Neutral Citation Number: [2025] EAT 15

Case No: EA-2023-000970-NT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date:7 February 2025

Before

SARAH CROWTHER KC
DEPUTY JUDGE OF THE HIGH COURT

- -

Between

MR P EASTON

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(BORDER FORCE)

Respondent

- -

Mr P Easton the **Appellant** appeared in person
Mr N Flanagan (instructed by Government Legal Department Employment Group) for the **Respondent**

Hearing date: 28 January 2025

- -

JUDGMENT

SUMMARY

Unfair Dismissal

The employment tribunal adequately addressed its mind to the question of whether the Respondent had been entitled to conclude that a reasonable applicant faced with a blank box headed ‘employment history’ on an application form would have understood that the information needed to be presented in such a manner as to reveal to the Respondent any gaps in employment, education or training.

The employment tribunal had applied the **BHS v Burchell** [1980] ICR 303 principles to all the facts and issues correctly and was entitled to find on the facts that the Respondent had reasonable grounds to believe that the Claimant’s decision to present his employment history in a way which obscured the fact and nature of his previous dismissal for gross misconduct and subsequent 3-month period of unemployment had been taken dishonestly. Accordingly, the tribunal had been entitled to find that the Respondent’s decision to treat the Claimant’s conduct as grounds for dismissal for gross misconduct was reasonable in all the circumstances of the case and the appeal is dismissed.

SARAH CROWTHER KC, DEPUTY JUDGE OF THE HIGH COURT:

INTRODUCTION

1. I shall refer during this judgment to the Appellant as the Claimant as that is what he was before the employment tribunal.

2. The issue on this appeal is whether the employment tribunal when deciding that the Respondent had behaved within the band of responses reasonably open to an employer had taken sufficient account of the Claimant's explanations for his conduct. The Respondent had concluded that the Claimant had been dishonest in the completion in May 2019 of his application form for employment, in that he had failed to disclose that he had previously been dismissed for gross misconduct by the Home Office in 2016 and had been unemployed for about 3 months in the summer of 2016 as a consequence.

3. The sole question for me is whether the employment tribunal addressed its mind adequately to the possibility that the Respondent had not behaved as a reasonable employer in reaching that conclusion, and failed to consider that a reasonable employer might have thought the Claimant had done all that he needed to do in order to complete the application form to the best of his ability and knowledge. In particular, it is the Claimant's case that the employment tribunal failed to grapple with whether, in the context of an application form which included a blank text box headed, 'employment history', the Respondent was entitled to conclude that the reasonable applicant should have presented that history in such a way that the vacancy holder would be able to identify any gaps in employment and would have been aware that his previous period of employment with the Home Office had ended in dismissal.

4. I have had the benefit of an appeal bundle, an authorities' bundle, as well as a further bundle from the Claimant containing two authorities on which he relies, together with an agreed chronology and his skeleton argument. I have also read a skeleton argument on behalf of the Respondent. There

is also a supplementary bundle which includes a selection of documents from the first instance bundle relating to application forms and the Respondent's application process.

5. The Claimant has appeared in person before me and Mr Flanagan, who also appeared below, on behalf of the Respondent. The Claimant is not legally qualified but presented his case attractively and with considerable skill and courtesy. I am grateful to all those involved in the preparation of this appeal by which I have been greatly assisted.

FACTUAL BACKGROUND

6. The Claimant is a career civil servant, who worked for the Ministry of Defence before, from 1992, the Department of Work and Pensions ('DWP'), then starting work for the Home Office in 2002. In 2016, he was working as a Chief Immigration Officer working with foreign national prisoners in the prison estate of the North-West of England.

7. He was dismissed on 13 June 2016 for gross misconduct. The circumstances and nature of the allegations which the Claimant faced have not been shared with me and did not feature in the employment tribunal proceedings under appeal save as background information.

8. The Claimant brought employment tribunal proceedings in 2016. In his claim he disputed that the reason for his dismissal was conduct and asserted that the primary reason was a disclosure of protected information he had made. He also claimed that his conduct was explicable by reference to a medical condition. The Home Office defended the action.

9. A COT3 settlement was reached on 17 July 2017, pursuant to which the Home Office made no admission of liability. I have not been shown the settlement agreement terms, however it is common ground that those terms did not alter the given basis of dismissal, namely gross misconduct.

10. By this time, the Claimant had started a new role with the DWP on 5 September 2016. There was, however, accordingly a 3-month gap between the termination of his employment with the Home Office and commencement of his work with the DWP.

