Appeal No. UKEAT/0191/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Cardiff Civil & Family Justice Centre
On 22 November 2018

Before

HER HONOUR JUDGE EADY QC

MS K BILGAN

MR D G SMITH

WILKO RETAIL LIMITED — APPELLANT

MR W GASKELL & MR. R WILLIS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MASSARELLA (of Counsel) Instructed by: Messrs Pinsent Masons LLP Solicitors 1 Park Row Leeds LS1 5AB
For the Respondents	MR GEORGE POLLITT (of Counsel) Instructed by: Slater and Gordon UK Limited Haywood House North Dumfries Place Cardiff CF10 3GA

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Unfair Dismissal – reasonableness of the decision to dismiss – section 98(4) Employment Rights Act 1996

The Claimants had been dismissed for failing to comply with the Respondent's fire safety policy. Rather than each signing-in and out when they came on, or left, site, Mr Gaskell would sign for both. The Respondent took the view that this amounted to gross misconduct, as a serious breach of health and safety procedures, and determined that both should be dismissed. The Claimants complained that they had been unfairly dismissed. The ET majority (the Lay Members) upheld the claims, albeit finding that any basic or compensatory award would be subject to a 33% reduction due to the Claimants' conduct. The Employment Judge (in the minority) held that the dismissals were fair. The Respondent appealed.

Held: *Allowing the appeal.*

The ET majority's finding that there had been no serious breach of health and safety procedures was based upon a mistaken view of the evidence before the Respondent when taking the decision to dismiss. The majority recorded that there had been nothing to suggest that Mr Gaskell's signing for Mr Willis was inaccurate, but that failed to take account of the uncertainty arising once the Claimants had ceased to text each other to check the position (something that had emerged during the investigation). More generally, however, the ET majority had substituted its view of what was important for the purpose of the fire sheet policy and, thus, as to what amounted to a serious breach. It had also erred in its record of the facts applicable to a comparator case relied on by the Claimants, concluding that the Claimants' conduct was less serious because the other employee had signed for a colleague when she was not in the building. That was not the allegation; the other case in question had involved a similar breach of the policy but only on one occasion, whereas Mr Gaskell had been signing in and out for Mr

Willis practically daily for several months. The ET majority had also failed to demonstrate that it had asked the correct question when considering the issue of inconsistent treatment, failing to ask whether the Respondent's view of the comparisons made by the Claimants fell within the band of reasonable responses. Generally, the ET majority had repeatedly focused not on the Respondent's assessment of the seriousness of the Claimants' conduct (or that of other employees) but on its own view, thus falling into the substitution trap; it had thereby applied the wrong approach to the question of fairness for section 98(4) purposes and its decision could not stand.

HER HONOUR JUDGE EADY QC

Introduction

1. This is our unanimous Judgment. For convenience, we refer to the parties as the Claimants and Respondent, as below, save where necessary to distinguish between the Claimants. This is the Respondent's appeal against a Reserved Judgment of the Employment Tribunal sitting at Pontypridd (Employment Judge Davies sitting with members, Mr R Mead and Ms B Roberts, on 29 to 31 August 2017, with a further day in Chambers on 6 November 2017; "the ET"), which was sent to the parties on 3 April 2018. Representation before the ET was as it has been before us today.

2. The Claimants pursued claims before the ET of unfair and wrongful dismissal. Mr Gaskell also complained of detriment and dismissal on trade union grounds. The ET unanimously rejected Mr Gaskell's trade union reasons complaints but, by a majority (the ET Lay Members), the Claimants' claims of unfair dismissal were upheld; no finding was made on the wrongful dismissal claims. There was no appeal against the ET's decision in respect of Mr Gaskell's trade union detriment and dismissal claims or against the failure to make a decision on the wrongful dismissal claims. The hearing before us (and, therefore this Judgment) was solely concerned with the ET's decision on the unfair dismissal claims.

The Background Facts

3. The Claimants both worked at the Respondent's distribution centre in Caldicot, Gwent, which is called DC2. Mr Gaskell started his employment on 1 August 1994; Mr Willis on 1 August 2000. Mr Gaskell was employed as a Team Member at DC2 but was also the GMB trade union Convener/Branch Secretary and, as such, attended monthly health and safety

meetings with management. Mr Willis held a more senior position within the Respondent as a Section Leader.

