Appeal No. UKEAT/0163/16/LA
UKEAT/0164/16/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 January 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

PORTSMOUTH HOSPITALS NHS TRUST — APPELLANT

MS S CORBIN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MR MUGNI ISLAM-CHOUDHURY (of Counsel) Instructed by: Mills & Reeve LLP 78-84 Colmore Row Birmingham B3 2AB
For the Respondent	MS NABILA MALLICK (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

CONTRACT OF EMPLOYMENT - Wrongful dismissal

UNFAIR DISMISSAL - Contributory fault

PRACTICE AND PROCEDURE - Review

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

*Unfair dismissal - fairness of dismissal (**Employment Rights Act 1996** ("ERA") section 98(4)) and band of reasonable responses test - whether the ET was guilty of a substitution mindset.*

Wrongful dismissal - whether the ET adopted the correct approach and reached a permissible conclusion, taking into account all relevant material.

*Contributory fault - sections 122(2) and 123(6) **ERA** - whether the ET adopted the correct approach, taking into account all relevant material and/or whether it gave adequate reasons to explain its conclusion.*

Reconsideration - whether the ET erred (1) in extending time for the reconsideration application; (2) in failing to reconsider its approach on the evidence before it (in particular given the Claimant's admissions) and/or as to the adequacy of its reasons.

Adequacy of reasons

The Claimant was a long-serving senior Radiographer who, when preparing her defence to earlier disciplinary proceedings, had utilised confidential patient information. The Respondent considered this was conduct in breach of its policies albeit the disciplinary investigation acknowledged that those policies did not expressly address the position of employees facing disciplinary proceedings; the decision was taken that the Claimant should be summarily dismissed by reason of her gross misconduct; a decision upheld on appeal.

The ET found the decision that the Claimant should be dismissed had been made with a closed mind: the relevant manager had considered a breach of the policy in respect of confidential patient information justified summary dismissal and did not consider the Claimant had not acted wilfully and thus was not guilty of a repudiatory breach of contract such as to warrant summary dismissal. In any event, the Claimant had not been culpable so as to justify any reduction for contributory fault.

The Respondent applied for the ET to reconsider its Judgment out of time, for reasons set out in its application letter. Referring to that letter, the ET extended time for the application but did not consider any proper basis had been demonstrated for it to reconsider its earlier Judgment.

The Respondent appealed against both Judgments. The Claimant cross-appealed against the ET's Decision to extend time for the reconsideration application.

Held: *dismissing the appeal against the ET's finding of liability for unfair dismissal but otherwise allowing the appeals and dismissing the cross-appeal.*

Given the ET's permissible findings of fact (against which there was no challenge) as to the way in which the Respondent had reached the decision to dismiss, it had been entitled to conclude that the Respondent had adopted an unreasonably constrained approach, which failed to allow for lesser sanctions and ignored mitigating factors identified as potentially relevant in the investigation report. The ET had not been guilty of falling into the substitution mindset but had properly carried out its task in applying the band of reasonable responses test. The appeal against the liability finding on the unfair dismissal claim was therefore dismissed.

The ET's reasoning on the wrongful dismissal claim and on the question of contributory fault did not, however, demonstrate it had applied the correct approach, considering all the relevant material before it; alternatively failed to adequately explain how the ET had approached its task and reached its conclusions. The Reconsideration Judgment did not rectify these failings and was thus also defective. The Respondent's appeals in these respects would be allowed.

Even if the cross-appeal raised a matter that the Claimant was entitled to take on appeal, the ET's reasoning expressly referenced the Respondent's detailed application for an extension of time and - adopting a proportionate approach (as the ET was entitled to do) - was adequate to the task. The cross-appeal was duly dismissed.

HER HONOUR JUDGE EADY QC

1. In this Judgment I refer to the parties as the Claimant and Respondent, as below. I am concerned with two appeals: the first being the Respondent's appeal from a Judgment of the Southampton Employment Tribunal (Employment Judge Kolanko, sitting with members Mr Sleeth and Mr Stewart between 19 and 21 October 2015, with an additional day in chambers on 4 November; "the ET"), sent to the parties on 16 December 2015 ("the first Decision"); the second comprising the Respondent's further appeal and the Claimant's cross-appeal against the ET's subsequent Reconsideration Decision sent out on 2 February 2016 ("the Reconsideration Decision"). Representation before the ET was as it has been on this appeal.

