Neutral Citation Number: [2022] EAT 110

Case No: EA-2019-000966-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 October 2021

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR MARK WARD

Appellant

- v –

DIMENSIONS (UK) LIMITED

Respondent

- -
- -

Zeljka Ivankovic for the **Appellant**
Charles Crow (instructed by **Anthony Collins Solicitors LLP**) for the **Respondent**

Hearing date: 19 October 2021

- -

JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant in the employment tribunal was dismissed because he was found to have made a threat to a colleague to the effect that he had a gun with her name on it. That allegation was, in the internal process, denied by the claimant, but supported by the evidence of others.

The manager who heard the claimant's appeal against dismissal had also, at an earlier stage, suspended the claimant, and authorised the matter being progressed by way of disciplinary charges. He had also had a conversation with the person who the claimant was alleged to have threatened, in which he had advised that she should consider making a report to the police. The tribunal concluded that these features did not mean that his being the manager who later heard the claimant's appeal rendered the dismissal unfair. The tribunal had carefully considered these issues and did not err in law in reaching that conclusion.

The tribunal also did not err in law, by failing to filing the dismissal unfair, on the basis that the respondent had wrongly formed the view that the claimant owned, or had owned, a gun, when there was no evidence before the respondent to support such a conclusion. It was not surprising that, in the internal process, the claimant had been asked questions about that, because an affirmative answer might have been thought to lend some support to the allegation that he had made a threat. But that was not a necessary finding in order to make out the charge. The tribunal also properly found that the decision to dismiss was based on the belief that he had made a threat, as charged, and despite his denial, not on the belief that he actually did own, or had owned, a gun. The tribunal properly found that it was fair to dismiss him for making such a threat, and that the dismissal was otherwise in all the circumstances of the case a fair one.

HIS HONOUR JUDGE AUERBACH

Introduction

1. The claimant in the employment tribunal was employed by the respondent until he was dismissed for the given reason of conduct. He complained of unfair dismissal and also that he had been subject to detriment and dismissed because he had made protected disclosures.

2. The claims were heard at Watford before Employment Judge Bedeau, Mr D Bean and Mr K Rose in June 2019. The claimant was represented by his fiancée Ms Z Ivankovic and the respondent was represented by Mr Crow of counsel. The tribunal dismissed all of the claims. Written reasons were requested and in due course provided. The claimant appealed to the EAT. The notice of appeal was considered on paper by HHJ Katherine Tucker not to be arguable, but at a Rule 3(10) hearing Choudhury P directed two grounds to proceed to a full hearing. I will come to those presently, but I note at this stage that they both relate to the decision in respect of the complaint of ordinary unfair dismissal. The EAT is not now concerned therefore with the protected-disclosure detriment or dismissal complaints.

The Facts

3. I will summarise the factual background so far as relevant to the issues that are raised by this appeal and drawing on the tribunal's decision.

4. The respondent is a charity which supports people with learning disabilities. It has approximately 7,000 staff or did at the time of the tribunal's decision and delivers a range of services to around 3,500 people across the UK. The claimant was employed by it as a Support Worker based at the relevant times at a supported living scheme called Linden House.

5. In April 2016 the claimant had a meeting with Siobhan Tipper, Acting Locality Manager, in which he raised a number of miscellaneous concerns. The tribunal described in full detail the grievance and grievance appeal process that ensued, but for the purposes of this

appeal I do not need to set all of this out. However, I note that one of the managers who dealt with the grievance at one point was Tina Panting, London & East Performance Coach.

6. For a combination of reasons which the tribunal describes, the process took a long time to run its course. However, it concluded with a decision on a grievance appeal in August 2017 by a manager, Jocelyn Alderson, in which some of the claimant's concerns were upheld and some not.

7. Having described these matters, the tribunal then set out its findings about an email sent by the claimant on 7 September 2017. Ms Bennett, to whom this passage refers, was a Lead Support Worker.

> **"37. On 7 September 2017, the day of the claimant's second alleged protected disclosure, he e-mailed Ms Tipper, copying Ms Panting, in which he stated that there had been concerns about Ms Tipper's checks on a vehicle. He wrote,**
>
> > **"Perhaps this is already under investigation and I am simply "out of the loop"? however, given that the record in question is the weekly vehicle safety check and if my suspicions are correct, it would mean that this was last carried in by Theo in February which given that would mean risk to PWS, staff and other members of the public would happened to be an innocent bystander at the time, please could I request attention be given to this?" (797-798)**
>
> **38. The matter was investigated by Ms Tipper who issued Ms Bennett, on 20 September 2017, an improvement notice for signing off vehicles checks when she did not carry them out herself as she was on annual leave at the time. Ms Tipper concluded that Ms Bennett had not falsified the records but was worried that the checks, which had been done, had not been properly recorded. It was, according to Ms Tipper, "bad judgement". She introduced and implemented a new system of recording vehicle checks.**
>
> **39. The claimant did not speak to Ms Bennett about the vehicle checks. Had he done so he would have been made aware that the checks were done but not by Ms Bennett. However, she signed them off instead of the person who had done the checks. The claimant was not disclosing facts but his 'suspicions'."**

8. On 19 September 2017 or thereabouts, Ms Tipper conducted an investigation which followed certain concerns having been raised by colleagues. Ms Tipper set out in her investigation record two particular matters, referred to by the tribunal at [41]:

> **"The matter came before Mr Barrie Ellis, Operations Director, who was of the view that the claimant "posed a probable risk to the people we support" and**

> **suspended him on 21 September 2017, on average pay. The claimant was required to respond to two allegations which were to be investigated, namely (1) changing a service user's pads in a public space, and (2) failure to follow support plans. He was sent a copy of the manager's guide to suspension, together with the suspension letter. (90-91)."**

9. An investigation was then conducted by Ross Hamilton-Smith, Interim Performance Coach. On 30 October she interviewed Ms Bennett. The tribunal continued as follows:

