. I can see why this would have suggested that someone had been in his office although whoever it was does not seem to have been anxious to "cover their tracks". The Claimant set up the camera after he had been suspended. As I have noted above in connection with Ground 3, at that time Mr Colam was seeking access to his computer password and the Claimant was suspicious of his motives for doing so.

67. The Respondent considered that in placing a camera in his office to monitor anyone taking access to it, he was guilty of misconduct such as to merit dismissal. The Tribunal disagreed. Its basis for concluding that the Respondent's decision fell outside the margins of a reasonable response were that the camera was not covert. It also concluded that Ms Newton and Ms Flattery had been wrong to hold that the Claimant had acted illegally. In its view he was entitled to be suspicious in light of recent events in the company and in setting up the camera was taking measures that would tell him whether or not persons were taking access to his personal data without his knowledge or consent.

68. I am unable to accept the first of these grounds. The Tribunal held that because the camera covered the Claimant's office and that of the neighbouring office which was used by his father, it was not covert. But plainly the fact that the camera covered an area larger than the interior of his office does not mean that that the camera was not covert. A covert camera is a hidden camera. It may be hidden because of its location or because it does not appear to be a camera. The Tribunal also decided that because there was CCTV throughout the building, the use of a camera in his office could not be said to be covert. But the fact that there were other cameras that were in public view in the building does not have any relevance for whether the camera in the Claimant's office was covert. I consider therefore that the Tribunal's reasoning does not support its conclusion. It

does not follow of course that the camera was not a covert camera. All that can be said is that the Tribunal's reasons for concluding that it was not are not satisfactory.

69. Whether there is a justification for installing surveillance camera depends on a variety of competing interests. If the space is one to which employees have regular access then a powerful justification is required and suitable measures may be necessary to alert the staff to the presence of the camera. In this case however the camera was not set up in a public space but in an office set aside for the Claimant's use. He thought he was the only person with a key to it. In light of his experience a fortnight before he installed the camera however he must have known that others had access to it. The office and the equipment in it were owned by the Respondent. It would be normal to expect a representative of the Respondent to have access to its own property. In light of these considerations it would appear to me that the issue was whether or not representatives of the Respondent were entitled to access the computer. I consider that they would be entitled to access it unless it stored information confidential to the Claimant, as opposed to confidential to the Respondents.

70. The Claimant's concern that someone had moved his USB stick and keyboard implies that he thought the computer held confidential information. It is not clear why the Respondent would have wished to get access to his computer or if they would have agreed that the information the Claimant wished to protect was confidential to him. This matter does not appear to have been explored. In this situation it is difficult to evaluate the force of the Tribunal's conclusion (paragraph 166) that the Claimant had a reasonable concern about people entering his office. I accept that if he was the only person with a key to the office that this would imply that it was private space and not a public thoroughfare key (paragraph 166; cf. paragraph 46 line 38). That

also would support the proposition that in monitoring the office the only people likely to be caught on camera were those who wished to enter it (presumably with another key) without his knowledge and permission. That said it should be observed that at the material time he was suspended and was not entitled to enter the premises. In that situation it is reasonable to suppose his entitlement to use of the office was likewise suspended.

71. I note that there is no evidence that he captured anyone on camera or that anyone's right to privacy was actually infringed. We know someone entered the office. The Claimant advised that the camera was moved. It was this that led to him disclosing to the Respondent that he had placed a camera in his office (paragraph 69 line 37). Whether the camera captured this incident or any other incident is unknown. I am not clear if the camera was discovered when entry was taken.

