

Neutral Citation Number: [2026] EAT 8

Case No: EA-2023-000610-AS

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 12 January 2026

**Before :**

**HIS HONOUR JUDGE JAMES TAYLER**

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**Between :**

**CRAIG LAMB**

**Appellant**

**- and -**

**TEVA UK LTD**

**Respondent**

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**Hana Abas** (acting as a FRU representative) for the **Appellant**  
**Mark Humphreys** (instructed by **Travers Smith LLP**) for the **Respondent**

Hearing date: 2 December 2025

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**JUDGMENT**

## **SUMMARY**

### **Unfair Dismissal**

This appeal concerns the requirements of a fair procedure where misconduct is alleged, including natural justice, ACAS guidance and the fundamental statutory test.

On the facts of this case the Employment Tribunal was not required to find that a dismissal was unfair because (1) the person who conducted the investigation provided a witness statement as part of the investigation (2) the note taker in the investigation also provided a witness statement as part of the investigation (3) evidence that was said to have materially increased the seriousness of the allegation was provided less than 24 hours before the disciplinary hearing; and/or (4) it was possible that the person who conducted the investigation had been overheard saying that “I don’t think he is going to be back at the business” or he “is done at the business”.

## **HIS HONOUR JUDGE JAMES TAYLER**

### **The issue**

1. The issue in this appeal is whether an Employment Tribunal was required to find that a dismissal was unfair because (1) the person who conducted the investigation provided a witness statement as part of the investigation (2) the note taker in the investigation also provided a witness statement (3) evidence that was said to have materially increased the seriousness of the allegation was provided to the claimant less than 24 hours before the disciplinary hearing; and/or (4) it was possible that the person who conducted the investigation had been overheard saying of the claimant that “I don’t think he is going to be back at the business” or he “is done at the business”. It will involve consideration of requirements for a fair procedure in a conduct dismissal, including natural justice, ACAS guidance and the fundamental statutory test.

### **The judgment appealed**

2. This is an appeal against the judgment of Employment Judge J M Wade, sitting with lay members. The hearing took place from 22 to 25 May 2023. Written reasons were provided in response to a request from the EAT.

### **Facts**

3. I take the facts from the judgment of the Employment Tribunal.

4. The respondent is a global supplier of medicines. The claimant was employed by the respondent in May 2011 as a “facilities/electrical technician”. At the time of the relevant events he had been promoted to be an Engineering Supervisor. The claimant was electrically trained.

5. On 21 June 2022, the claimant was made aware that there was a problem with a forklift charger because of a split cable (“the electrical fault”). How the claimant became aware of the electrical fault and who was responsible for remedying it were to be disputed by the claimant.

6. On 12 July 2022, work was undertaken to install new chargers. The claimant signed a work permit at 3:20pm to say that the area was safe, clean and tidy. The electrical fault had not been

remedied.

7. In the early hours of 17 July 2022, a worker in the warehouse suffered an electric shock while attempting to use a fork lift truck charger as a result of the electrical fault. The incident was categorised as a potential fatality.

8. On 17 July 2022, and at a morning meeting on 18 July 2022, the claimant told Ms Clark, Senior Warehouse Manager, that he was not aware of the electrical fault.

9. On 18 July 2022, Mr Cockcroft, Supply Chain Director, asked Mr Lillington, Technical Manager, to carry out an investigation.

10. That day Mr Lillington produced a witness statement setting out his recollection of a discussion he had heard between the claimant and Mr Rees, a Warehouse Operative, on 21 June 2022. The entire statement was as follows:

Whilst working from my office, Richard Rees entered the site services office, he engaged in conversation with Craig Lamb, Richard informed Craig of a damaged charger for VNAs. Craig then goes on to investigate the issue.

11. Mr Lillington's evidence was that Mr Rees told the claimant about the electrical fault and the claimant went to investigate it. The statement was not provided to the claimant until he was invited to a disciplinary hearing.

12. Mr Lillington reviewed CCTV recorded on 21 June 2022 ("the 21 June CCTV") that showed the claimant and Mr Link, a junior technician colleague who was not an electrician, inspecting the cable connected to the charger. The claimant could be seen assisting Mr Link to turn the charger to the wall as a means of putting it out of action. Mr Lillington wrote a summary of the 21 June CCTV concluding that a question arose as to whether the charger had been "locked out" in accordance with the respondent's "lock out tag out" policy ("the LOTO policy"). The LOTO policy required the use of a padlock to prevent faulty equipment which had been put out of use, being used inadvertently. The LOTO policy also required that a label be attached to the damaged equipment to indicate that it was not to be used until it had been repaired and signed as safe to use.

13. Mr Lillington obtained a statement from Mr Rees, who said that he had noticed the electrical fault and had reported it to the claimant in the presence of Mr Lillington in the office. Mr Rees said that the claimant told him that he (the claimant) would attend to it (the electrical fault).

14. Later on 18 July 2022, Ms Clark and Mr Lillington met with the claimant and explained that Mr Lillington was undertaking an investigation and that Ms Clark would take notes of their conversation. By this time Mr Lillington knew what Mr Rees had said and had written a statement from him. Ms Clark knew that the claimant had told her that he did not know about the electrical fault. Both of them had some limited involvement in the events.

15. Ms Clark took notes but also asked some questions. Mr Lillington asked the claimant whether the charger had been reported to him as being damaged. The claimant replied that he couldn't remember properly. Mr Lillington told the claimant about the statement from Mr Rees. The claimant again said "he couldn't really remember". Mr Lillington described the 21 June CCTV. The claimant then said that he was "in-between jobs" and he couldn't remember whether there was follow up action because "he had so much on".

16. The Employment Tribunal found:

44. Mr Lillington had reasonable grounds, having heard from the claimant in that meeting and watched the CCTV, to consider that the claimant had been at fault - he had not locked off the equipment, not tagged it, and had said to Ms Clark that he did not know of any damage to the charger when asked previously.