4. The Respondent operated a signing in and out policy, the relevant version of which was dated July 2015, which provided as follows:

> **"Knowing who we have on site at any time is paramount when understanding an emergency evacuation and it forms part of our fire evacuation plan; it is the responsibility of every team member and site visitor to ensure that they have signed in and out in line with the site controls.**
>
> **Why is this important?**
>
> **Signing in and out is important because it allows us to know who is on site in an emergency**
>
> **If you are unaccounted for in an emergency we know to send in the rescue team**
>
> **However if you also fail to sign out you may be endangering the rescue team**
>
> **What we require you to do**
>
> **All team members have an allocated signing in and out sheet which is normally kept in the department or office area this must be completed at the start and end of shift or if you are leaving site for a prolonged period - this will be used for the roll call in an emergency."**

And, as part of the fire signing in and out form, it was stated:

> **"Team members: Signing in and out forms is part of our emergency plan**
>
> **Our health and safety legal requirements; if you fail to sign in and out appropriately then you may be subject to disciplinary procedures... if you have any queries regarding the "fire - signing in and out" process then please speak to your leadership teams...."**

5. The ET noted that, while there was also a process of electronically swiping in and out into some departments at DC2, the manual fire safety signing-in sheet was the only readily accessible register and was therefore relied on by the Respondent in fire drills. It accepted the Respondent's evidence that the need for compliance was taken very seriously as this was an important part of health and safety. The ET further noted that disciplinary action had been taken against other employees for failing to comply with the signing-out procedures. Specifically, during the summer of 2016, disciplinary action had been taken against a Mr Absalom, who had signed-in another employee when he had not physically seen them on site, albeit he could see on the system that they were, in fact, present. Initially it was decided that Mr Absalom would be dismissed but on appeal Mr Absalom's promise that he would not make

the same mistake again was apparently accepted and the disciplinary sanction reduced to a final written warning. As a trade union representative, Mr Gaskell had been involved in Mr Absalom's case and was aware of the decisions taken and the ultimate outcome.

6. More generally, the ET recorded that the examples of gross misconduct listed in the Respondent's disciplinary procedure included a serious infringement of health and safety rules as follows:

> **"Actions that might endanger yourself or others**
>
> **Failure to manage/control or administer the company health and safety policy in respect of any employee/visitor to our premises**
>
> **Failure to comply with health & safety procedures resulting in accident/injury to person."**

7. In October 2016, an unnamed employee reported to management that the Claimants had been breaching the signing-in procedures. That led to a preliminary investigation of the signing-in sheets and CCTV footage by the DC2 Manager, Mr Twist, which showed Mr Gaskell signing the sheet for both himself and Mr Willis, turning a page to sign against Mr Willis's name since their names appeared on different pages. The matter was referred to Ms Lewis, Department Leader, who carried out a formal investigation conducting interviews with both Claimants.

8. In his first interview, Mr Gaskell accepted he had signed-in Mr Willis, saying he did so because he was aware Mr Willis was in the building. Mr Gaskell was suspended pending further investigation; the letter confirming his suspension explained he might be required to attend a formal disciplinary hearing as this might be considered to constitute gross misconduct within the meaning of the Respondent's disciplinary policy.

9. Ms Lewis also interviewed Mr Willis, who explained his understanding that the fire signing-in sheets would be ticked and he would swipe in and out. He was also suspended, with a similar letter explaining the process being provided to confirm his suspension.

10. Ms Lewis then interviewed Mr Twist, who explained he had asked for the CCTV footage to be looked at for the two weeks prior to the report from the whistleblower and that had shown the same thing happening every day, with Mr Gaskell signing himself and Mr Willis in at the same time. Both the Claimants would enter the foyer together; Mr Gaskell would then go up to the offices to sign them both in, while Mr Willis went straight to the warehouse. When Mr Gaskell left early, however, Mr Willis had gone into the office to sign himself out, showing he was aware of the process.

11. Ms Lewis re-interviewed Mr Gaskell, who accepted he had signed-in for Mr Willis "a few times" and that he knew he had not followed the correct process, but he denied falsifying documents on the basis that he knew Mr Willis was in the building, and he stated that Mr Willis would text him when he was leaving. He said he would not do this again and he had not signed anyone else in.

12. In Mr Willis's second interview, he also accepted that he would be signed-in by Mr Gaskell. He would bring Mr Gaskell to work and would let him know when he was leaving but he acknowledged they had stopped texting each other as "complacency set in". He did not think this gave rise to any problem as the important thing was that people would know he was in the building; he further explained that this had been going on for some three to four months, on a daily basis.

13. There were yet further investigation interviews with each Claimant, during which Mr Willis explained how the practice had started on one occasion when they were running late and he had asked Mr Gaskell to sign in for him and it had then "become the norm". Although Mr Willis accepted he was a Section Leader, and therefore had a position of responsibility, he said he considered that Mr Gaskell - as a trade union Convener - held a position of trust, so it was not a problem for him to do the signing-in. As for Mr Gaskell, he explained he would text Mr Willis if he was leaving but would not text to confirm that he had actually signed Mr Willis in.

14. Ms Lewis took the view that these matters should proceed to a formal disciplinary hearing. These hearings were conducted for each claimant by Mr Higgs, the Respondent's Shift Manager, on separate dates in early November 2016.