72. In evaluating his actions and the Respondent's reaction to them, it is necessary to remember that the employee in question was not an ordinary employee but a director of the company and of Cool Seas. I consider that this leaves open the possibility that his actions were designed to protect commercial and personal interests that arose from his status as a director and shareholder. Mr Grant Hutcheson referred me to The Employment Practises Code on Data Protection. As one might expect it is focused on the monitoring of staff by management. It has nothing specific to say about staff monitoring management. In any event that is to over simplify matters. The Claimant was more than an employee. His actions arose it would appear from a desire to protect interests that arose from his employment status and also his status as a director, manager and shareholder. The Code acknowledges that surveillance can be used where there is suspected malpractice (3.4.1). I acknowledge that it states that covert surveillance can only rarely

be justified. Given the fact that there is no evidence that anyone was caught on camera and that it was in a position where the only people it was likely to capture were people who were seeking access to his office, the threat to the privacy rights of the staff was in my view limited. Given the context in which he set up the camera and his concern that Mr Colam was seeking to obtain information from his computer that the Claimant did not consider he was entitled to, it is not clear to me that the Claimant's actions were unlawful. Given the sketchy nature of the evidence it is not easy to form definite conclusions.

73. The Tribunal was not impressed by Ms Newton and Ms Flattery's legal conclusions. Ms Newton's Decision Letter cited the sixth principle of the **Data Protection Act 1998** (now superseded by the **Data Protection Act 2018**). Ms Newton stated that persons caught on the camera had a right to know they were being recorded and to object and to have a copy of any recording. She concluded that his actions were in breach of "the Disciplinary Procedure relevant to your employment" and that what he had done was "an offence which would be a breach of the law of the land". I accept that Tribunal was correct to reject this as a legitimate ground for dismissal. This area of law is notoriously complex. While I accept that its complexity was not of itself a sufficient reason to ignore the lawfulness of his conduct, the approach taken to the law betrays a lack of appreciation of the considerations that could be said to favour his decision to monitor his office. There is little indication in their approach that they appreciated that privacy is not an absolute right. In particular they did not weigh up his claim of confidentiality or the strength of his interest in discovering whether the Respondent was taking access to his office. Although there does not appear to have been any attempt to establish what information was held on the computer, his actions indicate that he considered it held information worthy of protection. It would not appear that the HR consultants in the disciplinary process or the Respondent at

Tribunal led any evidence to demonstrate that it was both entitled to enter the office and access the contents of the computer. The only guide as to whether the computer held information confidential to the Claimant was his conduct.

74. Ms Flattery stated that the installation of the camera was a breach of the obligation of trust and confidence owed by the Respondent towards its employees. This is an indefensible view. This obligation is owed by the employer to its employees. Ex hypothesi the Respondent was unaware of the installation of the camera and removed it whenever its presence was discovered. The Claimant was not acting on behalf of the Respondent when he installed it. Indeed he was acting to protect himself from the Respondent. It is not possible to assert that the Respondent was responsible for the Claimant's actions and had unknowingly breached the implied term of trust and confidence. In any event there was no evidence that any employee had been unwittingly captured on camera. In that situation it is difficult to know who would be able to assert that the term in their contract had been breached.

75. In conclusion I accept that the Tribunal was wrong to hold that the camera was not covert. Its conclusion in this connection is not supported by adequate reasoning or suitable findings in fact. I consider nevertheless that the Tribunal was correct to conclude that the Respondent's decision to dismiss fell outside the band of reasonable responses. Thus even if it were to be assumed, contrary to the Tribunal's conclusion, that the camera was covert, the Respondent omitted to conduct a balancing exercise between the right to privacy and the Claimant's wish to protect his confidential information. Although there was a lack of evidence as to the nature of the information, there was evidence that he considered that his interests would be infringed if the Respondent or Mr Colam accessed the computer. In that circumstance the Respondent was bound

to weigh up his interests. In addition the Respondent failed to attach any weight to the fact that the camera was set up in a room to which as a rule he had exclusive access and where there was a negligible risk that persons other than those taking entry to it would be captured on camera. Nor had the Respondent taken account of the absence of any evidence that anyone had been captured on the camera. In conclusion I also bear in mind the Tribunal's concerns about the control Mr Colam exercised over the disciplinary process. As with the other grounds of dismissal I consider that the Tribunal was entitled to take a narrow view of the Respondent's conclusions. I am not persuaded that the Tribunal substituted its view for that of the Respondent.

