Appeal No. UKEATS/0040/19/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 16 March 2021
Judgment handed down on 1 April 2021

Before

THE HONOURABLE LORD FAIRLEY

MR P PAGLIARI

MR M SMITH OBE DL

TESCO STORES LIMITED — APPELLANT

S — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

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SUMMARY

TOPIC NUMBER(S): 11 – UNFAIR DISMISSAL; Reason for dismissal; band of reasonable responses; investigation.

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In a claim of unfair dismissal, the reason for dismissal relied upon by the employer in terms of section 98 of the **Employment Rights Act, 1996** "(**ERA**") was "conduct". The evidence suggested that the employer had considered a range of matters all of which related to conduct of the employee. Only some of those matters were ultimately mentioned in the letter to the employee which bore to confirm the reason for his dismissal. In these circumstances, it was incumbent upon the Tribunal to make clear and unequivocal findings in fact about precisely what conduct of the employee caused the employer to dismiss. Within his Reasons, the Employment Judge recorded his conclusion that the Appellant genuinely held a belief that the Claimant "*was guilty of the conduct for which he was dismissed*". Nowhere in his findings in fact, however, did he identify what that conduct was. In the absence of such a finding, the further conclusion that the employer did not have a reasonable basis for holding that belief could not stand.

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In any event, and whatever was the reason for the dismissal, the Employment Judge had, in a number of respects, substituted his own view as to what a reasonable inquiry demanded. The appeal was allowed, and the case remitted to a different Tribunal for re-hearing.

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Observed: To the extent that **Scottish & Southern Energy plc v. Ness** UKEATS/0043/10 held that, in a case of dismissal for conduct, there was no requirement on an employer to investigate wholly speculative matters advanced by an employee as possible mitigation, that was correct. If, however, the decision in **Ness** was intended to suggest that it would never be unreasonable in terms of section 98(4) **ERA** for an employer to fail to investigate mitigation, such an approach would be inconsistent with what was said in **Sainsbury's Supermarket Limited v. Hitt** [2003] ICR 111.

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THE HONOURABLE LORD FAIRLEY

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Introduction

1. This is an appeal by Tesco Stores Limited ("the Appellant") against a Judgment of the Employment Tribunal (Employment Judge I McFatridge, sitting alone) dated 12 June 2019. The Respondent to the appeal, Mr S, was the Claimant in the proceedings before the Employment Tribunal. I will refer to him, as the Employment Tribunal did, as "the Claimant". The appeal was heard at a sitting of the Employment Appeal Tribunal in Edinburgh on 16 March 2021. Due to Covid restrictions, the hearing was conducted by video conference. The Appellant was represented by Mr Andrew Crammond of the English Bar. The Claimant was represented by Mr David Hay of the Scottish Bar.

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Factual Background

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2. The Appellant operates supermarkets throughout the United Kingdom. The Claimant's employment with the Appellant commenced in or about 1998. He initially worked as a trolley collector. In around 2008, he was promoted to the role of "Team Support", working mainly from the Appellant's store at Riverside Drive, Dundee. In that role, the Claimant and four other Team Supports reported to a Team Leader.

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3. In September 2017, the Claimant participated in an informal discussion known as a "Let's Talk" procedure with his line manager, Team Leader Emma Lyttle ("EL"). The discussion arose from a concern which had been expressed by a female employee who worked with the Claimant about messages and calls received by her from the Claimant outside work from which she had inferred that the Claimant was attracted to her. The outcome of the discussion was that the Claimant was directed to delete her number from his phone.

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4. In April 2018, EL became aware of allegations against the Claimant by E, who was a member of the Appellant's checkout staff. E was a 17-year-old female who had started working at the Riverside Drive store in November 2017. As a Checkout Operator, E worked closely with the Claimant. He was her first point of contact within management in relation *inter alia* to rotas, shifts and time off. The Claimant would also have contact with E during her working day if she required assistance with things like Price Look-Up ("PLU") codes and customer queries.