11. On 31 May 2019, the Claimant applied for a role with the Border Force, which is part of the Home Office, as an immigration officer. He completed an application form and health declaration. This, to the knowledge of the Claimant, was part of a large-scale recruitment exercise being undertaken by the Border Force. He was interviewed for the role in June 2019 and following that interview was offered a position, subject to various checks and clearances.

12. Subsequently, on 9 June 2019, the Claimant completed a security clearance form. I was shown a print-out of the vetting form completed by The Claimant during the hearing. Security clearance was granted by the agency which conducts the vetting process and on 6 January 2020, the Claimant's employment with the Respondent as part of the Border Force at Manchester Airport began.

13. Shortly after he commenced employment, in about February or March 2020, the Claimant encountered one of his former line managers from his earlier Home Office days, who drew the current line management's attention to the fact that the Claimant's previous employment had been terminated on grounds of gross misconduct. A disciplinary investigation was launched in about May 2020 into allegations that the Claimant had failed to disclose his material details in his application, namely (i) that he had previously been dismissed by the Home Office for gross misconduct and (ii) that he had a serious underlying medical condition which would potentially impact on his ability to carry out the position for which he applied.

14. On 25 August 2020, the disciplinary investigation report was concluded and on 27 August 2020, the Claimant was suspended from work. On 16 September 2020, a disciplinary investigation hearing took place. During that hearing, the Claimant raised concerns about the line manager who

had reported the circumstances of his previous dismissal to his current management team. It was agreed that the disciplinary investigation would be paused to permit a formal grievance to be raised.

15. The Claimant submitted a grievance on 22 September 2020 in writing against the line manager who had raised the concerns about him. On the 6 November 2020, the grievance was dismissed.

16. The reconvened disciplinary hearing took place on 19 November 2020. On 20 November 2020, the Claimant was sent the outcome in writing, which was to terminate his employment with immediate effect on the basis that he had been dishonest in his application for the role. He appealed that decision on 2 December 2020 and his appeal was dismissed on 22 January 2021.

17. The proceedings before the employment tribunal were commenced on 4 January 2021. In them, the Claimant made claims of unfair dismissal, victimisation, discrimination on grounds of age and/or disability and detriment due to making a protected disclosure. The Claimant acted in person. It is common ground before me that the Claimant's complaints covered a broad range of different legal issues at the employment tribunal. A significant theme of his claim was that his dismissal in 2020 was tainted by the substance of the allegations made against him leading to his earlier dismissal in 2016, which had been disputed at the time and subsequently compromised in the earlier tribunal proceedings.

18. However, it is apparent that the Claimant had also pursued a case that the Respondent had not behaved reasonably in treating his conduct in relation to the 2019 job application as grounds for dismissal. At paragraph 11 of the Particulars of Claim, the Claimant states,

> **"The Respondent's job application form makes no mention of providing the reasons for leaving previous employment, nor does it mention including periods of employment. The online form simply stated, 'employment history' with an empty box for completion as candidates see fit."**

19. At paragraphs [45] and [46] of his particulars of claim, he asserts that others employed by the Home Office have gaps in employment in their CVs.

20. Mr Flanagan submitted to me that the Claimant's case had evolved, however, it seems to me that this pleading sets out clearly his case on this issue: he considered that it was unfair for the Respondent to have found him dishonest in failing to mention the information about his dismissal and the gap in his employment history it created because he considered that the Respondent had not been specific enough in seeking information and, he argued, there was evidence of double standards.

21. At the case management stage, the claims for victimisation and protected disclosure detriment were withdrawn by the Claimant. The remaining claims were determined at a hearing before Employment Judge M Butler (sitting with Mr D Mockford and Dr H Vahramian) between 22 and 26 May 2023. During that hearing the Claimant withdrew the age discrimination claim. Oral reasons were given at the end of the hearing on 26 May 2023. In a determination of 6 June 2023, with written reasons which were sent to the parties on 24 July 2023, the Claimant's claims were dismissed.

22. In that determination it was held that the Claimant did not have a disability pursuant to section 6 Equality Act 2010 and his disability discrimination claim was dismissed. In part this was because the Tribunal found that the Claimant's evidence regarding disability impact in his witness statement was not accurate (§§37-40). There is no appeal against those findings.

THE EMPLOYMENT TRIBUNAL FINDINGS ON THE UNFAIR DISMISSAL CLAIM

23. The Tribunal made detailed findings of fact in its judgment regarding the process adopted by the Respondent and the circumstances of the Claimant's dismissal (§§44 – 106).

