Appeal No. UKEATS/0012/18/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 14 November 2018
At 10.30am

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

BRIAN KEITH GLASSFORD APPELLANT

ROYAL MAIL GROUP LIMITED RESPONDENT

RESERVED JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr A Hardman, (Advocate) Instructed by Freelands Solicitors, 139 Main Street, Wishaw ML2 7AU
For the Respondent	Dr Andrew Gibson, (Solicitor) Morton Fraser LLP, 145 St Vincent Street, Glasgow G2 5JF

SUMMARY

UNFAIR DISMISSAL: Reasonableness of Dismissal

The claimant was dismissed following an unauthorised absence from work against a background of a poor disciplinary record and during a period of suspended dismissal. His alcohol consumption was part of the context, but he did not formally admit to having a drink problem until the stage of the internal appeal against dismissal. The Tribunal found that the dismissal was procedurally and substantively fair. On an appeal in relation to the single question of whether the appeals officer should have paused the appeal process for further investigation in light of the late admission by the claimant of his alcohol dependence ;-

Held – The material available to the Tribunal included the comprehensive findings of the appeals officer on the issue now raised. That material had been fully and satisfactorily considered by the Tribunal. It could not be said that the claimant had not been given a full opportunity to present his position on appropriate sanction. The case of *Weddel & Co v Tepper [1980] IRLR 96* was of no assistance to the claimant in the circumstances of the present case, where the actings of the employer, including at the appeal stage, fell squarely within the band of reasonable responses.

Appeal dismissed.

THE HONOURABLE LADY WISE

Introduction

1. The claimant was employed by the respondent as a delivery postman/driver between 19 April 1993 and 23 May 2016, when he was dismissed, with notice, following a conduct meeting held on 23 February 2016. His claims of automatic unfair dismissal and unfair dismissal were unsuccessful before the Tribunal who dismissed the claims on 8 May 2017 with full written reasons provided on 11 July 2017. The claimant appeals that decision. Before the Tribunal he was represented by Mr Santoni, solicitor and on appeal by Mr A Hardman, advocate. The respondent was represented on both occasions by Dr Andrew Gibson, solicitor. I will continue to refer to the parties as claimant and respondent as they were in the Tribunal below.

The Tribunal's Judgment

2. The background to the claimant's dismissal is narrated fully in the Tribunal's written reasons and for the purposes of this appeal only a brief summary is required. In essence the claimant had attended for work on 24 July 2015 whilst under the influence of alcohol and so unable to carry out his responsibility of driving a Royal Mail vehicle. This was the third time he had attended work unfit to drive as a result of being under the influence of alcohol. On the first occasion, in November 2014, he had been sent home as being unfit to work and **"precautionary suspended".** Thereafter he had been given an informal reprimand by his first line manager but no formal disciplinary action was taken. On 24 July 2015 the claimant attended for work smelling strongly of alcohol and as one of the duties he was expected to perform that day was driving he was sent home as unfit to work. Again he was suspended as a precaution and on 31 July 2015 attended a fact finding interview with his line manager. At that interview the claimant denied he had a problem with alcohol but the outcome was that the

matter was referred for a disciplinary hearing. On 4 September 2015 at that disciplinary hearing the claimant admitted that he had reported for work whilst being under the influence of alcohol, that being the second time such an incident had occurred. In all the circumstances a penalty of suspended dismissal remaining on the claimant's record for 2 years was imposed. Further, the claimant was removed from all driving duties with immediate effect to last for the 2 year period in order to ensure his own safety and that of other road users. Subsequently the claimant had registered a grievance against the decision to remove him from his driving duty but had not appealed the penalty of suspended dismissal.

3. On the morning of 6 February 2016 the claimant telephoned his delivery office and stated that he was not coming into work that day. He later gave the reason for his non-attendance as being to get his house ready for his mother coming out of hospital 3 days later. This unauthorised absence, during the period of suspended dismissal, led to a fact finding interview and subsequent formal conduct meeting. The decision to dismiss the claimant with notice was taken by the chair of the formal conduct meeting on 29 February 2016.