17. The claimant was suspended at the end of the meeting on 18 July 2022.

18. Mr Link was interviewed on 19 July 2022. Mr Link said that the claimant had told him about the electrical fault and he (Mr Link) had "tagged along" with him (the claimant).

19. In the evening of 19 July 2022, the claimant sent an email to Mr Lillington and Ms Clark stating:

More and more I think back I was asked by Jon to assist re turning the charger around as been advised from Jon [Mr Link] there was a fault with the charger. I didn't ask what the fault was at the time and said I will leave it with you to sort out and make safe or words to that effect

20. The claimant sought to blame Mr Link, a recently appointed junior technician colleague, who is not an electrician.

21. The claimant was interviewed again on 22 July 2022. He was told about the conflict between what he was saying and the evidence of Mr Link. The claimant stated that he might have told Mr Link to “make sure an out of order sign is on and lock off”. The claimant said that everyone had the necessary lock off kit.

22. Mr Link was interviewed again and said:

I was walking back to the site services office. I ran into Craig [the claimant]. Craig told me there was an issue with one of the chargers and suggested I tag along.

23. On the evening of 22 July 2022, the claimant sent an email to Mr Lillington and HR stating:

for my records and understanding I would like to know why only me who got a letter with the allegation of health and safety breach when there is another person. I know this will be discussed in further detail but I must stress I can’t be responsible for every task I allocate to another tech to complete. Please attach this to the investigation.

24. On 26 July 2022, the claimant was invited to a disciplinary hearing. The Employment Tribunal described the charge as being that the claimant was guilty of “a serious breach of health and safety rule and a serious breach of trust and confidence”. The letter described the allegation:

On 21 June a damaged charger cable was reported to the claimant and the claimant did not raise a query with the contractors to repair the damaged cable, which was one of his responsibilities;

On 12 July he signed a work permit at 3:20pm to say that the area was safe, clean and tidy whereas the repair had not been undertaken and the contractor on 12 July had put the charger back into use without realising there was any damage to it;

The fact of the shock injury to the colleague, his attendance at hospital, how the injury had occurred and the report to HSE;

The locking off by the claimant on 18 July of another charger;

That the claimant had stated during investigation that he did not know about the damaged cable but a CCTV and a witness had confirmed that he knew of it.

The lock out process was not completed on 21 June which led to the accident and injury occurring; the claimant was the most senior electrically qualified person and was engineering supervisor with IOSH training and a member of the on site health and safety council, such that the incident and investigations have led to a loss of trust

and confidence in your work and lack of accountability.

25. The Employment Tribunal set out the evidence that was sent with the letter inviting the claimant to the disciplinary hearing:

57. On 26 July the claimant was sent an invitation to a disciplinary hearing with Mr Dobinson which contained the investigation documentation including: notes of the investigation and interviews with Mr Link, Mr Lillington's statement that he had witnessed Mr Reece [sic] coming to the office to report the incident to the claimant, Jane Clark's witness statement from the conversation with the claimant on 17 July, and a work permit signed by the claimant on 12 July which concerned work in the room in which the faulty charger was located. The claimant had signed the work permit to say that the area was left clean, tidy and safe. Further he had minutes of a meeting, his further interview on 22 July, and his training documents indicating he was fully trained in lock out procedures and health and safety and other procedures.

58. He was also provided with a copy of the disciplinary policy, a copy of an email from the witness to the incident on 17 July, the photographs of both the charger and the injury, notes of an interview with an injured person on 19 July. That was a telephone conversation with Mr Lillington. Further he had witness reports from Mr Reece [sic] and Ms Coulthard, colleagues who confirmed the damaged charger had been noticed and reported to the claimant on or around 21 June.

59. The claimant's emails of 19 July and his further email of 22 July were also included and the CCTV footage of 21 June and of 12 July had been discussed with him in the meeting on 22 July and it was made clear that the CCTV would also be available in the disciplinary hearing upon request.

26. On 29 July 2022, Mr Lillington carried out a review of the CCTV footage from 12 July 2022 ("the 12 July CCTV") the day on which the claimant had signed the work permit form. Mr Lillington produced a written summary of the 12 July CCTV that was sent to the claimant on 1 August 2022.

27. The claimant attended a disciplinary hearing before Mr Dobinson, Facilities Manager, on 2 August 2022. Mr Dobinson decided to dismiss the claimant, giving the following reasons in the dismissal letter:

I confirm that the decision taken was to dismiss you from the business with immediate effect for reasons of Gross Misconduct. This decision was due to a serious breach of Health and Safety and a serious break down in trust and confidence following the investigation due to the accident which took place on Sunday 17th July at 00:13am.

You have failed to prevent harm to yourself or others by not picking up on the fault on the cable on 21st June 2022. I would expect someone with your level of experience and knowledge in both Health and Safety and electrical training to have seen that. A witness confirmed they had made you aware of the situation and there was a 5 cm

split in the cable.

At the time you knew your colleague did not have the right lock off equipment on the date of 21st June and you did not follow up with him about the situation and the equipment was not repaired and was just left there.

As part of your responsibilities, you ensure suppliers are told about work which needs to be carried out and manage the contractor relationship.

On 12th July there was an opportunity for the cable to be found when you said on the permit to work that you had checked the area after contractor left but CCTV footage showed you did not check the area. The permit to work form you signed and dates were therefore falsified as you didn't physically inspect.

As the engineering supervisor and the most electrically qualified person on site we expect you to use your experience to ensure work is completed satisfactory. Saying you were too busy when it comes to possible danger to an individual is not what we expect off any employee.

28. The claimant appealed against the decision to dismiss him. The appeal was heard by Mr Cartwright, Senior Director Finance, on 9 August 2022. The appeal was dismissed by letter dated 10 August 2022.