5. EL and another manager, Wendy Cooper ("WC") took statements from E. The first statement was taken on 7 April 2018 by WC and the second on 10 April 2018 by EL. Within those two statements, E described having received private messages from the Claimant through Facebook. She explained that at first, she thought that he was simply being nice to her because she was a new employee. Then, on Christmas Eve 2017, the Claimant waited for E in his car at the end of her shift and suggested that they go together to a McDonald's for food. E declined the offer but thought that the incident was "a bit weird". Thereafter, the Claimant continued to message her on Facebook. In her second statement dated 10 April 2018, E stated that the messages:

> **"started to get inappropriate and I didn't want to tell him to stop in case it got awkward at work."**

E provided EL and WC with screenshots of some of the messages which she felt were inappropriate and which had caused her to feel uncomfortable. She had circled "the worst ones". Examples of messages from the Claimant to E included (i) an instruction to "*get your cute ass to the doctors*" when she had been ill; (ii) "*check your cute smile today when you saw me*"; (iii) "*I'm going to tickle you until you pee"*; (iv) "*every time you saw me today you smiled at me*"; (v) "*you're definitely overdue a tickle*."; (vi) "*I missed your smiling pretty face today*"; (vii) "*did you miss me?*"; and (viii) "*I will give you a cuddle when I see you*." There were also references in some of the messages to underwear and to kissing.

6. E also referred to a number of other interactions with the Claimant which had caused her to feel uncomfortable. These included (i) an occasion when he had messaged her outside working hours at around 8 pm and invited her to meet him at Wormit beach; (ii) an occasion when he asked her during working hours if she was menstruating; and (iii) occasions when she had asked him for help at work, in response to which – and in contrast to other managers from whom she occasionally sought assistance – he would then lean over her and invade her personal space.

7. E had become sufficiently concerned about these matters that she had spoken to her mother who had told her to "say to someone" at work.

8. The Claimant was invited to a meeting with EL and WC on 11 April 2018 at which he was suspended. He was told that the reason for the suspension was:

> **"…numerous inappropriate comments to a colleague at front end – and also inappropriate actions towards the same colleague."**

The Claimant was handed a letter dated 11 April 2018 confirming his suspension. The letter invited him to attend an investigation meeting the following day with the Appellant's Lead Fresh Trade Manager, Mr Kerr. The statements taken by WC and EL and copies of the messages were then passed to Mr Kerr.

9. The investigation meeting with Mr Kerr took place as planned on 12 April 2018. The Claimant attended with a representative. Mr Kerr took the Claimant through the various allegations made by E. The Claimant accepted that various of the comments made by him to E were either "not acceptable", or "inappropriate". He stated, however, that it had not been his intention to upset E, make her feel awkward or to cause her embarrassment. He stated that he was sorry for having offended her. He offered explanations for the Christmas Eve and Wormit beach incidents. Mr Kerr also explored with him the subject matter of the "Let's Talk" procedure in September 2017.

10. Having concluded the investigatory interview, Mr Kerr concluded that there was a disciplinary case to answer. He advised the Claimant that a disciplinary hearing would be held before another manager, Mr Burness, which could result in disciplinary action being taken up to and including dismissal.

11. On 14 April 2018, Mr Kerr wrote to the Claimant inviting him to a disciplinary meeting on 20 April 2018 with Mr Burness. The letter stated *inter alia*:

> **"The purpose of the hearing is to discuss allegations of:**
>
> - **Numerous inappropriate comments to a colleague who works in the front end Team, including some of a sexual nature.**
> - **Inappropriate actions towards the same colleague.**
>
> **Please find enclosed the following documents to be considered at the hearing-**
>
> - **Investigation notes, witness statement (*sic*) and copy of messages."**

The Claimant was reminded that a possible outcome of the disciplinary hearing could be his dismissal. He was advised of his entitlement to be accompanied by a colleague or union representative, and was directed to where he could find a copy of the Appellant's disciplinary policy.

12. Mr Burness read the papers in advance of the disciplinary meeting and apparently formed the view that the allegations were of conduct by the Claimant "verging on grooming".

13. The disciplinary hearing took place as planned on 20 April 2018. The Claimant attended with his representative. At the start of the meeting, the Claimant handed over a personal statement which he had prepared. Mr Burgess then went through the various allegations with the Claimant inviting his responses. In relation to the Facebook messages, the Claimant's position, in summary, was that it was a conversation between two adults which E could have stopped at any

time; that he had not meant to cause offence; that it would not happen again; and that some messages sent to him by E could also be said to be inappropriate. He referred to a message to him in which she had used the word "*bitch*". The Employment Judge has noted other examples as including an occasion when E used the expression "*Pure shat myself*" in a text to the Claimant and as well as references by her to drinking alcohol and getting drunk when she was under the age of 18.

