Neutral Citation Number: [2026] EAT 17

Case No: EA-2023-001316-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 February 2026

Before:

THE HON. LORD FAIRLEY, PRESIDENT

Between:

Elizabeth Chand

Appellant

and

EE Limited

Respondent

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- -

Jeffrey Jupp KC and **Patricia Leonard** (instructed through **Advocate**) for the Appellant
Thomas Cordrey (instructed by **BT Group PLC Legal Services**) for the Respondent

Hearing date: 15 January 2026

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JUDGMENT

SUMMARY

Unfair dismissal; reason for dismissal; composite reason; fairness

The claimant was dismissed by the respondent for the stated reason of gross misconduct. The conduct relied upon was made up of four separate incidents. The respondent concluded that each incident was fraudulent. The Employment Tribunal found that the respondent did not have a reasonable basis to conclude that any of the four matters amounted to fraud. It nevertheless held that the dismissal of the claimant was fair because one of the four incidents was a serious departure from the respondent's policy. The claimant appealed against that conclusion, arguing that what the Tribunal had found was a belief by the employer in a composite reason for the dismissal. Important elements of that belief had not been held on reasonable grounds. Accordingly, the only conclusion properly open to the Tribunal was that the dismissal was unfair. The respondent cross-appealed, arguing that the Tribunal had erred in concluding that there was no reasonable basis for a belief in fraud.

Held:
In the cross-appeal, the Tribunal's conclusion that the respondent did not have reasonable grounds to view any of the incidents as fraudulent (and thus as instances of gross misconduct) was reached following a full analysis of the evidence that was before the respondent at the time when the decision to dismiss was taken. The Tribunal's conclusion was not said to be perverse and, in the absence of any error of law, required to be respected.

In the principal appeal, the Tribunal had erred in failing to recognise that, in a case of dismissal for conduct, it is necessary to consider the subjective question of what, in fact, was the principal reason for the dismissal. That involves examination of what the decision-maker *actually* decided, not what they *could* have decided. The Tribunal did not make any finding that the fourth incident was the principal reason for dismissal and, on its findings, a key element of the respondent's reason – a belief in fraud – was not held on reasonable grounds. The only conclusion properly open to the Tribunal was that the dismissal was unfair.

The cross-appeal was refused. The appeal was allowed, a judgment substituted that the claimant was unfairly dismissed. The claim was then remitted to the Tribunal to determine remedy.

THE HON. LORD FAIRLEY, PRESIDENT:

1. This is an appeal from a reserved judgment and reasons dated 2nd November 2023 of Employment Judge Codd, sitting alone in the Employment Tribunal at Birmingham. I will refer to the parties respectively as the claimant and the respondent as they were described below.

Facts

2. The claimant was employed by the respondent as a Senior Customer Advisor within branches of the respondent's high street stores. Her employment began on 21st August 2007. She was dismissed on 14th November 2022 for the stated reason of gross misconduct. She had not previously been the subject of any disciplinary sanction and had what the Tribunal described as "16 years of good service" (ET § 4).

3. During late 2021, the claimant's parents each separately became unwell. This resulted in the claimant having to take periods of emergency leave to care for them. It was the claimant's position – which the tribunal accepted – that these caring responsibilities placed her under significant stress and that this impacted upon her work performance. She submitted that this was a factor in leading to her making a number of poor decisions at work during 2022.

4. In particular, the respondent became aware of four separate incidents between June and October of 2022 each of which involved the claimant's interaction with customers (ET § 6). It took the view that these were potentially disciplinary issues of fraud.

5. Following an investigation, a disciplinary hearing took place before the respondent's manager, Mr Palmer who ultimately considered that each of the incidents amounted to fraud. As the Tribunal put it: at ET § 29:

> "It was clear that Mr Palmer felt the actions of the claimant had committed numerous egregious breaches of policy and were fraudulent."

6. The Tribunal recorded, however, that Mr Palmer was unable in his evidence to distinguish between a customer attempting to commit a fraud and the claimant herself committing a fraud:

> "When examining whether it was a customer attempting to commit a fraud, or whether it was the claimant who was committing fraud, I found that he did not, and could not,

> distinguish the two matters in his evidence. It was clear to me that he found the claimant to be equally culpable of fraud, in respect of each of the four allegations."

7. The claimant, for her part, accepted that, in each of the four instances, she had been negligent. She denied, however, any attempt to defraud or manipulate the respondent's systems.