2. By its first Decision the ET upheld the Claimant's claims of unfair and wrongful dismissal and found that she did not contribute to the dismissal. It dismissed her claim of disability discrimination, and no point is taken in that regard. Subsequently, the ET determined to extend time for the Respondent to make an application for reconsideration but then refused that application. Upon the initial paper sift of the Respondent's proposed appeals Laing J allowed that reasonably arguable questions of law arose (1) in regard to the ET's approach to the issue of contributory fault in respect of the unfair dismissal claim or, alternatively, as to the adequacy of its reasoning on that point, and also (2) as to the ET's approach to the question of wrongful dismissal. The Respondent having applied for an oral hearing under Rule 3(10) of the **EAT Rules**, this matter then came before HHJ Shanks, who was persuaded that its appeal against the unfair dismissal finding was also arguable on the ground that the ET had substituted its view for that of the Respondent. Whilst unimpressed by the Respondent's arguments based on what was said to be the Claimant's concessions during the ET hearing, HHJ Shanks allowed that the dismissal letter did appear to indicate that her position may have been taken into

account by the Respondent when deciding to dismiss and the ET had arguably not allowed for that. The Respondent's fuller appeal was thus permitted to proceed on amended grounds.

3. Subsequently, the Claimant's cross-appeal against the ET's Decision to extend time for the Respondent's reconsideration application was permitted to proceed after consideration on the papers by Kerr J, who considered it arguable that the ET's reasoning was inadequate.

The Factual Background and the ET's First Decision and Reasoning

4. The Claimant commenced her employment as a Radiographer with the Respondent in July 2000. In October 2013, after a disciplinary hearing, she had been issued with a first written warning. Whilst that was still extant, in the autumn of 2014, she was the subject of a further disciplinary process, which ultimately led to an extension to her existing warning. More relevantly, however, during the course of that disciplinary process the Claimant had put together a defence pack that she had complied at home, which included extracts from patient records with only partial redaction of identifying information. That was not initially identified as a concern, but subsequently led to the disciplinary hearing being adjourned for the Claimant to properly redact patient information and gave rise to a separate disciplinary process. It was that later process that ultimately led to the decision to dismiss without notice; the subject of the ET proceedings with which this appeal is concerned.

5. The Respondent's investigation report into this matter - undertaken by a Mr Taylor - had noted that the various policies on confidentiality relating to patient healthcare information did not provide guidance regarding preparation for disciplinary proceedings and also observed that staff may feel isolated in such circumstances and thus exhibit less professional behaviour than would be usual. The ET found, however, that the dismissing manager, Mr Howe, took the view

that "*a breach is a breach*" and had concluded that the Claimant, an experienced member of staff, had demonstrated complete disregard of the importance of patient confidentiality. In explaining his decision to the Claimant in the dismissal letter, Mr Howe had stated:

> **"I explained the rationale for my decision. It was demonstrated that you had fully completed your Information Governance training and completed the Trust e-learning module. You also had a signed contract of employment including your obligation to ensure patient confidentiality at all times. You had received a copy of the Trust Disciplinary Policy on a number of occasions which also included your responsibilities to protect patient confidentiality. The personal witness statement you submitted, and your personal statement, demonstrated your full understanding of and commitment to confidentiality. You had also attempted to anonymise the data produced, an indication you knew it was inappropriate to include.**
>
> **You admitted that you had breached information governance by disclosing patient information during the disciplinary process and stated you would not do this again.**
>
> **We concluded that, in line with the Trusts [sic] Disciplinary Policy, this constitutes a breach of data protection and thus gross misconduct.**
>
> **In deciding the sanction I considered your service record - two disciplinary hearings in two years and a first formal warning on file for one year. I considered your position of Senior Radiographer with a professional registration and code of conduct and your considerable length of service. I also considered the circumstances around this incident - that you were stressed and fearful for your job and had shared this information with your union representative. There had been no malicious intent in sharing the information. I balanced all these factors and concluded the sanction of dismissal was appropriate."**

6. The Claimant appealed against Mr Howe's decision but was unsuccessful. The appeal hearing manager, Ms FitzSimons, did not have the background documentation, including Mr Taylor's report, and limited her consideration to whether Mr Howe had made a sound decision.

7. The ET accepted that the Claimant had been dismissed for the potentially fair reason of conduct, namely the inappropriate use of patient information. There was no issue in respect of Mr Taylor's investigation or in terms of the procedure adopted by the Respondent; the case came down to the question whether the decision to dismiss fell within the band of reasonable responses. The ET expressly stated that it approached that question in the light of guidance from the relevant case law, in particular the strictures regarding substitution. That said, it noted that the investigation report acknowledged the absence of guidance to staff undergoing disciplinary procedures and proposed a review of the Respondent's policies in that respect.

