Neutral Citation Number: [2022] EAT 205

Case No: EA-2021-000195-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 June 2023

Before :

HER HONOUR JUDGE KATHERINE TUCKER
MR NICK AZIZ
MS EMMA LENEHAN

- -

Between :

MR LESLIE BUTLER	**Appellant**
- and -	
SYNERGY HEALTH UK LIMITED	**Respondent**

- -
- -

Mr Leslie Butler the **Appellant** in person
Andrew Watson for the Appellant
Mr C Edwards for the **Respondent**

Hearing date: 10 November 2022

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

A Tribunal found that the Claimant was fairly dismissed. The Claimant had worked for the Respondent for some 9 years. Over 8 of those years he had changed out of PPE he was required to wear just prior to the end of his shift and just prior to clocking out. He was absent from work for a year. During that time the Respondent implemented a policy through which staff were not permitted to change out of PPE prior to clocking out and had to do so in their own time. When the Claimant returned to work, the new policy was not explained to him; he adhered to his previous practice. He explained his genuine belief that he had a contractual right to act as he did. The Respondent disagreed. He was disciplined and given a final written warning. He appealed against that warning. Over two days, and before that appeal was heard or determined, he continued to act in accordance with his prior practice on two occasions. He was suspended and subjected to further disciplinary action in respect of his actions on those dates and dismissed.

The Judge concluded that there was no contractual term entitling the Claimant to change out of his PPE prior to the end of his shift. There was no error in respect of her conclusion in that regard. Nor was there any error in respect of her conclusion that the instruction to act in accordance with the new policy was reasonable. However, having regard to the Judge's own findings, her conclusions that the procedure as a whole was fair, that the dismissal was fair and within the band of reasonable responses open to a reasonable employer, were perverse and could not stand.

Appeal allowed.

HER HONOUR JUDGE KATHERINE TUCKER

1. This appeal is against the Judgement of Employment Judge Woffenden, sitting in the Midlands West Employment Tribunal. Judgement and Reasons were given orally on 3 September 2020. The Judgement sent to the parties on 8 September 2020. Written reasons were sent to the parties on 1 December 2020. The Tribunal determined that the Claimant was fairly dismissed by the Respondent. The Claimant appeals against that decision.

The facts

2. The Claimant worked for the Respondent as a technician at its site at New Cross Hospital, Wolverhampton. The Respondent provides sterilisation and decontamination services for medical devices. The Claimant began working for the Respondent on 11 August 2010. His employment ended on 30 April 2019. At the time of his dismissal, the Claimant had worked for the Respondent for nearly 9 years. The Claimant was dismissed for misconduct during the currency of a final written warning which had been imposed for a period of 12 months on 16 April 2019.

3. Prior to his dismissal, the Claimant had been summarily dismissed in February 2018 by a Mr Preston. Mr Preston was, at that time, the General Manager at New Cross, and began working in that role in March 2017. The Claimant successfully appealed against that dismissal and was notified of that successful appeal by letter dated 23 May 2018. In that letter the Respondent's appeal officers stated:

> "[t]here has been a catalogue of significant errors relating to this case and I would like to take this opportunity to apologise for any upset and distress caused by these failings."

The appeal had highlighted the immediate need for management training in relation to the handling of employee related issues. The Employment Judge noted that there was no evidence before her that any such training had taken place.

4. Following his successful appeal against dismissal, the Claimant returned to work on 2nd April 2019. By then he had been absent from the workplace for just over a year, from February 2018 to April 2019. In advance of his return, in a letter dated 7 March 2019, the Respondent informed the Claimant, that on his return to work, his terms and conditions of employment remained unchanged.

5. The Claimant was paid at an hourly rate of £6.98 per hour. The Claimant had precise start and finish times, agreed locally. His hours were between 12 noon and 5pm.

6. The Respondent operated a 'clocking in' and 'clocking out' process at New Cross Hospital called Synergy Track which used a Kronos clock machine. There was a laminated notice above the Kronos machine, dated 3 March 2016. It stated:

> *"All staff clocking in/out must ensure it is on the hour as deductions will be made if late clock in early clocking out as Kronos will be checked daily. It is your responsibility to check your times.*

7. The Claimant was required to wear specialist protective clothing because of the nature of the work he performed. Before the Tribunal there was a dispute of fact about whether, prior to February 2018, staff were required to remain at their workstations right up until their contractual finishing time and then change out of their PPE after they had clocked out. The Claimant asserted that that had never been the case prior to February 2018. The Respondent asserted that it had been the case at the New Cross site since 2015. That factual issue was determined by the Employment Judge in favour of the Claimant. She found that it was not until February 2018 that the Respondent introduced a new clocking-in system and that it began to implement and apply the policy that staff should remain at their workstations until the end of their shift, then clock out, and then change into PPE. The Judge also found that the Respondent did not communicate that policy to staff in writing, but monitored its application through the Synergy Trak system. She found that staff adhered to the policy.

8. In the context of the claim before the Tribunal, those were significant findings of fact: the Claimant did not work between February 2018 and April 2019. He was, therefore away when the policy about when employees should change in and out of PPE was implemented and began to be monitored.

9. Although not referred to by the parties or by the Judge, we have noted that, given the rate of pay of staff undertaking work the Claimant did, relatively small differences in time worked would appear to have been, potentially, of some financial significance to staff.

10. There was no finding of fact that the Claimant was informed about the change of policy once he did return to work. Nor did the Judge make any findings about how other staff had responded to the change of policy when it was initially implemented.

11. Within the Claimant's contract of employment, the Respondent had a contractual right to make deductions from wages if any mistake was made in the payment of any monies due.

12. The Respondent had a written disciplinary procedure. Stage III provided:

> "if there is a further offence or if the offence is sufficiently serious to warrant only one written warning, in effect both first and final warning, or if there is a further recurrence of a lesser offence, a final written warning will be issued by either the employee's line manager, senior manager, or director."