> **"During questioning she revealed a matter unprompted. In question 11 of the notes, she was asked to name the person whom she had concerns about. She replied that is was the claimant and that she had raised her concerns a few times with Ms Tipper. In question 12, she was asked the length of time she worked with the claimant and her working relationship with him. She responded by saying;**
>
> > **'Since I have started in January, we had a good working relationship in the beginning and would chat and have a laugh, then the more I raised issues with him and Siobhan about things like C not going out, our relationship went downhill from them on. He was never rude to me or horrible but said things like 'I have guns and one with your name on it if you want it', he smirked when he said it but that was quite normal, I felt I didn't want to be there when he said this and I had half an hour left of my shift, I had to leave the house and went to another Linden House, the garden of house and cried, I called Siobhan and said I can't keep working with him.' (178)"**

10. The tribunal then continued:

> "**On the same day, Ms Heidi Vardon, Assistant Locality Manager, was interviewed by Ms Hamilton-Smith and gave an account of her concerns regarding the claimant. In relation to the claimant's threatening behaviour towards Ms Bennett, Ms Vardon said in response to the following:**
>
> > **'I caught the conversation mid-on, M said something like I have a gun and could shoot you. Heidi – Jessica came to me about it, she was concerned that people wouldn't believe her, I can't recall reporting it on but I will check my e-mails to see if Siobhan had received anything from me. This was around August 2017, it was a few weeks after Jessica had issued an improvement note about the daily records being taken out of the house by M.' "**

11. Separately, another interviewee raised a concern that the claimant had commented in the presence of a vulnerable resident with mental health issues, referred to as "A", that he, the claimant, disliked A's family.

12. The tribunal then continued:

> **"47. On 22 November, the claimant was interviewed. He said that he did not have**

> **a relationship with Ms Bennett, Ms Vardon and another worker by the name of Jennifer as they were 'recent arrivals'. He said he tried to separate work from his private life. He denied the allegations. (198-213)**
>
> **48. Arising out of the accounts given by Ms Bennett, Ms Vardon, and Taylor-Marie, the claimant was written to again by Mr Ellis who informed him that two further allegations would be investigated, allegations three and four. Allegation number three was "making inappropriate comments regarding service user's family in earshot of the service user and that if established breached the respondent's code of conduct".**
>
> **49. Allegation four was "making a threatening comment to a colleague". That was breach of the respondent's Code of Conduct and also its Dignity at Work policy. In the Disciplinary policy "threat of violence or offensive behaviour" constitutes gross misconduct entitling the respondent to dismiss without notice or pay in lieu of notice. (104-105, 371-381)"**

13. The claimant was interviewed about allegations 3 and 4. After setting out the record made of the discussion of allegation 3 the tribunal continued:

> "**52. The interview then moved on to threatening comments, the fourth allegation. The following is the recorded dialogue:**
>
> > **"Do you own guns?**
> >
> > **No.**
> >
> > **Do you recall ever talking about owning guns to a colleague?**
> >
> > **Yes. I wanted to buy an air pistol. My cat was being bullied by another neighbourhood cat and so was looking to hang balloons and shoot them with an air pistol to drive the other cat away.**
> >
> > **Who was the colleague that you discussed this with?**
> >
> > **Taylor.**
> >
> > **Have you ever discussed with a colleague things that have been left to you by family?**
> >
> > **Yes. I forget who the conversation was with. I had three great uncles who were all missionaries in other countries who had firearms who had kept them in the family and was supposed to be left to me. An uncle had told Mark that he had thrown them in the Thames but in fact he had sold them to a registered licensed company.**
> >
> > **Who was that conversation with?**
> >
> > **Siobhan Tipper.**
> >
> > **When was this?**
> >
> > **A couple of years ago".**

53. He was then asked:

> **"Do you recall telling a colleague that you had to go to France to sort out a vineyard and weapons that had been left to you by family?**
>
> **No I have had discussions regarding a vineyard but that was not in France. We have a couple of houses and vineyard in Croatia. There was a farm in France, not a vineyard. It was something bequeathed to the family as a whole.**
>
> **Just to be clear, we believe that the discussion was with Siobhan to sort out a farm in France? And at no point did you have weapons left to you by your family? Do you recall telling a colleague that you had guns, and one with that person's name on it?**
>
> **No. If I do not own any guns, why would I then have somebody else's name written on it?"**
>
> **Was there anything you would like to add to this?**
>
> **No". (198-213)"**

14. Ms Tipper was interviewed and was asked whether Ms Vardon had made a report to her. The tribunal found: "Ms Tipper responded by saying that Ms Vardon said that the claimant had said something to Ms Bennett about 'having a gun, and he could shoot her'. She had overheard this and 'the perception was that it was a threating comment made towards Jessica'." Ms Tipper said that this had probably happened in late summer. She reported that she had then spoken to Ms Bennett and advised her to put the matter in writing so that it could be investigated, but Ms Bennett had declined to pursue it as she said that she was anxious about repercussions.

15. Ms Hamilton-Smith produced a report recommending that all four allegations be considered at a disciplinary hearing. Mr Ellis emailed an HR business partner, Ms Sidgwick, stating that he was content for the allegations to proceed to a disciplinary hearing. That disciplinary hearing took place in January 2018 before Charles Collier, Locality Manager, who had had no prior dealings with the claimant. A notetaker was present.

16. The tribunal found at [63]:

> **"In relation to the fourth allegation, he said that he had mentioned that he did not**

> **own a gun, therefore, why did he refer to a gun. He had a cap gun and a cowboy outfit, but at age 7, he had disposed of them. He had uncles who were missionaries. He had no idea why Ms Bennett would make this statement about him. … He asserted … that Ms Bennett, Ms Vardon, and Ms Tipper had conspired to remove him."**

17. Mr Collier found that there was no case to answer in relation to allegations 1 and 2. He found that allegation 3 warranted a written warning. He also upheld allegation 4, which he considered was gross misconduct warranting dismissal. He informed the claimant of the outcome by telephone and followed up with a detailed letter.