15. During his disciplinary hearing, Mr Willis confirmed that he knew the correct process but explained he was in a rush and he had, "seen people signing whole departments in"; he therefore considered it was not wrong. Mr Higgs, however, considered that as a Section Leader, Mr Willis should have been responsible for warning others if they had breached the signing-in process; he did not consider that reference to what others may have done was relevant given that Mr Willis had not been within Mr Gaskell's sight when he signed him in, as had occurred in the other cases; this was a serious breach of health and safety procedures and amounted to gross misconduct. Although he had regard to Mr Willis's length of service and clean disciplinary record and considered whether any lesser penalty would be possible, Mr Higgs determined this was a case where Mr Willis should be dismissed for gross misconduct. Specifically, he considered that there had been deliberate and repeated breaches of policy, which were at odds with the Respondent's very clear focus on Heath and Safety, and there had been a complete breach of trust.

16. Mr Higgs took a similar view in Mr Gaskell's case. Although the cases of others were relied on, Mr Higgs considered the circumstances were not the same: this was not a case of genuine mistake but acting in a deliberate way, over a period of time; put in its simplest terms, this was a case of falsification because Mr Gaskell was signing against Mr Willis's name when he was not Mr Willis and he had not obtained permission from management to do this - he was acting on an assumption as to Mr Willis's whereabouts and this was an act of gross misconduct for which the appropriate penalty was dismissal, notwithstanding Mr Gaskell's length of service and past record.

17. Similar views were taken, both on the Claimants' first and second appeals. The first level appeals were conducted by a more senior Shift Leader, Mr Ryan, who carried out further investigations which included speaking with Mr Millgate-Hewer, the Respondent's Senior Health and Safety Officer, about the importance of the procedure, as well as considering Mr Absalom's case, which had been raised but which Mr Ryan considered distinguishable as Mr Absalom had only committed a breach of procedure on one occasion. In the case of each Claimant, Mr Ryan concluded that the decisions to dismiss should be upheld. As for the second level appeals, these were conducted for each Claimant by the Respondent's Head of Inventory, Mr Ingham. Mr Ingham also carried out his own further investigations, including looking into the cases of other employees relied on as comparators. In one case - involving an allegation that a manager had been known to go out twice a day for cigarette breaks without signing-in or out - Mr Ingham forwarded details to Human Resources; ultimately however, he did not consider that these other cases were truly comparable, not least given the time over which the Claimants had continued to breach the policy. Mr Ingham also concluded that the decisions to dismiss should be upheld; he was particularly influenced by the period of time over which the Claimants had acted in breach of the policy and the letter explaining his decision referred to the

Respondent's zero tolerance for breaches of health and safety, which had to be seen in the context of previous serious incidents, which had resulted in catastrophic outcomes.

The ET's Decision and Reasoning

18. Against the ET's unanimous findings, as we have summarised above, the Lay Members took the view that the matters complained of amounted to misconduct rather than gross misconduct. They reasoned that the seriousness of a health and safety breach is to be considered in the context of the risk caused by the breach, explaining their thinking as follows:

> **"93… Signing the sheet for Mr Willis and Mr Willis allowing this to happen is not a serious health and safety breach in the circumstances. The Respondent referred to the fire risk caused by the improper signing practice whereby someone may be looked for in a burning building if signed in and not there or someone would be ignored in a burning building if signed out but still there. However there was never any suggestion Mr Willis was not in the building when signed in nor that he was in the building when signed out. There would be control by a role call process if there was an evacuation and as Gemma Lewis said in her evidence people would go to the nearest point. If Mr Willis was signed in and out appropriately regardless of by whom then he would be properly checked through the roll call process. Mr Higgs described the risk factor as a risk however small. Nobody suffered as a result of the breach or came to physical harm. The majority view was there was no real potential risk because the fire sheet was not wrongly completed but it was correctly completed but by the wrong person.**
>
> **94. The majority consider that the Claimants were not furtive and there was open signing in of Mr Willis in and out. Neither of the Claimants ever signed anyone else in or out or allowed anyone else to sign them in and out. Furthermore they never breached the fundamental key requirement of the fire signing process which was to provide a record of employees who are either on or off the premises at any particular time. In the majority view the Claimants whilst not accepting what they did was a serious breach of health and safety, always admitted what they did was wrong and apologised repeatedly. Therefore the view from Mr Ingham that there was a refusal by Mr Gaskell to accept the seriousness of the actions did not allow for this consideration."**

19. As for the comparative cases relied on by the Claimants, the Lay Members considered that Mr Absalom's case was more serious in that he had signed someone in when that person was not on site; although this was a single incident, that factor had not been mentioned in his disciplinary. It was, furthermore, not correct to characterise what Mr Gaskell had done as falsification - the label used by the Respondent - as that was likely to mean knowingly compiling a document with incorrect information; that was not what had happened here.