Stage IV provided:

> "if there is a further offence or if exceptionally the offence is serious enough to justify dismissal without prior warnings, an employee will be dismissed without prior warnings. Such actions may be taken by a senior manager or a director. The procedure states that as, as an alternative to dismissal, the Respondent may, at its discretion, impose a disciplinary measure such as demotion or transfer to another job, with or without a reduction in pay, all suspension without pay for up to 5 working days, in addition to the imposition of a final written warning."

The non-exhaustive definition of gross misconduct included gross insubordination or, refusal to follow instructions.

13. As noted above, the Claimant returned to work on Tuesday 2nd April 2019. On Wednesday 3rd April 2019 a supervisor reported to the Production Manager, Ms Heitzman, that he had been observed tidying up early, at 16.46. Ms Heitzman spoke to the Claimant. The Claimant informed her that he would leave at 5pm. The Employment Judge found that Ms Heitzman told the Claimant that he had to change into his own clothes, and out of his PPE, in his own time. The Claimant responded that he believed that he was entitled to do so before the end of his shift, and that that which Ms Heitzman was saying amounted to a change to his terms and conditions of employment. At this early point, therefore, the difference between the Claimant and the Respondent's view about this matter was highlighted, as recognized by the Judge (paragraph 20 of the Reasons).

14. The Claimant and Ms Heitzman spoke again on, it appears, Thursday 4th April 2019. They each stuck to their previously stated positions. Ms Heitzman asked the Claimant to stay in the production area until 5pm. The Claimant asked to see a copy of his terms and conditions of employment. Ms Heitzman informed the Claimant that he might face disciplinary action if he did not comply.

15. On Monday 8 April 2019 (just under a week after returning to work) the Claimant was invited to attend a disciplinary hearing on the Thursday of that week, the 11th April in respect of *"Gross Misconduct … namely gross insubordination or refusal to follow instructions"* arising from him not staying in the production area until 5pm.

16. On Tuesday 9th April 2019 and Wednesday 10th April 2019, the Claimant continued his practice of leaving the production area just before 5pm and clocking out at 5pm.

17. The disciplinary hearing took place on Thursday 11 April 2019. The Employment Judge found that Ms Heitzman did not ask the Claimant to explain to her, at any stage, why he was not complying with her instructions. Ms Heitzman imposed a final written warning, to last for a period of 12 months. Although the Employment Judge found that the Claimant was "markedly un-cooperative" during the meeting, she also noted that it was "hardly surprising" that he had not engaged in dialogue about why he was acting as he did, nor provide any satisfactory explanation about it, given that Ms Heitzman did not ask him about those matters. She also noted that, in fact, the Claimant had already provided an explanation for his actions when Ms Heitzman had first approached him on 3 and 4 April 2019.

18. After the disciplinary hearing on Thursday 11th April 2019, and on Tuesday 16 April 2019, the Claimant continued to leave the production line just before 5pm. In addition, on 16th April 2019, he appealed against the final written warning.

19. On Wednesday 17 April 2019, Ms Heitzman suspended the Claimant "pending investigation" because he had continued to leave his workstation before the end of his shift. No further investigation was carried out.

20. The appeal hearing regarding the final written warning took place on Tuesday 23 April 2019. The appeal was heard by Mr Preston, something the Claimant objected to. The final written warning was upheld.

21. On Wednesday, 24 April 2019, Ms Heitzman invited the Claimant to a further disciplinary hearing to take place on Tuesday 30th April 2019, in respect of his actions on 11th and 16th April 2019 when he left his workstation before 5pm in order to change out of PPE before clocking out. It will be noted from the chronology above that those dates were the date the final written warning was given, and the next working day, which was also the date upon which the Claimant appealed against the final written warning. The disciplinary hearing was conducted by Ms Heitzman. Again, the Claimant and Respondent stuck to their positions. The Judge found that the Claimant said (amongst other matters) that he was working to the notice displayed above the clocking out machine, and that he was not paid after 5pm, so should not have to do any task which was part of his job duties after that time. Ms Heitzman told him that his job duties were those set out in his job description (although it was common ground that he was not given one) and that he was paid for his working hours. Ms Heitzman took the decision to dismiss the Claimant on grounds of misconduct, with payment in lieu of notice. Ms Heitzman stated in evidence that had the Claimant not received a final written warning, he would not have been dismissed. The Claimant appealed against his dismissal. His appeal was dismissed. It was heard and determined by Ms Doyle.

The Tribunal's Judgment and Reasons

22. The Judge concluded that there was no implied term in the Claimant's contract that he should be permitted to change out of his PPE during working hours. She stated that the Claimant had failed to discharge the burden of proof in that regard. She concluded that the notice above the clocking out machine was, "no more than a reminder to staff that they should clock out on time to avoid deductions being made to their wages". She continued:

> **"55. … I conclude that the claimant has failed to discharge the burden of proof on him to establish the existence of [the relevant] implied contractual term. He relied on the notice dated 3 March 2016 to support this but that notice in my judgement is no more than a reminder to staff that they should clock out on time to avoid deductions being made to their wages. Although it was the Claimant's contention that this had always been the practice of employees at New Cross, he provided no evidence from any other employees to corroborate the existence of the practice in question prior to 2018 or provided any satisfactory explanation for his failure to do so. If he and any other employees did conduct themselves in the way the Claimant asserts that is equally explicable as being afforded to them as a matter of discretion by the Respondent rather than legal obligation. The Claimant has therefore failed to prove that the time for which he contends had become implied into his contract of employment by conduct as alleged prior to his dismissal in February 2018; I conclude by the time he was dismissed in February 2018 the Claimant had become accustomed to act in that way at the end of his shift and erroneously but genuinely**

> **believed that he was contractually entitled to do so and the Respondent was not allowed to change this without his agreement or giving notice of the change." (Our emphasis added).**

23. The Judge then set out her finding that the policy applied to the Claimant in 2019 was only put in place at New Cross in February 2018, and was not communicated in writing to staff. The Judge concluded that there was no unilateral change to an implied term of the Claimant's contract by the Respondent when he returned to work in 2019. Rather, he was given an instruction to act in accordance with a policy which, by that time, was in place at the New Cross site, and, consequently, the instruction given to the Claimant was not unlawful on the basis alleged by the Claimant.