Although Mr Howe had read those recommendations, they had not caused him to reflect upon the sanction to be imposed, something the ET considered significant:

> **"28. … Bearing in mind that he relied solely upon Mr Taylor's report to justify his actions, to have ignored Mr Taylor's concerns about appropriate training and understanding by staff in the claimant's position when dismissing the claimant, we find totally incomprehensible."**

8. The ET also noted that the Respondent's policy documents envisaged that there may be levels of seriousness in terms of patient confidentiality thus entitling the Respondent to impose various sanctions short of dismissal, something that Mr Howe had apparently not recognised:

> **"29. … The evidence from Mr Howe clearly demonstrated, and proceeded upon the basis that any breach of confidentiality constituted gross misconduct. This would explain the reason why, we find, that he was not interested in assessing the nature and extent of the patient disclosure, and/or any mitigation, such as the fact that the claimant was seeking to defend herself within the trust, before senior members of the trust, concerning clinical issues regarding patients being treated within the trust. We are satisfied that Mr Howe was solely concerned to establish that the claimant had used confidential information and having satisfied himself that this was the case, he determined that this was a very serious breach which warranted summary dismissal for gross misconduct."**

9. The ET further considered that Mr Howe's reliance upon the Claimant's apparent understanding of patient confidentiality issues in other contexts (so, when not facing disciplinary proceedings), demonstrated a wholly flawed approach (paragraph 30); concluding:

> **"31. … Given the straight jacket [sic] that Mr Howe imposed upon himself concerning confidentiality breaches generally, and his failure to take on board the concerns of Mr Taylor the Clinical Governance Manager, regarding the potential deficiencies in training, and the potential for staff not to appreciate the implication of confidentiality breaches in the context of putting forward defences in disciplinary process [sic], we are satisfied that his conclusion that the claimant's action in defending herself in respect of disciplinary proceedings warranted summary dismissal, fell well outside the band of reasonable responses of a reasonable employer. We accordingly find that the claimant's dismissal was unfair."**

10. Further, the ET found that the (wholly inadequate) appeal had not rectified the unfairness of the dismissal: Ms FitzSimons, who had not seen Mr Taylor's report, had also approached matters on the basis that any breach of confidentiality constituted gross misconduct.

11. Turning then to the question of any reduction for contributory fault, the ET allowed that the Claimant had made certain admissions in cross-examination but did not consider that her actions constituted culpable or blameworthy conduct:

> **"33. … We are satisfied that the claimant at the time, had no appreciation that what she was doing by way of defending herself breached obligations owed in relation to confidentiality. We note that lack of knowledge will not necessarily prevent a finding of contributory conduct. We judge however that the claimant's ignorance was compounded by Mr Taylor's acknowledgement that training and appreciation of fault may not be understood by someone in the position of the claimant defending herself in disciplinary proceedings, hence his recommendations. Such matters prompts [sic] us to conclude that there should be no reduction for contributory fault."**

12. That reasoning also led the ET to uphold the Claimant's claim of wrongful dismissal, finding that she was not guilty of serious misconduct warranting summary dismissal.

The ET's Reconsideration Decision

13. The first Decision having been sent out to the parties on 16 December 2015, any application for reconsideration had to be lodged by 30 December 2015. In fact, the Respondent's application was emailed to the ET on 8 January 2016, outside that time limit. Having considered the application - which included the Respondent's explanation for its timing and an application for an extension of time - the ET concluded that time should be extended. Going on to consider the grounds for the application, the ET noted that the Respondent was complaining that it had failed to have regard to admissions made by the Claimant in cross-examination. While accepting it had not referred to such admissions in its findings on the unfair dismissal claim, save for when addressing contribution, the ET confirmed it:

> **"6. … had such matters in mind, but judged that such admissions were not determinative of the matter, as the tribunal had to consider the reasonableness of the findings made by the respondent when determining as to whether dismissal fell within the band of reasonable responses, in the light of all relevant matters. It was the thinking and conclusions of the dismissing and appeal officers, that we judge were relevant in our determination, and not the opinion of the claimant by way of cross-examination. …"**

14. As for the findings in respect of contributory fault and on the wrongful dismissal claim, the ET again did not consider the Claimant's admissions to determinative of these issues. It therefore rejected the reconsideration application.