18. The tribunal reproduced the full text of Mr Collier's findings in relation to allegation 4 which set out the respective accounts of Ms Bennett, Ms Vardon, Ms Tipper and the claimant. As to the claimant's account, the letter read as follows,

> **"You have stated that you did not make this comment to Jessica and you have no idea why she would come out with this comment. You said that you did not own guns. You said that you had wanted to buy an air pistol to shoot balloons to scare a neighbourhood cat away. You said you had talked to Siobhan about your three great uncles who were missionaries in other countries who had firearms who had kept them in the family and was supposed to be left to you."**

19. Mr Collier went on to consider matters of mitigation and alternatives to dismissal but came to the conclusion that there was no alternative but to dismiss. He told the tribunal that as Ms Bennett was frightened of the claimant, he could not allow him to return to work. The dismissal letter told the claimant he could appeal to Mr Ellis, which he did.

20. As to the designation of Mr Ellis as appeal manager, the tribunal said this:

> **"70. In the course of his evidence, Mr Ellis told the tribunal that following the disclosure to Ms Hamilton-Smith by Ms Bennett, of the alleged threat, he wanted to speak to Ms Bennett to find out what support the respondent could offer her. He said that she had been in a potential threatening situation and as Operations Director, he felt obligated to speak to her, not about the case, but about support. In his discussion with her, he advised her to consider reporting the matter to the police. He did not make a note of their conversation because it was not to discuss her evidence. He also told the tribunal that he formed the impression, having discussed the matter with her, that she had experienced 'something serious'.**
>
> **71. It seems to this tribunal that having been involved in sanctioning the claimant's suspension; having added the two further allegations; having formed the view that the four allegations should proceed to a disciplinary hearing; and having advised**

> **Ms Bennett to consider reporting the matter to the police, another Operations Director should have conducted the appeal or instructions could have been given to Human Resources to speak to Ms Bennett. This is the tribunal's observation, however, we will come back to this in due course in our conclusion."**

21. The appeal hearing held on 20 March 2018 was by way of a review. The claimant described his interview with the police in relation to the gun-threat allegation of which he said there was a DVD. Mr Ellis indicated that he would delay his decision until 26 March to enable the claimant if he wished to send him any further evidence pertaining to the police interview. In the event, the claimant did not do so. Mr Ellis wrote to the claimant with his decision on 29 March, which was that he upheld Mr Collier's decision to dismiss.

The Employment Tribunal's Decision

22. The tribunal gave itself a detailed self-direction as to the law. As to ordinary unfair dismissal this began as follows:

> "**Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:**
>
> > **'Where the employer has fulfilled the requirements of subsection (1), and 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 employees 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.' "**

23. The tribunal went on to refer to **British Home Stores v Burchell** [1980] ICR 303 and to a number of other authorities. I will return to the tribunal's self-direction as to the law later.

24. The tribunal set out its reasons and conclusions that the communications relied upon by the claimant as protected disclosures did not amount to such in law and that he had in any event been neither subjected to detriment nor dismissed by reason of any such disclosures. In the

course of considering the protected-disclosure unfair-dismissal claim the tribunal stated that the principal reason for dismissal "was that he had threatened Ms Bennett by saying that he had a gun with her name on it". When it turned to the ordinary unfair dismissal claim, the tribunal repeated this and added a finding that Mr Collier was satisfied, notwithstanding the absence of a specific date of the incident, "that the threat was made".

25. The tribunal went on to find that this conclusion was reached by Mr Collier after a reasonable investigation. The tribunal continued:

> "**121. Were there reasonable grounds for genuinely believing in the claimant's guilt? Although there was the absence of a specific date of the threat, it did not negate the finding that a threat had occurred. Ms Bennett's account and that of Ms Vardon's, were very significant. Ms Bennett felt threatened and reluctant to take it any further due to possible repercussions. This was supported by Ms Vardon who came part way through the conversation between Ms Bennett and the claimant. Ms Tipper, recorded a recent complaint of threatening behaviour. The claimant acknowledged that at one time he had possession of at least a gun.**
>
> **122. There was no evidence in support of either a conspiracy or collusion on the part of Ms Bennett, Ms Vardon and Ms Tipper.**
>
> **123. There is no challenge to the genuine belief held by Mr Collier and Mr Ellis. Those were the grounds upon which they formed that belief, not motivated for any ulterior reasons."**

26. The tribunal went on to note that the respondent's disciplinary policy designated threatening behaviour as gross misconduct and that it was concluded that the claimant could not be safely retained on any of the respondent's sites and that the interests of Ms Bennett was a concern. The tribunal said that it could not substitute its own decision and whilst another employer might have issued a final written warning, dismissal was within the band of reasonable responses.

27. The tribunal then said this at [125]:

> **"We referred earlier to the role of Mr Ellis, who conducted the appeal, observing that he was close to the disciplinary process. We are satisfied he was not influenced by what Ms Bennett said to him when he spoke to her about what support the respondent could provide for her. There was no evidence that he had been motivated by malice towards the claimant or was involved in a conspiracy or collusion. We found that he had a genuine belief in the claimant's guilt on reasonable grounds. Had another Operations Director conducted the appeal and**

> **having been presented with the same evidence and having considered the respondent's disciplinary policy with regard to threatening behaviour constituting gross misconduct, the outcome would have been the same."**

28. The tribunal then concluded at [126] that the ordinary unfair dismissal claim was not well founded.

The Grounds of Appeal and the Arguments

29. The two grounds permitted by Choudhury P to proceed to a full hearing were set out by him as follows:

> **"Ground 1 – the tribunal erred in concluding that it was not unfair for the appellant's disciplinary hearing to be conducted by a person who had close prior involvement in the disciplinary proceedings, had taken the decision to suspend and had concluded that the complainant in the allegation of gross misconduct had experienced "something serious."**
>
> **Ground 2 – the tribunal's conclusion that the appellant had acknowledged that he had had "possession" of a gun was unsupported by the evidence and/or one that no reasonable tribunal would have reached, and vitiated the tribunal's conclusions on fairness."**

30. I pause to observe that it was agreed that Choudhury P obviously meant to refer to the disciplinary appeal hearing (not the disciplinary hearing) being conducted by a person who had close prior involvement, which was a reference to Mr Ellis.