4. The Tribunal's findings in fact are contained within paragraph 47 of the Judgment which contains 72 subparagraphs. Insofar as material to this appeal those findings in fact include the following, starting with findings on the letter sent to the claimant by Mr Wallace (chair of the conduct meeting) and advising of the reasons for the dismissal:-

> **"(41) Mr Wallace enclosed, with his undated letter to the claimant, a decision report, setting out the employee background, the case investigation outlined, his deliberations, and his conclusions, as also heads of decision which was in the following terms:-**
>
> **'*Mr Glassford was issued with a suspended dismissal in September 2015, he was also removed from driving duties as part of this case. The penalty was issued on 07/09/15 and as of 06/02/16 Mr Glassford is again involved in a conduct case. After considering the mitigation I still feel that Dismissal with Notice is the correct decision. Mr Glassford was given a suspended dismissal on his previous conduct case. As the previous case was the 2nd time he had been suspended for the same offence, I believe that the business really has tried to help Mr Glassford and give him the opportunity to change his behaviour. On the Saturday in question Mr Glassford was given all of the relevant facts about his situation, he was offered a day off on the Monday to help his situation, he was allowed the chance to***

***seek council* (sic) *from the unit Union Representative and the Manager insured* (sic) *Mr Glassford understood the decision he was making, still Mr Glassford chose not to attend his work. Unfortunately, I see no other option as Mr Glassford has been given multiple chances. As there have been 3 serious incidents in November 2014, July 2015 and Feb. 2016 the correct decision in this case Dismissal with Notice.*'**

Claimant's Appeal against Dismissal

(43) On 1 March 2016, the claimant, having received Mr Wallace's decision letter and report, completed a *pro-forma* reply slip stating that he did wish to appeal against the penalty given, and he stated the grounds for his appeal shortly as follows:-

'*PERSONAL CIRCUMSTANCES*'

Respondents' Consideration of the Claimant's Appeal

(45) On 7 March 2016, Mr Graham Nielson, Independent Casework Manager, at Edinburgh West Delivery Office, Tallents House, wrote to the claimant inviting him to an appeal hearing on 21 March 2016 at Glasgow Mail Centre, Turner Street.

Appeal Hearing by Independent Casework Manager

(48) On 25 March 2016, the claimant attended for his appeal hearing with Mr Nielson, at Motherwell Delivery Office. The claimant was accompanied by his CWU representative, Mr Norrie Watson, the CWU divisional representative for Scotland & Northern Ireland.

(49) At his appeal hearing, the claimant's representative, Mr Watson, informed Mr Nielson, the Appeals Officer, that the claimant had been under the influence of alcohol when he phoned the Motherwell Delivery Office on Saturday, 6 February 2016.

(50) It was only at this appeal hearing that the claimant stated he did have a problem with alcohol, but he also informed Mr Nielson that he had not taken up his GP's offer of help to address his problem with alcohol.

(51) At the appeal hearing, the claimant confirmed to Mr Nielson that he had a current 2-year suspended dismissal on his conduct record which had been issued for coming into work smelling of alcohol.

(52) At no time prior to his appeal hearing, on 25 March 2016, did the claimant state to the respondents that he had a drink problem. On the contrary, when asked on numerous occasions if he had a drink problem, the claimant had answered in the negative.

(53) To the best of the respondents' knowledge, at no time during his employment with them did the claimant seek assistance from Occupational Health Services for counselling or assessment.

Appeal Outcome

(56) On 12 April 2016, Mr Nielson wrote to the claimant informing him that his decision was to dismiss the appeal against dismissal, and uphold Mr Wallace's decision to dismiss the claimant with notice.

(63) In his appeal decision document, Mr Neilson, the respondents' Appeal Officer, made the following findings, at paragraphs 34 to 38, reproduced at pages 118 and 119 of the Joint Bundle, as follows:-

'*34. Mr Glassford has never denied that he planned to take the day off irrespective of*

the consequences which were pointed out to him by the delivery office manager and his trade union representative. Whilst, to an extent, I can understand his reluctance to take the advice of the delivery officer manager on the matter I find it difficult to understand the reluctance to take the advice of his trade union representative. Why he did so will only be known to Mr Glassford but I am clear in my own mind that he was well aware of the consequences of his non-attendance at work on Saturday 6 February and wantonly ignored the advice given to him by his unit manager and his trade union representative.

35. Whilst I can understand Mr Glassford's desire to ensure the house was ready for his mother's homecoming I find it difficult to believe he thought no-one else in the family would have helped him to ensure everything was in place. After all I have no doubt that the rest of the family would have wanted to ensure everything was in place in order to avoid their mother returning to a nursing home or elsewhere if it wasn't.