24. It found that the Claimant had been planning for some time after the settlement of the tribunal proceedings to apply for roles within the Home Office and was concerned about whether his previous dismissal would affect his prospects. It found that he specifically enquired with the Shared Services

and the Respondent's HR team in 2017 and 2019 as to whether his previous dismissal would be a 'bar to appointment' for a role at the Home Office and that the Claimant had been informed by Home Office agents that a previous dismissal would not be 'an automatic bar to being re-employed' (§47).

25. In my judgment, the significance of this finding is that the Tribunal considered that the Claimant was aware that it was a matter for the Respondent to determine on an application whether a previous dismissal was a factor which would preclude subsequent employment and that the information was material and relevant to a job application.

26. However, the matter does not end there, because the Tribunal also found at (§49),

> **"The claimant understood that any dismissals from the Home Office and periods of unemployment in the previous 3 years would be relevant and material information that the Home Office would require from him when applying for a role within in. This was the claimant's evidence when cross-examined."**

27. The Tribunal found that the claimant had completed the section of the application form headed 'Employment History' using years only. He had made no reference to having been dismissed or that there was a gap of about 3 months between his employment at the Home Office and that at the DWP in summer of 2016 (§50). It found that, contrary to his oral evidence, the claimant did not raise the fact of his dismissal from the Home Office in his interview or the gap in employment which followed (§52).

28. The Tribunal further found that the claimant had ticked a box on his application to agree with the following declaration,

> **"I understand my application may be rejected or I may be subject to disciplinary action if I've given false information or withheld relevant details" (§54).**

It held that the security vetting form, which came after the conditional job offer was not part of the recruitment decision process and was never considered by the vacancy holder as part of recruitment (§56).

29. The Tribunal made detailed findings as to the nature of the investigations made by the investigating officer, into the allegations (§§60 – 79). He concluded that there was a case to answer, and consequently a disciplinary process was commenced. The Tribunal then made detailed findings about the disciplinary process (§§82 – 100) culminating in the decision to dismiss the Claimant.

30. It recorded the Claimant's explanation at the disciplinary stage for failing to include information about his previous dismissal and the gap in employment was that "he did not consider it to be relevant information." (§88). The Tribunal found that the Claimant did not adduce any further evidence by way of explanation for his conduct at the disciplinary hearing (§93).

31. The Tribunal found that the Respondent had concluded that there was a dishonest failure by the Claimant to disclose the fact of his previous dismissal and period of unemployment. The Tribunal found that the Respondent had rejected the Claimant's argument that the information was not materially relevant and noted that the declaration required the Claimant to acknowledge that all relevant facts had been disclosed. The Tribunal found that the reason why the Claimant was dismissed was for failure to disclose relevant information respect of the fact and circumstances of his dismissal in 2016 and in seeking to conceal a period of unemployment following that dismissal.

32. The Tribunal made findings about the Claimant's appeal (§§103-106). It found that the Claimant did not raise any concerns about the appeal process.

33. In terms of the Claimant's case before the Tribunal, it made the following observation (§107),

> **"It is not entirely clear what the Claimant's case is in respect of the unfair dismissal part of his claim. The way that he explained his case to the tribunal, the witness**

> **evidence that he brings and the way that he presented his case, left it unclear as to what part of the process or the decision making itself, he was saying fell outside of the band of reasonable responses."**

34. The Claimant submitted to me that this paragraph illustrated the Tribunal was confused as to his case and this had led it into error. I do not accept this submission. In my judgment, on a fair reading of the Tribunal's reasons as a whole, this paragraph, which formed the introduction to the 'Discussion' section of the decision, explained why the Tribunal had gone through each and every aspect of the process as well as the decision itself when forming its judgment in respect of reasonableness.

35. It found that Mr Finch 'undertook an extremely thorough investigation' (§109). In particular, the Tribunal made a clear finding as to what Mr Finch needed to investigate and that he had,

> **'Considered the claimant's application form. And this was necessary as <u>part of Mr Finch's task was to establish whether the claimant had failed to disclose information that was material and relevant to his application</u>. This inevitably required Mr Finch <u>to interrogate the application form itself</u>, but also would require him to understand the circumstances around the claimant's dismissal in 2016, as it only on understanding that that Mr Finch could conclude <u>whether this was information that was relevant and material</u>.' (§110) (my emphasis).**

36. It is worth noting that before the employment tribunal, the Claimant had been arguing that it was unreasonable for the Respondent to make enquiries about the fact and circumstances of the 2016 dismissal, because knowledge of the previous allegations and dismissal would 'taint' the index investigation. The Tribunal rejected that argument, correctly, in my judgment, identifying that the relevant misconduct was during the application process for the Border Force role in 2019 (§115) but that the circumstances of the dismissal were material to working out whether there had been misconduct in the 2019 application process.