24. The Judge considered the question of whether the instruction was a reasonable management instruction. She concluded that it was. She stated as follows:

> **"58. … The Respondent wanted to ensure that productivity at its sites continued right up to the end of the shift to avoid 'down time' … And required employees to stay in their production areas until the end of their shift. By April 2019 the policy and (systems to monitor its application) and employees adhered to it. In those circumstances the Respondent gave a reasonable instruction to the Claimant to adhere to the requirement to stay in the production area."**

25. The Judge concluded that the Respondent genuinely believed that the Claimant had refused to follow a reasonable management instruction and left his workstation early, and that therefore, the Respondent had established that the reason for dismissal related to a potentially fair reason, namely conduct. She also concluded that the criticisms made of the procedure adopted by the Respondent were not such that she could conclude that the investigation which was carried out in respect of the relevant conduct, fell outside the range of reasonable responses. Similarly, she reached the same conclusion about the complaints the Claimant raised regarding the overall fairness of the procedure adopted by the Respondent. In particular, the Claimant had asserted that the procedure was unfair because he was disciplined in respect of his conduct on days when he was still in dispute with the Respondent about the fairness of the final written warning (i.e., the 11th and 16th April 2019) and, because the letter inviting him to the disciplinary hearing at which he was dismissed was sent only some 24 hours after the appeal hearing regarding the final written warning, therefore at a point where he had had no time to modify his behaviour. Having set out those submissions, the Judge stated, simply "I do not agree." (Paragraph 61).

26. The Judge considered the Claimant's submission that it had not been appropriate for Mr Preston to hear his appeal against the final written warning because, having regard to the prior history between the Claimant and Mr Preston, there was a real possibility of apparent, not actual, bias. The Judge rejected that submission. She stated as follows:

> **"6[2]. …There is no evidence of bad faith or manifest impropriety for that the final written warning was issued without prima facie grounds. What is required under the ACAS Code is that the manager hearing the appeal had not previously been involved in the case. There was no evidence that Mr Preston had been so involved in this disciplinary matter. He was the appropriate manager to hear the appeal under the Respondent's disciplinary procedure and there was no evidence before me from which I could conclude that he did not approach his decision making in relation to the appeal against the imposition [of] the final written warning in an impartial way. If I am wrong about that Mr Preston should have considered apparent bias in the circumstances and not have decided the Claimant's appeal against the final written warning in my Judgement his failure to do so would not be sufficient in and of itself to render the dismissal unfair."**

27. The Judge considered the Claimant's submission that it was not 'appropriate' for Ms Heitzman to hear both of the disciplinary hearings because she was both the investigator, disciplining, and dismissal officer. The Judge noted that the Respondent had not explained why it was not practicable for different people to carry out the investigation and the disciplinary roles. The Judge concluded as follow:

> "**I conclude that [Ms Heitzman] failed to come to her decision-making at the disciplinary hearings with an open mind; she came with her mind already made up that it was the Claimant who was in the wrong and had to change his ways."**

28. However, she noted that the tribunal must consider fairness of the procedure adopted by the Respondent as a whole and considered that the criticisms made of Ms Heitzman could not be made in respect of Ms Doyle.

29. In respect of the appeal and the role of Ms Doyle Judge stated that:

> **"39. Following the appeal hearing Ms Doyle carried out further investigations with Ms Heitzman and the member of the Respondent's administrative department responsible for the notice dated 3 March 2016. She concluded the notice had been taken down in April 2019 as a result of the introduction of the SynergyTrack performance analysis and Clocking system as a notice subsequently put up by Ms Heitzman in June 2019 and that the earlier notice had been put up to highlight to staff that if they clocked out earlier than the end of their shift this would be identified as an exception requiring a review and approval in order to avoid the deductions being made. She compared clocking out records for the Claimant and other staff on**

> **the 9th,11th and 16th April 2019 and found he had clocked out at 16.59 on each occasion meaning he had left the production area sometime before that. She also recalled the inquiry undertaken in October 2015. There is no evidence that the outcome of these further investigations were provided to the claimant to enable him to comment on them before she made her decision on the appeal. There is no evidence she spoke to any other staff about why they stayed in the production area until the end of their hours of work before clocking out and for how long they have done so. She concluded that it was the Respondent's custom and practice to ensure that staff were in the production area at the start and end time of their contracted hours and that this predated the Claimant's dismissal 2018 and subsequent absence, the evidential basis for which was the email to her and others from the Operations director in October 2015."**

30. The Judge concluded that:

> **"60. … It would have been preferable for Ms Doyle to inform the Claimant about the outcome of the further investigations she undertook and give him the opportunity to comment before reaching her decision and she failed to speak to other employees … but these matters (either individually or taken together) were not such that I could conclude that the investigation which was carried out fell outside the range of reasonable responses.**
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> **61. I turn now to the specific allegations made by the claimant about the fairness of the procedure adopted by the respondent. He complains he should not have been disciplined before his appeal was concluded. He was not disciplined before his appeal was concluded as Mr Ennis accepted in his submissions. If I understood him correctly the point he sought to make was that the further non-compliance by the claimant had taken place at a time when there was still a dispute about whether or not the respondent was entitled to impose the instruction in question and I therefore should have regard to the fact that the dismissal invitation letter was only 24 hours after the appeal hearing given the claimant no time to modify his behaviour in the meantime. If so, I do not agree.**
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> **…**
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> **63 … Notwithstanding the lack of an open mind on [Ms Heitzman's] part Ms Doyle did approach the appeal and her decision-making with an open mind and overall (notwithstanding any earlier deficiencies) the procedure adopted by the Respondent fell within the range of reasonable responses."**