20. As for the seriousness of the breach of health and safety policy, the setting aside of the dismissal of Mr Absalom's case - a decision of which Mr Gaskell was aware - did not support the Respondent's case that it had a zero tolerance of breaches in this regard. There was also some suggestion of others breaching the policy, which had not been fully investigated, and the ET majority considered it was too fine a distinction to say, as the Respondent did, that it was reasonable to allow someone to sign others in when they were all present at the signing in book but not when they had just left and were not far away. Ultimately, the ET majority took the view that the Claimants' conduct had not amounted to gross misconduct and had not justified the dismissals under ordinary unfair dismissal principles pursuant to section 98(4) of the **Employment Rights Act 1996** (see paragraph 101 of the ET's Judgment).

21. That said, the ET Lay Members did consider that the Claimants' conduct warranted a reduction in the basic and compensatory awards of one third.

22. The Employment Judge, in the minority, took a different view, reasoning as follows:

> **"103. The minority view, Employment Judge Davies, was that the actions of the Claimants constituted a serious breach of health and safety procedure. It is not the actual risk but the potential risks which have to be considered. Both the Disciplinary Officer and the Appeals Officers properly balanced the failures to comply with the procedure and came to reasonable decisions regarding breach of the health and safety policy. Moreover the repetition of these offences for a prolonged period of some months meant that comparison with single one off cases was not valid. This was a process deliberately and flagrantly in breach of the health and safety procedures which both the Claimants understood at the time to be breaches, and yet persisted in those breaches until discovered by way of complaint from a third party. As regards the signing out there were inconsistencies in the account of Mr Willis and Mr Gaskell regarding the procedure of text messages. The fact that Mr Willis was not present when Mr Gaskell signed his name in the book was a significant distinguishing fact which was properly reasonably considered by the Respondents."**

23. Concluding that the Respondent had been entitled to find that this was a serious health and safety breach, the Employment Judge considered that - as a wilful and repeated breach on an almost daily basis - it was permissibly treated as gross misconduct even if it did not fall within the examples within the Respondent's disciplinary policy. Against a background of tightening up health and safety procedures, the Respondent had given cogent reasons for

deciding that dismissal was the appropriate sanction; none of the other cases relied on were true comparisons and the reasons given by the Respondent for distinguishing those cases were reasonable; to find otherwise would be to impermissibly substitute the ET's view for that of the reasonable employer. If, however, that conclusion was wrong, the Employment Judge agreed with the ET majority, that a reduction of one third the contributory fault would be appropriate.

The Appeal

24. The Respondent's appeal is put on five grounds: (1) it is said that the ET majority erred in that they substituted their views for that of the reasonable employer; (2) in finding that the conduct was not a serious health and safety breach, and that the Claimants' actions did not amount to gross misconduct, the ET majority had focused on the wrong issue and had failed to have regard to a relevant factor, alternatively had reached a perverse conclusion; (3) in finding the Claimants never breached the fundamental key requirement of the signing-in process, the ET majority again erred in failing to have regard to a relevant consideration, alternatively reached a perverse conclusion; (4) as for the finding that this was not falsification, this again failed to have regard to a relevant consideration or was perverse; (5) moreover, in finding that Mr Absalom's case gave rise to inconsistency of treatment the ET majority applied the wrong test and/or misapprehended the evidence and had erred in wrongly focusing on individual decision-makers rather than considering the process as a whole.

25. The Claimants' resist the appeal, essentially relying on the reasons provided by the ET majority.

The Relevant Legal Principles

26. The starting point in any unfair dismissal complaint is section 98 of the **Employment Rights Act 1996** (the "ERA"), which relevantly provides as follows:

> **"(1). In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
>
> **(a). the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b). that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2). A reason falls within this subsection if it—**
>
> **(a) …**
>
> **(b) relates to the conduct of the employee,**
>
> **…**
>
> **(4). [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

27. Although the ET majority did not find that the Claimants had been guilty of gross misconduct - a term that connotes a deliberate flouting of the essential contractual conditions involving either deliberate wrong-doing or gross negligence (**Sandwell & West Birmingham Hospitals NHS Trust v Westwood,** UKEAT/0032/09/LA) - they did accept that this was a dismissal for a reason relating to the Claimants' conduct. The question was, therefore, whether the decision to dismiss, having regard to that reason, was fair.