37. The Tribunal held that the investigation, disciplinary and appeal process and the decisions made because of them, all fell within a band of reasonable responses open to the Respondent and that the dismissal was fair.

APPEAL TO THE EMPLOYMENT APPEAL TRIBUNAL

38. The Claimant issued a notice of appeal on 29 August 2023. On 10 January 2024, Judge Keith permitted one ground of appeal to proceed to full hearing, namely that the Tribunal arguably failed to engage with the application form used by the Respondent. The relevant ground states,

> **"The application form lacked guidance and featured a simple, empty box for employment history. The Respondents decision maker stated that the form didn't specify unemployment dates or reasons for leaving employers. The Judge's failure to recognise the ambiguous application form was a legal error. In *Cheltenham Borough Council v Laird [2009] EWHC 1253*, the court emphasized that it's the employer's responsibility to ensure application forms are clear and unequivocal, rather than expecting candidates to compensate for their ambiguity."**

39. In his excellent written submissions, the Claimant explains that the employment tribunal was provided with a copy of his application form. He submits that there is no direction as to the content or form and in particular no instructions are given regarding how to set out dates of past employment or gaps in employment. He submits therefore that completion of the form is 'at the discretion of the candidate'. He relies on the decision of Hamblen J in **Cheltenham v Laird**, § 274, as authority for the proposition that an application form should be construed objectively, as a reasonable person in the position of a candidate would have done, that where there is ambiguity, an answer which addresses either of the possible meanings will be true, that there is no requirement for technical or specialist understanding on the part of a candidate in completing an application form. The obligation on a candidate is to answer the questions asked correctly to the best of their knowledge and ability and not to wilfully withhold material facts. There is no general duty of disclosure on a job applicant. He tells

me he did not refer to the **Cheltenham v Laird** case before the tribunal, but he had taken it to his disciplinary appeal hearing.

40. The Claimant refers to examples of other application forms which he says demonstrate candidates describing their previous employment history in a similar way to him and which he placed before the Tribunal. I have been taken to some in the supplemental bundle. He also refers to other candidates whose employment histories disclose short gaps in employment and submits that 'a normal person would display their employment history in the way' he did. He also submits that custom and practice has evolved over recent years and that candidates are less specific than they used to be in providing career and employment history. He submits that there are many reasons why applicants might have a gap in their employment history, including maternity or paternity leave, career break, other caring responsibilities, or even if the candidate has been incarcerated, there would be no obligation to volunteer such information to a prospective employer.

41. He therefore submits that the absence of specific direction or guidance in the form renders it ambiguous and that therefore it was 'entirely at the discretion of the candidate as to what information they provide and what they consider relevant' and that in the circumstances he completed the application form to the best of his ability and knowledge and had not wilfully withheld information.

42. He also submits that the Respondent's own policy is not to take account of employment history when assessing candidates, but instead to use a competency-based framework. He submits that employment history is therefore irrelevant, and the Respondent is not now entitled to take account of employment history, unless the role was specifically advertised on the basis that employment history was material and where a separate marked assessment had taken place. He submits that in those circumstances his job offer was on the basis that past employment history was not relevant to his suitability. He therefore submits that any failure to disclose by him was not material to the Respondent's decision to employ him and ought not to have been treated as grounds for dismissal.

43. The Claimant suggested in his skeleton argument that the Tribunal erred in failing to address his case that the real reason for his dismissal from the Respondent in 2020 was because the decision-makers were influenced, or 'tarnished' in his words, by the decision made regarding him in 2016. However, that point is not developed in the skeleton argument and was not actively pursued by the Claimant in his oral submissions.

44. The Claimant further relies on the somewhat unusual facts of his case, that the Respondent was 'aware' of the circumstances because it was the Respondent that had employed (and dismissed) him previously. He points to the fact that he had been supplied with the same employee number and email address he had previously used as evidence of continuity and that his history was discoverable. He therefore (by implication) submits that there was no duty on him to make disclosure because it was information available to the Respondent.

45. He submits that the employment history was correct and was not false. He did work for the Home Office from 2002 to 2016 and then for the DWP from 2016 onwards. He says that there was no incentive for him to withhold information about his work history, because the Respondent was to his knowledge carrying out checks and, as far as he was concerned, would be aware of the relevant background.

46. In conclusion, he submits that the Tribunal ought to 'have made findings of fact in relation to the application form' and invites me to remit the case to a freshly constituted tribunal. He relies on the decision of HHJ Serota QC in the EAT on 16 January 2012 in **Quashie v Methodist Homes Housing Association** (UKEAT/0422/11/DM) to the effect that it is not necessary for an appellant to show that the outcome would have been different had the point been considered, merely that there is a real prospect that it could have been.