31. The Judge considered whether dismissal for refusing to obey a lawful management instruction was reasonable. She noted that the lawfulness of the instruction itself was not determinative of that issue. She stated:

> **"In deciding whether to dismiss an employee for failing to comply with a management instruction a reasonable employer should consider if the employee in question was or could be acting reasonably. The Claimant's explanation for not complying with the instruction was that he believed the Respondent was unilaterally**

> **changing his terms and conditions of employment without notice and requiring him to work beyond the end of his shift without being paid for it because he had to leave the production area and then change out of his specialist protective clothing and into his own clothes before leaving the premises which he considered tantamount to extortion and the deprivation of his liberty. The effect of the management instruction so far as the Claimant was concerned was that he was on the Respondent's premises for a number of minutes without being paid for that time."**

32. The Judge stated that it was, "implicit" in Ms Doyle's decision that she had considered whether the Claimant was, or could have been acting reasonably in refusing the instruction, and that she had decided that he was not, because, having given him an opportunity to state his case and provide material in support of it, she reasonably concluded that the Respondent had not unilaterally changed a term of the Claimant's contract of employment without notice, but had imposed a policy which had been adhered to by other employees.

33. Pulling together the Judge's conclusions regarding procedural unfairness from the Reasons as a whole, the Judge's reasoning records the following matters regarding the fairness of the procedure as a whole:

    a. At paragraph 60, she noted that it would have been preferable for Ms Doyle, who heard the appeal and carried out some further investigations, to have informed the Claimant about the outcome of those investigations and to have given him the opportunity to comment before reaching her decision.
    b. In addition, at paragraph 60, she found that it would have been preferable for Ms Doyle to have spoken to other employees about whether they stayed in the production area until the end of the shift and if so, for how long they had been doing so.
    c. The Judge concluded that neither the matter set out at (a) nor (b) above were "such that [she] could conclude that the investigation which was carried out fell outside the range of reasonable responses".
    d. The Judge disagreed with the submissions made by the Claimant that it was unfair to discipline him for a second time in respect of actions he had taken when he and his employer were still in dispute about the legality of the instruction he had been given. She also did not consider that she should have regard to the fact that the letter inviting the Claimant to a disciplinary hearing which led to his dismissal, was sent only 24 hours after the appeal hearing when that issue had been determined, and therefore, without him having had time to modify his behaviour. (Paragraph 61). She did not set out why or how she reached that view on either point.

e. The Judge did not consider that it was inappropriate for Mr Preston to hear the appeal against the final written warning. However, she stated that even if she were wrong about that (and, it would appear, notwithstanding the prior history of dismissal by Mr Preston) she considered that that would not "be sufficient in and of itself to render the dismissal unfair". (Paragraph 61).

f. Ms Heitzman failed to approach the disciplinary process (possibly both processes she was involved in, although it is not clear) with an open mind: she came to her decision with her mind already made up that it was the Claimant who was in the wrong and had to change his ways. (Paragraph 62). In addition, at an early stage of the problems which led to the Claimant's dismissal she failed to ask him for an explanation as to why he was acting as he did. (See the facts found by the Judge and recorded above at paragraph 17 of the Judgment.)

g. There was no evidence before the Tribunal why Ms Heitzman should have conducted both disciplinary processes.

h. Ms Doyle came to the appeal process and decision making with an open mind and "overall (notwithstanding any earlier deficiencies) the procedure adopted fell within the range of reasonable responses." No analysis of how Ms Doyle's approach remedied the specific deficiencies identified, particularly taking account of the matters which it would have been preferable for Ms Doyle to have done, but did not do.

34. In respect of the fairness of the dismissal, the Judge concluded as follows:

> **"64. The lawfulness of the instruction given by the respondent is a relevant but not decisive question when considering the reasonableness of the dismissal for refusing to obey such an instruction. In deciding whether to dismiss an employee for failing to comply with a management instruction a reasonable employer should consider whether the employee in question was or could be acting reasonably. The claimant's explanation for not complying with the instruction was that he believed the respondent was unilaterally changing his terms and conditions of employment without notice and requiring him to work beyond the end of his shift without being paid for it because he had to leave the production area and then change out of his specialist protective clothing and into his own clothes before leaving the premises which he considered tantamount to extortion and the deprivation of his liberty. The effect of the management instruction so far as the claimant was concerned was that he was on the respondent's premises for a number of minutes without being paid for that time. It is implicit in Ms Doyle's appeal decision … That she considered whether the claimant was or could have been acting reasonably in refusing the instruction in question and decided he was not because having given the claimant the opportunity to state his case and provide any material in support of it she reasonably concluded that the respondent had not unilaterally changed the term of**

> **the claimant's contract of employment without notice but had imposed a policy which was adhered to by other employees.**
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> **65. Although it was finally balanced, I have concluded that the Respondent acted within the range of reasonable responses in dismissing the Claimant for his failure to obey the instruction that he stay in the production area until the end of his shift. The Claimant was already subject to a final written warning, which clearly warned him of the effect of further misconduct during its currency. Refusal to follow instructions is within the Respondent's definition of gross misconduct…"**

35. The Judge noted that whether another reasonable employer might have taken a different approach, and utilised dispute resolution rather than an immediate disciplinary route in respect of an employee who had just returned to work after a substantial period away, did not take the Claimant's dismissal outside the range of reasonable responses. She stated:

> **"In accordance with the equity and the substantial merits of the case the Respondent acted reasonably in treating the Claimant's conduct as sufficient reason to dismiss him. The claim of unfair dismissal therefore fails and is dismissed."**

The Law

36. Contractual terms can be implied into a contract of employment by the conduct of the parties, or by custom and practice. In the former case, it must be established that there was an intention to include the term, demonstrated by the manner in which the contract has been before performed. In the latter case, a term may be implied by custom and practice if it is normal or usual to include such a term in contracts of a particular kind. In this case, the Claimant asserted that a term had been implied into his contract of employment by the conduct of the parties. The question of whether right or not such a term had been implied is a question of law. See **O'Brien v Associated Fire Alarms Ltd** [1969] 1 All ER 93.