14. The Claimant read out a letter of apology to E which he had prepared and advised that he had come off Facebook Messenger completely. Mr Burness summarised the Claimant's position as being that the Claimant had engaged in banter but didn't think at the time that he was causing offence, albeit that he had since realised that some of his comments to E "weren't very good". The Claimant stated that he would have stopped right away if he had realised that at the time. There was also discussion of the Christmas Eve and Wormit beach incidents in relation to each of which the Claimant offered his explanations.

15. Mr Burness adjourned the meeting to consider the material that had been presented to him. During the adjournment, Mr Burness apparently made a note of his thought processes. The note stated:

> **"I believe comments to be inappropriate.**
>
> **So is in trusted position as a Team Leader. I believe that there was a bigger intention than just friendship and could be seen as sexual harassment even grooming case.**
>
> **I have a big concern that 3 ½ months after a similar complaint he engages in this kind of dialogue.**
>
> **The comments are certainly not acceptable taking into account S's position and also that E is a 17 year old student.**
>
> **Taking into consideration the above I can no longer have any trust or confidence that this would not happen again."**

16. On reconvening the disciplinary meeting, Mr Burness stated:

> **"I have made a decision. I believe that they (*sic*) are inappropriate you are in a trusted position as a team support I believe that there was more than a friendly nature and it (*sic*) had a sexual element. I believe that you are in a trusted position I cannot have any trust that this would not happen again given it is less than three months since a similar incident therefore my decision is to dismiss for gross misconduct."**

17. The decision to dismiss was confirmed in a letter dated 21 April 2018 which stated *inter alia*:

> **"I am writing to confirm my decision to summarily dismiss you for gross misconduct. The reason(s) for this are:**
>
> **1. Numerous comments to a colleague, who works for you, over social media of an unacceptable nature including some of a sexual nature**
>
> **2. This occurring only 3 months after a complaint by another colleague against you for similar behaviours**
>
> **3. You have fundamentally breached the trust placed in you by Tesco as a Team Support colleague."**

18. The Claimant appealed against the decision to dismiss him. In his Appeal Form, he ticked several of the pre-printed *pro forma* reasons for the appeal. These included, "The outcome was too harsh"; "The investigation was not complete"; "I was not given a fair hearing"; "I feel that my version of events wasn't adequately considered"; and "Other". He also set out in his own words why he maintained that the appeal should be allowed.

19. The appeal was heard on 11 May 2018 by another of the Appellant's managers, Mr McRonald. The Claimant attended with his representative. The Claimant's position remained, as it had been before Mr Burness, that he agreed that some of his comments to E had been

A inappropriate but that he had not meant to cause her offence. He repeated his earlier submission that the exchanges were a conversation between two adults, and were "banter". Mr McRonald upheld the decision to dismiss.

B **The Employment Tribunal's Judgment and Reasons**

20. The Employment Judge identified the issues which he had to determine as being:

> **"whether or not the claimant had been unfairly dismissed… If the claim succeeded the Tribunal required to determine remedy."**

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21. At paragraph 54, he stated:

> **"In my view the respondents in the person of Mr Burness and indeed Mr McRonald had a genuine belief that the claimant was guilty of the conduct for which he was dismissed.**

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He concluded, however, that: (a) the Appellant's investigation "fell well outwith the band of reasonable responses" (paragraphs 54-60); (b) the Appellant "did not have reasonable grounds upon which to base their decision as to the claimant's guilt" (paragraphs 61-63); (c) "there were a number of respects in which the dismissal was procedurally unfair" (paragraphs 64-68); and (d) both Mr Burness and Mr McRonald "pre-judged the case and jumped to a conclusion which they were not entitled to do on the basis of the evidence".

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22. Drawing these conclusions together, he stated (at paragraph 69):

> **"The dismissal was unfair both procedurally and substantively unfair (*sic*) from beginning to end."**

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23. He accordingly made a basic award of £6,581.98 and a compensatory award of £16,537.69. He reduced both the basic and compensatory awards by 25% to take account of the claimant's contribution to the dismissal. The aggregate monetary award was therefore £17,339.76.