8. Having concluded that the claimant had been guilty of four instances of fraud, Mr. Palmer considered that trust and confidence had been broken (ET § 85). He decided that she should be summarily dismissed for gross misconduct.

9. The claimant appealed. The appeal was conducted by another of the respondent's managers, Mr Matthewman. In the course of the appeal process, Mr Palmer told Mr. Matthewman that if had there been fewer incidents, the length of the claimant's good service may have made a difference to the outcome (ET § 85).

10. Whilst the Tribunal's findings of fact about the appeal process could have been more clearly expressed, it appears that Mr Matthewman agreed with Mr Palmer's decision that all four incidents of misconduct had been established and that they amounted to fraud. He refused the appeal and upheld the decision to dismiss.

The Tribunal's decision

11. In relation to three of the four incidents, the Tribunal concluded that Mr Palmer was unreasonable in coming to the view that the claimant had acted fraudulently and also that the conclusion that the incidents amounted gross misconduct was outside the range of reasonable responses (ET § 47, 53 and 63).

12. The Tribunal's conclusions about to the fourth incident are not expressed with the same level of clarity. At ET§ 29 to 36, the Tribunal set out its analysis of the evidence that was before Mr Palmer. Counsel in this appeal were agreed that when ET § 29 to 36 are read with ET § 47, 53 and 63 and 81 the correct interpretation of the Tribunal's reasons is that it concluded that there was no reasonable basis for a belief by the respondent in the existence of fraud in relation to *any* of the four allegations.

13. In relation specifically to the fourth allegation, however, the Tribunal stated (at ET § 81):

> "81. Based on all the evidence before me, I can entirely see why [Mr Palmer] upheld the findings that the policy had been breached, and the mitigation was an inadequate explanation. I find that the claimant had committed an egregious breach of the customer connections policy. I find her explanation inadequate. However, I stop short of finding that this was a deliberate fraud. Everything I have seen in the claimant's presentation and the evidence suggests an individual suffering from acute stress and shame as to the situation she has found herself in. My assessment is that she has blocked out the events of that day, and she is not yet ready to discuss the true circumstances. Without such an explanation, the findings that Mr Palmer arrived at in respect of this allegation were, in my view entirely reasonable, based reasonably upon the evidence before him. In my finding this allegation alone was (in and of itself) sufficient to find gross misconduct had been committed."

14. The Tribunal drew its conclusions together at ET § 87 to 96:

> 87. There is no dispute that there has been a breach of policy by the claimant on four separate occasions.
>
> 88. I have considered that there was a flawed approach undertaken by Mr Palmer in respect of three of the four allegations. He has limited knowledge of certain aspects of the claimant's conduct and his approach to her mitigation was lacking. On balance, having considered the evidence, I was of the view that the decision to dismiss the claimant for three of the allegations was materially misguided, and insufficient weight and consideration was applied to the mitigation.
>
> 89. Mr Palmer failed to view these allegations individually and was clouded by his perception that the claimant had committed a fraud. If the dismissal had been solely in relation to these three matters, I would have no hesitation in declaring the dismissal as unfair.
>
> 90. However, just because certain aspects of the process were flawed, does not necessarily render the entire process unfair. The evidence presented in respect of the claimant's breach of the BAN policy is clear and irrefutable and the mitigation offered is limited and the explanation totally lacking.
>
> 91. Mitigation offers an explanation for an event, but it does not excuse it. Even the most trying circumstances does not excuse a claimant from culpability for all of their conduct. It is still possible for an individual to make a catastrophic error of judgment, which in and of itself amounts to misconduct, and breaches the trust and confidence provisions of a contract.
>
> 92. Even taking the claimant's case at its highest, and allowing for all the mitigation, I consider that it falls well within this latter category, and that it was entirely open to the respondent to find that the trust and confidence was breached, meriting the dismissal. Even with my findings regarding the flaws in respect of the other allegations, the investigation and evidence was sufficiently comprehensive in respect of this aspect of the dismissal.
>
> 93. It is clearly open in those circumstances for a reasonable employer to consider a range of reasonable responses, including dismissal. It is not for me to substitute my decision for the respondents, as to what I would have done in the circumstances. I have been concerned at points that is in effect what the claimant is asking me to do. The nuance of her case has come very close to this at points. However, I cannot see that a dismissal decision would be off the table in this

> scenario. Mr Palmer knew he had a choice and chose to dismiss rather than a lesser sanction, despite the claimant's record. It was open to him and a reasonable outcome in the circumstances.
>
> 94. I find that the dismissal decision was for a fair reason within s. 98(4) of the Employment Rights Act 1996, namely the claimant's conduct.
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> 95. It follows therefore that I find that the claimant's case is not well founded and her claim for unfair dismissal fails.