37. In **Park Cakes Ltd v. Shuma** [2013] IRLR 800, (a case concerning an enhanced redundancy payment) Underhill LJ stated:

> "[The central question in the case of the present kind must be whether, by his conduct in making available a particular benefit to employees over a period, in the context of all surrounding circumstances, the employer has evinced to the relevant employees and intention that they should enjoy that benefit as of right"

The objective of the Court's or Tribunal's analysis is to ascertain what the parties must have, or must be taken to have, understood from each other's conduct and words, applying ordinary

contractual principles. In **Park Cakes**, although in the context of an entitlement to an enhanced redundancy payment, Underhill LJ identified a short, non-exhaustive list of relevant considerations including:

(i) the number of occasions as the period over which the benefit in question had been paid or made available
(ii) whether the benefits were always the same
(iii) the extent to which the [enhanced] benefits were publicised generally
(iv) how the relevant terms were described
(v) what was expressly stated in the contract
(vi) equivocalness, in other words, whether the practice, viewed objectively was equally inexplicable on the basis of the exercise of a discretion rather than legal obligation.

38. The fairness of a conduct dismissal is to be determined in accordance with the well established principles set out in **BHS v Burchell [1978 IRLR 379, EAT**.

39. Fairness of a dismissal procedure must be considered as a whole. (**Taylor v OCS Group Ltd** [2006] EWCA Civ 702).

40. Consideration of whether a dismissal is fair or unfair involves an evaluation of the facts and circumstances of the dismissal, against the relevant legal principles (a point we return to below) best left to the good sense of the Tribunal which heard the evidence. In **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387 (CA), Lord Justice Rimer stated:

> "52. Given that difference between the two tribunals below there was some discussion before us during the argument as to what this court's role is in such a case. In this context, it is to be noted first, that, just as the ET wing members will have experience from both sides of industry, so likewise will the EAT wing members, so that each tribunal will bring to bear the like industrial experience. It is perhaps an unusual feature of the EAT, to which appeals ordinarily rely only on questions of law, that its appeals will normally be heard by panels of three, of which two members will usually have no experience as lawyers. Having noted that, there is no doubt that the so-called lay members of the EAT make an invaluable contribution to the decision-making process, as I found from my own experience of sitting in the EAT.
>
> 53. In my Judgement, the answer to the question referred to at the beginning of the preceding paragraph is this. The ET is the tribunal to which fell the responsibility of finding the facts in the case and of applying the applicable law to the facts so found.

> Amongst the findings it had to make was whether or not the dismissal [of the Claimant, for misconduct, fell within the 'band of reasonable responses']. That was either a finding of fact pure and simple, or else was a finding in the nature of a value Judgement akin to such a finding. Whichever it was, once the ET had made its finding, that would normally mark the end of the matter. That is because there is no appeal to the EAT against an ET's findings of fact. Appeals to the EAT against the ET's judgment lie only on questions of law … This principle is applied by the EAT strictly. It will for example, not be enough for a would-be appellant to the EAT, to assert that the ET's finding on a particular factual issue was against the weight of the evidence. If there was evidence justifying the ET's finding that will usually be fatal to the bringing of an appellate challenge and the EAT will refuse to permit an appeal to proceed. Generally speaking, the only bases on which the appellate challenges to an ET's findings of fact will be permitted by the EAT will be if they are said to have been supported by no evidence at all, or if they are findings that no reasonable tribunal could have reached. In either case, if such challenges are made good, they would demonstrate an error of law. At least the latter way of putting the case is dependent on an assertion of perversity, although that requires nothing less than 'an overwhelming case'
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> …
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> 54. So the decision of the ET in a case such as the present is, and will be, normally the end of the road for both parties -just as it should be- unless, however, it can be shown to be arguably vitiated by an error of law. Only then will an appeal to the EAT be permitted. In the present case, an appeal was permitted because BHL had what the EAT recognised was a properly arguable point that the ET's Judgement as to the dismissal falling outside the band of reasonable responses was vitiated by errors of law."

41. As that quotation makes abundantly clear, the EAT may only interfere with the Tribunal's decision if there has been a misdirection of law or in the case of perversity:

> "19. It is important that, in cases of this kind, the EAT pays proper respect to the decision of the ET. It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt sometimes, difficult and borderline decisions in relation to the fairness of dismissal. An appeal to the EAT only lies on a point of law and it goes without saying that the EAT must not, under the guise of a charge of perversity, substitute its own judgment for that of the ET." **Bowater v Northwest London Hospitals NHS Trust** [2011] IRLR 331, per Lord Justice Longmore.

42. An appellate court must be mindful that a ground of appeal based on perversity has a high threshold to reach. It must be satisfied that an 'overwhelming' case is made out that the Tribunal reached a decision that, on a proper application of the evidence and law, no reasonable Tribunal could have reached: **Yeboah v Crofton** [2002] IRLR 634 at 93; **Melon v Hector Powe Ltd** [1981] ICR 43 at 48. It is not enough that the appellate court disagrees with the decision of the Employment Judge, perhaps strongly so. The rigours of the high test

set out in **Yeboah** and other cases must be met: is it the case that no reasonable Tribunal, properly directed, could have reached that conclusion?