36. The final point to consider is the penalty to be awarded. The Royal mail Conduct Agreement offers a range of [penalties up to and including dismissal without notice – i.e. summary dismissal – and I have considered the merits of each. I am conscious of the fact that at the time of the appeal Mr Glassford had almost 23 years' service which on its own carries a good deal of weight. I have also noted that his conduct record is not clear and he has a 2-year suspended dismissal which does not expire until 7 September 2017 for attending work whilst being under the influence of alcohol.

37. The ethos of the Conduct Agreement is that of being corrective but I am not convinced that warding Mr Glassford a penalty of less than dismissal would have the desired effect given that his latest incident occurred only 5 months after he was awarded a 2-year suspended dismissal albeit for a different offence but alcohol was involved. In addition I remain unconvinced Mr Glassford is serious about tackling his alcohol problems and anything attempted now is, in my view, too little too late.

38. Accordingly, I believe the penalty of dismissal with notice to be fair and reasonable under the circumstances and thus Mr Glassford's last day of service remains 23 May 2016."

5. The Tribunal decided that the dismissal was fair and that, even had the claimant been unfairly dismissed, it would not have ordered reinstatement, the relationship of trust and confidence having broken down. It is apparent from the lengthy Judgment that a number of arguments were advanced that are no longer relevant for the purposes of this appeal. The submissions of each side in relation to those are set out fully by the Tribunal together with a record of a dispute between parties about the conduct of the litigation. Before the Tribunal the claimant had made a complaint under section 57(A-B) to the effect that the respondent had unreasonably refused to permit him to take time off in connection with his mother's house move. The facts relating to that were relevant to the general unfair dismissal claim and the Tribunal's conclusions, insofar as relevant to this appeal include the following:-

"114. However, on the evidence available to me, I was satisfied that the claimant did not request time off covered by Section 57A, because his unauthorised absence was not to deal with something unforeseen, sudden or unexpected. He had known for two weeks previously that furniture was being delivered for his mother. On the evening of Friday 5 February 2016, he was informed that his mother would be returning home on Tuesday 9 February 2016.

115. On receipt of this information, the claimant continued to drink alcohol during the evening of Friday 5 February 2016, when he had Friday evening, Saturday evening, all day Sunday and all day Monday to arrange furniture for his mother's return. In these circumstances, it is self-evident that there was nothing unforeseen, sudden or unexpected about the case he had to provide on his mother's return.

116. Further, I am equally satisfied that the Section 57A right is to take a reasonable amount of time off in order to take action which is necessary. On the evidence before me at the Final Hearing, I was satisfied that the claimant was offered a reasonable amount of time off in order to take action which was necessary, as he was offered the same amount of time off as he had informed the respondents that he was taking.

117. Again, on the evidence before me, it is clear that the claimant informed the respondents that he was not attending work on the morning of Saturday 6 February 2016, but it only became clear to them at the stage of the Appeal hearing before Mr Nielson that the claimant did so because he was under the influence of alcohol on the morning of Saturday 6 February 2016, and that whilst on a two-year Suspended Dismissal for attending work whilst under the influence of alcohol on 24 July 2015.

118. In these circumstances, it was clear to me that, at the relevant time, the claimant was not making a request for time off covered by Section 57A, but that he was trying to avoid attending for work whilst under the influence of alcohol, because he was well aware of the likely consequences for his employment if he did so."

The claimant's arguments on appeal

6. In presenting the appeal Mr Hardman advanced a single concise argument. He contended that the Tribunal had erred in law in failing to consider whether, in the circumstances of the case, a reasonable employer would have investigated the claimant's newly disclosed admission (at the stage of internal appeal) that the offending telephone call was made under the influence of alcohol and that he had a drinking problem before reaching a decision to reject the claimant's appeal and thus finally dismiss him. He accepted that there was no longer any question as to whether the claimant had committed an act of misconduct which, it was now accepted for the purposes of this appeal, he had. The sole remaining issue was that of the sanction of dismissal as opposed to some less draconian disposal. Under reference to the findings of fact relating to the incident in February 2016 Mr Hardman submitted that it was plain that the misconduct of the claimant that led to his dismissal was influenced by his failure