31. At the hearing before me today, as before, the claimant was represented by Ms Ivankovic and the respondent by Mr Crow. I had the benefit of reading written skeletons from them both and hearing extensive oral argument during the course of today. I start by commending the high quality of the submissions from both Ms Ivankovic who is not a lawyer and Mr Crow who is. Both presented their submissions with great clarity and conviction. Following initial oral submissions on each side there was further discussion in response to questions raised by me. I will set out my summary of what seem to me to have been the most significant points, and the positions at which they each arrived at the end of our discussions.

32. Mr Crow submitted that ground 1 ought not to have been permitted to proceed and

invited me to revisit that decision. It was common ground that this ground of appeal did not as such appear in the original notice of appeal. In her skeleton argument for the Rule 3(10) hearing, Ms Ivankovic had included a submission, the gist of which was that, because of his prior involvement in earlier aspects of the process, Mr Ellis ought not to have heard the appeal. She did not in that document specifically formulate an application to amend, but drawing on the skeleton Choudhury P crystallised that into a ground of appeal which he permitted to proceed by way of amendment.

33. Mr Crow submitted that, as this had been allowed as an amended ground at the Rule 3(10) hearing, the respondent was entitled to apply for the permission to amend to be revoked. He submitted that, applying the guidance in **Khudados v Leggate** [2005] ICR 1013, that was the appropriate course in this case. In **Readman v Devon Primary Care Trust**, UKEAT/0016/11, it was postulated that it would usually be fair to permit an amendment raised at a Rule 3(10) hearing where an appellant was professionally represented for the first time by an ELAAS representative. But in this case Ms Ivankovic had been involved throughout.

34. Ms Ivankovic said that this point had been drawn by her from an observation by HHJ Katherine Tucker, who, in her Rule 3(7) opinion, noted that the tribunal did not consider that the appeal should have been heard by a different individual to the manager who did hear it. Mr Crow submitted that, if so, the application to amend should have been made promptly following the receipt of Judge Tucker's reasons in around February 2020 and there was no good reason that the point not having been raised at all until the skeleton argument for the Rule 3(10) hearing almost a year later. The passage of time was significant, the respondent would be prejudiced by having to defend a ground that it would not otherwise have to defend and there was limited prejudice to the claimant given Choudhury P's view that the point was in any event only just about arguable. However, he accepted that I should consider this in conjunction with my consideration of the merits and not give a separate preliminary decision on it. There was also

no suggestion from him that the respondent had not been able to martial its arguments in relation to this ground of appeal, which indeed he presented in his skeleton argument and orally today.

35. Ms Ivankovic said that she had done her best as a non-legal representative and noted that the letter she received with the Rule 3(7) opinion simply told her of the claimant's right to seek a Rule 3(10) hearing.

36. I will return to this aspect when I come to my overall conclusions. I turn now to my summary of the arguments in relation to the substance of each ground.

37. In relation to ground 1, Ms Ivankovic relied upon the tribunal's finding at [70] that when Mr Ellis spoke to Ms Bennett he had "formed the impression" described there. She submitted that the tribunal was here in substance saying that he had formed a view or an opinion, and there must have been some reasoning process involved in that. So Mr Ellis had in effect at that point pre-judged the matter. She relied also on the finding at [70] that he had advised Ms Bennett to consider reporting the matter to the police. The tribunal should have concluded in light of these findings alone that Mr Ellis should have been precluded from later hearing the appeal. Ms Ivankovic submitted that his involvement in fact went further. Mr Ellis had suspended the claimant. He had approved the disciplinary charges. She submitted that he had been involved every step of the way and in charge of every decision. He was the constant feature throughout.

38. As to the respondent's size and resources, she referred to the tribunal's finding as to the overall number of staff roughly that it employed. By OECD standards an enterprise that employs 250 or more people is not a small or medium enterprise, but a large one. The tribunal itself found that the respondent could have had another Operations Director conduct the appeal and/or have got someone else to speak to Ms Bennett. She referred to a provision of the *ACAS Guide* on disciplinary and grievance procedures, which reflects paragraph 27 of the *ACAS Code*, which provides: "The appeal should be dealt with impartially and, wherever possible, by a

manager who has not previously been involved in the case." The respondent was large enough to be apply to comply with this. Mr Ivankovic submitted that at [71] that was the view to which the tribunal had effectively come, even though it did not specifically cite the *ACAS Code*.

39. Ms Ivankovic accepted that a breach of the *ACAS Code* did not itself automatically lead to the conclusion that an employer has unfairly dismissed; but she referred to two examples of cases in which it was said that a failure to follow the *ACAS Code* was relevant to the fairness of a dismissal. She noted that in his witness statement, Mr Ellis identified the conversation with Ms Bennett as having occurred after Ms Hamilton-Smith had conducted her investigation interviews, in around November or December 2017; but the disciplinary hearing did not happen until January, and so someone else could had been found then to deal with the later appeal.

40. Ms Ivankovic submitted that when the tribunal stated at [125]: "We are satisfied he was not influenced by what Ms Bennett said to him when he spoke to her about what support the respondent could provide for her", what it meant was that Mr Ellis was not influenced at the time when he had that conversation with Ms Bennett. But, given what the tribunal said at [70] about his impression, when he spoke to her on that occasion, that she had experienced "something serious", what it then purported to say at [125] was flatly contradictory of the natural meaning of what it said at [70], and was in that sense perverse.

41. She submitted that in any event the tribunal erred in concluding that notwithstanding what it had found about Mr Ellis' prior role, including his contact with Ms Bennett, his having conducted the appeal did not render the dismissal unfair.