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24. On the issue of investigation, the Judge stated (paragraph 58):

> **"The first point is that Mr Kerr who was the Investigation Manager did not actually speak to E nor did he speak to the two managers who had taken statements from E. As a result, he and indeed all of the managers who dealt with matters subsequently were unaware of the precise circumstances which led to E's statement being made. There were also a number of other issues such as who had made copies of the messages and the precise circumstances in which certain messages came to be circled. It is clear from the internal evidence of E's statements that there must have been other conversations between E and Emma Lyttle and perhaps Wendy Cooper which were not recorded. In my view any reasonable employer would have sought to at least interview Emma Lyttle or Wendy Cooper to find out the course of whatever investigation had been carried out up to the point where E had given her two statements. There are a number of other individuals who are mentioned within E's statement as being in a position to give relevant evidence. They were not spoken to at all. There is also the issue of the 'Let's Talk'. It was clear from the evidence that Mr Kerr had found the 'Let's Talk' in the claimant's file and had resolved to make that part of his investigation. Having spoken to the claimant about it he did not speak to Emma Lyttle who gave the 'Let's Talk' or indeed anyone else. It was the claimant's evidence that Wendy Cooper was also at the meeting to which the 'Let's Talk' refers. It is clear that both of the decision makers in the case placed some weight on the Let's Talk and it is unfortunate to say the least that the respondents had no information other than the text of the document and what the claimant told them. It was also clear that, as noted below, the respondents did not actually accept what the claimant told them about the Let's Talk but instead made various assumptions which were not based on any investigation whatsoever."**

25. Developing this theme, the Judge continued (at paragraph 59):

> **"Most importantly however there was a complete failure by all three of the managers involved (Mr Kerr, Mr Burness and Mr McRonald) to make any attempt to investigate the various points made by the claimant at the investigatory hearing, the disciplinary hearing and the appeal hearing. All three of them seemed to focus on the fact that the claimant was apologetic and indeed quite appalled to find that his messages were being interpreted in the way that they were. They entirely failed to note that the claimant was in fact setting out his position which was that he was carrying on what he thought was a conversation between two adults who were friendly with each other…The claimant made the point that Facebook Messenger provides a substantial number of methods by which someone can break off communication with someone they no longer wish to communicate with. The claimant also makes the point that many of the responses which E makes to his messages could also in certain circumstances be viewed as inappropriate. The claimant also sets out a different version of events in relation to the 'Wormit beach incident'. He states that he and E had been chatting all evening on Messenger. This was not investigated. From the messages lodged it is unclear which messages would relate to this date. The claimant also gives a different version of the 'Christmas Eve incident'. His position is that a number of employees had suggested going for a meal. He then went to do other duties and when he subsequently left decided to wait to see if anyone else was going for a meal. None of this was investigated. Instead each time the claimant raised these points the manager concerned would take it upon themselves to answer for and on behalf of E. How they could do this on the basis of the limited information in the statements given is difficult to see."**

26. On the issue of reasonable basis for the employer's belief, the Judge stated (at paragraph 61):

> **"I also consider that the respondents having failed to carry out a proper investigation, did not have reasonable grounds on which to base their decision as to the claimant's guilt. It was clear to me from hearing the evidence of Mr Burness and Mr McRonald that both the decision**

> **makers saw the age difference between E and the claimant as paramount. They were simply not prepared to entertain that there could be a non-sexual, non-exploitative motive for a 39 year-old man to be carrying on a conversation with a 17 year-old girl. This view of theirs which appears to have been formed prior to the claimant attending each meeting appears to have entirely coloured their view and led to them effectively pre-judging matters."**

27. Having noted that the reference to "inappropriate actions" in the letter inviting the Claimant to the disciplinary meeting lacked specification and did not mention the Christmas Eve or Wormit beach incidents, he stated:

> **"With regard to the messages…[c]ontext was clearly important in deciding whether, as the claimant contended, he was on friendly terms with E and that this was the type of conversation which happened between friends or whether, as the respondents appear to have believed, the claimant was a sexual predator who was bent on exploiting the claimant and grooming her for sexual purposes. In my view the respondents would have required much more information before them before they reached the conclusion they did on this subject."**

28. The Employment Judge then went on to consider (paragraphs 64-68) what he described as "procedural fairness". It was his view that the Claimant was not given adequate notice of the allegations against him prior to the investigatory meeting with Mr Kerr, or of the fact that the "Let's Talk" might feature in his discussions with Mr Kerr at that meeting. In relation to the disciplinary meeting itself, the Judge observed that the Claimant had not had sufficient notice of allegations of sexual harassment or abuse of his position. He also accepted (paragraph 68) a submission made for the Claimant that:

> **"…there was further serious procedural unfairness in that Mr Burness went on to find the claimant guilty of allegations which had not been put to him in the letter inviting him to the Tribunal (*sic*)"**

29. Having concluded that the dismissal was unfair on these grounds, the Employment Judge did not reach the stage of considering whether or not the sanction of dismissal fell within the band of reasonable responses (per **Iceland Frozen Foods Limited v. Jones** [1983] ICR 17 and **Foley v. Post Office** [2000] ICR 1283).