The Relevant Legal Principles

15. When considering whether a decision to dismiss is fair for the purposes of section 98(4) of the **Employment Rights Act 1996** ("ERA"), an ET is to apply a band of reasonable responses test as laid down, albeit referring to the precursor to the present legislation, by the EAT, Browne-Wilkinson J (as he then was) presiding, in **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17, at paragraph 24:

> **"(1) the starting point should always be the words of s.57(3) themselves;**
>
> **(2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;**
>
> **(3) in judging the reasonableness of the employer's conduct an Industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;**
>
> **(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;**
>
> **(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."**

16. The risk of substitution thus recognised in **Jones** was the subject of further consideration by the Court of Appeal in **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, where it was recognised that an ET may fall into the substitution mindset even where it has expressly directed itself that it should not do so; more generally, see per Mummery LJ at paragraph 43 of **Small**:

> **"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along**

the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

17. Whilst an ET must be on guard against slipping into the substitution mindset, the EAT must equally be careful not to itself step into the shoes of the ET as the first-instance Tribunal; see per Mummery LJ in **Fuller v LB Brent** [2011] EWCA Civ 267, as follows:

> **"27. Unfair dismissal appeals to this court on the ground that the ET has not correctly applied s.98(4) can be quite unpredictable. The application of the objective test to the dismissal reduces the scope for divergent views, but does not eliminate the possibility of differing outcomes at different levels of decision. Sometimes there are even divergent views amongst EAT members and the members in the constitutions of this court.**
>
> **28. The appellate body, whether the EAT or this court, must be on its guard against making the very same legal error as the ET stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the ET without committing error of law or reaching a perverse decision on that point.**
>
> **29. Other danger zones are present in most appeals against ET decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.**
>
> **30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the ET, but then overlooked or misapplied at the point of decision. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

18. Moreover, it is to be recognised that it can be only too easy to allege that an ET is guilty of a substitution mindset when really confusing substitution with an appropriate exercise of the ET's task under section 98(4); see per Langstaff J in **JJ Food Service Ltd v Kefil** UKEAT/0320/12, as follows:

> **"17. A substitution mindset is all too easy to allege. There is a great danger which is readily apparent to those of us who sit day by day in this Tribunal that employers who do not like the result which a Tribunal has reached, but cannot go so far as to say it is necessarily perverse, seek to argue that the very fact of the result in the circumstances must indicate a substitution. That is not, in our view, a proper approach. We bear in mind that section 98 [ERA] in subsection 4 provides as follows:**
>
> > **"… 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."**
>
> **18. In other words, the very business of the Employment Tribunal is considering whether once the employer has established the reason for the dismissal the decision to dismiss for that reason was fair or unfair. In order to see if a Tribunal has stepped beyond the permissible and gone outside the scope of its duty as set out in section 98(4), it is necessary to have regard to a Tribunal's decision as a whole, but what one is looking for is some indication that the Tribunal has, in dealing with a complaint of unfair dismissal, asked not whether what the employer did was fair but asked instead what it would have done in the light of the basic and underlying facts."**

19. Further, as to the ET's role under section 98(4), see per Bean LJ in **Newbound v Thames Water Utilities Ltd** [2015] EWCA Civ 677:

> **"60. The fairness of a dismissal falls to be judged on the basis of the facts known to the employer at the time of the decision to dismiss (*Devis v Atkins* [1977] ICR 662, HL): hence Mummery LJ's observations in *Small* about the claimant who comes to the tribunal with more evidence in an attempt to clear his name. But in the present case there was no material evidence placed before the tribunal which had not been available to Thames Water's management at the time of the decision to dismiss.**
>
> **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) [ERA], 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. The authority he cited as an example among decisions of this court was *Bowater v NW London Hospitals NHS Trust* [2011] IRLR 331, where Stanley Burnton LJ said:**
>
> > **"The appellant's conduct was rightly made the subject of disciplinary action. It is right that the ET, the EAT and this court should respect the opinions of the experienced professionals who decided that summary dismissal was appropriate. However, having done so, it was for the ET to decide whether their views represented a reasonable response to the appellant's conduct. It did so. In agreement with the majority of the ET, I consider that summary dismissal was wholly unreasonable in the circumstances of this case." "**

20. The test for determining a claim of wrongful dismissal is, however, different. The distinction is helpfully described by Langstaff J in **British Heart Foundation v Roy (Debarred)** UKEAT/0049/15:

> **"6. Whereas the focus in unfair dismissal is on the employer's reasons for that dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or**