15. The claimant has appealed against the decision that her dismissal was fair. She does not challenge the dismissal of her complaint of wrongful dismissal. The respondent has cross appealed against the Tribunal's conclusion that, the respondent's belief that the claimant had acted fraudulently was not reasonable.

Law

16. So far as relevant to this appeal, section 98(1) of the **Employment Rights Act, 1996** ("**ERA**") states:

> **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.

17. In **Smith v. Glasgow City District Council** [1987] ICR 796, the Judicial Committee of the House of Lords considered how the predecessor to section 98 **ERA** should be applied

where the employer had relied upon more than one incident of misconduct. Mr Smith had been dismissed for unsatisfactory performance of his duties. Three incidents were relied upon by the employer, one of which the Tribunal found not to be established on reasonable grounds. It nevertheless found the dismissal to be fair. The Employment Appeal Tribunal sustained that conclusion. On a further appeal by the employee, however, the Inner House of the Court of Session allowed his appeal. The employer then appealed to the House of Lords.

18. In the leading speech, with which all other members of the Judicial Committee agreed, Lord Mackay of Clashfern made the following observations (between pages 803B and 804D):

> "It is important to notice that the resolution of the question what is the reason or, if there is more than one, the principal reason for the dismissal is important not only in relation to subsections (1) and (2) … but also in relation to… the question…[of]… whether the employer acted reasonably or unreasonably in treating *it* as a sufficient reason for dismissing the employee and *it* must refer back to the reason or the principal reason determined under subsection (1)…
>
> …As a matter of law a reason could not reasonably be treated as sufficient reason for dismissing Mr Smith when it had not been established as true nor had it been established that there were reasonable grounds upon which the [employer] could have concluded that it was true…
>
> …To accept as reasonably sufficient reason for dismissal a reason which, at least in respect of an important part was neither established in fact nor believed to be true on reasonable grounds is, in my opinion, an error of law."

19. The council having failed to prove that the principal reason for dismissal excluded the matter which it had failed to establish on reasonable grounds, the appeal failed and the decision of the Inner House was upheld.

20. In **Robinson v. Combat Stress** UKEAT/0310/14, Langstaff P noted that the "reason" for a dismissal is a set of facts or beliefs, which the employer *actually had* for making the decision to dismiss at the time when the dismissal occurred. Section 98 **ERA** requires identification of that reason, and not whether there might have been a good reason for the dismissal which in fact occurred or which the employer might have had, albeit that the same broad label could be applied to it. He continued (at paras. 18, 20 and 21):

> 18 …where the reason for dismissal is a composite of a number of conclusions about a number of different events, it is the whole of that reasoning which the Tribunal must examine, for it is that which the employer held as the actual reason for its dismissal of the employee.
>
> …

> 20. The determination thus has to have regard to the reason. The reference to the reason is not a reference in general terms to the category within which the reason might fall. It is a reference to the actual reason. Where, therefore, an employer has a number of reasons which together form a composite reason for dismissal, the Tribunal's task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss. An example might be where there had been a chain of events in which it is suspected that an employee had his "hand in the till". If only some of those events are sustained before a Tribunal, nonetheless that might be quite sufficient — indeed perhaps usually would be — for a dismissal for that reason to be sustained even if the employer believed that all the events had occurred whereas the Tribunal thought the employer was only entitled to consider that some had. Similarly, if an employer thought there to have been several different occasions on which racist language had been used by an employee, but a Tribunal concluded that some of those incidents did not bear close examination; or if the employer thought there had been a number of sexual assaults, but the Tribunal thought the number smaller, nonetheless a dismissal — "having regard to the reason shown by the employer" — might easily fall within the scope of that which it was reasonable for an employer to have done.
>
> 21. All must depend upon the employer's evidence and the Tribunal's approach to it. But that approach must be to ask first what the reason was for the dismissal, and to deal with whether the employer acted reasonably or unreasonably by having regard to that reason: that is, the totality of the reason which the employer gives."