### **The Law**

29. Section 98 **Employment Rights Act 1996** (“ERA”) provides:

98 General.

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
  - (a) **the reason (or, if more than one, the principal reason)** for the dismissal, and
  - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it— ...
  - (b) **relates to the conduct of the employee, ...**
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of **the question whether the dismissal is fair or unfair** (having regard to the reason shown by the employer)—
  - (a) depends on whether **in the circumstances** (including the **size and**

**administrative resources** of the employer's undertaking) the **employer acted reasonably or unreasonably** in treating it as a **sufficient reason for dismissing** the employee, and

(b) shall be determined **in accordance with equity and the substantial merits** of the case. [emphasis added]

30. The fundamental test in a claim of unfair dismissal is that set out in section 98 **ERA**. There are three steps in the analysis:

30.1. the employer is required to establish the reason, or principal reason, for dismissal; for convenience, I will refer to the reason, or principal reason, as "the reason" for dismissal; at this stage the Employment Tribunal considers the factual reason for dismissal

30.2. the reason for dismissal established by the employer must be a potentially fair reason

30.3. if the employer establishes that the employee was dismissed for a potentially fair reason, the Employment Tribunal will go on to determine whether the dismissal was fair or unfair on application of the provisions of section 98(4) **ERA**; fairness is determined on a neutral burden of proof

31. The first issue for the Employment Tribunal is the reason the employer had for dismissing the employee. The words "it is for the employer to show" means that it is for the employer to establish in evidence the reason for dismissal.

32. In **Croydon Health Services NHS Trust v Beatt** [2017] ICR 124, Lord Justice Underhill considered what is meant by the term "reason" for dismissal, at Paragraph 30:

30. What tends to be treated as the classic expression of the approach to identifying the "reason" for the dismissal of an employee for the purpose of section 98 and its various predecessors is the statement by Cairns LJ in *Abernethy v Mott Hay & Anderson* [1974] ICR 323, at p. 330 B-C, that:

**"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

As I observed in *Hazel v Manchester College* [2014] EWCA Civ 72, [2014] ICR 989, (see para. 23, at p. 1000 F-H), Cairns LJ's precise wording was directed to the particular issue before the Court, and it may not be perfectly apt in every case; but **the essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision** – or, as it is sometimes put, what "motivates" them to do so (see also *The Co-Operative Group Ltd v Baddeley* [2014] EWCA Civ 658, at para. 41). [emphasis added]

33. If the employer fails to establish the factual reason for dismissal, the complaint will succeed.

34. The second question for the Employment Tribunal is whether the reason established by the employer is one of the potentially fair reasons for dismissal, provided by section 98(2) and 98(1)(b) **ERA**. A reason that relates to the conduct of the employee is a potentially fair reason for dismissal: section 98(2)(c) **ERA**.

35. If the employer does not establish that the factual reason for dismissal was one of the potentially fair reasons for dismissal, the complaint will succeed.

36. If the employer establishes the factual reason for dismissal, and that it was a potentially fair reason, the Employment Tribunal will go on to consider, on a neutral burden of proof, whether the dismissal was fair. Section 98(4)**ERA** requires that the Employment Tribunal considers a number of factors to determine the core question of whether the dismissal is fair or unfair. The Employment Tribunal must have regard to the reason shown by the employer; i.e. the factual reason for dismissal and the potentially fair category of reason into which it falls. The Employment Tribunal must consider all the relevant circumstances, including the size and administrative resources of the employer's undertaking. Having regard to the reason shown by the employer, the Employment Tribunal must decide whether the employer acted reasonably or unreasonably in treating it (the reasons established by the employer) as a sufficient reason for dismissing the employee, which shall be determined in accordance with equity and the substantial merits.

37. The Employment Tribunal must not substitute its view for that of the employer. Employment Tribunals apply a range, or band, of reasonable responses test. In **Hewston v Office for Standards in Education, Children's Services and Skills** [2025] EWCA Civ 250, [2025] I.C.R. 1270, Underhill

LJ considered the origin of the test and its ongoing applicability, while emphasising the underlying statutory test:

15. **It is very well-recognised that a decision to dismiss may be reasonable even where another employer, or the tribunal itself, might have taken the view that a lesser sanction was sufficient;** and it follows from the statutory language that in such a case the tribunal must find the dismissal to have been fair. **This is generally referred to as “the range [or band] of reasonable responses” approach.** After some confusion in the EAT authorities, arising from a concern that that formulation encouraged tribunals to apply a lesser level of scrutiny than the statute requires, this court gave authoritative guidance as to the correct approach in *Foley v Post Office* [2000] ICR 1283 : see the judgment of Mummery LJ at pp 1291–1293. **It endorsed the range of reasonable responses approach, but it is important to note that Mummery LJ emphasised that that did not mean that a tribunal can only find unfairness where the employer’s decision has been “perverse”** (see p 1292D–E); he also observed that in many cases reference to the range of reasonable responses is an unnecessary gloss (see p 1292F–G). It is important to be alert to the possibility that the tribunal has failed to heed that message and has been deflected by the invocation of “the range of reasonable responses test” from its statutory responsibility to decide for itself whether the employer “acted reasonably or unreasonably” in deciding to dismiss the employee (for the identified reason). [emphasis added]

38. In *University of Exeter v Plaut* [2024] EAT 159, I made a similar point:

38. The concept of a band of reasonable responses prevents the Employment Tribunal from substituting its view for that of the employer. It does not preclude the Employment Tribunal from holding that the employer has acted unreasonably if no reasonable employer would have dismissed. **The band of reasonable responses is not so elastic that no employer can ever break it.** As Bean LJ observed in *Newbound v Thames Water Utilities Ltd* [2015] EWCA Civ 677, [2015] IRLR 734 at paragraph 61:

**The 'band of reasonable responses' has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook s.98(4)(b) of the 1996 Act, which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss 'in accordance with equity and the substantial merits of the case'.** This provision, originally contained in s.24(6) of the Industrial Relations Act 1971, indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the tribunal's consideration of a case of this kind to be a matter of procedural box-ticking. As EJ Bedeau noted, an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer. [emphasis added]

39. Employment Tribunals are often assisted, when considering misconduct dismissals, by the

guidance given in **British Home Stores Limited v Burchell** [1978] IRLR 379:

2. ... What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. ...