28. As the Claimants have emphasised in their arguments before us, Parliament has made clear that the determination of fairness for section 98(4) purposes is a matter of assessment for the ET; the decision reached in this regard is akin to a finding of fact (see, for example, the discussion in **Retarded Children's Aid Society Ltd v Day** [1978] ICR 437 and **Bowater v Northwest London Hospitals NHS Trust** [2011] EWCA Civ 63). As such, it will not be open

to the EAT to interfere unless the ET has applied the wrong legal test, has failed to take account of relevant factors or has had regard to an irrelevant matter or has reached a decision that is perverse (that is, the decision in question was one that no reasonable ET properly appreciating that all of the evidence could have made, see **Yeboah v Crofton** [2002] IRLR 634, and see the various iterations of that test set out in **Stewart v Cleveland Guest (Engineering) Ltd [**1994] UKEAT/0683/93).

29. For its part however, an ET will err in its approach if it substitutes its view for that of the employer. Its job is to determine whether the employer has acted in a manner in which a reasonable employer might have acted in the circumstances, even if the ET would itself have acted differently, see **Iceland Frozen Food v Jones** [1982] IRLR 439 (specifically, the five principles set out in that case at pages 24G to 25A). The band of reasonable responses approach applies equally to each aspect of the decision-taking; this includes the employer's assessment of credibility (**Linfood Cash and Carry Ltd v Thomson [1989]** ICR 518 at 523) and the investigation and process followed (**Sainsburys Supermarkets Ltd v Hitt** [2003] IRLR 23, at paragraphs 20 and 30 to 34), as much as the decision taken as to appropriate sanction (**British Leyland (UK) Ltd v Swift** [1981] IRLR 91, paragraph 11). In this regard, the respective roles and functions of employer, ET and EAT were explained by Mummery LJ in **London Borough of Brent Council v Fuller** [2011], ICR 806, as follows:

> **"12. … it is for the employer to take the decision whether or not to dismiss an employee; for the ET to find the facts and decide whether, on an objective basis, the dismissal was fair or unfair; and for the EAT (and the ordinary courts hearing employment appeals) to decide whether a question of law arises from the proceedings in the ET. As appellate tribunals and courts are confined to questions of law they must not, in the absence of any error of law (including perversity), take over the ET's role as an "industrial jury" with a fund of relevant and diverse specialist experience."**
>
> **….**
>
> **"27. ... 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."**
>
> **…**
>
> **"30. Another teaching 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 a pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a 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."**

30. Although it is thus impermissible for an ET to substitute its own findings of fact for those of the decision taker (and see **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 at paragraphs 40-43), in **JJ Food Service Ltd v Kefil** [2013] IRLR 850 Langstaff J cautioned against over reliance on allegations of substitution mindset: to identify substitution there must be some indication that the ET has asked not whether what the employer did was fair but, instead, what it would have done in the light of the basic and underlying facts (see paragraphs 17 and 18 of the EAT's Judgment in **JJ Food**).

31. On the particular question of consistency of treatment, an ET should only find that a dismissal is unfair for inconsistency if the two cases in question were truly similar (see **Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352, in particular, at paragraphs 24 to 25 of the discussion and guidance in that case, where it was stressed that ETs must scrutinise arguments based on disparity with particular care). Specifically, in **Securicor v Smith** [1989] IRLR 356, it was noted that the range of reasonable responses test extends to questions of consistency: provided the assessment of the similarities and differences between different cases was one which a reasonable employer could have made, the ET should not interfere even if its own assessment would have been different. Indeed, in **Securicor v Smith**, the Court of Appeal held that the employer's decision on consistency could only be overturned if its assessment was so irrational that no employer could reasonably have made it. Although we would respectively

demur from using the language of irrationality in this context, it seems to us that the real issue identified by the Court of Appeal in **Smith** is whether the view taken fell within the range of reasonable responses, see paragraph 43 of that Judgment.

32. In perversity appeals a high test must be met by any Appellant. Where an ET has properly directed itself according to the principles laid down in **Burchell**, then - save where there is a proper basis for saying it simply failed to follow its own self-direction - the EAT should not interfere with the decision reached, unless there is no proper evidential basis for it or if it is perverse (see **Salford Royal NHS Foundation Trust v Roldan** [2010] EWCA Civ 522). Moreover, it is not for the EAT to go through the ET's Judgment with a fine tooth comb to seek out errors: just because a particular point has not been expressly mentioned does not mean the ET did not have it in mind (and see Lord Denning at page 444, **Retarded Children's Aid Society v Day** [1978] ICR 437); an ET's Judgment is not required to be an elaborate formulistic product of refined legal draughtsmanship (and see the well known guidance in **Meek v City of Birmingham District Council** [1987] IRLR 250).