43. It was submitted, that the question of whether or not the dismissal falls within the 'band of reasonable responses' was a pure question of fact, and that if support for the proposition was required, it could be found in the quotation set out above from **Tayeh**. We do not entirely agree that that quotation and case supports the proposition advanced. We prefer the formulation set out in paragraph 40 above that that determination involves 'an evaluation of the facts and circumstances of the dismissal, against the relevant legal principles'. That does not detract however from the principle that that evaluation is primarily one for the tribunal, at first instance, to undertake and that the EAT may only consider and allow an appeal against the tribunal's decision where there is an error of law within the decision and, in the case of perversity, where there is an overwhelming case, that no reasonable tribunal, properly directing itself, would have reached that decision.

44. We were referred to **Union of Construction, Allied Trades and Bechnicians v Brain** [1981] ICR 542 CA. In that case, the Court of Appeal held that an employee had been unfairly dismissed when he refused to follow an instruction from his employer which, in fact, the employer had no right to ask of him. However, the Court of Appeal also held that, even if the instruction had been a reasonable and lawful one, the employer had not consulted the employee about relevant matters and were acting unreasonably in ordering him to comply with the instruction and treating his failure to do so as a sufficient reason for his dismissal. Lord Justice Donaldson and Lord Justice Oliver observed that when conduct complained of was a refusal to obey an instruction, the primary factor which fell to be considered by a reasonable employer considering dismissal, was whether the employee was reasonable in refusing to obey the instruction. Lord Justice Donaldson stated:

> " … where the conduct complained of is, as it is in this case, a refusal to obey an instruction given to the employee by the employer, it seems to me that the primary factor which falls to be considered by the reasonable employer deciding whether or not to dismiss his recalcitrant employee is the question, "is or could he be acting reasonably in refusing to obey my instruction?"" (At page 550 of the report, F-G).

Lord Justice Oliver stated:

> " … I agree that, even if the employers' instruction is to be treated as reasonable and proper instruction, it was wholly unreasonable to dismiss the employee for failing to comply with it, having regard to the fact that the employee had never been consulted about …" (At page 553 of the report, D-E).

The Grounds of Appeal

45. Five grounds of appeal were advanced:
    (1) That the Tribunal erred in law in finding that there was no unilateral change by the Respondent to an implied term of the Claimant's contract;
    (2) That the Tribunal erred in law in finding that the management instruction given by the Respondent to the Claimant was reasonable;
    (3) That the Tribunal's finding that the management instruction given by the Respondent to the Claimant was reasonable was perverse;
    (4) That the Tribunal's finding that the whole procedure adopted by the Respondent was fair was perverse; and
    (5) That the Tribunal's finding that the dismissal was within the range of reasonable responses was perverse.

Submissions

46. The Claimant submitted that the Judge had erred in respect of the contractual issues because she focused unduly on the question of discretion and because she had failed to ask the specific question posed by Underhill LJ in **Park Cakes**, paragraph 35. Further, that in error, the Judge did not set out the factors listed in **Park Cakes** or consider their application by analogy to the present case. It was submitted that, in error, the Judge focused, unduly on two points, and failed to properly consider others. The two matters the Judge placed too much focus upon were first, the fact that the Claimant had not produced evidence from other employees to corroborate the existence of the practice prior to 2018 (or provided any satisfactory explanation for his failure to do so); and, secondly, that the asserted right to change out of PPE during working hours was equally explicable as being afforded to employees as a matter of discretion, rather than by way of a legal obligation. She failed, however, it was submitted, to balance that with the fact that the Claimant was required to wear PPE as part of his role, that prior to February 2018 the Claimant's practice had been to clock out after having changed out of his PPE, and, that the change of policy occurred during the Claimant's absence from work. Further, it was noted that there was no evidence that, prior to February 2018, any employee of the Respondent had in fact exercised a discretion to allow the Claimant to change out of his PPE prior to the end of his shift. It was submitted that had the Judge addressed the questions posed by Underhill LJ she would have concluded that the term was implied into the contract.

47. As to Grounds Two and Three, it was submitted that the Judge appeared to have concluded that the management instruction was reasonable, simply because it was not unlawful. It was submitted that if the Claimant succeeded in respect of the first ground of appeal, the only correct decision open to a Tribunal, properly directing itself, was that the instruction was not reasonable. As to Ground Four, it was submitted that, although a high test, the relevant 'overwhelming' case was made out in respect of the Tribunal's decision regarding the fairness of the procedure: the Judge identified that there was no explanation as to why other individuals could have carried out the investigation and disciplinary roles; Ms Heitzman came to her task with a pre-determined view; Ms Doyle, when she conducted the second disciplinary appeal, failed to inform the Claimant about the outcome of the further investigations she had taken out, or allow him an opportunity to comment upon them.

48. It was submitted that simply because the Claimant had raised no specific criticisms about Ms Doyle, the Judge concluded that, overall, the procedure fell within the band of reasonable responses. It was submitted that the Claimant had in fact criticised Ms Doyle, in particular, suggesting to her during cross-examination that the appeal was very much a "box-ticking" exercise, and that she had failed to engage with the substance of the Claimant's appeal. It was submitted that, having regard to the significant failings arising from the involvement of Ms Heitzman, and the tribunal's conclusions regarding Ms Doyle's failings, and guidance set out in a **Taylor v OCS,** the conclusion that the procedure was fair was perverse.

49. As to Ground Five, the Claimant noted that the Judge herself described the decision regarding the fairness of the appeal as the one which was, "finely balanced". It was submitted that, in fact, the facts found by the Judge made out an overwhelming case of unfair dismissal, such that no reasonable tribunal, properly directing itself, could have found in the Respondent's favour. In particular, it was submitted that the Claimant was dismissed for leaving his workstation early before the end of his shift on the 11th and 16th of April when, on those dates, he still had the right to appeal against a final written warning, which he did. It was submitted that those facts fell outside the scope of the decision of the Court of Appeal in **Davies v Sandwell MBC** [2013] EWCA Civ 135: the final written warning and dismissal were in effect, part of a single sequence of events. Further, there was a genuine dispute between the Claimant and Ms Heitzman about his contractual obligations, which Ms Heitzman did not attempt to resolve informally before initiating a disciplinary procedure. On the facts, the Claimant was working on the basis of his usual practice, which he had worked to for all of his employment up until February 2018. The Judge found that the Claimant was informed

that he would return to work on the same terms and conditions of employment which had existed prior to his dismissal, and on return, he was not told that he was required to change out of his PPE after the end of his shift. The Judge found that the Claimant erroneously, but genuinely believed that he was contractually entitled to act as he did. Ms Heitzman had not worked for the Respondent prior to February 2018 and had, therefore, no personal knowledge of the working practices of the Claimant up to that date. In addition, she approached both disciplinary proceedings with a closed mind.