The Grounds of Appeal

30. The Appellant's Notice of Appeal contained four separate grounds. Read short, these were that the Employment Judge had erred:

i. in failing properly to consider the issue of whether or not there were "reasonable grounds" for the Appellant's belief in terms of **British Home Stores v. Burchell** [1980] ICR 303;

ii. in failing to apply the *ratio* of **Scottish & Southern Energy plc v. Ness** UKEATS/0043/10 in relation to the issue of the reasonableness of the investigation;

iii. in substituting his view of the reasonableness of the investigation for that of the employer; and

iv. in any event, in restricting the reduction for contributory fault to 25%.

Submissions

31. During the course of submissions, it became apparent that parties disagreed about the important factual issue of what exactly was the Appellant's reason for dismissing the Claimant. We will return to the reasons for that disagreement below. Relying on the terms of the letter of 21 April 2018. Mr Crammond submitted that the reason for the dismissal was simply the making by the Claimant of inappropriate comments to E. It did not extend to any other behaviour of the Claimant, including the Christmas Eve incident or the Wormit beach episode. Nor, submitted Mr Crammond, did issues of "grooming" or of the Claimant being a "sexual predator" form any part of the reason for dismissal. Mr Hay took a broader approach, submitting that it could be inferred from the Tribunal's Reasons that the reason for the dismissal included all of those other matters.

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32. On the narrower approach to the reason for the dismissal, Mr Crammond submitted (Ground 1) that the Tribunal's conclusion that there was no reasonable basis for belief in the existence of misconduct was erroneous in circumstances where the Claimant had accepted that he had sent the messages to E and had further accepted that, in a number of instances, the content of those messages was either "not acceptable", or "inappropriate". He submitted that the Claimant's explanations for the messages was, in these circumstances, no more than mitigation in relation to admitted misconduct. Relying upon **Ness** he submitted (Ground 2) that the "band of reasonable responses" which in **Sainsbury's Supermarket Limited v. Hitt** [2003] ICR 111 described as applying to the conduct of investigations did not extend to investigation of the issue of mitigation. In any event, he submitted (Ground 3) that in relation to the issues of investigation and procedural fairness, the Employment Judge had erred by substituting his own view rather than considering the "band" of reasonableness. Finally, (Ground 4) he submitted that even if the dismissal was unfair, a reduction of only 25% for contributory conduct was inappropriate.

33. Mr Hay, whilst accepting that there was no express finding by the Employment Judge about the reason for the dismissal, invited us to infer that it had included all aspects of the conduct that was discussed at the disciplinary hearing. Taking that broader approach to the reason for the dismissal, he submitted that in a case where the reason for dismissal was for conduct – as this one clearly was – the reasonableness of the investigation involved questions of degree which were matters for the fact-finding Tribunal. **Ness** was not authority for the proposition that the band of reasonable investigations did not extend to the issue of mitigation put forward by the employee. Responsibility for inquiry into mitigation did not rest with the employee. If it was accepted that the reason for dismissal encompassed all of the allegations discussed at the disciplinary hearing, there were clear problems with the approach that the employer had taken. These included deficiencies in the investigation and dismissal of the Claimant for matters of which he had not been given fair notice, including the very serious accusation of "grooming" for sexual purposes.

Mr Hay fairly accepted that the expression "sexual predator" was the Employment Judge's gloss on the evidence but submitted that there was at least an evidential basis for the proposition that Mr Burness had dismissed the Claimant for conduct that "could be seen as sexual harassment even grooming".

34. Mr Hay submitted that paragraph 59 of the Reasons was important on the issue of investigation. The Employment Judge had been correct to conclude that in five particular respects the extent of the Appellant's investigation fell outside the "band". Mr Hay submitted that the issues which the Judge was correct to conclude should have been further investigated were (i) the Claimant's suggestion that the messages had formed part of a conversation between two adults; (ii) his evidence that E could have blocked further messages from him but had failed to do so; (iii) his suggestion that some of E's messages to him had contained inappropriate language; (iv) his position about the Wormit beach incident; and (v) his position about the Christmas Eve episode.