Submissions

The Respondent's Case

33. By its first ground, the Respondent says the ET majority substituted its view for that of the reasonable employer, explicitly and repeatedly overriding the Respondent's assessment of the seriousness of the Claimants' conduct and substituting its own view (e.g. in holding that Mr Gaskell's signing of the sheet for Mr Willis, and Mr Willis's allowing this to happen, was not "a serious health and safety breach", see paragraph 93; in stating that Mr Absalom's case was a more serious one on the facts, paragraph 95; in stating that Mr Gaskell did not pose any threat to himself and no threat to Mr Willis or any others, paragraph 96; by find that the manner in which Mr Gaskell signed Mr Willis into work was outside the company procedure but complied

with the overall requirement, paragraph 99; and by holding that this was not gross misconduct, paragraph 101). In each instance, the ET majority had explained its conclusion exclusively by reference to its own assessment without proper reference to, or consideration of, the Respondent's assessment. There was no indication that the ET majority had applied, in any meaningful way, the band of reasonable responses test and the reasoning of the majority in this regard stood in sharp contrast to that of the ET minority, where there were repeated references back to the 'range' test.

34. Second, and more specifically, in finding that the conduct was not a serious health and safety breach in these circumstances (paragraph 93) and that the the Claimants' actions did not amount to gross misconduct (paragraph 101), the majority focused on the wrong issue and failed to have regard to relevant considerations, alternatively misapprehended the evidence or reached a perverse conclusion. The importance of the fire signing sheet was clearly set out in the relevant policies and the Respondent's disciplinary policy provided that, "actions that might endanger yourself or others", were classified as gross misconduct (see the ET at paragraph 90). Moreover, in cross-examination, Mr Gaskell had acknowledged, "I don't think I was entitled to disregard the policy but I did it anyway on a regular basis". In stating its conclusion on gross misconduct, the ET majority made no reference to the relevant legal tests or to the Respondent's policies or to the deliberate and repeated nature of the Claimants' conduct but had, rather, wrongly focused on the fact that no harm had occurred instead of the fact that the Claimants routinely ran the risk that it might (which was the mischief that the policy sought to address).

35. Third, the Respondent complains that the majority erred in finding that the Claimants had never breached the fundamental key requirement of the fire signing process and thus failed to have regard to a relevant matter or reached a decision that was perverse. Specifically, for a

record of this sort to be fit for purpose, it must self-evidently be accurate. As the agreed note of evidence recorded, however, Mr Gaskell admitted there had been several occasions where he had ticked Mr Willis out and then gone downstairs only to find Mr Willis was not there. In the light of that evidence, it was perverse for the ET majority to find that there was never a breach or that the fire sheet was never wrongly completed.

36. Fourth, the ET majority had characterised the Respondent's finding of falsification of documents (specifically levied against Mr Gaskell), as weak but the reasoning provided was insufficiently clear to support a finding of unfair dismissal on this basis. Simply put: when Mr Gaskell signed Mr Willis in and out, he was stating that Mr Willis was present at the signing in sheet when he was not; that was a falsehood, something Mr Gaskell, it is said, had accepted in cross-examination. Given this evidence, it was not open to the majority to reject the Respondent's case on falsification. Equally this meant that the ET majority's rejection of the comparison with an employee signing-in or out another employee who was standing next to them could not stand.

37. Lastly, in finding that Mr Absalom's case warranted a finding of inconsistency of treatment, the ET majority applied the wrong test and/or misapprehended the evidence. On the comparative question, there was no evidence of anyone else who had knowingly and deliberately committed a repeated breach of established health and safety procedures over a period of several months, as the Claimants accepted they had done. Specifically, when the ET majority found that Mr Absalom's case was more serious because he had signed a colleague in when he had not seen her, that was a misapprehension of the evidence. Mr Absolum had in fact seen the colleague in question was present from the system - which showed she was already working – but had wrongly assumed she had arrived at 6.00am when she had arrived at 6.15am. It was not, however, in dispute that she was present when he signed her in. Moreover, the ET

majority had wrongly focused on the view formed by each individual decision-taker (specifically, that of Mr Higgs) rather than looking at the process as a whole. It had also failed to appreciate that in some instances (for example, the manager leaving site for a cigarette) the allegations made against others were bare assertions and the finding of inconsistency could not be made good by reference to an unproven allegation.

The Claimants' Case

38. For the Claimants it is said that this appeal gives rise to an important point of policy: ET Lay Members use their industrial knowledge to determine what was or was not within the band of reasonable responses, they have an equal vote in the overall decision and, provided they have correctly applied the law, the majority view of Lay Members can not be overruled because an Employment Judge disagreed with them. It was also helpful to keep in mind precisely what it was the Claimants had done: they had arrived at work together and simply parted company when Mr Gaskell went upstairs to sign them in; they would then meet up again and leave together, Mr Gaskell again signing them both out. Given that the Respondent considered it acceptable to sign-in and out another employee when they were standing next to the sheet, the question arose as to when it ceased to be acceptable to do this.