> **whether, in fact, the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred.**
>
> **7. In a claim for wrongful dismissal the legal question is whether the employer dismissed the Claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is herself in breach of contract and that breach is repudiatory - that is, in the modern expression of the phrase (see *Tullett Prebon plc and others v BGC Brokers LP and others* [2011] EWCA Civ 131, [2011] IRLR 420) whether she "abandons and altogether refuses to perform" the contract.**
>
> **8. Just as all contracts of employment contain an implied term on the part of the employer that it will not act without reasonable or proper cause so as to damage or destroy the relationship of trust and confidence which exists, or should exist, between employer and employee, so too the employee may be bound by that term, and is undoubtedly bound by the term that the employee is to provide loyal service to the employer. Stealing from an employer is a clear and undoubted breach of those terms. It could not be otherwise. If an employer, knowing of the repudiatory conduct, dismisses an employee for it, the employer is, by doing so, accepting the employee's breach as terminating the need for it, the employer, to continue to perform its side of the bargain which is the employment contract. In short, if an employee is guilty of repudiatory conduct, which stealing inevitably is, then except perhaps in the most exceptional circumstances (which for myself I cannot readily bring to mind, but I am prepared to accept may possibly exist), an employer is entitled to dismiss that employee without notice. The employer, by doing so, is not in breach of the contract. It is the employee's breach which causes the termination."**

21. As Langstaff J identified, the same approach is to be adopted when addressing the question of any reduction for contributory fault on an unfair dismissal claim (governed in respect of the basic award by section 122(2) **ERA** and by section 123(6) as regards the compensatory award). The EAT, Langstaff J again presiding, gave more detailed guidance in this regard in **Steen v ASP Packaging Ltd** [2014] ICR 56, as follows:

> **"10. The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve a consideration of what it is just and equitable to do.**
>
> **11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy.**
>
> **12. It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in**

the least when doing so by the employer's view of the wrongfulness of the conduct. It is the tribunal's view alone which matters.

13. (3) The tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question, (4).

14. This, question (4), is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."

22. As for the requirement upon the ET in terms of its reasoning, the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules 2013"), at Rule 62 of Schedule 1, relevantly provide as follows:

"(1) The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs).

…

(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short.

(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated."

23. That said, Rule 62 does not impose a straitjacket on an ET, and an appellate court should not be overly pernickety in its approach to the reasoning of a first-instance Tribunal. Moreover, where an ET has correctly directed itself as to the law, the EAT should be slow to assume that it has then failed to adopt the correct approach to the facts when reaching its conclusions. More specifically, where an ET is addressing questions of contributory fault, it is entitled to expect its earlier reasoning on the question of liability for unfair dismissal to be taken into account (**Ekwelem v Excel Passenger Service Ltd** UKEAT/0291/15).

Submissions

The Respondent's Case

24. On the unfair dismissal claim, the ET had been concerned with four questions: (1) did the Respondent carry out a reasonable investigation? (2) Did it believe that the Claimant was guilty of the misconduct complained of? (3) Did it have reasonable grounds for that belief? (4) Did its decision to dismiss the Claimant fall within the band of reasonable responses that a reasonable employer might have adopted? (**Graham v Secretary of State for Work & Pensions (Jobcentre Plus)** [2012] IRLR 759 CA) The ET had answered the first three questions in the Respondent's favour. It ought also to have answered the fourth in the affirmative but had conflated the questions identified in **Graham** so as to focus not on whether there was a reasonable belief in guilt but instead on whether the Claimant's actions in defending herself in respect of disciplinary proceedings warranted summary dismissal. The ET's error of substitution was further evidenced by its characterisation of the misconduct relied on as inappropriate use of patient information: (i) that was not the charge - the charge against the Claimant was that she had acted in breach of confidentiality in respect of patient identifiable data - and (ii) it failed to reference the second charge, that of potentially bringing the Respondent into disrepute (albeit this was not a point expressly taken in the amended grounds of appeal). The second charge was significant, given that the Claimant had copied and taken home 69 patients' records and 58 patients or their families had to be informed of the breach.

25. The ET had erred by substituting its view of the appropriate response without taking account of all relevant factors; specifically: (i) that the Claimant was an experienced and long-serving radiographer (a "senior radiographer") who understood the import of patient confidentiality, and was fully trained on the duties of confidentiality, including those obligations set down by her regulatory body; (ii) the records were those of cancer patients, who

were all the more likely to be distressed if there was a breach; (iii) the Claimant chose to access and copy the records and take them home, without first seeking advice from her regulatory body, HR, management or union; (iv) she had given no valid reason why she failed to seek advice before the breach; (v) the Disciplinary Policy at paragraph 5.1.2 expressly stated that "*clarity regarding what can be disclosed and to whom, should always be sought from the manager prior to disclosure, when in any doubt*.": so, although Mr Taylor found there should be training about patient confidentiality, the Disciplinary Policy was not silent on the issue, and gave guidance to seek advice from management in case of any doubt; (vi) the Claimant had been in receipt of the Disciplinary Policy before the breach; (vii) the mitigation she provided did not give any adequate explanation why she accessed the data without first taking advice; and (viii) the Claimant had not advanced a case that lack of training had led to the breach.