42. With regard to the last sentence of [121], the EAT had the notes of the employment judge of the claimant's evidence about whether he had ever owned a gun. Ms Ivankovic submitted that those notes did not show that he had told the tribunal that he had ever owned a gun, apart from owning a cap gun as a child. In any event, on a natural reading of the last

sentence of [121] the tribunal was not referring to what the claimant had said *in evidence to the tribunal* but to what, according to the tribunal, the claimant had acknowledged to the respondent during the course of the internal disciplinary process. She submitted that perhaps the tribunal had in mind there what it had found (at [63]) that the claimant had said about the childhood cap gun. But the tribunal had made clear findings at [52] and [53] that he had told Ms Hamilton-Smith unambiguously that he did not own any guns and that whilst firearms were supposed to have been left to him by a great uncle, in the event they had been sold.

43. A toy cap gun is not a real gun or a firearm. These findings simply did not support the tribunal's later finding at [121], that he had acknowledged in the internal process that he had at one time "owned at least a gun". That was perverse. Ms Ivankovic also submitted that this was not an incidental statement by the tribunal. In the internal process the respondent had asked the claimant a number of questions about whether he had, or had ever owned, a gun. He had been asked about this before the tribunal as well. It was a feature of both decisions and this error meant that the tribunal's reasoning was materially flawed.

44. In relation to ground 1 Mr Crow contended that the tribunal concluded that the dismissal was not unfair *notwithstanding* the matters relating to Mr Ellis' prior involvement referred to at [70] and [71]. The ground therefore failed at the first hurdle because it was based on a false premise as to what the tribunal had actually decided. In any event, the tribunal had given itself a proper self-direction as to the law, including setting out section 98(4) of the **1996 Act** including the reference to the size of the administrative resources at the employer's undertaking, and as to the elements **Burchell** test including the requirement for a reasonable investigation. At [102] it had referred to **Taylor v OCS Group Ltd** [2006] ICR 1602 which held that the reasonableness of the decision to dismiss had to be considered in light of the entirety of the process followed. It had also correctly referred to authorities to the effect that the band of reasonable responses approach applies to the process followed as well as to the outcome.

45. The tribunal had also, he said, properly considered the factual position regarding Mr Ellis' involvement prior to the appeal stage setting out its findings at [70]. It was plainly aware of the need to have regard to the size and administrative resources of the respondent, having made findings about its general size. As appeared from [71] it had considered whether another Operations Director could have heard the appeal and/or whether someone from HR could have spoken to Ms Bennett instead of Mr Ellis. Having done so the tribunal had gone on specifically to consider at [126] whether Mr Ellis had come to a genuine view at the appeal stage and whether his prior involvement vitiated the overall fairness of the dismissal. It did not matter that the tribunal had not specifically referred to the *ACAS Code* paragraph 27 because the point of substance made there had been considered and addressed by it. It was not bound to conclude because of his prior involvement or what the *ACAS Code* said, that the dismissal was unfair.

46. In reality this ground of appeal therefore amounted to a perversity challenge. But it did not surmount the well-established high legal threshold for such a challenge. What the tribunal said at [125] was not in flat contradiction of what it said at [70] and [71]. Mr Ellis' evidence was that he understood that *Ms Bennett* considered that the claimant had made a serious and genuine threat. That was why he advised her to consider reporting the matter to the police. The description at [70] was, in the tribunal's word, of the "impression" that she gave him, not of a firm or fixed conclusion that he had drawn.

47. In any event, in the second sentence of [125] the tribunal was not referring to whether, at the time when he heard and decided the appeal, he was influenced by the earlier conversation that he had with Ms Bennett. The EAT should not infer that the tribunal had contradicted itself unless that was the unavoidable meaning of the words. The natural and better reading of [125] as a whole was that that paragraph was concerned with Mr Ellis' state of mind and thought processes when deciding the appeal. The tribunal had made a specific finding in that paragraph, which it was entitled to make having heard him give evidence, that that earlier conversation

did not influence his decision on the appeal. That conclusion was not in conflict with the findings at [70] and [71], but, rather, was reached having given due consideration to them.

48. The tribunal was properly entitled to conclude as it did at [125] that the prior involvement of Mr Ellis did not vitiate the overall fairness of the dismissal. That, said Mr Crow, was having regard in particular to the following features. First, the appeal was only one stage in the overall process. It was also not correct to say that the tribunal had found that Mr Ellis was involved at every stage or in every decision along the way. The investigation was conducted not by Mr Ellis but by Ms Hamilton-Smith. The disciplinary hearing was conducted not by Mr Ellis but by Mr Collier. It was Mr Collier who drew conclusions about whether the threat had been made and Mr Collier who took the decision to dismiss. Mr Ellis was not involved in either of those processes or in Mr Collier's decision.

49. Mr Ellis' role at the appeal stage was to review the decision of Mr Collier. He was not required to formulate his own view of whether a threat was made or to make fresh findings about that. The tribunal had in any event found that both Mr Collier and Mr Ellis had come to genuinely stated conclusions. It had also found that any other appeal manager would have reached the same conclusion.

50. The involvement of Mr Ellis in dealing with matters such as the approval of disciplinary charges going to hearing and the suspension of the claimant was, said Mr Crow, "supervisory". The tribunal was entitled to find, having considered that and also having given careful consideration to the significance or not of his encounter with Ms Bennett, that these features, and his having then heard the appeal hearing, did not result in the overall dismissal process being unfair.

51. In relation to ground 2, Mr Crow accepted on consideration that Ms Ivankovic was probably right that the reference in the final sentence of paragraph [121] was not to what the

claimant had said in evidence to the tribunal but to the tribunal's understanding of what he had acknowledged to be the case in the internal disciplinary process. This finding was entirely peripheral to the tribunal's reasoning. The claimant was not dismissed for possessing, or ever having possessed, a gun, but for making a threat. Neither the respondent nor the tribunal needed to make a finding of fact as to whether the claimant in fact did possess or had possessed a gun. The tribunal properly found that Mr Collier concluded that the claimant had made a threat to use a gun, and reasonably came to that view on the evidence before him, after a reasonable investigation. It also properly found that Mr Collier's decision was fairly upheld by Mr Ellis.