Submissions

Claimant – appeal

21. Senior counsel for the claimant submitted that the Tribunal had not made any finding that the single matter it found to be capable of justifying summary dismissal was the respondent's sole or principal reason for doing so in terms of section 98(1)(a) **ERA**. Rather, on the Tribunal's findings, Mr Palmer had "failed to view [the] allegations separately" (ET § 89) and had also expressed the view that if there had been fewer proven allegations, "the length of good service may have made a difference to the outcome" (ET § 85).

22. On the Tribunal's findings, the principal reason for dismissal was a composite one made up of four allegations, each of which was of fraudulent conduct. In these circumstances, the Tribunal should have applied the *ratio* of **Smith**. Had it done so, it would inevitably have concluded that the dismissal was unfair. It had found that the part of the composite reason that consisted of a conclusion that the claimant was guilty of fraud was not one that was reasonably

open to the employer. That conclusion was fatal to the employer's contention that the dismissal was fair (ground 1).

23. In the alternative, a conclusion that dismissal for the single non-fraudulent incident of breach of a policy – however egregious – justified summary dismissal was perverse. The Tribunal appeared to have considered mitigation only in relation to the incident, but not in relation to its conclusion at ET § 4 that she had "16 years of good service" (ground 2).

24. In the second alternative, although the Tribunal had been bound to follow **Foley v. Post Office** [2000] ICR 1283, that the test of fairness was the "band of reasonable responses", **Foley** was wrongly decided and should be reviewed by the Supreme Court. The requirements for certification of section 37ZA(1) and (4)(b) of the **Employment Tribunals Act, 1996** were met and permission should be given for a "leapfrog" appeal.

Respondent – ground 1 and cross appeal

25. The Tribunal found that the single allegation which justified dismissal was "the main allegation in these proceedings" (ET § 64). It had concluded that the single allegation was, in itself, sufficient to find gross misconduct to have been established. This was, therefore, a situation akin to that described by Langstaff J in **Robinson v. Combat Stress** where a single episode of misconduct was capable of justifying a summary dismissal even though the employer had unreasonably concluded that other incidents had also happened (ground 1).

26. In relation to the cross-appeal, all four incidents were admitted. The only question for the Tribunal was whether it was reasonable for the respondent to view them as acts of gross misconduct. Before rejecting the respondent's conclusions as unreasonable, the Tribunal should have looked at the four allegations carefully in their context. Instead, the Tribunal had analysed each allegation separately. Had it examined them together, it would have recognised that the issue that it found to be established cast a different light on the other three incidents.

27. If the cross appeal was refused and the principal appeal led to a finding of unfair dismissal being substituted, the EAT should also find a 100% **Polkey** reduction to be inevitable given that the allegation which the Tribunal found to be established could reasonably be categorised as an act of gross misconduct.

Respondent – grounds 2 and 3

28. The high test of perversity (per **Piggott Brothers & Company Limited v. Jackson** [1991] IRLR 309; **Stewart v. Cleveland Guest (Engineering) Ltd** [1994] IRLR 440 and **DPP Law Limited v. Greenberg** [2021] EWCA Civ 672 and **Oxford Said Business School v. Heslop** UKEAT/0110/21 was not met (ground 2).

29. The Tribunal was bound by and properly applied **Foley**. The EAT is similarly bound.

Claimant – cross appeal

30. The three allegations that were found not to be gross misconduct were of no relevance to the fourth allegation and *vice versa*. For reasons that were not perverse, the Tribunal had made a clear finding that none of the incidents involved fraud.

Analysis and decision

The cross appeal

31. Logically, it is appropriate to deal first with the cross appeal. Parties were agreed that the combined effect of ET § 29 to 36, 44 to 63 and 81 was that the Tribunal had concluded that the respondent's belief in the existence of fraud was not held on reasonable grounds in relation to *any* of the four allegations.

32. The Tribunal reached that conclusion as a result of a full analysis of the evidence that was before the respondent at the time when the decision to dismissal was taken. Whilst it could have done so, there was no obligation upon the Tribunal, as a matter of law, to consider all of the incidents together or to examine the first three incidents through the prism of the fourth. How it analysed the evidence was a matter for it as the primary fact finder. Viewed as a whole, the Tribunal's reasons indicate that it correctly applied **BHS v Burchell** [1980] ICR 303 and **Post Office v. Foley** [2000] ICR 1283. It concluded, on the evidence, that the respondent did not have reasonable grounds to view any of the incidents as fraudulent and thus as instances of gross misconduct. Its conclusions in that regard are not said to be perverse, and require to be respected by this Tribunal. I do not consider, therefore, that the cross-appeal has any merit. It does not identify any error of law and is therefore dismissed.