39. Turning then to the specific grounds of appeal and the first ground relied on (substitution), the Claimants contend that the Lay Members made no error; they did not substitute their view for that of the reasonable employer but had identified the correct test (see paragraphs 74 and 86-88) and could be seen to have applied that throughout their reasoning (see paragraphs 93-101). As Langstaff J had cautioned in **JJ Food Service Ltd v Kefil**:

> **"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…."**

40. As for ground 2, and the suggestion that the ET majority reached a perverse decision in concluding that the Claimants' conduct had not amounted to a serious health and safety breach, the Claimants remind us of the high threshold for perversity challenge (see **Stewart v Cleveland Guest (Engineering) Ltd**). They contend that in this case it was logical and necessary (so as to determine the mixed question of fact and law involved) for the ET to consider the nature of the act that had led to the Claimants' dismissals. The fact that it had not been established that Mr Gaskell had actually signed Mr Willis in or out inaccurately was part of the relevant factual matrix and the ET majority was entitled to have regard to that. Although the Respondent relied on the potential risk, the ET was not bound by the reference in the Respondent's policy to, "any actions which might endanger yourself or others", as amounting to gross misconduct, and see **Sandwell & West Birmingham Hospitals NHS v Westwood**, where it was made clear that the ET was not bound to simply accept the employer's characterisation of conduct as gross misconduct. It was apparent that the majority had a clear understanding of the policy and what it required; it was equally clear that they were aware of the fact that the Claimants had acted in the way complained of over a period of time - that much could be inferred from the majority's observation that the fact Mr Absalom had only breached the policy once had not been a reference for the fact of the decision made in his case. More generally, whether or not the Claimants made admissions in their evidence at the ET was not determinative; it was what had been said to the employer before the decision to dismiss had been made that was the issue.

41. As for the Respondent's position, the ET majority had been entitled to find there was a lack of consistency in what was permitted when employees were standing next to the register, but ruled to be gross misconduct if the other person was not physically present in the room. Similarly, on ground 3, it was apparent that the Lay Members understood the process set by the Respondent and the way it had been breached (the Claimants say in a technical sense). They had, nonetheless, concluded that, on the facts, this did not amount to gross misconduct; that was

not a perverse conclusion. Again, the ET majority had been entitled to have regard to what they considered to be the unsatisfactory distinction drawn by the Respondent between the different ways employees signed in for each other. And there was no reason to think that Mr Gaskell was guilty of falsification when signing in for someone else, given that signing-in for someone else was not so characterised when they were also next to the register but not actually signing in for themselves personally. On this point, the ET majority again reached a permissible view, that the Respondent had taken "too finer distinction to say it is reasonable to allow a person to sign others in when they are all present at the signing in sheet and the circumstances here" (see paragraph 99) - that was relevant to the falsification charge that Mr Gaskell had faced.

42. Lastly, the ET had referred to the key case-law and guidance regarding inconsistency of treatment and the majority had been entitled to reach the conclusion that Mr Absalom's breach had been more serious. It was equally permissible for the majority to have had regard to the fact that the Respondent had not investigated the allegation that a manager had breached the procedure (something that contradicted the assertion that the Respondent had a zero-tolerance policy for breaches of health and safety procedures): ultimately, the Respondent had not been able to make good its contention that it allowed no health and safety breaches.

Discussion and Conclusions

43. The question raised by this appeal can be simply put: when assessing the question of fairness under section 98(4) **ERA**, did whether the ET majority fail to apply the correct test? The fact that the majority was comprised of the ET Lay Members does not, in our view, make any difference to our task. Lay Members sitting as part of an ET have an equal say in the decision reached (as they do when sitting as part of the EAT); if they have correctly applied the law to findings of fact that were open to them on the evidence, and have provided adequate

reasons for their decision, the EAT will not interfere with that decision. That will be so, even if the conclusion reached by the ET Lay Members differs from that of the Employment Judge.

44. In our collective experience this is an uncommon but by no means unheard of circumstance. Allowing that there might well be divergent views (and see paragraph 27 of **LB Brent v Fuller**), there is no reason, in principle, why the Lay Members might not reach an entirely permissible conclusion that a dismissal was fair or unfair whilst the Employment Judge takes the opposite view. There is, therefore, no presumption that a majority decision reached by Lay Members gives rise to an error of law. Indeed, it can be taken that the Employment Judge - even if disagreeing with the ultimate conclusion reached - will have assisted the Lay Members, as necessary, as to the correct legal tests they must apply. Where, however, the decision of ET Lay Members evinces a failure in the application of the relevant equal tests then the EAT will be bound to interfere. That is not failing to give respect to the input of Lay Members; it is simply recognising that they are bound to apply the same legal tests as the Employment Judge: they too must act within the constraints of the statute and of the binding case law relevant to their task.

45. In assessing whether something went wrong in this case we have started with the objections taken by the Respondent to specific findings by the ET majority.