to address a drink problem. It was clear from the Tribunal's Judgment that this was a situation in which the claimant refused to admit that he had a drink problem at all. The first acknowledgment he gave to his managers that he had a drink problem was during the course of the appeal hearing before Mr Nielson. That appeal hearing had been intended as a full rehearing of the circumstances alleged to amount to misconduct. Turning to the appeal decision letter, Mr Nielson, who had given evidence before the Tribunal, had suggested that the claimant's admission and accompanying indication that he would tackle his alcohol problem was effectively ***"too little too late".*** In the letter he stated in terms **"*… I remain unconvinced Mr Glassford is serious about tackling his alcohol problems and anything attempted now is, in my view, too little too late*".** The contention of the claimant was that Mr Nielson had jumped to a conclusion about the claimant's conduct and his ability to remedy that conduct by failing to postpone his decision on the fairness of the dismissal until an assessment had been made of the significance of the submission by the claimant, its effect on his ability to take steps to address his drink problem and in turn the effect of such steps on the seriousness of the claimant's misconduct. Against a background of a now admitted unauthorised absence Mr Nielson ought to have explored alternative possibilities where an employee of 23 years standing finally admitted that he had a drink problem. Although it was acknowledged that the respondent was aware that there was an issue with alcohol in the past it was the acceptance by the claimant of that problem that was new and ought to have led to further investigation. The Tribunal had overlooked Mr Nielson's failure to pause and investigate whether a rehabilitation programme was an alternative to dismissal.

7. In support of his argument Mr Hardman relied on the dictum of Stephenson LJ in **W Wedell & Co Limited v Tepper [1980] IRLR 96** at paragraph 20. There, having set out the correct application of the test formulated in **British Homes Stores v Burchell [1978] IRLR 379** Stephenson LJ emphasised that it would be unreasonable for an employer to jump to

conclusions which it would have been reasonable to postpone in all the circumstances until they had gathered further evidence or investigations. He continued:-

> ***"That means they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably."***

Mr Hardman submitted that the failure on the part of Mr Nielson in this case to pause during the appeal hearing and ask whether dismissal was really the appropriate sanction giving that this longstanding employee was now admitting for the first time that he had an alcohol problem he should have led the Tribunal to question the reasonableness of the decision to dismiss. Mr Nielson knew that the employer had policies and procedures for dealing with employees who had alcohol problems. The reasonable thing to do would have been to defer a decision on dismissal and allow investigation under those policies and procedures. The Tribunal had accordingly erred in not considering whether the respondent had acted precipitously and therefore unreasonably in dismissing the claimant.

8. Counsel anticipated that the respondent might suggest that the argument being advanced was not one raised by Mr Santoni before the Tribunal. In support of a contention that the matter was raised, he referred to paragraph 51 of the Tribunal's Judgment which records that a Dr Gibson and Mr Santoni had both handed up written closing submissions following the close of evidence. Mr Hardman provided a copy of those submissions as advanced by the claimant and those include a section about the claimant's alcohol addiction, including reference to the policies and practices that the respondents had to deal with employees with addiction issues. The submissions complain that Mr Nielson **"simply slammed the door of help in his face holding him to be a chronic alcoholic with no hope of redemption".** There is a specific complaint about the absence of any attempt to refer the claimant to occupational health and review his condition in order to try and establish whether he had stopped drinking. It was noteworthy, according to

Mr Hardman, that there was something in the order of seven paragraphs in the written submissions about this topic whereas the Tribunal had given the matter only scant attention. In all the circumstances the Judgment of the Tribunal should be quashed and the matter remitted to a differently constituted Tribunal for a full rehearing.

Submissions on behalf of the respondent

9. Dr Gibson for the respondent accepted at the outset, in relation to Mr Hardman's last point, that Mr Santoni had raised the issue of the claimant's drink problem in submissions. But the specific point that had not been raised before the Tribunal was that the error had been in failing to adjourn the appeal hearing and investigate the matter as an alternative sanction to dismissal. In any event, a principal issue in the appeal appeared to be that the decision to dismiss was unreasonable because the appeal manager did not consider carefully enough the evidence about what was said in relation to the drink problem on Mr Glassford's behalf and had accordingly acted precipitously. He referred to the appeal decision document which was included in full in the appeal bundle and had been before the Tribunal. In the section on deliberations, attention was drawn to paragraphs 18-28 inclusive in which the appeals officer Mr Nielson considers in full all of the points made at the appeal hearing. It was submitted that these illustrated that the very point now being made for the claimant was fully taken into account. Paragraph 19 of those deliberations is in the following terms:-

> **"I can also understand the point about him being in denial from my dealings with other appellants who have had varying degrees of alcohol dependency. That said the fact that he almost lost his job in September 2015 owing to him attending work and his breathe smelling of drink I would have thought this would have triggered some kind of wake up call. However this does not seem to be the case and Mr Glassford appears to have carried on regardless to the point where he is now fighting to save his livelihood."**

10. Against that background Dr Gibson submitted that it was clear that Mr Nielson had not summarily dismissed the point about the claimant being in denial. He acknowledged it and understood it but set it into the context of the claimant's actings from September 2015 onwards.