26. Moreover, the ET failed to have regard to the fact that the Claimant had conceded that her actions amounted to a breach of confidentiality within the meaning of the Respondent's disciplinary policy, a response to a question of fact not law. Both the Respondent and the Claimant had accepted that her conduct amounted to gross misconduct. It was not for the ET to find there was no misconduct; by so doing it substituted its view of fairness. The ET had cherrypicked from the Respondent's reasoning. The task it faced required it to judge whether the sanction of dismissal fell within the band of reasonable responses, taking account of what the Respondent had in mind at the relevant time, which included the Claimant's admission in the disciplinary process and the mitigating factors that the ET had itself found existed (see the reasons given in the dismissal letter from Mr Howe).

27. On the wrongful dismissal claim, the question for the ET was whether the Claimant had committed a repudiatory breach of contract; a question to be answered objectively. It was,

however, not possible to discern how the ET had approached its task in this regard either from the brief reference in the first Decision or from the more detailed (but still not illuminating) explanation provided in the Reconsideration Decision.

28. As for the ET's reasoning on contributory fault, its task was as set out by the EAT in **Steen** (see above). The ET had, however, failed to address the basic award at all and failed to show engagement with the Claimant's concessions that: (i) her (admitted) actions fell within scope of "gross misconduct" within the Trust's disciplinary policy; (ii) the normal sanction would be dismissal, subject to mitigation; and (iii) she would have accepted a final written warning as action short of dismissal. The ET had either approached its task incorrectly in failing to have regard to this material or had failed to give adequate reasons for the conclusion it had reached given that material. During the course of argument Mr Islam-Choudhury further put this as a perversity challenge, albeit that was not how it was labelled in the original or the amended grounds of appeal and not how it had been understood by Laing J on the original sift.

29. As for the cross-appeal, the Respondent observes that it set out a full explanation for making its application for reconsideration out of time; the Claimant had not then objected and the ET was not obliged to give fuller reasons given the application to extend time was not disputed (see Rule 62(1) of the **ET Rules 2013**). In any event, having not raised the point below, the Claimant was not entitled to take it on appeal.

The Claimant's Case

30. The Claimant urges me, first, to hold the Respondent to its amended grounds of appeal.

31. On the unfair dismissal claim, she submits the Respondent's complaint of substitution is really a criticism of the weight given by the ET to parts of the evidence. The Respondent's own information governance policy allowed there might be a lawful basis for using confidential health information such as protection of vital interests or prevention/detection of crime. The ET was plainly aware of the need to avoid the substitution mindset, keeping that uppermost in its mind, and the EAT should be slow to find it had lost sight of its own clear self-direction (see per Lord Dyson in **MA (Somalia) v Secretary of State for the Home Department** [2010] UKSC 49 at paragraph 46). An allegation of substitution was all too easy to make (see **Kefil**) but had not been made out in respect of the first Decision in this case.

32. Turning to the wrongful dismissal challenge, the ET had expressly concluded the Claimant was not guilty of serious misconduct warranting summary dismissal; that was sufficient. Its earlier findings of fact - specifically as to the Respondent's internal policies and Mr Taylor's investigation report - provided the relevant background; it had been entitled to find any breach of patient confidentiality was neither wilful nor deliberate (see, by way of analogy, **Chhabra v West London Mental Health NHS Trust** [2014] IRLR 227 SC).

33. As for the challenge to the finding on contributory fault, the amended Notice of Appeal had put this as an inadequacy of findings challenge (it raised no issue as to a failure to address the test in respect of the basic award). As for the substantive criticism, before the ET the Respondent had simply broadly relied on its contention that the Claimant had committed the acts in question, which were thus contributory conduct (the Respondent in reply noted that its written submissions in this regard had been drafted before the Claimant's cross-examination and it had addressed her concessions in its oral submissions). In any event the ET's conclusion that the Claimant had no appreciation of her wrongdoing (such as to mean that her conduct was

culpable) was properly reasoned, given its decision was to be read in the context of its earlier findings and conclusions on the unfair dismissal claim (see **Ekwelem**).