52. The last sentence of [121] was therefore an irrelevant additional observation. It was not essential to the tribunal's reasoning. Even if that was not right, that finding was not, in fact, wholly unsupported by the evidence. The EAT did not have a full picture from the tribunal's decision of the evidence before it about what was said in the disciplinary process. At [53] the tribunal had referred to the reference the claimant had made in the investigation to his great uncle's will and there was also the reference to owning a cap gun as a child. If the tribunal was drawing an inference from the evidence it had about what he had expressly said in the disciplinary process, then that was a legitimate inference to draw. But, in conclusion on this aspect, Mr Crow emphasised that his main point was that this sentence was peripheral, because the tribunal properly found that the respondent had reasonable grounds for concluding, despite his denial, that the claimant had made the *threat* that he was accused of making.

53. In reply Ms Ivankovic said that whilst Ms Bennett gave evidence to the tribunal, Ms Vardon and Ms Tipper did not and so their accounts were not tested in cross-examination before the employment tribunal. In any event, the employment tribunal's findings about the account that the claimant had given in the internal process were clear and unambiguous. He stated clearly in that process that he had never owned a real gun and only ever owned a cap gun as a small child. Perhaps, she said, the tribunal did not understand that a cap gun was a toy gun and

not a real gun. Ms Ivankovic also emphasised that the respondent seemed to regard the issue of whether the claimant owned or had owned a gun as relevant and gave credence to that idea despite the claimant's clear answers to the questions that he was asked.

Discussion and Conclusions

54. In view particularly of those last submissions by Ms Ivankovic, I should start by stressing this. The employment tribunal was not concerned to make its own finding about whether or not the claimant had threatened Ms Bennett in the manner alleged by her, something which he has always denied. The tribunal was required to determine whether the employer had come to a genuine conclusion that he had made such a threat, and if so whether it had reached that conclusion following a reasonable investigation and whether it was reasonably entitled to do so based on the evidence that was before it.

55. That is why the focus of the tribunal was on the evidence which emerged from the investigation and which was presented to Mr Collier, and what Mr Collier made of it, and why he reached his decision to dismiss. That is also why the tribunal was focused also on the process that was followed up to and beyond that point including the appeal. The EAT can only intervene if the tribunal has made an error of law, whether by getting the law wrong, not applying it correctly and/or reaching a decision which is in the legal sense perverse.

56. I turn to the question of whether the permission given by Choudhury P in respect of ground 1 should be revoked. Mr Crow is right that this ground was never in terms formulated as an application to amend by Ms Ivankovic. The original notice of appeal does not raise an argument that Ms Ellis' prior involvement meant that his involvement in hearing the appeal was unfair. But, drawing on the observations of HHJ Katherine Tucker, Ms Ivankovic did advance that point in her own way as part of her skeleton argument for the Rule 3(10) hearing, and it was then formulated into a ground of appeal permitted to proceed by way of amendment.

57. Mr Crow is right that this was not a case of a professional legal adviser becoming involved for the first time at the Rule 3(10) stage. However, Ms Ivankovic, for all her admirable skill as an advocate and representative, is not a lawyer; and it seems to me that she simply did not appreciate, though this is set out in the EAT's practice direction that there was the option of applying to amend the grounds of appeal. Nor did she appreciate that, if an amendment was to be sought, the application should have been made as soon as practically possible.

58. True it is that approaching a year passed between the Rule 3(7) opinion being sent in February 2020 and the Rule 3(10) hearing in January 2021, but it was not suggested to me that this was because of any wilful delay on the claimant's part. As a resident judge I can take notice of the fact that there were considerable delays caused by the onset of the pandemic in the EAT progressing matters such as this to hearings. As a matter of fact, the respondent was able to respond to this point in its Answer and then in Mr Crow's written and oral arguments.

59. I have of course considered the guidance in **Khudados** and, so far as relevant, **Readman**. On the particular facts of this case, I do not think it would be fair not to give consideration to this ground on its merits. I say that having duly noted that Choudhury P considered that it was just about arguable, but nevertheless he allowed it through.

60. I turn then indeed to the merits of ground 1. Firstly, with respect I do not understand or accept the distinction that Mr Crow sought to draw in his skeleton between the proposition that the tribunal concluded that Mr Ellis' prior involvement did not render the dismissal unfair and the conclusion that the dismissal was fair despite his prior involvement. I think, respectfully, that that is a distinction without a difference. But I note in fairness to Mr Crow that he did not highlight it in oral argument. I therefore do not accept that this ground fails at the first hurdle because it is based on a false premise as to what the tribunal decided.

61. Secondly, I do agree with Mr Crow that the tribunal did at [125] specifically consider

the findings and observations at [70] and [71] and what impact Mr Ellis' earlier involvement in matters described there did or did not have on the dismissal. I also agree with him that on a natural reading [125] as a whole, the second sentence is referring to whether, when he considered and decided the appeal, Mr Crow was influenced by what had been said by Ms Bennett during his earlier discussion with her described at [70]. In isolation the sentence is grammatically ambiguous, but read in the context of [125] as a whole that is its clear meaning. The whole of that paragraph is about Mr Ellis' conduct of the appeal and his thought processes at that time, including, as the tribunal goes on to describe, that he formed, as the tribunal found, a genuine belief in the claimant's guilt on reasonable grounds.

62. A potential concern that I had initially, although not raised by Ms Ivankovic, was that the final sentence of [125] could be said to be concerned not directly with the fairness of what happened in terms of Mr Ellis's actual involvement, but with whether, if that did render the dismissal unfair, it made any material difference. Such a consideration would be relevant only to remedy, if the tribunal indeed had found this to be an unfair dismissal. But on reflection, I am not entirely sure that that is what the tribunal was thinking about in that last sentence. Another way of reading it is that it is a way of restating its conclusion in the body of [125] that Mr Bennett had a genuine belief in the claimant's guilt on reasonable grounds. That is, the tribunal is saying that this is not a remarkable or surprising conclusion, as any appeal manager presented with the same material would have reached the same conclusion.