The two points which flowed from that and which were those for scrutiny in the present case were, first, whether Mr Nielson was convinced that the claimant was now addressing his problem and secondly, whether he accepted the claimant's position that he was no longer in denial. So far as the first was concerned, contrary to Mr Hardman's position, it was clear from Mr Nielson's notes that the claimant must have gone to his GP between the date of dismissal and the internal appeal given that before that he had not admitted any drink problem at all. Mr Nielson dealt with this at paragraph 20 of his deliberations as follows:-

> **"As for Mr Glassford now trying to address his problem I'm frankly not convinced of this. Whilst his trade union representatives, family and GP have voiced their concerns over his alcohol dependency Mr Glassford appears to have done little or anything to address his problems. At the appeal he told me that his GP had told him he would have to wean himself of drink and he had not taken up the doctor's offer of other help. I would have given this part of his point more credence if he had said that he had been told to wean himself off drink and had started to do so. I also find it difficult to understand why, if he was serious about tackling his problems, he would refuse the offer of other help from his GP. This simply doesn't make sense to me."**

Dr Gibson submitted that what that paragraph illustrated was that there was information before Mr Nielson on which he was entitled to rely, namely the claimant's admitted failure to take up his GP's offer of help.

11. In relation to the question of whether Mr Nielson was convinced that the claimant was no longer in denial Mr Nielson had again relied on the claimant's failure to take up assistance and had concluded it was noted that in terms that the claimant was still in denial. His deliberations on that are expressed at paragraph 21 of his decision as follows:-

> **"He went on to say that he would take any offer of assistance up now but I find this also difficult to comprehend. I would have thought if he was serious about addressing his drink problem there would be no hesitation on his part to seek whatever help his GP could offer him. The lack of positive action on his part suggests to me he is still in denial about the depth of his drink problem and actually contradicts his point that he was now doing something about it."**

The claimant's arguments seemed to be that, despite Mr Nielson being presented with the issue of the drink problem only at the hearing, ie after the dismissal, that a further delay in upholding the decision to dismiss in order to investigate the drink problem that everyone knew he had and for which he was suspended in 2015 and removed from driving was somehow the only

reasonable course. Looking at it the other way there was no particular reason for Mr Nielson to halt proceedings with a view to helping the claimant, standing his failure to take up any help before that.

12. Dr Gibson submitted that the claimant's dismissal fell directly into the band of reasonable responses available to the employer. Mr Glassford had already been through appropriate procedures short of dismissal and had not raised as a mitigating factor his drink problem at the disciplinary hearing that had led to his dismissal. It was also important to record that before the Tribunal the claimant was still running as his main argument that he had been unfairly refused time off for caring responsibilities. The focus of the evidence and submissions had been about whether he had improperly been refused that time off. In the later stages of the Tribunal hearing the claimant had tried to run a combined argument and one small part of that was the subject of this appeal. The context of his failure to attend for work on the day in question was that the claimant must have known if he turned up for work while still subject to a 2 year suspended dismissal for like conduct he would of course be sacked. Further, it was clear from paragraph 37 of Mr Nielson's deliberations that he had given full consideration to the question of whether a sanction less than dismissal would have the desired effect. Reasons for rejecting a sanction short of dismissal were given in his appeal decision and in the conclusion, quoted by the Tribunal, that the claimant's protestation were **"too little too late".** In all the circumstances and particularly bearing in mind the parallel argument the claimant was trying to run before the Tribunal about time off for caring for his mother, the dismissal was clearly within the band of reasonable responses and so not a decision with which the Tribunal should have interfered.