76. In these circumstances I uphold the Tribunal's decision in connection with Ground 4.

The Fifth Ground of Dismissal

77. The Claimant was advised in his suspension letter not to "attend the workplace". On 12 May 2016 he drove his father to the factory and parked on the forecourt. His father entered the building and as he did so the Claimant filmed him on his phone through the security window. The Claimant stated he was concerned for his father's security. The Respondent concluded that by parking on the forecourt the Claimant had breached the term of his suspension letter that instructed him not to attend his workplace. Ms Newton decided that since the forecourt was part of the Respondent's property he had broken the instruction in his suspension letter. She concluded that he had broken a reasonable management instruction. Ms Flattery is recorded however to have accepted at the Tribunal that the workplace should be understood to mean the work premises. She accepted that by not entering the building the Claimant had not broken the terms of the suspension

letter of 22 March 20164. Ms Flattery accepted that her conclusion that the Claimant was guilty of gross misconduct was wrong (paragraph 72). No other justification of the Tribunal's approach is required.

78. In these circumstances I uphold the Tribunal's conclusion that the Claimant's dismissal under Ground 5 was unfair.

The Fairness of the Process

79. In conclusion I must draw attention to a feature of the case that counsel did not mention in their submissions. The Tribunal's Judgement not only rejects the grounds of dismissal, it rejects the whole process by which the dismissal was accomplished. The Tribunal's conclusions in this connection begin with section entitled "The Issues and the Tribunal's Decision" (paragraph 125). The Tribunal begins and ends this section by giving an overview of the disciplinary process. The first broad statement is found in paragraph 125.

> **…. I was concerned about the motivation for bringing the various allegations, the categorisation of most as "gross misconduct" when clearly they were not, and the extent to which *Mr Colam may have been able to influence the decisions which were taken.* (My italics)**

80. At paragraph 139 the Tribunal expresses "concern" that Ms Flattery was unaware that the Respondent had agreed to be bound by her decision. Her evidence at the tribunal was that she thought she was making a recommendation. The tribunal said this caused "concerns about the robustness of the disciplinary procedure and supported the claimant's contention that the decision to dismiss was "pre-determined". It is not clear to me why this piece of evidence supports the view that the disciplinary procedure was "pre-determined". There are benign explanations for her misapprehension. The Tribunal appears to have thought that because she was unaware of the true

position it was entitled to infer that there was a disjunction between the superficial position (that the HR consultants were entitled to determine the matter, see paragraph 18) and the true position (the Mr Colam was in charge of the process).

81. At paragraph 140 it said -

> **Further it was unusual, to say the least, that I did not hear any evidence at the Tribunal hearing from anyone employed by the respondent. It was clear that the disciplinary proceedings had been initiated and were being driven by Jan Colam. (my italics)**

82. It is difficult to follow the Tribunal's logic. Why should the lack of witnesses from the Respondent infer that the proceedings were "driven and initiated by Jan Colam". The Tribunal then summarised evidence given by the Claimant. His position was that Mr Colam used the disciplinary process to conduct a vendetta against the Anderson family and remove them from the company.

83. At paragraph 141 the Tribunal stated –

> **The Claimant gave his evidence at the Tribunal in a measured and convincing manner, consistent with his stated position at the Investigatory Meeting and the subsequent disciplinary procedures. He presented as credible and reliable. Neither Mr Colam nor Mr Ritchie gave evidence at the Tribunal Hearing.**

84. After dealing with the individual allegations the Tribunal returns to these general concerns at paragraphs 174-178. The Tribunal reiterates its view that the allegations were not serious

enough to warrant dismissal. In its view "there seemed to be an attempt at every turn to inflate the seriousness of the allegations". It then says -

> **I was satisfied that Mr Colam had initiated and driven the disciplinary procedures. There was acrimony between him and the claimant and his family and yet this issue was never raised with Mr Colam. The only statement that was obtained from Mr Colam as part of the disciplinary procedures related to the claimant's father attending the premises on 12 May. Nor was it ever put to Mr Colam that he was intent on removing the Anderson family from the respondent's business. Not only was Mr Colam not interviewed concerning his motives, it remained unclear from Ms Musgrave's evidence as to how the allegations had been framed in the first place. I strongly suspected Mr Colam was responsible. However on the face of it, at least, Mr Colam was not involved in the conduct of the disciplinary procedures, at least not directly: it was Ms Musgrave… the respondent's position was that he was not involved at all and the procedures were not discussed with him…. although there was no direct evidence of any involvement or interference by him… it was highly unlikely in my view that Mr Colam would not have been kept appraised of development and afforded the opportunity of expressing his views and able to exert influence.**