63. But be that as it may, I am satisfied that in the body of [125] what the tribunal was clearly addressing was what Mr Ellis thought, and in particular whether, when he reached the decision on the appeal, he was influenced by his earlier discussion with Ms Bennett, and whether the account he gave of his decision was a genuine one and whether that decision was reached on reasonable grounds. Those points are all about the fairness of what actually happened in terms of Mr Bennett's conduct of the appeal process and appeal decision and

therefore do go to the fairness of the overall dismissal at the liability stage.

64. I turn then to the question of the tribunal's approach to Mr Ellis' prior role. He was the manager who suspended the claimant, and who sanctioned the disciplinary charges proceeding. However, as the tribunal found, the investigation itself, including the interviews, was conducted by Ms Hamilton-Smith, and the disciplinary hearing including the decision to dismiss was the responsibility of Mr Collier. It is not clear to me whether perhaps the claimant suspects or suspected Mr Ellis of somehow influencing or interfering with the decisions of Ms Hamilton-Smith and/or Mr Collier. If so, it is not clear to me whether such a case was ever run before the tribunal, but certainly there is no finding to that effect by the tribunal, nor was it suggested to me that the tribunal erred by not making such a finding.

65. I accept Mr Crow's submission, therefore, that the tribunal did not find that Mr Ellis had been involved in, or controlled, the decisions at every stage, nor that suspending the claimant or sanctioning the recommendation for disciplinary charges to proceed would have required him at that stage to consider or form a view on all of the underlying evidence. Nor was the tribunal obliged to infer that from the fact of such involvement.

66. I turn to the issue of whether the tribunal's conclusion at [125] cannot stand either because it flatly contradicted what the tribunal had said at [70] and [71] about the conversation with Ms Bennett, or because those paragraphs should have led the tribunal to conclude that the subsequent involvement of Mr Ellis in conducting the appeal rendered the dismissal unfair. I have already said that I agree with Mr Crow's reading of the second sentence of [125]. That was therefore not in contradiction of [70]. Further, what the tribunal said there was that he formed an impression. It plainly accepted his evidence that he did not discuss with Ms Bennett the substance of the matter or the details of her account. Whether the claimant considers that the tribunal was wrong to accept that evidence, that was a finding fact for the tribunal to make.

67. The tribunal found that at the appeal hearing Mr Ellis heard in person about this episode from the claimant and heard from Mr Collier, who gave an account of his own reasons for his decision. It also found that Mr Ellis asked the claimant if he wished to submit the police interview recording, and that Mr Ellis had addressed the points raised by the claimant in his subsequent appeal decision. The tribunal went on to note that there was no challenge to the genuineness of Mr Ellis' conclusions as such. But the tribunal in any event accepted that he had genuinely stated then, and he had formed his conclusions on reasonable grounds.

68. The tribunal was plainly and understandably concerned to examine whether Mr Ellis' conclusion in relation to the appeal was influenced by his earlier discussion with Ms Bennett. But upon doing so its answer was in the negative. The tribunal reached that conclusion having considered all of the evidence before it, including, to repeat, having heard him give evidence in the tribunal and be cross-examined. The claimant and Ms Ivankovic consider that the tribunal got this wrong, but that is not a basis for the EAT to interfere in its decision. In summary therefore I do not consider that the conclusions at [125] stand in contradiction to the earlier findings at [70] and [71], or are otherwise perverse.

69. Should the tribunal, however, have concluded that, in view of his prior involvement, Mr Ellis being the person who heard the appeal made the dismissal unfair? The tribunal had to apply the test in section 98(4) to the overall process, as explained in **Taylor v OCS**. Ms Ivankovic has highlighted the reference in section 98(4)(a) to resources, but as I have said the tribunal did take on board the substantive point that the respondent was large enough to be able to find someone else to hear the appeal or to speak to Ms Bennett. It stated at [71] that it would have been practically possible to assign someone else to either or both of those tasks.

70. This aspect overlaps with the point about the *ACAS Code*. By virtue of section 207 **Trade Union & Labour Relations (Consolidation) Act 1992,** tribunals are required to take relevant provisions of the *ACAS Code* into account. It would have been better had the tribunal

specifically referred to that obligation and to paragraph 27. But the tribunal did in substance consider the point in the form that it arose in this case, namely whether in view of Mr Ellis' prior involvement it was unfair for him to have heard the appeal.

71. Under section 98(4) the tribunal has to determine fairness taking into account all of the circumstances, of which the employer's size and resources are specifically one, but they are not the only consideration. A failure to comply with the *ACAS Code* must also be taken into account but does not necessarily as such render a dismissal unfair. The tribunal also correctly identified that it should consider the overall dismissal process, not just one stage of it in isolation; and that a band of reasonable responses approach fell to be applied.

72. The last words of [71] make clear that the tribunal was not at that point deciding the impact of the findings and observations at [70] on the question of fairness. It made an observation and stated that it would return to the matter. When it did so at [125] it considered the impact of those earlier observations on the question of fairness in particular by addressing two issues. The first was whether Mr Ellis' previous encounter with Ms Bennett had influenced his decision on the appeal and the second was what material he had before him as the result of the disciplinary and appeal process, whether he had come to a genuinely independent view and whether he had a reasonable basis for reaching that view.

73. In summary, having observed that allowing Mr Ellis to hear the appeal notwithstanding his prior involvement was both unnecessary and bad practice, the tribunal then went on to consider whether this led to the claimant not getting a fair appeal and how this impacted on whether his dismissal overall was fair or unfair. It found that, in fact, Mr Ellis' consideration of the appeal was not tainted by the impression that he had formed when he spoke to Ms Bennett and he reached a conclusion on the material before him that was genuinely described and reasonably open to him to reach.

74. Ultimately, therefore, I cannot conclude that there was any error of law by the tribunal as alleged by ground 1 and that ground therefore fails.