The claimant's appeal

33. **Robinson v. Combat Stress** is entirely consistent with **Smith**. The point made in **Robinson** is simply that a dismissal for misconduct will not necessarily be unfair if the employer proves what was, in fact, the principal reason amongst a series of reasons and also that he acted reasonably in treating that principal reason as a basis for dismissal. As **Robinson** also makes clear, in any case of dismissal for conduct it is necessary for the Tribunal to consider the subjective question of what, in fact, was the principal reason for the dismissal. That is not an exercise in deciding what the decision-maker *could* have decided. Rather, it is an analysis of what the decision-maker did *in fact* decide.

34. The Tribunal in this case seems to have lost sight of that important principle. It did not make any finding that the fourth incident was Mr Palmer's principal reason for dismissal. The respondent invites that inference and relies heavily upon the Tribunal's observation (at ET § 64) that the fourth incident was the "main allegation in these proceedings". That, however, was not the relevant question. Rather, the first issue for the Tribunal was whether the fourth incident was, in the mind of Mr Palmer, the principal reason for the dismissal.

35. Such a conclusion is impossible to reconcile with the Tribunal's findings that Mr Palmer "failed to view [the] allegations separately" (ET § 89) and expressed the view to Mr Matthewman that, if there had been fewer proven allegations, "the length of good service may have made a difference to the outcome" (ET § 85). Those latter findings clearly demonstrate, at least in the mind of Mr Palmer, a composite reason for dismissal in terms of **Smith**.

36. The Tribunal's analysis at ET § 81 fell into the error of attaching relevance to what Mr Palmer *could* have concluded on the evidence before him rather than looking at the relevant question of what he *actually* concluded. The former issue may yet be relevant to remedy, but was irrelevant to the question of liability. A consequence of its error was that the Tribunal failed to recognise that, on its own findings, a key part of Mr Palmer's reasoning – that all four incidents were fraudulent – had not been held by him on reasonable grounds.

37. Turning to the internal appeal process, the Tribunal again required to consider what was Mr Matthewman's reason for refusing the appeal. Here, the respondent seeks to attach significance to the final sentence of ET § 86 in the Tribunal's conclusion that:

> "Even if the appeal had been upheld on the other three allegations, nothing would have changed in respect of the outcome of he fourth allegation."

38. It is not clear from the Tribunal's reasons whether that sentence is a finding about Mr Matthewman's actual thought processes or merely, once again, a conclusion about what he *could* have been entitled to conclude. In any event, the fundamental problem with the analysis is that that the Tribunal made no finding that Mr Matthewman's conclusions about the fourth allegation were any different to those of Mr Palmer. The fourth allegation comprised two elements. The first was that there was a material breach of the respondent's procedure. The second was that the breach was fraudulent. Even if the final sentence of ET § 86 is given the generous interpretation contended for by the respondent, it is still the case that the respondent failed to prove that any belief in fraud was held on reasonable grounds. The *ratio* of **Smith** applies, in my view, with equal force to a situation where an employer relies upon several separate incidents of alleged misconduct as it does to a situation where a single incident of alleged misconduct comprises more than one key element. In each case, the "reason" relied upon for dismissal cannot have been sufficient in terms of section 98 **ERA** if a key part of it was not found to have been established on reasonable grounds.

39. On the Tribunal's findings, neither Mr Palmer nor Mr Matthewman had any reasonable basis to conclude that the claimant had acted fraudulently. Fraud was, however, a key part of both the decision to dismiss and the decision to refuse the appeal. I, therefore, accept the submission for the appellant, in terms of the first ground of appeal, that the Tribunal erred in law in its conclusion that the dismissal was fair in terms of section 98 **ERA**. Once the Tribunal had found that there were no reasonable grounds for a belief in fraud, the only conclusion open to the Tribunal was that the dismissal was unfair. I will, therefore, set aside paragraph 1 of the Tribunal's judgment and substitute a finding that the complaint of unfair dismissal succeeds.

40. In these circumstances, it is not necessary for me to determine ground 2, or to consider the appellant's application for a leapfrog appeal to the Supreme Court.

41. The issue of remedy has never been determined by the Tribunal, and it would not be appropriate for this Tribunal to do so in this appeal. Any reduction of compensation either for contributory fault or in terms of **Polkey** are matters to be determined by the Employment Tribunal. I will therefore remit the case to the same Tribunal for a remedy hearing in the unfair dismissal complaint.