46. First, on the question whether the Claimant's conduct amounted to gross misconduct. In this regard, we bear in mind that section 98 **ERA** simply uses the term "conduct" (not "gross misconduct") and we note that there was no final decision on the wrongful dismissal claim for which such a finding would have been necessary. So far as relevant to its finding on the unfair dismissal claims, we consider the real issue identified (effectively by grounds 2 and 3 of the appeal) relates to the ET majority's view that the Claimants' conduct - which it certainly

accepted amounted to misconduct - did not give rise to a serious health and safety breach in the circumstances of this case.

47. The first problem is that this conclusion was seemingly based upon a misunderstanding of the evidence. The ET majority apparently laboured under the impression that "there was never any suggestion Mr Willis was in the building when signed out". Given, however, the evidence at the investigation stage to the effect that the Claimants had ceased texting each other when they were about to leave the building, that was not something of which there could be any certainty. We have not gone on, however, to consider the evidence Mr Gaskell gave in cross examination before the ET, as we tend to agree with Mr Pollitt that our focus must be on the material that was before the employer when taking the decision to dismiss and the way in which the ET majority approached its task when assessing that.

48. More significantly, it is apparent that the ET majority - when forming its view as to the seriousness of the health and safety breach - was substituting its view of what was important for that of the reasonable employer. Here, the evidence before the decision-takers within the Respondent was that the fire sheet policy required individuals to be physically present at the register when signing in and out so that this document could be used in an emergency, with complete certainty that it accounted for all those present in the building. Indeed, the ET had itself unanimously accepted the Respondent's case in this regard (see paragraph 12, as summarised above) and, in stating their view that continually breaching this policy over a period of many months was not serious, the ET Lay Members were substituting their view of what was important for that of the employer.

49. As for the finding that Mr Gaskell's conduct did not amount to falsification (ground 4), we have rather more sympathy for the ET majority. As the Claimants have submitted, just

because an employer uses a particular term to describe certain conduct does not mean an ET is required to blindly accept and adopt the same label. There were, we can see, difficulties in the use of this language in this case, not least because the Respondent allowed that the employees could sign others in who were standing next to them, although it would not be true to say the actual employee had personally signed in. If this had been the only quibble with the ET majority's reasoning, we would not have been persuaded that we should interfere.

50. We next turn to the ET majority's finding that there had been inconsistency of treatment, in particular, in relying on Mr Absalom's case. Again, the first point that can be made is that the ET majority's conclusion is apparently based on a misunderstanding of the evidence. In finding that Mr Absalom's case was less serious, the ET majority proceeded on the basis that he had signed someone in when that person was not on site (see paragraph 95). That, however, was not the charge against Mr Absalom. The employee in question was on site - that much was apparent from the system that Mr Absalom could see - but Mr Absalom himself had not seen her and had assumed an earlier start time than was in fact the case. That is not to say that the disciplinary charge against Mr Absalom was not a serious matter; certainly, it is apparent that the Respondent considered that it was: Mr Absalom, after all, faced a full disciplinary process and was initially dismissed. Mr Absalom's case had parallels with that of the Claimants, save that he had only breached the policy once rather than on a regular basis over a sustained period of time.

51. More generally, on the question of comparative cases and the issue of inconsistency of treatment, the question the ET majority needed to ask was whether it was in the range of reasonable responses for the Respondent to consider the cases to be distinguishable. That applied to Mr Absalom's case and to any other comparative case relied on by the Claimants. As Mr Pollitt has argued, where others have been allowed to get away with the conduct in

question, that might be relevant to the question of fairness – duly applying the range of reasonable responses test - as indicating to the Claimants that this would not be seen as something that would give rise to disciplinary sanction. Here, however, we again consider that the ET majority erred in substituting the view that they would have taken on comparative cases (not always correctly understood on the facts), failing to ask whether the view taken by this employer fell within the range of reasonable responses.

52. That takes us back to the first ground of appeal and the Respondent's contention that the ET majority erred in failing to apply the correct test and instead adopted a substitution mindset. That is, we consider, what happened here. Notwithstanding the references to the 'range' test in the directions of law, the ET majority repeatedly and explicitly overrode the Respondent's assessment of the seriousness of the Claimants' conduct, and that of other employees, and substituted its own view. That was an error of law, which is fatal to the decision reached and accordingly we are bound to allow the appeal.

Disposal

53. We do not consider that this is a case where it would be appropriate for us to substitute our view for that of the ET. Notwithstanding our criticisms of the ET majority's decision, we do not feel able to say that only one outcome is possible and, as we have identified, the determination of the fairness of a dismissal for section 98(4) **ERA** purposes is for the ET. We consider that the appropriate course in this case must be to remit the case for re-hearing. Given the division between the Employment Judge and the Lay Members, and, having duly applied the tests laid down in **Sinclair Roche & Temperley v Heard and Fellows** [2004] IRLR 763, we further consider that should be to a freshly constituted ET.