75. I turn to ground 2 which revolves around the last sentence of [121]. There are potentially two ambiguities in that sentence: was the tribunal referring to evidence given *to it* or to something that it considered had been acknowledged during the course of the internal disciplinary process; and what did it mean by "at least a gun". As to the latter, if the tribunal had meant "at least one gun", I think that is what it would have said. What the words "at one time" clearly conveys is that the tribunal is talking about the past and not the present.

76. On the first question, although the EAT has not seen all of the evidence before the tribunal, the tribunal's own decision does contain a very detailed account of the records of what the claimant said on this subject in the investigatory process and at the disciplinary hearing. Further, this sentence comes at the end of a paragraph in which the tribunal is considering whether the respondent had reasonable grounds for believing in the claimant's guilt. This was also not a case where the tribunal had to form its own view as it would have, for example, had there been a wrongful dismissal claim. In agreement with both representatives it is therefore my view that what the tribunal was referring to in this sentence was its view of what the claimant had acknowledged during the course of the internal disciplinary process.

77. The tribunal did not suggest here that the claimant had acknowledged during the course of that process that he had *current* possession of a gun. I suspect that Ms Ivankovic may be right that the reference to "at least a gun" might have been to the evidence that the claimant had spoken in the internal process about having had a cap gun as a child. She speculated that the tribunal may also have misunderstood that a cap gun is just a toy. But putting aside speculation what I am confident of is that the tribunal was referring to what it made of the evidence about the internal process.

78. Ms Ivankovic says that one way or another this was an error. The clear evidence was that the claimant had never, ever owned a real gun. I agree that if the tribunal had thought that the respondent had treated the claimant owning a cap gun as a child, as having a bearing on whether he had made the threat of which he was accused, it would have been wrong to regard that as a reasonable approach for the respondent to take. But I do not think that that is what the tribunal found the respondent had done, or that this passage formed part of the tribunal's essential reasoning as to why this dismissal was fair.

79. The starting point here is that the allegation was at all times that the claimant had engaged in serious misconduct *by making a threat.* That was the conduct charge, the conduct of which Mr Collier found the claimant guilty and the finding that Mr Ellis in turn upheld as proper. It was not necessary to the determination of that charge for the respondent to make a finding as to whether the claimant did currently, or ever did in the past, own a gun. It is perhaps not surprising that he was asked some questions about that, given the nature of the allegation, because if it transpired that he did have a gun or had had one, that might potentially have been thought to lend extra weight or credibility to the allegation that he had made such a threat; but it was not a *necessary* ingredient of the conclusion that the threat itself had been made.

80. I also do not agree with Ms Ivankovic that the tribunal should have found that the respondent gave credence when reaching its decision to the idea that he owned or had owned a real gun, and that that had influenced the decision to dismiss. The tribunal considered Mr Collier's written decision which was lengthy and very detailed. It made a finding about the reasons for his decision, based not just on the letter he wrote, but having heard him give evidence. There is nothing anywhere in the tribunal's decision to suggest that Mr Collier believed that the claimant actually did own a gun or had owned one, or that such a finding was a material element of his conclusion that the claimant had made a threat.

81. Rather, the tribunal stated repeatedly that the allegation was of having made a threat. It

specifically referred twice in its conclusions and in particular in the run up to [121] to Mr Collier having dismissed the claimant because he, Mr Collier, believed that the claimant had threatened Ms Bennett by saying that he had a gun with her name on it, or words to that effect.

82. Then, in [121] itself, the tribunal refers more than once to the evidence about whether a threat occurred, the evidence before Mr Collier being the first-hand evidence of Ms Bennett's account; the first-hand evidence of Ms Vardon's account that she had overheard part of the discussion in which the claimant had uttered such a threat; and the hearsay evidence of recent report by way of Ms Tipper saying that Ms Vardon had reported Ms Bennett raising the matter further with her. The findings in the body of [121] accurately summarise the evidence before Mr Collier, that had been gathered by Ms Hamilton-Smith's investigation, including of course the evidence of the claimant in the investigation, which he repeated in person to Mr Collier at the disciplinary hearing, that he absolutely denied ever having uttered such a threat.

83. It was the responsibility of Mr Collier to weigh up the evidence from Ms Bennett, Ms Vardon and Ms Tipper on the one hand, and the claimant on the other, and to decide where he believed that the truth lay. It was the responsibility of the tribunal to decide what he really did believe and whether he came to his belief following a reasonable investigation, and by taking a view that was reasonably open to him of the evidence before him. There is no suggestion in the employment tribunal's decision that Mr Collier had made an erroneous finding that the claimant had admitted to past gun ownership, still less that this was the thing that persuaded Mr Collier that the threat had been made.

84. It seems to me therefore that the employment tribunal reached conclusions that it was entitled to, on the evidence before it, about the evidence that was before Mr Collier, his decision-making process, how it was reached and what his decision was. These conclusions did not depend on what it said in the last sentence of [121]. It was not an essential part of the tribunal's decision and importantly no such conclusion was found by the tribunal to have

formed an essential part of Mr Collier's own reasons.

85. Given the findings that the tribunal made as to the evidence presented to Mr Collier, as the conclusions that it found Mr Collier reached about whether the claimant had made a threat, and given the evidence before the tribunal that Mr Collier did have some evidence before him that the threat had been made, despite the claimant's denying it to him, it is indeed hard to see how the tribunal could have properly concluded that Mr Collier's finding that the threat was uttered was not one that was reasonably open to him. To repeat, it was not for the tribunal to decide for itself whether the threat had actually been made, nor did it purport to do so.

86. For these reasons, I conclude that the last sentence of [121] does not undermine the tribunal's decision on whether this dismissal was fair or unfair. Ground 2 therefore also fails.

87. I conclude by repeating that it was not the tribunal's task to decide whether the claimant did or did not make the threat that he was accused of making. That was the task of the employer. The tribunal made no finding about that. Nor is it any part of my role to do so. What the tribunal found was that the respondent came to a fair conclusion after a fair process. What I have concluded is that neither of the grounds of challenge to that decision before me are well founded so as to establish that the tribunal erred in law. This appeal is therefore dismissed.