47. The Respondent submits that the Tribunal's role was to review the Respondent's investigation process as a whole to decide whether, in light of that investigation, the decisions to find the Claimant

dishonest and to dismiss him were within a range of reasonable responses. It submits that there was no failure on the part of the Tribunal to address the application form. The Respondent points out that the Claimant did not raise any specific issue with the nature of the application form during its investigation or disciplinary processes. It notes that the point on which this appeal now solely focusses was one of many about which the Claimant complaining in his ET1 and that at the hearing before the Tribunal the issue was only raised with Mr Finch in cross-examination. The Respondent submits that the Tribunal established that the Claimant's subjective understanding of the purpose of the need to provide employment history on the application form was to ascertain whether there had been any periods of unemployment or any dismissals (at §49 of its judgment), a finding which it was entitled to make as it reflected the Claimant's own evidence. It also made a finding that, contrary to the Claimant's evidence, he did not raise the issue of his dismissal in 2016 at interview (§52).

48. Mr Flanagan submits that the Tribunal had formed a negative view of the Claimant's reliability as a witness in relation to the disability claim and that view entitled it to discount his evidence in respect of the application and disclosure issues.

49. In respect of the decision in **Cheltenham v Laird**, Mr Flanagan submitted that it was a case which turned on its own facts rather than laying down general principles of law and that in any event it was distinguishable because it concerned a lay person's appreciation of technical medical concepts rather than basic objective statements of fact such as dates and nature of previous employment. He submitted that the Tribunal had not been taken to the authority.

50. Mr Flanagan submitted that the CVs which the Claimant relied on supported the Respondent's case because those candidates had all set out their employment history giving months as well as years, revealing gaps in employment or education. The purpose of giving more accurate information was to permit the employer to scrutinise any gaps and to ask questions at interview, an opportunity which was denied the Respondent by the Claimant's use of years. He also submitted that the declaration at

the end of the application form made it plain that there was a high duty on the applicant to take care to include material information and to be accurate and that it could not be compared to a CV.

51. Mr Flanagan submitted that the Tribunal had taken the correct approach to the issues in this case: it had correctly understood that it needed to be satisfied that the Respondent had adequately investigated whether the Claimant ought to have disclosed the information about his previous employment and whether in light of that investigation it was open to the Respondent to conclude that the failure to provide that information amounted to dishonesty on the part of the Claimant. He pointed out that the Claimant at the disciplinary hearing had put forward two different and potentially inconsistent explanations, namely that the application form was an error carried forward due to 'copy and paste' from a CV and secondly that he had not included the information because it was not relevant. It was entirely open to the Respondent to disbelieve the Claimant and to find that he was deliberately seeking to withhold information which he knew to be relevant but also prejudicial to his application prospects.

52. In those circumstances, submitted, Mr Flanagan, there was no need for the Tribunal to make any finding as to whether the application form was adequately specific or not: indeed, it would have been an error of law for it to substitute its own view for that of the Respondent. What the Tribunal did was to take the correct approach of reviewing the Respondent's process and determining whether it was reasonable for the Respondent to conclude that the material was relevant and deliberately withheld. The Tribunal had found that the Claimant knew that his previous dismissal and the gap in employment were relevant to the Respondent's decision whether to employ him a second time, (see the findings at §§47-49), and therefore it had clearly concluded that it was open to the Respondent to find that the Claimant's choice not to include that information was done deliberately and dishonestly.

THE LEGAL FRAMEWORK

Unfair Dismissal

53. Section 94 of the Employment Rights Act 1996 (‘ERA 1996’) provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer. Section 98 ERA 1996 sets out potential fair grounds for dismissal, including conduct of the employee. It is for the employer to show what the reason for dismissal.

54. The appropriate approach in conduct cases was set down by the EAT in **BHS v Burchell** [1980] ICR 303. Following section 6 of the Employment Act 1980, the principles can be stated as:

(i) The employer must show that it believed the employee to be guilty of misconduct.

(ii) The Tribunal must determine whether the employer had in mind reasonable grounds upon which to sustain that belief.

(iii) The Tribunal must determine whether, at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

(iv) This means that the employer does not need to have conclusive direct proof of the employee’s misconduct: the Respondent only needs to have a genuine and reasonable belief, reasonably tested. Further, there is no requirement to show that the employee was subjectively aware that their conduct would meet with the employer’s disapproval.