85. At paragraph 176 the Tribunal under reference to Grounds 1 and 2 indicates that in its view the HR consultants failed to investigate the case against the Claimant as they should have done. Ms Flattery did not re-interview Mr Good or Ms Bailey when Mr Good supplied a statement supporting the Claimant's account before the appeal. In connection with Ground 2 Mr Ritchie was not asked whether or not it was the case that the Claimant had repeatedly asked him to correct the erroneous data.

86. At paragraph 178 the Tribunal reiterates that Mr Colam was hostile to the Andersons and was determined to get rid of them. In support of its conclusion it referred to the dismissals of Mr Anderson, senior, Mr Jimmy Anderson and the Claimant. It also referred to evidence from the Claimant that he had been told that Mr Colam, Chris Ritchie and Bob Macgee were saying he "would not be back". The Tribunal reiterated that the Claimant's dismissal was "pre-determined".

87. The Tribunal's conclusion that both the disciplinary process and the outcome were pre-determined is a serious one. The Tribunal's reasoning in support of this conclusion contains a mixture of suspicion ("I strongly suspected that Mr Colam was responsible" paragraph 175) and certainty ("I was satisfied that Mr Colam had initiated and driven the disciplinary procedures" paragraph 178). I must confess that after reviewing the evidence and the Tribunal's reasoning I do not share the Tribunal's confidence. I accept that there are indications in the evidence that the process was biased in favour of the Respondent. I am not confident however that these indications support the proposition that Mr Colam directed and controlled the process.

88. Despite these qualms however, I cannot interfere with this aspect of the judgement. The Respondent confines its challenge to the Tribunal's rejection of Grounds 1-5 and does not seek to address the Tribunal's conclusions about the fairness of the disciplinary process. In the absence of a challenge the Tribunal's conclusion must remain undisturbed.

Conclusion

89. I uphold the Respondent's challenge in relation to Ground 2. In that circumstance I consider that I should remit the case back so that the position can be considered of new. Given the Tribunal's finding that the outcome was predetermined I consider that it is best if the justification offered by the Respondent for the dismissal is reconsidered in light of my conclusions that the Claimant was obliged to submit to a decision of fellow managers and the board. It may be that the Claimant will wish to make submissions about the disciplinary process and the Tribunal's findings about it. He may wish to submit that whatever the position may be under Ground 2, his dismissal in these circumstances cannot be fair. It may be that the Respondent

will wish to argue that notwithstanding the Tribunal's conclusion about the disciplinary process, dismissal was nevertheless merited having regard to the gravity of the issue and the failure of the Claimant to follow the instruction given. I consider such matters are not for me and are best judged by the tribunal after a remit back. The tribunal should proceed on the basis that Ms Newton and Ms Flattery were entitled to take into account Mr Ritchie's statement in arriving at a decision. Given however that the reason for dismissal in the Decision Letter and Appeal Letter does not appear to depend on Mr Ritchie's evidence to any extent, the statement may not matter very much. But that is a matter for the tribunal.

90. Although I have reservations about the Tribunal's conclusion that Mr Colam controlled the disciplinary process and that its outcome was pre-determined, I wish to make it clear that I support the Tribunal's observations on the quality of evidence. The only witness from the company, Ms Musgrave, had no personal involvement in the issues in dispute. Mr Colam, Mr Pillar and Mr Ritchie were not adduced. Although the HR consultants could provide an account of the grounds of their decision, the Tribunal was not bound by their perceptions. The HR consultants were not an adequate substitute for the witnesses to fact. The best they could offer was hearsay. While they could explain matters to some degree, they could not provide satisfactory evidence about issues such as Mr Colam's motives or provide a response to the Claimant's personal knowledge of events. It would appear to me that the Respondent's failure to lead suitable witnesses to fact paved the way for the Tribunal's acceptance of the Claimant's evidence. There was no one who could contradict him on a variety of important matters. The Tribunal had no other witness against which to measure his evidence. The Tribunal plainly thought that the Claimant presented well. The Tribunal was entitled to form a favourable view of him. The Respondent's main submission was that the Tribunal had adopted a substitution mind-

set. Such an approach to the appeal failed to take account of the Tribunal's concerns about the quality of the evidence offered by the Respondent and the conduct of the disciplinary process.