35. In relation to Ground 4, Mr Hay submitted that a 25% reduction for conduct contributing to the dismissal could not be said to be unreasonable.

Decision and reasons

36. In many cases involving dismissal for conduct, the answer to the question "what was the particular conduct of the employee which caused the employer to dismiss?" will be obvious from the evidence. In other cases, however, the evidence before the Employment Tribunal may suggest a range of possible answers to that question. In that latter situation, the Tribunal must either make clear and unequivocal findings in fact as to precisely what conduct of the employee caused the employer to dismiss or, alternatively, find that the employer has failed to discharge the burden of proving the reason for the dismissal. The second of these two options may not often arise, but

A could happen where the evidence as to the reason for the dismissal was simply too vague or uncertain to allow a finding in fact to be made on a balance of probabilities.

37. In this case, it is clear from the findings in fact made by the Tribunal that Mr Burness B considered a range of misconduct allegations against the Claimant. Ultimately, however, many of these were not mentioned in the dismissal letter of 21 April 2018 either expressly or by implication. In these circumstances, it was essential for the Employment Judge to make clear C findings in fact identifying precisely what conduct of the Claimant caused the Appellant to dismiss him. The Employment Judge did not do so. Instead, having made findings in fact about the range of issues discussed at the disciplinary meeting, he merely recorded what was considered by Mr Burness during the adjournment, what was said by Mr Burness after the adjournment and D what was said in the letter of 21 April 2018. He appears to have failed to recognise that what was said in the letter about the reason for dismissal was significantly narrower in its scope than the range of issues discussed at the disciplinary meeting. At paragraph 54 of his Reasons, the E Employment Judge recorded his conclusion that the Appellant genuinely held a belief that the Claimant "*was guilty of the conduct for which he was dismissed*". Nowhere in his findings in fact, however, does he identify what that conduct was.

F 38. In these circumstances it is not at all surprising that, in the course of this appeal, parties were unable to agree exactly what the Employment Judge had found was the conduct constituting the reason (or principal reason) for the dismissal. That was because the Employment Judge made G no such finding.

39. Faced with these difficulties in the Employment Judge's Reasons, Mr Hay invited us to imply certain findings in fact about the Appellant's reason(s) from the Judge's subsequent H conclusions about the fairness of the dismissal. We were not persuaded that we should do so. In the first place, it would be circular for this Tribunal to imply findings in fact that were not made

by the Employment Tribunal from its conclusions about other aspects of **Burchell** that are themselves contentious in this appeal. Secondly, if it was indeed the Employment Judge's conclusion that the narrower terms of the letter of 21 April 2018 contained an inaccurate or incomplete account of the reasons for the dismissal, we would have expected that to have been the subject of a clear finding in fact. No such finding was made.

40. Without a clear finding as to what was the conduct that caused the employer to dismiss, it is difficult to make any meaningful assessment of the other parts of **Burchell**, including whether or not the belief in the existence of the conduct was reasonably held, and whether or not the investigation which informed that belief was reasonable.

41. In relation to the first Ground of Appeal, we accordingly agreed with Mr Crammond to the extent that we could not understand how the Employment Judge could conclude that there was no reasonable basis for the Appellant's belief in the existence of the misconduct which caused the dismissal without any finding in fact as to what that belief was.

42. In relation to the second Ground of Appeal, we were unable to accept Mr Crammond's submission that the **Sainsbury's** band of reasonable investigation could never, as a matter of law, extend to the investigation of mitigatory factors. There is no reason in principle why the need to carry out a reasonable investigation should not apply equally to issues bearing upon sanction for proven or admitted misconduct. As the Court of Appeal noted in **Sainsbury's** (at paragraph [34]) the range of reasonable responses applies to all procedural and substantive aspects of the decision to dismiss a person from employment for a conduct reason. The degree of investigation required in relation to potential mitigation is inevitably fact sensitive and will vary from case to case. In considering whether a particular line of inquiry into mitigation was so important that failure to undertake it would take the investigation outside the **Sainsbury's** band, Tribunals require to consider *inter alia* the degree of relevance of the inquiry to the issue of sanction, whether or not

A the employee advanced any evidential basis which merited further inquiry, and the extent to which resultant further investigation could have revealed information favourable to the employee.