Discussion and Conclusions

34. I consider first the appeal against the ET's conclusion on liability on the unfair dismissal claim. On my reading of the ET's reasoned first Decision, it had accepted that the Respondent genuinely believed the Claimant had misconducted herself. It further found that the investigation and process followed had been reasonable. The point of dispute identified by the ET was as to whether the decision to dismiss the Claimant because of this misconduct fell within the range of reasonable responses.

35. In approaching that question, the ET expressly reminded itself that it must not fall into the substitution mindset but by its appeal - as permitted to proceed by HHJ Shanks - the Respondent contends the ET then went on to do precisely that. What weighed with HHJ Shanks was the fact that Mr Howe, the dismissing manager, had referred to the Claimant's admission of culpability in the dismissal letter. Although unimpressed by the Respondent's reliance on various admissions during the Claimant's evidence before the ET in this regard, HHJ Shanks allowed that it was relevant for the ET to have regard to that which had been before the employer at the relevant time and apparently taken into account in reaching the decision to dismiss. The amended Notice of Appeal, which HHJ Shanks had then permitted to proceed, specifically referenced the Claimant's admission during the disciplinary process as well as Mr Howe's evidence as to his consideration of the Claimant's mitigation and his rejection of her case in that respect and further criticised the ET for giving undue weight to the opinions expressed by Mr Taylor in his investigation report.

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36. The focus of the Respondent's submissions in its skeleton argument at this hearing has, however, rather shifted, with a renewed focus on the Claimant's admissions in cross-examination and a contention that the ET had in fact found that the Respondent had not demonstrated a genuine belief that the Claimant had been guilty of gross misconduct.

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37. I do not, however, consider that to be a correct characterisation of what the ET was saying in its first Decision or as to what was relevant to its decision on the unfair dismissal claim.

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38. Considering first the approach the ET was bound to adopt, I note that it had addressed what was in the Respondent's mind - its reason for dismissing - at an earlier stage, accepting that it was because of its genuine, subjective view of the Claimant's conduct. Having thus found the reason for dismissal to be made out - a reason related to conduct - the ET's focus was then on whether the decision to dismiss for that reason fell outside the band of reasonable responses. In determining *that* question, the ET had to judge the Respondent's decision at the time it was taken; in the light of all of the circumstances at that stage. That would not include the Claimant's admissions in cross-examination before the ET but could include her response in the disciplinary process. If the Respondent itself failed to have regard to circumstances the ET might otherwise have seen as relevant, the question was whether its failure to do so fell within the band of reasonable responses - just because an ET might see a particular point as relevant would not mean that a reasonable employer must have done so.

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39. Here, I do not read the ET's approach to the unfair dismissal claim as based upon a finding that the Claimant had *not* committed an act of gross misconduct. The ET was, rather, concerned with Mr Howe's closed mind to the possibility of an outcome other than dismissal,

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notwithstanding that the Respondent's own policies on confidentiality allowed that there might be different levels of seriousness in respect of any breach. The ET was further concerned with Mr Howe's apparent failure to allow for any mitigation, notwithstanding Mr Taylor's recognition of specific mitigating circumstances. To the extent the submissions made on appeal criticise the ET for basing its unfair dismissal conclusion on a finding of no gross misconduct, they aim at the wrong target.

40. Returning to what HHJ Shanks allowed might be a relevant criticism, the issue is whether the ET failed to address the question whether the Respondent - acting through Mr Howe - reached a decision falling within the band of reasonable responses when determining that the mitigating circumstances (such as those identified by Mr Taylor) did not mean that some sanction less than dismissal should be imposed. I can see why HHJ Shanks was concerned that the reasoning in the dismissal letter had not been referenced by the ET, and, although that has not been the focus of the Respondent's submissions before me, I can see why that might be said to raise a question as to whether the ET substituted its view as to the respective importance of the mitigating factors. The answer to that question - and the difficulty for the Respondent on the appeal - is, however, that the reasoning in the dismissal letter was not the only evidence before the ET; specifically, it had the benefit of hearing from Mr Howe, and made very clear findings as to how he had in fact approached his decision (see in particular paragraphs 7.18 to 7.21 of the ET's findings of fact in the first Decision). Those findings then feed into the ET's conclusions that Mr Howe had a closed mind that did not allow for the possibility of a lesser penalty ("*a breach is a breach*") and did not consider the mitigating factors identified by Mr Taylor to be "*relevant to the disciplinary sanction*". The amended grounds of appeal do not present a perversity challenge on this question and I am bound to proceed on the basis that the ET made permissible findings of fact as to Mr Howe's approach to

his task; findings that justify the ET's conclusion that he unreasonably ignored relevant facts. That does not betray an error of substitution by the ET. It is, rather, a permissible finding that to ignore the possibility of lesser sanction and mitigating factors (in particular, as identified as relevant by the investigation report) fell outside the range of reasonable responses. That was a conclusion open to the ET, properly undertaking the task charged to it and with which I am not entitled to interfere. I must therefore dismiss the appeal on that basis.