55. In carrying out this task, the Tribunal must take care not to substitute its own view of events or the decision it would have made for that of the employer: the question is always whether or not

dismissal was a reasonable response in all the circumstances: see **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439, **Trust House Forte Leisure Ltd v Aquilar** [1976] IRLR 251.

56. When reviewing the decision of an employer, the tribunal should not require the employer to have conducted a perfect investigation of every conceivable line of defence available to an employee. What is required is that any defences advanced are considered to the extent necessary considering the circumstances as a whole. In **Shrestha v Genesis Housing Association** [2015] EWCA Civ 94; [2015] IRLR 399, Lord Justice Richards said (§23),

> ***"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole."***

The Decision in Cheltenham v Laird

57. **Cheltenham BC v Laird** [2009] EWHC 1253 (QB) Hamblen J is a remarkable case - both on its facts and in terms of the volume of legal issues which fell to be addressed. In very short summary, the claimant local authority brought a claim for damages for fraudulent or negligent misrepresentation arising out of a medical questionnaire completed by the defendant when applying for the role of managing director of the local authority. One of the issues for Hamblen J to decide was how to construe the medical questionnaire, in particular whether it was seeking statements of subjective and honestly held belief rather than objective fact. The dispute centred on the defendant's mental health history of anxiety and depression and whether she ought to have included details of previous episodes of mental ill health in her answers to the specific questions raised.

58. The questionnaire comprised a series of specific questions and concluded with the following,

> **"I declare that all the statements on the above answers are true and given to the fullest of my ability and acknowledge that if I have wilfully withheld any material facts, I am, if engaged, liable to the termination of my contract of service."**

59. The defendant's case was that the declaration was consistent with the form merely requiring subjectively true answers, given in good faith and from a non-technical perspective.

60. Hamblen J held that (§274) the medical questionnaire needed to be construed objectively, in the manner that a reasonable person in the position of the defendant would have done. Where the questionnaire was ambiguous, an answer which correctly addressed either of those meanings would be true (see **Revell v London** [1934] 50 Lloyd's Rep 114). No technical or specialist knowledge was expected. On the specific facts of that case, the candidate's stated duty in the declaration was "to answer the questions asked correctly to the best of their ability and knowledge" and not to wilfully withhold material facts and that wilfully meant deliberate or reckless withholding.

61. At §275 Hamblen J addressed the argument that only subjectively in good faith answers needed to be provided and said as follows,

> **'As to whether the form was only seeking subjectively true answers, I am not persuaded that it is so limited. The form sought various statements of fact, statements which self-evidently were likely to be relied upon and therefore liable to cause loss or damage if care was not taken to ensure that the statements were accurate. In the ordinary way a person making such statements would be expected to take reasonable care in so doing. That is their duty at common law, and, where the 1967 Act applies, as a matter of statute law. Clear words would be required to exclude or limit that duty.'**

62. I accept the submission of Mr Flanagan that this is a case which turns on its somewhat unusual facts. In particular, the terms of the declaration which was signed by Mrs Laird heavily influenced

the content of the duty of care which she was held to owe to the local authority in respect of the content of her answers. Further, in relation to the nature of her responses, the fact that it concerned medical diagnoses and prognoses in respect of sensitive and fluctuating mental health issues meant that the court was understandably cautious before making any findings of 'wilful' non-disclosure.

63. Further, I would add the observation that Hamblen J had the task of being the primary factfinder in that case. It is therefore important to appreciate that the task which the Tribunal faced was fundamentally different to the one which Hamblen J undertook in **Cheltenham v Laird**. He had the role of construing the medical questionnaire and then finding the facts as to whether Mrs Laird had complied with her duties under that form. By contrast, where an employment tribunal considers a case for unfair dismissal, its role under section 98 ERA 1996 is one of review of the employer's decisions and associated processes leading to those decisions. It was not for the Tribunal in this case to determine whether the non-disclosure was material, or whether the Claimant was dishonest. Those decisions were for the Respondent.

64. However, to the extent that the case does lay down any principle of law, it seems clear to me that the standard by which responses to questions in an employment application process fall to be judged is an objective and reflects the duty to take reasonable care to ensure that statements of fact, which are likely to be relied upon, are accurate.

DISCUSSION

65. It follows that the questions which the Tribunal had to answer were (i) whether the Respondent believed the Claimant to be guilty of misconduct by his presentation of his employment history in years, rather than months, without reference to either his dismissal for gross misconduct in 2016 or his subsequent 3-month gap in employment, and if so, (ii) whether the employer had in mind reasonable grounds upon which to sustain that belief and (iii) whether the employer had conducted a

reasonable investigation before reaching those conclusions. In my judgment, the Tribunal has taken great care to apply the correct test and to provide scrutiny in the right manner to the decisions of the Respondent whilst refraining from substituting its own view of the evidence.