50. The Respondent submitted that, in truth, the present appeal was a 'perversity appeal.' It reminded the EAT of the high threshold such an appeal must cross, and warned the EAT against interfering with the decision of the Tribunal, submitting that the EAT should not be tempted to do so. In particular, the Respondent drew our attention to the fact that the Judge herself, had identified that the decision was 'finely balanced'. The Respondent drew the EAT's attention to the decision in **Bowater,** and again, cautioned against interfering with the decision. The Respondent submitted that the Claimant's central challenges to the decision include whether dismissal fell within the 'band of reasonable responses' and, quite properly, placed significant emphasis on the words of Lord Justice Rimer in **Tayeh**.

51. It was submitted that the Claimant was wrong to criticise the Judge for considering the decisions in **Albion Automotives v Walker** and **Park Cakes.** Although those decisions both concerned redundancy situations, there was no reason in principle why the legal propositions set out, particularly with **Park Cakes** should be restricted to such cases. The Judge had, legitimately determined that the Claimant had failed to establish the relevant implied term and that the fact that he had acted as he did was equally explicable as a matter of discretion rather than legal obligation. Further, when considering the contractual issues, she had, correctly considered the decisions in **Farrant** and **Ford** in concluding that the real issue, as regards the claim of unfair dismissal, was whether the Respondent genuinely believed that the Claimant's conduct fell within the contract of employment, even if, in fact, that was not the case.

52. The Respondent submitted that the Judge's approach to the evidence, legal issues and submissions was exemplary. In particular, she clearly set out the issues, evidence, made appropriate, detailed and relevant findings of fact and set out an excellent summary of the relevant legal principles; she analysed the parties' arguments and provided detailed and considered conclusions on the fairness of the dismissal.

53. It was submitted that it was clear that the Employment Judge had considered and taken into account the unfairness of Ms Heitzman's approach, but, having regard to the fairness of the disciplinary procedure as a whole, including the appeal, legitimately concluded that the process was fair.

54. It was submitted that the Judge's approach to the question of whether the management instruction given was reasonable was entirely appropriate. The Respondent referred to the headnote **Union of Construction, Allied Trades and Bechnicians v Brain** [1981] ICR 542 CA and the dicta of Lord Justices Donaldson and Oliver: when conduct complained of was a refusal to obey an instruction, the primary factor which fell to be considered by a reasonable employer considering dismissal, was whether the employee was reasonable in refusing to obey the instruction. It was emphasised that in this case, there was no dispute that the Respondent genuinely believed that the Claimant had failed to follow a reasonable management instruction and, that in those circumstances, it is difficult to see how that belief would not also be reasonable against the background of the factual findings made by the Employment Judge.

55. It was submitted that the challenges based on perversity came nowhere near the relevant threshold of an overwhelming case.

Conclusions and Analysis

Ground 1: implied term

56. We do not consider that the Judge erred in law in her determination that there was not a contractual term entitling the Claimant to change out of his PPE and into his own clothes before clocking off at 5pm. The Claimant had established that, as a matter of fact, prior to February 2018 he had usually finished his working tasks slightly early so that he could then change and clock off at exactly 5pm. It did not follow, however, that there was therefore, an established legal right for him to do so.

57. It was for Claimant to establish the relevant implied term. Significantly, he did not call evidence to establish that other work colleagues had acted as he did. Whilst it is right, as the Employment Judge recorded, that the Respondent did not call any evidence to establish that other staff did not act in that way, evidentially, that was less significant: the burden of proof lay upon the Claimant. Further, on the evidence, the Judge was fully entitled, in our view, to

conclude that, viewed objectively, the fact that the Claimant was able to act as he did was equally explicable by the employer exercising a discretion to permit him to do so, or not to insist upon him not doing so.

58. The Judge was clearly aware of the relevant authorities of **Park cakes** and **Albion Automotive Ltd v Walker**, having referred to them at paragraph 51 of the Reasons. In our judgment, there is, as the Respondent submitted, no reason in principle why the approach set out and advocated in those cases should not apply to this. The Judge did not, in our judgment, improperly focus on just one issue, namely equivocalness. Her summary of the relevant legal principles, her analysis in paragraph 55 of her Reasons, and the paragraphs thereafter was clear and detailed. We agree with the Respondent's submission that an appropriate description of this part of the Reasons is 'exemplary'. There is not, in our judgment, any error of law within her reasoning or analysis. We dismiss this ground of appeal.

Grounds 2 and 3: reasonable management instruction

59. We considered grounds two and three together. We did not consider that there was any error of law in the Judge's conclusion that it was a reasonable management request the Claimant to adhere to the policy, established by the time of his dismissal, to clock out at 5pm, and then change into his own clothes. Nor indeed, that it was it not unreasonable for the Respondent to initiate some form of formal procedure, once it became clear that the Claimant did not consider that he was required to comply with that request. The Respondent had, by April 2019, managed to establish, within the workforce as a whole, its expectations regarding clocking in and out. On the facts, the Judge was fully entitled to conclude (as she did in paragraphs 57-59) that the instruction, given to the Claimant, to act as all other employees were required to act, was reasonable. We dismiss these grounds of appeal.