41. I turn next to the ET's conclusion on wrongful dismissal, which is, at paragraph 34 of the first Decision, expressed very shortly. Allowing that the ET might be entitled to expect this conclusion to be read alongside its earlier reasoning on unfair dismissal - including its reasoning on contribution, to which I return below - I still cannot see that the explanation provided is adequate to the task. The Claimant's actions certainly gave rise to a question as to whether she had acted in breach of the Respondent's policies. There might have been mitigating circumstances, but, on the wrongful dismissal claim, the first question for the ET was - applying an objective test - whether the Claimant had acted in serious breach of contract. I am unable to see how the ET addressed that question, still less - if it concluded she had not - how it reached its conclusion. Either the ET failed to adopt the correct approach to the question it had to answer, or it failed to adequately explain how it had done so and arrived at its conclusion. I allow the appeal on this ground.

42. I reach a similar view on the question of contributory fault. The questions that the ET needed to address are set out in **Steen** (see above). Here there is a question as to whether the ET even properly identified the conduct said to give rise to the possible contributory conduct (which the Respondent contended included potentially bringing it into disrepute). As for the question whether that conduct - once properly defined - was blameworthy, the ET needed then

A to show that it had fully engaged with all relevant factors. It is not sufficient to simply say (as it does on the reconsideration application) that it had regard to the Claimant's admissions; the ET needed to explain why acceptance of blame did not support a finding of contribution in this case. I therefore also allow the appeal on this ground.

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43. In trying to see whether a proper basis for the ET's conclusions on wrongful dismissal and contributory fault might be found, I have had regard to the Reconsideration Decision, but - apart from asserting that the fuller evidence relied on by the Respondent was taken into account - that does not take matters further forward; it does not make good the inadequacy of the ET's explanation. To the extent that the Reconsideration Decision thus fails to rectify the reasoning in the interests of justice, I would also allow the Respondent's second appeal.

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44. Given, for the reasons I have explained, that the Reconsideration Decision really adds nothing to the matters raised by the substantive appeal, I am unconvinced that there is any point to the cross-appeal. In any event, I cannot see that the Claimant's challenge in this regard has been made out. There is an argument as to whether the Claimant can even raise the point on appeal given her apparent failure to raise the argument below but, even if it does properly arise, it is unclear to me as to whether the ET should even have appreciated that there was any dispute between the parties. In any event, the requirement on the ET was only to provide reasons that were proportionate in the circumstances. Given the full explanation and grounds for making the application out of time provided in the Respondent's reconsideration application letter and the ET's express reference to that letter in its Reasons, that is sufficient to explain why it exercised its discretion to extend time, and no proper basis has been identified to show why it was wrong to do so. I therefore dismiss the cross-appeal.

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Disposal

45. There is only one outcome possible in terms of the Reconsideration Decision - that it must be set aside. On the appeals on contributory fault and wrongful dismissal, however, more than one outcome is possible and it is common ground those matters must be remitted. For the Respondent, it is contended I should send this back to a different ET: the ET's decisions on contributory fault and wrongful dismissal have been shown to be wholly flawed and it has previously had the opportunity to address the issue of reasoning in its Reconsideration Decision but failed to do so. For the Claimant, it is said that I should remit to the same ET: it has made substantive findings that have not been overturned; the fact that it previously had the opportunity to address the flaws in its reasoning but failed to do so, did not alter the position; the ET would now have the assistance of the EAT's Judgment as to the approach it should take and should be given the opportunity to undertake its task.

46. I have considered the factors set out in **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763 EAT and conclude that I should remit this matter to the same ET. That is plainly the proportionate course: this was a three-member panel which, over a period of time, reached detailed conclusions of fact on the evidence it heard, which largely remain undisturbed. As for the criticisms I have made as to the approach on wrongful dismissal and contributory fault, the reasoning I have provided should assist the ET in revisiting its task. It may be that ultimately it is really an issue of inadequate explanation. I have, however, no reason to doubt the professionalism of this ET and if the failings lie in the approach taken I do not doubt that it will undertake a substantive reconsideration of its decisions; this is not a chance for the ET to be given a second bite at the cherry, nor would I expect it to approach its task in that way. It will therefore be remitted to the same ET, to the extent that that is still possible.