66. It was common ground before me that the Claimant had not referred to the authority of **Cheltenham v Laird** in his submissions before the Tribunal. However, I am satisfied that this would not have made any difference to the outcome. The Tribunal in my judgement properly understood its task and applied it to the facts and evidence before it.

67. The Tribunal had the Claimant's pleaded case before it at the hearing and as I have said it clearly encapsulates the essence of his complaint that he was being punished for failing to provide information which had not been specifically requested. It is clear to me that the Tribunal had the point being made by the Claimant regarding the fairness of judging him by reference to the contents of the 'employment history' box on the application form well in mind throughout the case.

68. In my judgment, it is for this reason that the Tribunal described the scope of the investigation which Mr Finch had to conduct on behalf of the Respondent as including (§110-111),

> **"Whether the claimant had failed to disclose information that was material and relevant to his application. This inevitably required Mr Finch to interrogate the application form itself, but also would require him to understand the circumstances around the claimant's dismissal in 2016, as it is only on understanding this that Mr Finch could conclude whether this was information that was relevant and material.**
>
> **…the tribunal considered this to be a reasonably necessary part of Mr Finch's investigation and would have been more critical of Mr Finch had he not sought out this investigation. Especially given that this is information that relates to whether there had been a dismissal and/or employment gap."**

69. It is correct that the Tribunal here is rejecting the Claimant's argument that investigation of the 2016 allegations would improperly 'taint' the 2020 investigation, but in my judgment it is apparent

from this passage that the Tribunal also understood that the Respondent would need to investigate what the Claimant had been asked and had written and whether the information omitted was, on a reasonable view, material and relevant in order to determine whether he had a misconduct case to answer. Indeed, those were the express terms of reference for the investigating officer, as the Tribunal had found.

70. During his submissions, the Claimant said that one of the Respondent's witnesses (I assume it must be Mr Finch because Mr Slevin did not give oral evidence) had said that he approached HR for advice about whether it was a material non-disclosure in circumstances where the application form did not specifically ask for a particular format for the information. This, in my judgment, is further support for the fact that the Tribunal heard the evidence on this issue in full and that its determination that Mr Finch's investigation was 'extremely thorough' was by reference to the correct issues which the Respondent had to decide. It seems to me that the Tribunal's finding (§114) that the Respondent was entitled to consider that the Claimant had a case to answer cannot be criticised. It was one which was entirely open to the Tribunal on the evidence and there is nothing I can discern from any of the matters which have been canvassed before which supports the suggestion that it failed to consider whether Mr Finch had the right issues in mind.

71. In terms of the Tribunal's consideration of the Respondent's response at the disciplinary hearing and appeal stages, the Tribunal made direct findings (§87-88) that the Claimant presented his case regarding the missing and/or misleading information in the application form and that the Claimant did not present any evidence in support of his assertion that it was a copy/paste error and that this was a new explanation being advanced for the first time and again at §93 that no further evidence was forthcoming from the Claimant. These findings engage directly with the issue of whether it was reasonable for the Respondent to consider the Claimant's completion of the application form to be deliberately or recklessly inadequate.

72. It is true that the Tribunal did not expressly deal with the fact that the Claimant had argued by reference to the **Cheltenham v Laird** decision before Ms Hickman (who dismissed his disciplinary appeal) that he was under no obligation to provide the information. That may be because the Claimant did not refer the Tribunal to the case himself. However, in my judgment that does not mean that the Tribunal has failed to grapple with the fundamental point being made by the Claimant: in my judgment it clearly recognised that there was a debate regarding the extent of the duty on the Claimant to volunteer the information about his past dismissal at the disciplinary hearing which the Claimant sought to justify his conduct.

73. The Tribunal clearly considered it reasonable for the Respondent to have rejected that explanation. On a proper reading, therefore, the Tribunal's finding (at §117) that it was open to Mr Slevin to reject the Claimant's case that he had told the interviewers about his previous dismissal and to reject his explanation that the information was not relevant and therefore to conclude that the Claimant's failure to provide the information was done dishonestly was fully supported by the Tribunal's previous findings and was made in full consideration of the Claimant's case on the application form and process.

74. The Claimant may be right that not all employers would have reached the same conclusion as the Respondent did. But his arguments that the omissions were genuine errors or oversights, or that they occurred in the honest belief that the information was not needed or sought by the application process, or that the conduct was not of such seriousness as to warrant dismissal were all aired in the disciplinary process and the Tribunal considered carefully the Respondent's approach to them all. It was not the Tribunal's role to go behind those decisions. The Tribunal's role was to scrutinise whether the process and the decisions were within a band of reasonable responses. That is exactly what it did.