40. In **Boys and Girls Welfare Society v McDonald** [1997] ICR 693, His Honour Judge Peter Clark emphasised that, while **Burchell** provides useful guidance, the fundamental principles are to be found by reading the clear words of section 98 **ERA**. HHJ Clark also noted that **Burchell** was decided before a change in the burden of proof. Where an employer has established the reason for dismissal, and that it is a potentially fair reason, the fairness of the dismissal is determined on a neutral burden of proof. HHJ Clark emphasised the importance of an Employment Tribunal considering whether there has been an adequate investigation, in addition to considering whether there were reasonable grounds for the employer forming a belief that the employee was guilty of the alleged conduct.

41. In **Reilly v Sandwell Metropolitan Borough Council** [2018] UKSC 16, [2018] ICR. 705, the Supreme Court considered the extent to which the analysis in **Burchell** fits with the statutory test, but chose not to depart from it. Lord Wilson JSC (With Whom Lord Carnwath, Lord Hughes and Lord Hodge JJSC agreed) stated:

19. The proper approach to the inquiry under what is now subsection (4) has long been regarded to have been set out in the judgment of the Employment Appeal Tribunal (Arnold J presiding) in *British Home Stores Ltd v Burchell* (Note) [1980] ICR 303 . In the present case Elias LJ described it as the “classic formulation of the employer’s obligation in misconduct cases”: [2016] IRLR 779, para 21. In the passage of the judgment at p 304 frequently cited, the Employment Appeal Tribunal, through Arnold J, held that the tribunal had to be satisfied first that the employer believed that the employee was guilty of misconduct; second that it had reasonable grounds to sustain its belief; and third that, prior to forming its belief, it had carried out a reasonable amount of investigation into the matter.

20. It is at once apparent that the three requirements identified by Arnold J do not well fit the inquiry mandated by what is now section 98(4). It is indeed clear that, on the contrary, they were directed to the first part of the inquiry under what is now section 98(1) to (3). Unlike in the present case, in which the conduct—the non-disclosure—is an agreed fact, the employee’s alleged conduct is often disputed. So it was in the *British Home Stores* case. The issue there was whether, which she denied, the employee in the store had dishonestly abused her right to buy its goods at a discount. To the tribunal’s resolution of that disputed issue relating to her conduct, Arnold J’s three requirements, which all related to belief in the employee’s guilt, fitted perfectly. Applying them, the Employment Appeal Tribunal held that the store had reasonable grounds for its belief that the employee had conducted herself dishonestly and—which was not separately considered because it followed so obviously—that therefore, under a precursor to section 98(4), it had been reasonable for the store to treat her conduct as a sufficient reason for her dismissal.

21. But, although the judgment of Arnold J on behalf of the Employment Appeal Tribunal in the *British Home Stores* case did not relate to the inquiry mandated by what is now section 98(4) of the Act, the Court of Appeal has for long applied it to that inquiry. Thus, in *Foley v Post Office* [2000] ICR 1283, 1287–1288 Mummery LJ, with whom the other members of the court agreed, stated that the tripartite approach there explained by Arnold J governed not only the reason for a dismissal but its reasonableness or unreasonableness. Since then the Court of Appeal has consistently adopted the same view of the breadth of Arnold J’s judgment: see for example *Turner v East Midlands Trains Ltd* [2013] ICR 525, para 1.

22. Nevertheless, so far as I can see albeit in the absence of full argument, no harm has been done by the extravagant view taken of the reach of the judgment of Arnold J in the *British Home Stores case* [1980] ICR 303. In effect it has been considered only to require the tribunal to inquire whether the dismissal was within a range of reasonable responses to the reason shown for it and whether it had been preceded by a reasonable amount of investigation. Such requirements seem to me to be entirely consonant with the obligation under section 98(4) to determine whether, in dismissing the employee, the employer acted reasonably or unreasonably.

23. On any view it is clear that the tribunal is at one remove from answering the direct question: was the dismissal unfair? Instead it must answer the question: was the dismissal within the range of reasonable responses to the reason shown for it by the employer? Indeed all appellate bodies, namely the Employment Appeal Tribunal and, in this case, also the Court of Appeal and this court, are at two removes from answering the direct question. For, under section 21(1) of the Employment Tribunals Act 1996, an appeal against the tribunal’s decision lies only on a point of law and therefore, in the absence of procedural error, can succeed only if for some reason the tribunal’s decision was not open to it or, in other words, only if the tribunal had not been entitled to reach it. Thus, in the present case, the Employment Appeal Tribunal correctly identified the question to be whether the tribunal had been “entitled to conclude that ... this was a case in which dismissal did fall within the range of reasonable responses”. The exercise required of an appellate body is not always easy. It might, for example, be an intellectual struggle for it to conclude: “left to ourselves, we would not have considered that the dismissal fell within the range of reasonable responses but the tribunal was entitled to conclude that it did so.” But those of us required to determine these appeals must conduct the exercise as best we

can.

42. Baroness Hale of Richmond PSC noted:

32. The case might have presented an opportunity for this court to consider two points of law of general public importance which have not been raised at this level before. The first is whether a dismissal based on an employee's "conduct" can ever be fair if that conduct is not in breach of the employee's contract of employment. Can there be "conduct" within the meaning of section 98(2)(b) which is not contractual misconduct? Can conduct which is not contractual misconduct be "some other substantial reason of a kind such as to justify the dismissal" within the meaning of section 98(1)(b)? It is not difficult to think of arguments on either side of this question but we have not heard them—we were only asked to decide whether there was a duty to disclose and there clearly was.