13. Under reference to subparagraphs 49-63 of paragraph 47 of the Judgment Dr Gibson submitted that the Tribunal had made a proper record of what the claimant had told Mr Nielson

and that had been taken into account. The fact of the 2 year suspended dismissal still being in force and the denial at the time of dismissal by the claimant that he had a drink problem were all factors to be taken into account. The claimant's argument might have more weight had it been focused before the Tribunal that the reason the dismissal was allegedly unfair was due to his alcohol problem, but that had not been the position. This fed into Mr Nielson's finding of not being convinced about the claimant's position. Mr Nielson realised that the claimant's talk of acknowledging the problem and wanting to seek help was effectively a charade designed to achieve a particular outcome. The appeal should be dismissed as there was no error of law identified, the dismissal having been within the band of reasonable responses having a regard to all of the material before the employer.

Discussion

14. Section 98(1) of the Employment Rights Act 1996 provides:

> **"In determining for the purposes of this Act whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason ... for the dismissal;**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a time such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **2. A reason falls within this sub-section if it ...**
>
> **(b) relates to the conduct of the employee. ...**
>
> **4. ... where the employer has fulfilled the requirements of sub-section (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."**

15. Conduct cases of this sort continue to be determined in accordance with the well-known

principles laid down by Arnold J in the case of **British Home Stores v Burchell [1978] IRLR 379**. First, there must be an honest belief by the employer in the fact of the misconduct. Secondly, the employer must have had in mind reasonable grounds on which to sustain that belief. Thirdly, the employer must carry out as much investigation into the matter as was reasonable in all the circumstances of the case. It is this third aspect of the **Burchell** test that is at issue in this case. There was no dispute between parties that the duty to investigate is in a sense a continuing one. If when material information comes to light at a late stage in the process, including at the stage of internal appeal, there may be circumstances in which it requires investigation before reaching a conclusion on whether the determination of dismissal is fair and/or the sanction imposed is a reasonable one. The short point raised by the claimant on appeal is whether the appeals officer, Mr Neilson, ought to have paused and questioned whether dismissal was appropriate in this case given the statements by the claimant at the appeal hearing in relation to his admission of an alcohol problem. If that was an error on the part of Mr Neilson and it can be shown that he ought to have postponed his decision until further investment or investigation, then it can be argued that the Tribunal in turn erred in neither acknowledging that failure nor taking it into account in assessing the reasonableness of the respondent's actings.

16. It is noteworthy that the conduct to which the claimant ultimately admitted was unauthorised absence from work against a background of a poor disciplinary record and in particular during the period of a suspended dismissal. The claimant's alcohol consumption was part of the context of that poor disciplinary record, but the claimant made no admission in respect of the role of alcohol in his absence from work on 6 February 2016. Rather he raised it in the context of an appeal against the penalty of dismissal imposed. It is apparent from the passages of the appeal decision document relied on by Dr Gibson and reproduced at paragraph 9, 10 and 11 above, that the appeals officer Mr Neilson, far from summarily

dismissing the point about the claimant being in denial about his drink problem both understood and acknowledged it. The submission at this appeal that it was an error not to pause and investigate what help might be available for the claimant appears to ignore that Mr Neilson explicitly took into account that the claimant had already been offered help from his general practitioner and had refused it. Perhaps more importantly, Mr Neilson (at paragraph 21 of his decision) concludes in terms that the claimant is still in denial about the depth of his drink problem and points out that this contradicts any claim that he was now doing something about it.

17. In my view, as it cannot be suggested that Mr Neilson did not address directly the claimant's contention that he was now acknowledging and attempting to address a drink dependence problem; the appeal could only succeed if Mr Neilson's treatment of that new information fell clearly outside the band of reasonable responses. If so, it could be argued that the Tribunal erred in overlooking that unreasonableness. There are a number of factors militating against such a conclusion. First, as already indicated, the material now available to this Tribunal illustrates that Mr Neilson gave full consideration to the claimant's argument in this respect. Reasons are given for rejecting a contention that the claimant's recent acknowledgment of his drink dependence should be a basis for avoiding dismissal. The number of opportunities that the claimant had previously had to address his alcohol related conduct and his failure to take up an offer of help from his general practitioner even by the date of the appeal all led to the conclusion that the point being raised was in Mr Neilson's view **"too little too late"**.