Disposal

91. In these circumstances I shall remit the claim back to the employment tribunal. I direct that the employment tribunal shall consider of new the Claimant's contention that he was unfairly dismissed under Ground 2 having regard to my conclusions above in connection with the management instruction of 16 March 2016 and the admissibility in evidence of Mr Ritchie's written statement. I shall direct that the matter be heard by a differently constituted employment tribunal.

Addendum

92. After the Tribunal hearing in the present case was over, a dispute between Cool Seas, the company controlled by the Andersons, came to trial before the High Court in England. A copy of the judgement of Rose, J in the unfair prejudice petition was placed before me. **Cool Seas (Seafoods) Ltd v Interfish Ltd & Ors.** [2018] EWHC 2038 (Ch) involves claims by Cool Seas that the actions of the majority shareholders in North Bay Pelagic Ltd were unfair and prejudicial to its interests. The evidence in part traversed matters that formed part of the subject matter of the present claim. Evidence was led about the dispute over construction materials that formed the basis of Ground 1. Evidence was also led about the landing of capelin from the Haugagut in February 2016, the issue raised by Ground 2.

93. The Judgement in **Cool Seas (Seafoods) Ltd v Interfish** refers to the Claimant. Cool Seas alleged that the dismissal of the Claimant was part of the Respondent's unfairly prejudicial conduct towards Cool Seas (see paragraph 116). Rose, J explicitly deals with Ground 2 and the Tribunal's Judgement. She states at paragraphs 136 and 241.

> **136. So far as Colin Anderson is concerned, I have formed a different conclusion as to what happened as regards the reporting of the landing from the Haugagut in January 2016 from the conclusion reached by the Employment Tribunal. This is discussed further below. I have therefore also concluded that any prejudice suffered by Cool Seas by reason of Colin Anderson's exclusion from the management of Northbay was not unfair for the purposes of section 994. (my italics)**

> **241. Colin Anderson's evidence was that he had concerns over Northbay losing its customs warehouse authorisation if HMRC had decided to investigate the under recorded landing. He says that although he was told that the matter was in the hands of the company solicitor, this was not enough to alleviate his concerns. He did not accept that Mr Pillar was entitled to give him an instruction not to contact HMRC. I reject this evidence as incorrect and self-serving. He must have realised that if the matter was being dealt with by the company's solicitors it was inappropriate for him to contact HMRC as well. Further he was fully aware that the explanation that he gave of an innocent miscount was untrue. He was certainly not acting in the best interests of Northbay when he took it upon himself to write to HMRC in those terms. It is not surprising in my judgment that this incident led to Colin Anderson's suspension. This is a further instance of unfairly prejudicial conduct by a director of Northbay nominated by Cool Seas. (my italics)**

94. While of course it is interesting read Rose, J's conclusion, I do not consider it has any bearing on the present case. It is evident from Rose, J's decision that she heard evidence from a variety of witnesses. In particular she heard evidence from Mr Colam and witnesses from Interfish. There was detailed evidence about the circumstances of the Claimant's dismissal. It is clear that Rose, J had the benefit of a far wider range of evidence than that presented to the Tribunal in this case and her decision must be read with that in mind. I note that she states "he must have realised that if the matter was being dealt with by the company's solicitors it was inappropriate for him to contact HMRC as well". Although she does not expand on why his action was inappropriate it may be that she considered that he was bound by the decision of his co-directors.

95. I also note that Mr Anderson, senior was found to be untruthful in connection with landings to Fresh Catch in a decision of the UTT called **HMRC v Fresh Catch Ltd** [2016] UKFTT 196.