33. Nor have we heard any argument on whether the approach to be taken by a tribunal to an employer's decisions, both as to the facts under section 98(1) to (3) of the Employment Rights Act 1996 and as to whether the decision to dismiss was reasonable or unreasonable under section 98(4), first laid down by the Employment Appeal Tribunal in *British Home Stores Ltd v Burchell* (Note) [1980] ICR 303 and definitively endorsed by the Court of Appeal in *Foley v Post Office* [2000] ICR 1283, is correct. As Lord Wilson JSC points out, in para 20 above, the three requirements set out in the *British Home Stores* case are directed to the first part of the inquiry, under section 98(1) to (3), and do not fit well into the inquiry mandated by section 98(4). The meaning of section 98(4) was rightly described by Sedley LJ, in *Orr v Milton Keynes Council* [2011] ICR 704, para 11, as "both problematical and contentious". He referred to the "cogently reasoned" decision of the Employment Appeal Tribunal (Morison J presiding) in *Haddon v Van den Bergh Foods Ltd* [1999] ICR 1150, which was overruled by the Court of Appeal in the *Foley* case [2000] ICR 1283. Even in relation to the first part of the inquiry, as to the reason for the dismissal, the *British Home Stores* approach can lead to dismissals which were in fact fair being treated as unfair and dismissals which were in fact unfair being treated as fair. Once again, it is not difficult to think of arguments on either side of this question but we have not heard them.

34. There may be very good reasons why no one has challenged the *British Home Stores* test before us. First, it has been applied by employment tribunals, in the thousands of cases which come before them, for 40 years now. It remains binding upon them and on the Employment Appeal Tribunal and Court of Appeal. Destabilising the position without a very good reason would be irresponsible. Second, Parliament has had the opportunity to clarify the approach which is intended, should it consider that the *British Home Stores* case is wrong, and it has not done so. Third, those who are experienced in the field, whether acting for employees or employers, may consider that the approach is correct and does not lead to injustice in practice.

35. It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct.

43. In **Sainsburys Supermarket Ltd v Hitt** [2002] EWCA Civ 1588, [2003] ICR 111 the Court of Appeal held that the band of reasonable responses test applies to all of the steps in determining

whether a dismissal is fair, including the investigation into a disciplinary allegation.

44. The Employment Tribunal should take an overview of the process from investigation, through the disciplinary hearing up to the determination of any appeal. If there is an appeal the Employment Tribunal should not be sidetracked into considering whether it was a review or rehearing. This point was considered in **Software 2000 Ltd v Andrews and others** [2007] ICR 825, in which Elias J also emphasised the importance of applying the statutory test:

47. The use of the words “rehearing” and “review”, albeit only intended by way of illustration, does create a risk that employment tribunals will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if employment tribunals realise that **their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care.** But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but **to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.**

48. In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that **section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be.** The two impact upon each other and the employment tribunal’s task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The dicta of Donaldson LJ in *Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542 , 550, are worth repetition:

**Whether someone acted reasonably is always a pure question of fact... where Parliament has directed a tribunal to have regard to equity-and that, of course, means common fairness and not a particular branch of the law-and to the substantial merits of the case, the tribunal’s duty is really very plain. It has to look at the question in the round and without regard to a lawyer’s technicalities. It has to look at it in an employment and industrial relations context and not in the**

**context of the Temple and Chancery Lane.** [emphasis added]

45. So what can be expected of a disciplinary process? When dealing with misconduct employers cannot be expected to set up their own Police force to investigate the allegations, an equivalent of the Crown Prosecution Service to decide whether to bring charges or to conduct the disciplinary process as if it were the Crown Court, with a right of appeal to an equivalent of the Court of Appeal. Nor is an employer expected to conduct the process with the full rigour required in civil court proceedings. What is required is substantive industrial fairness, that takes account of the seriousness of the allegations and ensures that the allegations are investigated fairly, looking both for material that may support or undermine the allegation.

46. This equates to the core tenets of natural justice; **Khanum v Mid-Glamorgan Area Health Authority** [1979] ICR 40 at 45F:

Some of the authorities are not easily reconciled and we do not think it would be helpful to try to do so, for in the end **how nearly a domestic disciplinary inquiry, a statutory inquiry by a statutory body, a public statutory inquiry, or any other inquiry which has to make decisions must approach to the full-blown procedure of a court of justice in order to comply with the rules of natural justice is no doubt a matter of degree.** But in our judgment as regards the sort of domestic tribunal with which we are concerned in this case the law is as it was expressed by Harman J. in *Byrne v. Kinematograph Renters Society Ltd.* [1958] 1 W.L.R. 762, 784 and approved and applied by the Privy Council to the context of a University Vice-Chancellor's inquiry into cheating in examinations in *H Fernando's Case*:

What then are the requirements of natural justice in a case of this kind? First, I think that **the person accused should know the nature of the accusation made;** secondly, that he should **be given an opportunity to state his case:** and, thirdly, of course, that **the tribunal should act in good faith.** I do not myself think that there really is anything more.

47. This succinct statement sets out the fundamentals of a fair procedure. The fact that they can be stated so briefly does not detract from their profound importance, particularly where upholding a disciplinary charge may result in the loss of a job; and in some cases the loss of a career. Whether a process has met these requirements is a matter of substance, depending on the circumstances of the case.

48. The employee needs to know the charge. The employee must have a fair chance to answer the charge. That will often require sight of any witness statements, but in some cases a summary of the evidence will do. Whether the employee is guilty, or not, of the alleged misconduct must be determined in good faith. While the band of reasonableness applies to the totality of a disciplinary process, if on any view the employee does not know the charge, the information provided does not give the employee a fair opportunity to answer the charge, or the determination is not made in good faith, the dismissal is unfair, and the concept of a band of reasonableness does not have much to add to the analysis. There will often be a number of ways in which an employer could have acted fairly; there is scope for variation in how precisely a charge is drawn up, how much information is required for the employee to have a fair chance to respond and in determining the penalty; but if the process is fundamentally unfair the band of reasonable responses cannot make it fair.