18. So far as the Tribunal is concerned, there are comprehensive findings in relation to the internal appeal at paragraph 47, sub-paragraphs 48-63. In particular, the Tribunal made findings to the effect that the claimant had informed Mr Neilson that he had not taken up his GP's offer of help to address his problem with alcohol and records the numerous occasions on

which the claimant had denied any drink problem at all. Further, there is a finding that at no time had the claimant ever sought assistance from Occupational Health Services for counselling or assessment. It is the Tribunal's reproduction of certain material passages of the appeal decision (sub-paragraph 63 of paragraph 47) that is most instructive. These passages illustrate beyond doubt that the Tribunal took into account Mr Neilson's analysis of the issue of the now admitted drink problem and whether or not the claimant was serious about tackling it in assessing the overall reasonableness of the employer's decision.

19. I do not consider that the case of **Weddel & Co v Tepper [1980] IRLR 96** lends any direct support to the claimant's argument in this case. The circumstances in which the Employment Tribunal held in that case that the employers had acted unreasonably was that the employee had been dismissed on grounds of suspected dishonesty without first giving him a fair opportunity to defend himself. Such a failure quite clearly fell foul of the reasonable investigation requirement in the case of **British Home Stores v Burchell**. The Court of Appeal's analysis acknowledged (at paragraph 19) that there may be cases in which an employer appears to be acting reasonably in dismissing an employee on the material before him, but other matters exist which would have been reasonable for the employer to ascertain by enquiry before deciding to dismiss, could render otherwise reasonable conduct on the part of the employer unreasonable. What the material in this case illustrates is that, not only did the employer consider carefully all the submissions made insofar as relevant to the issue of the late acknowledgment of the claimant's alcohol problem, but so too did the Tribunal. It is trite that the Judgment must be read as a whole. There are many passages, quite apart from the Tribunal's findings on the appeal process, to support a conclusion that the Tribunal considered sufficiently this aspect of whether the overall decision of the employer fell within the band of reasonable responses. First, at paragraph 113 of the Judgment, the Employment Judge confirms that he had considered carefully all of the evidence and the competing submission and that in

general he preferred the submissions advanced by Dr Gibson on behalf of the respondent. Secondly, at paragraph 117 the Tribunal noted the stage at which the claimant came to advance as a reason for his non-attendance at work the fact that he was under the influence of alcohol. The Tribunal concludes from that, at paragraph 118, that what had occurred on 6 February 2016 was that the claimant was trying to avoid attending for work whilst under the influence of alcohol standing the likely consequences if he did so during the period of suspended dismissal. Finally, at paragraphs 123-27 inclusive, the Tribunal makes exemplary self-directions in law and narrates in a series of bullet points (at paragraph 127) the actions upon which it was satisfied the respondent had carried out as evidence of the reasonableness of the employer's approach. No less than four of those bullet points relate to the appeal hearing before Mr Neilson. The Tribunal found that the claimant had a full opportunity to make representations at the internal appeal which it was agreed, constituted a full rehearing of the case. Most importantly, the Tribunal relied on the evidence given by Mr Neilson that he fully considered whether another lesser sanction would be appropriate and that he took into account the claimant's disciplinary record and length of service. The importance of the reference to the evidence about a possible lesser sanction is that the claimant's argument about the significance of his acknowledgement, albeit belatedly, of his drink problem, was given in the context of his appeal against the sanction of dismissal imposed. The passages from the appeal decision document reproduced by the Tribunal can be taken to be germane to that issue in the Tribunal's view. That Mr Neilson remained unconvinced that the claimant was serious about tackling his alcohol problems was sufficient to negate any impact of his stated acknowledgement that he had a problem.

20. The matter does not end there however, as the Tribunal took care to narrate and apply the applicable law on substitution mind-set (paragraphs 135-137). Then, at paragraph 138 and 139 there is reference to the well-known authority of **Orr v Milton Keynes Council [2011]**

ICR 704 and particularly to paragraph 78 thereof where Aikens LJ, in summarising the relevant principles established by the case law, referred to the need for the Tribunal to focus attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (including any appeal process) rather than on whether the employee had suffered any injustice. The passages that follow are sufficient to disavow any suggestion that the Tribunal erred in its approach to the band of reasonable responses test. All the Tribunal required to do in relation to the points raised in this appeal was to assess the reasonableness of the process undertaken by Mr Neilson at the time. I conclude that the Tribunal's treatment of the sole issue raised in this appeal was both comprehensive and satisfactory in the context of a lengthy Judgment on a claim whose focus was rather different than the limited matter now presented.

21. In all the circumstances the appeal must be dismissed and the Judgment of the Tribunal stands.