43. **Ness** was an unusual case. It involved an employee who was dismissed for excessive B private internet use during working hours. The Tribunal held that in not investigating the employee's health prior to dismissing, the employer had failed to carry out an investigation which fell within the **Sainsbury's** band. The Employment Appeal Tribunal held that the Tribunal had C erred in reaching that conclusion. Importantly, however, and as is clear from the Judgment, there was no evidence whatsoever of any causal connection between the employee's health and his internet use. To the extent that **Ness** held that there was no requirement on an employer to investigate wholly speculative matters advanced as possible mitigation, we agree with that D proposition. If, however, the decision in **Ness** was intended to suggest that it could *never* be unreasonable in terms of section 98(4) **ERA** for an employer to fail to investigate mitigation, we would respectfully disagree. Such an approach would be inconsistent with what was said in E **Sainsbury's**.

44. In relation to the third Ground of Appeal we considered that, whatever was the reason for the dismissal, there was considerable force in Mr Crammond's submission that the Employment F Judge had, in a number of respects, substituted his own view as to what a reasonable inquiry demanded. On any view of matters, we could not see the relevance of many of the inquiries the Judge deemed to be essential.

G 45. In relation to paragraph 58 of the Reasons, we could not understand why it mattered who had copied the messages or who had circled them. Absent any suggestion of an ulterior motive on the part of E in complaining about the Claimant, we could not understand what purpose could H have been served by further investigation of the precise circumstances which led to E's statements being given. We could not see any relevance of further inquiry into what investigations were

made prior to E's statements being taken, nor did we understand what "relevant evidence" the Employment Judge thought could have been given by the unidentified individuals who were apparently mentioned in those statements. In relation to the "Let's Talk", it appeared to be uncontroversial that the Claimant's contacts by message and telephone with the other female colleague had been unwelcome, that he had been told to delete her number from his phone, and that he had done so. Much of that information in fact came from the Claimant himself at the disciplinary hearing.

46. In relation to paragraph 59 of the Reasons, the proposition that E could have blocked the Claimant from contacting her on Facebook was, again, uncontroversial. The passage of E's statement of 10 April 2018 quoted at page 7 of the Reasons at lines 20-23 made clear her reason for not asking the Claimant to stop. The submission that the Claimant and E were both adults did not obviously call for any further inquiry and there was no dispute that E had sent messages to the Claimant. It did not seem to us to be any part of the Claimant's position at the disciplinary hearing that E had somehow invited or encouraged the Claimant to send her inappropriate messages. If that had been his position, however, we would have seen no basis whatsoever for it in the evidence presented by him at either the disciplinary hearing or the appeal hearing such as to call for further inquiry by the Appellant. Finally, we were puzzled at the suggestion that any unfairness arose from the absence of notice to the Claimant of the allegations against him prior to the investigation meeting with Mr Kerr. Plainly, what mattered was that the Claimant should have had notice of the allegations against him prior to the disciplinary meeting with Mr Burness.

47. All of these matters seemed to us to be material to the Employment Judge's conclusion that the dismissal of the Claimant was unfair. All, were, however, redolent of the Judge having left the **Sainsbury's** band far behind and substituted his own view of the reasonableness of the

A Appellant's investigation. Even without a clear finding in fact as to the reason for the dismissal, therefore, we concluded that the third Ground of Appeal was well founded.

Disposal

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48. In the course of submissions, Mr Hay suggested that if the findings in fact about the reason for the dismissal were thought to be deficient, it would be open to this Tribunal to remit to the Employment Judge under the **Burns / Barke** procedure with an invitation to consider C making further findings. We considered that possibility. Had the deficiencies in the factual findings been the only criticism of the Employment Judge's Reasons, there might have been scope for the use of that procedure. In light of our conclusions about the third Ground of Appeal, D however, the only appropriate disposal is to set aside the Judgment of 12 June 2019 and thereafter to remit to a different Tribunal for a full re-hearing of the case.

49. It is implicit in that disposal that all issues as to the fairness or otherwise of the dismissal E will be for that different Tribunal to determine on such evidence as may be presented to it. In that regard, both of the very experienced industrial members of this Tribunal expressed a strong view that any re-hearing of this case would benefit significantly from a full Employment Tribunal F panel of a Judge and two lay members. I agree with that assessment.

G

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