49. Employment Tribunals should consider the **Acas Code of Practice on disciplinary and grievance procedures** (“the ACAS Code”) issued pursuant to section 199 of the **Trade Union and Labour Relations (Consolidation) Act 1992** (“TULR(C)A”). Section 207 TULR(C)A provides:

207 Effect of failure to comply with Code

(1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.

(2) In any proceedings before an [employment tribunal] or the Central Arbitration Committee **any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.** [emphasis added]

50. The **ACAS Code** starts by setting out some general principles:

3. Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.

4. That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- **Employers should carry out any necessary investigations, to establish the facts of the case.**
- **Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.**
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made. [emphasis added]

51. The **ACAS Code** states of investigations:

**5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.** In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

**6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.**

7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure. [emphasis added]

52. The **ACAS Code** then goes on to consider the core requirements of a fair disciplinary process:

9. If it is decided that there is a disciplinary case to answer, **the employee should be notified of this in writing.** This notification should contain **sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.**

10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting. Hold a meeting with the employee to discuss the problem.

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

53. The **ACAS Code** then deals with the right to be accompanied, deciding whether or not disciplinary or any other action is justified, determining any sanction and providing a right of appeal.

54. The **ACAS Code** is clear and concise. It merits regular careful reading. The **ACAS Code** codifies the core principles of natural justice as well as going on to add some practical advice about how they are to be applied at work.

55. Breach of the **ACAS Code** can result in an uplift to any award of compensation by up to 25%: **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992**; see **Rentplus UK Ltd v Coulson** [2022] EAT 81, [2022] ICR. 1313. But that does not mean that the **ACAS Code** should be an afterthought, to be considered only if remedy is reached; the **ACAS Code** should be at the forefront of an Employment Tribunal's thinking when determining an unfair dismissal complaint.

56. In addition to the **ACAS Code**, ACAS provide guides, which while not having the same statutory relevance as the **ACAS Code**, can assist in understanding good practice and demonstrating what a fair process will generally look like.

57. The **Acas Guide on Conducting Investigations in the Workplace** is relevant to this appeal. Step 1 deals with making a decision to investigate:

#### Step 1: Deciding to investigate

When there is a possible disciplinary or grievance issue at work, the employer should carry out an 'investigation'. This is where they find out all they reasonably can about the issue.

An investigation is to:

- gather evidence from all sides find out if there is a case to answer make sure everyone is treated fairly
- help the employer to decide what should happen next

At any stage the employer can still look at whether:

- the issue can be resolved informally instead
- a formal procedure needs to carry on

58. Within Step 2 it is suggested:

Who can carry out the investigation

The employer should get somebody who's not involved in the case to carry out the investigation, for example another manager or someone from HR. This is to make sure there is no conflict of interest.

If this is not possible, they should try and make the procedure as impartial as they can.

Where possible, the person investigating should also have had training. They should also have a good knowledge of their organisation's policy on investigations. Acas offers training courses in handling disciplinary and grievance procedures, including courses on conducting investigations.

When choosing an investigator, the best choice will often depend on how serious and complex the case is. For example, if it involves potential gross misconduct, discrimination or bullying. For investigations like this, it might be best to appoint someone more senior or experienced. ...

In a disciplinary case

In a disciplinary case, the employer should think about who will handle matters if further action is needed.

Where possible, a different person should handle each of the following steps of the disciplinary procedure:

- the investigation the disciplinary hearing and outcome
- the appeal hearing (if an appeal is raised)

The person handling the disciplinary hearing should have the authority to make a decision on the outcome.

59. Step 3 includes the following provisions:

In a disciplinary or grievance investigation, the person investigating should do their best to:

- be fair and objective follow any policies or guidelines their organisation might have
- get as much information on the case as is reasonable
- not try to prove guilt, but get evidence from both sides
- keep the case confidential

In a disciplinary procedure, the person investigating should be finding out if there is an issue that needs to be addressed. They should not be trying to prove guilt.

60. Those who have acted for employers, especially small businesses, will know that managers often say that they felt that there is just too much information to deal with; and that employment law is excessively complex. But the **ACAS Code** and the ACAS Guides are brief and written in plain English; there is no good excuse for not reading them.

61. It is important that an employee knows the charge, and that the employer decides whether the employee is guilty of the misconduct alleged, rather than some other misconduct. This too is a matter of substance over form. Employers cannot be expected to draft an indictment as would be used in the Crown Court, but they can be expected to state what the employee is said to have done wrong and to decide whether the employee is guilty of that alleged misconduct.

62. In **Strouthos v London Underground Ltd** 2004 IRLR 636, Lord Justice Pill stated:

41 What has to be considered is the overall fairness of the procedure. Mr Craig has argued that, even if the charge was defective (he does not accept it was), any defect was cured by the procedure followed before the disciplinary panel. Having decided the case as I would, it is not necessary to make a ruling, but it does appear to me quite basic that care must be taken with the framing of a disciplinary charge, and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. There may, of course, be provision, as there is in other tribunals, both formal and informal, to permit amendment of a charge, provided the principles in the cases are respected. Where care has clearly been taken to frame a charge formally and put it formally to an employee, in my judgment, the normal result must be that it is only matters charged which can form the basis for a dismissal. That is something which may have come to the notice of the disciplinary panel as shown by their declining to make the finding of fact upon which the tribunal subsequently permitted reliance to be placed by the employers.