60. However, we return to this issue in the context of Grounds Four and Five. The Judge was fully entitled to conclude that the Respondent was entitled to give that instruction to the Claimant. However, when considering fairness, it was incumbent upon the Judge to consider fairness both from the employer's perspective and from the employee's. The Judge found that the Claimant had a genuine, albeit, erroneous belief about his contractual rights. In addition, the Judge found (contrary to the Respondent's case, and indeed Ms Doyle's conclusions) that the new policy was not in place prior to the Claimant being away from work for a year.

Grounds 4 and 5 : perversity regarding the Judge's decision that the procedure, overall, was fair and the decision that the dismissal was fair

61. The Judge considered the criticisms made of the procedure. She made careful findings of fact directly relevant to those criticisms. We refer to our summary at paragraph 33 above. In particular, she found that Ms Heitzman came to her decision making process with a closed mind. That, she concluded, was not the case for Ms Doyle. She did not, however, detail how that overcame that which Ms Heitzman had done, nor how it overcame the deficiencies in the procedure adopted by her which the Judge herself identified. Whilst the procedure had to be considered 'as a whole', those words require, in our judgment, some reflection upon whether, and how, earlier identified shortcomings in procedure were, in fact, remedied, at the appeal stage, or whether the practical impact of those failings in procedure persisted to impact on the fairness of the dismissal overall. That analysis is not apparent from the Judge's reasoning. Nor does the Judge appear to have taken a step back to consider whether, all of the individual criticisms of the procedure, taken as a whole (not just in isolation or one or two together) rendered the procedure unfair.

62. In addition to the points set out at paragraph 33 we noted that Ms Doyle had concluded that it had been custom and practice for employees to stay at their work-stations until the end of their shift prior to February 2018. That was not the finding of fact which the Judge made. The Judge did not consider that matter when she considered Ms Doyle's 'implicit' determination that the Claimant had not been acting reasonably when he refused to obey the instruction to stay in his work place until 5pm. Yet that analysis was obviously needed, particularly when the Judge's finding that the reasonableness of the Claimant's actions was merely 'implicit' within Ms Doyle's decision.

63. In addition, the Judge herself concluded that the Claimant had a reasonable, albeit mistaken belief, that his entitlement to change during working time was an implied contractual term. That conclusion demanded to be considered when considering fairness of the decision to dismiss.

64. Although the Claimant did not establish an implied contractual term to change out of PPE in working hours, he did establish, as a fact, that, for a significant period of time (some 8 years), he had stopped working a few minutes early and then changed into his own clothes within

his working hours. This was part of the Judge's determination on the facts. Furthermore, the Judge found he was not at work when the changes regarding working practices were implemented and then began to be monitored. Nor was he told about that when he returned to work. Those matters were, in our judgement, significantly relevant to the Tribunal's conclusions regarding the fairness of the dismissal. At the time of the disciplinary proceedings, the Claimant genuinely believed that, contractually, he was entitled to act as he was doing and, as the Judge found, he provided that explanation to Ms Heitzman on 3 April 2019. Although the Employment Judge recognized that the Claimant's belief was genuine, albeit mistaken, it appears not to have been considered in the Judge's overall analysis of fairness. Nor was the Claimant's length of service, and the length of time over which he had acted in accordance with his belief, without criticism.

65. As set out above, we did not consider that the Judge erred in concluding that the instruction to act in accordance with expected standards in April 2019 was a reasonable instruction. However, we noted, as she did, that there were significant issues with the manner in which the Respondent implemented the instruction in the Claimant's case. In particular, the Claimant returned to work after a lengthy absence. He was immediately given a final written warning for failing to adhere to a newly established policy in circumstances where that had not been communicated to him, and (as noted above) what he was doing was something he had done for a significant period of time prior to his absence, without criticism.

66. Further, it was not surprising, in those circumstances, that he sought to appeal against the sanction imposed upon him (the final written warning). On the facts, before that appeal had been heard, he worked for two days and acted in accordance with his former (and established) practice which he genuinely believed he was entitled to do. He was suspended as a result, prior to the appeal regarding the final written warning being determined. He was unsuccessful in respect of the appeal against the final written warning. He was then dismissed for having acted in accordance with his former practice.

67. As the second disciplinary process began before his appeal against the written warning had been heard, the Claimant did not, therefore, have any time back at work between the actions for which he was dismissed and the determination of the appeal in respect of the final written warning. It follows that he had therefore, had no opportunity to reflect upon that final written warning, to understand the basis for it after the unsuccessful appeal against it, and have an opportunity to change his actions before being at risk of dismissal.

68. In our view, the Employment Judge did not engage with those facts significantly, or at all. Yet, they required proper consideration, determination and explanation within the assessment of fairness. In consequence, when determining whether or not the decision to dismiss was fair, the Judge failed to grapple with significant features of the case and the specific findings which she herself made. That, in our judgment, was an error.

69. Notwithstanding the high bar that a finding of perversity entails, we have concluded that it is met in this case in respect of the fourth and the fifth grounds of appeal. The conclusion that the dismissal was fair was at odds with the specific findings which the Judge had made within her Reasons, and overwhelmingly so.

70. In particular, it was an evident oversight not to consider the finding that the Claimant had a genuine, but mistaken belief of the Claimant about the lawfulness of his employer's instruction. We also consider that it was perverse to reject, summarily, the criticism advanced by the Claimant that he had had no time to consider the outcome of the appeal against his final written warning and to change his actions before further disciplinary proceedings were initiated. Whether he would have changed his stance had that opportunity been afforded to him, was something which could, legitimately, be considered at the remedy stage. However, at liability stage, we considered that no properly directed, reasonable Tribunal, considering all these matters within the context of facts found in this case, could have reached the conclusion that the dismissal came within the range of reasonable responses open to a reasonable employer. We allow the appeal in respect of Grounds 4 and 5.

71. We invite written submissions as to disposal within 14 days.