75. That, in my judgment, is sufficient to dispose of the appeal. However, in deference to the skill with which the Claimant has presented his argument before me, I should like to say a few words in

response to the specific issues he has raised, even though to some extent, they seek to invite me to reconsider the decision of the employment tribunal.

76. First, the argument that there is nothing specific in the question or format of the 'employment history' box of the application form to suggest that months as well as years should be provided. The answer to this point lies in the wider reading of the form itself. The application form clearly contained information which was very likely to be relied upon by the Respondent. That much is apparent from the general declaration which the Claimant signed. The Claimant, as he accepted in cross-examination, was aware that the previous dismissal and subsequent period of unemployment were relevant facts.

77. The Claimant, as Hamblen J explained in **Cheltenham v Laird**, owed a duty to take reasonable care that his answers were accurate. The employment history information was purely factual and, unlike in the **Cheltenham** case, did not involve any technical or specialist knowledge or expertise. The Claimant is right to say that he was not given instruction or supervision as to how to complete the form, but the essence of what he was being asked to do was understood by him and it was clearly within his skills and experience to present that information in a comprehensive manner.

78. Secondly, I cannot see that there was anything ambiguous about being asked to provide an employment history. It would, as the Tribunal found to be well understood by the Claimant (§§47, 49 and 52), go to the heart of the matter if there was a previous dismissal or an employment gap. It was straightforward and basic information to provide, of a kind which is routinely sought in job applications, the reasons for which are well known and obvious. The suggestion that it needs to be spelled out to applicants that they should provide sufficiently precise dates to permit the vacancy holder to understand any gaps in employment has a slight air of unreality about it. The Claimant's further evidence of CVs of other individuals only serves to reinforce the Respondent's position and does not, in my judgment, assist the Claimant's case at all. Each of those applications has, by giving

precise periods of employment by reference to months and years, disclosed such short periods of unemployment or gaps as exist. Those can then, should the vacancy holder wish, be explored as part of the application process. The Claimant denied that information and opportunity to the Respondent.

79. As to the suggestion that the Claimant need not have disclosed the relevant information, because the Respondent was aware of his dismissal, it does not assist the Claimant's case. First, I accept the Respondent's point that it is a large organisation which is effectively an 'umbrella' for various smaller organisations and that it should not be assumed that there is a single collective corporate memory of all HR records, especially in a large recruitment exercise where some tasks have been outsourced. Secondly, the fact that the Respondent might have found out by other means (and did ultimately do so) does not take away from the Claimant's obligations under his declaration in the application form not to withhold relevant information. The failure to disclose deprived the Respondent of the opportunity of exploring the issue at the interview stage and forming its own judgment as to whether employment should be offered considering the full and true facts.

80. For similar reasons, the materiality argument, is misconceived in my judgment. The Tribunal's task was not to consider whether, had it been aware of the relevant information, the Respondent would nevertheless have decided to engage the Claimant in 2019. The issue was whether the Respondent was entitled to conclude that what it considered to be deliberate withholding of that information was reasonable grounds to conclude that the trust and confidence essential for the employment relationship was destroyed and to dismiss him as a result.

81. The Claimant submitted that it was not open to the Respondent to take account of his employment history for the purposes of assessing his suitability for the role. That might be correct insofar as this was not a post advertised on the basis that specific prior experience was a condition of the role. However, that overlooks the fact that any vacancy holder has a wider interest in understanding the previous employment history of a candidate than merely post-specific expertise.

As I put to the Claimant in the hearing, if a hypothetical candidate had had 80 different jobs in 20 years (a far-fetched example, I appreciate), the employment history information would draw the vacancy holder's attention to that fact and permit further information to sought at interview. It seems to me that the employment history was as important for what it did not contain as what it did and would have been well understood by all applicants to be relevant information which needed to be provided accurately, especially in light of the declaration on the form.

82. Finally, and perhaps what seems to have been the Claimant's key concern before the Tribunal, was that he was being dismissed for the alleged misconduct in 2016 rather than his dishonesty in the application process in 2019. That argument was also met head on by the Tribunal in its findings (at §102). The Tribunal was satisfied that the reason the Claimant was dismissed was because the Respondent had a genuine belief in his dishonesty in withholding relevant information in his job application and that that such belief was a reasonable one to form having conducted a reasonable investigation in all the circumstances.

83. For these reasons the appeal shall be dismissed.