63. In concluding this analysis, a final reminder that the core test is that in the statute - never lose sight of that.

### **The conclusion of the Employment Tribunal**

64. The Employment Tribunal correctly started by determining the reason for dismissal:

100. There is absolutely no doubt that **the principal reason for dismissal was the claimant's conduct in failing to lock off the charger, or make sure it was locked off, and subsequently signing the area had been inspected as safe for contractors.** Mr Robinson did not believe that he had given clear instructions to Mr Link to lock off the

charger, but even if he did, he certainly did not provide him with the equipment or follow up on it and Mr Link was new, and junior to the claimant. **The claimant had signed a permit to work to say the area was safe without inspecting it. These were the principal facts and beliefs of Mr Dobinson which caused the claimant's dismissal.**

101. It follows that we accept the oral evidence and indeed the written evidence of Mr Dobinson, and indeed on appeal, the evidence of Mr Cartwright: they believed that the claimant had conducted himself in a way which could not maintain trust and confidence. They believed he had not taken the first opportunity to avert harm, which is a very serious breach of the respondent's approach to health and safety.

65. The Employment Tribunal reached a clear conclusion as to the factual reason for dismissal which was a potentially fair reason, being related to the conduct of the claimant.

66. The Employment Tribunal set out its overall finding on the fairness of the dismissal:

102. This matter started with the claimant's conversation with Ms Clark on the 17th July, and ended with a dismissal on 2 August (and an appeal outcome was given on 10 August 2022).

103. The claimant knew well before his disciplinary hearing, the vast majority of the evidence that was to be discussed. The CCTV of him and Mr Link in June had been discussed and observed with him. He had the full pack of materials provided to him, which included that Ms Clark and Mr Lillington were also witnesses because of their early conversations with him. He had a reasonable amount of time to consider those materials. At no stage did he seek more time or delay to consider matters further, or adduce further material.

104. At the very outset the claimant had said that he did not know about the damaged charger. As events unfolded there was a full and thorough investigation. In no sense could it be said that any lines of enquiry were not pursued, or that any matters were not looked into, considering matters from beginning to end.

105. The setting out of the matters of concern for the claimant was very clear in the disciplinary invitation letter – matters could not have been clearer. It was very clear that the aspect of not taking the first step to prevent injury at the time, was the matter for which the claimant was initially suspended.

106. As the investigation had progressed, the issue of trust became apparent because the respondent had reasonable grounds to believe that the claimant was not being straightforward about what he knew and when, and, in terms of lack of accountability, the email that he sent on the 19th and indeed on the 22nd sought to put the blame, or at least equal blame, on his new colleague Mr Link.

107. These are matters of fact with which the claimant, including in his claim form details, fundamentally disagrees. There is a fundamental dispute of fact between the parties and there was such a dispute before the respondent at the time.

108. The claimant said, ultimately, in the disciplinary process, that the colleague, Mr Link, came to him and asked him to go and see the faulty charger, and the matter was therefore Mr Link's responsibility. Over that there was a fundamental dispute of fact which pertained right up until the appeal and indeed during the appeal.

109. As the lines of enquiry were followed up by Mr Lillington he was hoping something would come out of these enquiries which would exonerate Mr Lamb because he liked him, he'd worked really well with him, and they had a good working relationship. He had absolutely no interest in any disciplinary outcome for Mr Lamb. The Tribunal accepts his evidence about all these matters. He was seeking to conduct a fair investigation. ...

114. We go back to looking at the reasonableness of the investigation in the round, and we give ourself a typical *Sainsburys v Hitt* direction: Section 98(4) does not require a perfect investigation, it has to be a reasonable one, that is within the band of reasonable investigations of a reasonable employer. Applying that standard we are satisfied that this was a reasonable investigation albeit Mr Lillington and Ms Clarke also gave statements: Mr Lillington was trying fairly and reasonably to get to the root cause and to establish whether there was any potential for disciplinary, and he hoped something would emerge to remove the claimant from criticism. At no stage did the claimant suggest Mr Lillington or Ms Clark were wrong or not being truthful in their accounts – had he done so, it would not have been appropriate for Mr Lillington to continue – but he did not.

115. That is our finding on the reasonableness of the investigation. It goes without saying that having reached that conclusion, the respondent had reasonable grounds for concluding that there had been misconduct by the claimant. ..

118. It will also be apparent from the conclusions above that in the round the respondent acted fairly in its disciplinary process.

67. The Employment Tribunal dealt with a number of specific issues. I will deal with those relevant to this appeal when considering the specific grounds of appeal.

### **Analysis of this appeal**

***Ground 1 – it was perverse for the ET to find that the investigation conducted by the respondent was reasonable, in light of the dual involvement of Mr Lillington as both a witness and the individual charged with conducting the investigation;***

68. This claimant did not raise this issue. The Employment Tribunal raised the point, in being scrupulously fair to the claimant as a litigant in person. The Employment Tribunal concluded that the brief witness statement given by Mr Lillington and his involvement in having heard Mr Rees tell the claimant about the electrical fault did not render the dismissal unfair.

69. There are a number of authorities that have considered whether prior involvement by a decision maker has rendered a disciplinary process unfair. Prior involvement of the decision maker

will often render the process unfair, unless the prior involvement was insignificant or unavoidable. That accords with the **ACAS Code** which suggests that “where practicable, different people should carry out the investigation and disciplinary hearing”. But that is a different situation to this case. Mr Lillington was not a decision maker. His role was to investigate.

70. The question of whether someone who has had some involvement in the events can fairly conduct the investigation is not dealt with in the **ACAS Code**, although the guidance does suggest that the employer “should get somebody who's not involved in the case to carry out the investigation, for example another manager or someone from HR” to make sure there is no conflict of interest.

71. There may be circumstances in which it is not only desirable to have an independent investigator, the absence of such might make a dismissal unfair. If two employees were to be in a fight it would almost certainly be unfair for one of the two pugilists to be appointed to investigate the fight. However, there is no absolute rule that someone who has had some involvement in the events cannot undertake the investigation.

72. The claimant cannot surmount the high hurdle of establishing that the Employment Tribunal’s decision was perverse. The Employment Tribunal was entitled to take account of the fact that the claimant did not expressly challenge the evidence of Mr Lillington at the disciplinary hearing. He knew that Mr Lillington had given a statement once he received the disciplinary pack, but did not challenge his prior involvement.

73. There was an inherent contradiction between the claimant’s later evidence, when he sought to blame Mr Link, suggesting that he (the claimant) had not been responsible for locking out the charger, and what Mr Lillington had overheard Mr Rees tell the claimant about the electrical fault, which suggested that the claimant was responsible to ensure it was made safe. But it was not the key evidence. It was for Mr Dobinson to assess the entirety of the evidence and to decide whether to dismiss the claimant. Mr Lillington provided only a relatively minor part of the evidence.

74. I reject the claimant’s contention that the minor dual involvement of Mr Lillington amounted

to a fundamental breach of natural justice. The Employment Tribunal was entitled to hold that the process overall was fair.

***Ground 2: it was perverse for the ET to find that the investigation conducted by the Respondent was reasonable, in light of the dual involvement of Ms Clark as both a witness and a note-taker for the investigation***

75. Ms Clark had a much less significant role in the investigation than Mr Lillington. While her role went a little beyond note taker, because she asked some questions, she was not in charge of the investigation. The claimant had initially told her that he did not know about the electrical fault. That was evidence to be taken into account when Mr Dobinson made his overall assessment.

76. It was not perverse of the Employment Tribunal to hold that this relatively minor dual involvement, which it raised of its own motion, did not render the process unfair.

***Ground 3: it was perverse for the ET to find that the investigation conducted by the Respondent was reasonable, when the Claimant had received evidence which materially increased the seriousness of the allegations against him less than 24 hours before his disciplinary hearing on 2 August 2022***

77. The late evidence referred to in this ground was the report based on the 12 July CCTV. The Employment Tribunal made findings of fact about the late provision of this evidence. The Employment Tribunal noted that the claimant did not object to its introduction. The evidence was relevant to the allegation that on 12 July 2022 the claimant “signed a work permit at 3:20pm to say that the area was safe, clean and tidy whereas the repair had not been undertaken and the contractor on 12 July had put the charger back into use without realising there was any damage to it”. The finding in the dismissal letter that the claimant signed and dated a permit to work which was falsified because he “didn’t physically inspect”, was a finding made in respect of the allegation put to him in the letter inviting him to the disciplinary hearing. I do not consider that the determination was materially different to that charged. Further, the specific ground of appeal was about the late provision of the statement to which the claimant did not object. I do not consider that it was perverse for the Employment Tribunal to find that this issue did not render the dismissal unfair.

***Ground 4: it was perverse for the ET to find that the Claimant’s dismissal was fair, in***

*circumstances where the ET had accepted that a comment along the lines of “I don’t think [the Claimant] is going to be back at the business” or “[the Claimant] is done at the business” had been made by either Mr Lillington, Ms Clark or Mr Cockroft prior to the disciplinary hearing on 2 August 2022.*

78. The Employment Tribunal made careful findings of fact about this issue:

75. Using our industrial knowledge in light of the findings above, it is not unlikely that a comment, “I don’t think he is going to be back in the business”, or as the claimant put it to Mr Lillington “he’s done at the business”, might have been said by one of Mr Lillington, Ms Clark or Mr Cockroft. They spoke together on operational issues gathered in the office at least once a day. This was reported to the claimant as having been overheard by Mr Heppleton before the claimant’s disciplinary hearing. It was the genesis his complaint of to the ethics line.

76. The context for such a remark is that two of those three managers have conducted or been present through a full investigation, and the third has been party to communications with HSE about the incident. They had good relationships, and they did not take any decisions on a disciplinary outcome. They could not mandate what would happen, but they no doubt had views. The industrial knowledge of all the members of the Tribunal tells us that holding such a view was not unreasonable or indicative of any ill will towards the claimant – it simply reflected the seriousness of the incident, the part his role was expected to play and his lack of recollection (at best) when asked about the matter initially.

77. Unwise though it was to express such a remark (and we consider it was made, but we cannot say by whom), it does not tell us anything about the likelihood or not of whether homophobic remarks were made. Each manager denied having made a remark about the claimant “being done at the business”, but that is not to say they are giving untruthful accounts - memories fade, and particularly about what was said in any given daily meeting across a month or so.

78. When we come to assess the dismissal in the round, the remark is to be weighed against the patently fair and diligent investigative and disciplinary process in which the HR person advising on it wrote, in an unguarded email, “whatever happens with Craig”. That indicated to the Tribunal open and fair minded advice. Indeed that was the impression given by the entirety of the disciplinary process, which was scrupulously fair. **It was also the case that none of these three managers took, or influenced, Mr Dobinson’s decision to dismiss the claimant. We accepted Mr Dobinson’s evidence about that.** [emphasis added]

79. As none of the managers who may have made such comments were involved in the decision to dismiss, it clearly was not perverse for the Employment Tribunal to find that, if any such comments were made, they did not render the process unfair. The person who might have made such a comment who was most involved in the disciplinary process was Mr Lillington, of whom the Employment Tribunal held: “Mr Lillington was trying fairly and reasonably to get to the root cause and to establish

whether there was any potential for disciplinary, and he hoped something would emerge to remove the claimant from criticism.” There is no error of law in the decision of the Employment Tribunal.

### **Overall**

80. This was a very thorough judgement in which the issues were carefully considered. Despite the skill with which they were argued the perversity grounds fail.

### **The hearing**

81. I am very grateful to Counsel for all the work they did to provide clear and concise skeleton arguments, for the measured way in which the oral arguments were presented and their courtesy to each other and the EAT. Judges of the EAT perhaps do not sufficiently often publicly state the great assistance we receive from Counsel acting *pro bono*, as so many do, consistently providing representation to exactly the same high standard that they would for all of their clients. I am grateful to Ms Abas for the assistance she provided acting as a FRU representative.