Case No: EA-2021-000187-JOJ (Previously UKEATPA/0003/21/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 December 2021

Before :

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

- -

Between :

MR M HOPE **Appellant**

- and -

BRITISH MEDICAL ASSOCIATION **Respondent**

- -
- -

William Young (instructed by Bower Bailey Solicitors) for the **Appellant**
Jack Mitchell (instructed by Capital Law LLP) for the **Respondent**

FULL HEARING
Hearing date: Tuesday 26 October 2021

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant brought numerous grievances against senior managers. These were concerned with, amongst other matters, the failure of senior managers to include him in meetings which he thought he should be attending. Management considered that decisions as to who should attend were a matter for them. The grievances could not be resolved at the informal stage, in part because the claimant wished to discuss his grievances informally with his line manager who had no authority to resolve concerns about more senior managers. However, the claimant refused to progress any of the grievances to the formal stage, instead seeking to retain the ability to do so, and neither did he withdraw the grievances. A grievance hearing was fixed but the claimant refused to attend despite being informed that attendance was considered to be a reasonable instruction. The grievance hearing proceeded and the grievances were not upheld. The respondent considered the claimant's conduct to amount to gross misconduct in that he had brought numerous vexatious and frivolous grievances and had refused to comply with a reasonable management instruction to attend the meeting. He was dismissed. The ET found that his dismissal was fair. The claimant appealed. The principal ground of appeal was that the ET had erred in failing to consider whether the conduct relied upon was capable of amounting to gross misconduct in the contractual sense and that the ET's conclusions were perverse.

Held, dismissing the appeal, that the ET had not erred in its approach. The test under s.98(4) of the Employment Rights Act 1996 involved a consideration of all the circumstances, one of which might include, in some cases, the fact that the conduct relied upon involved a breach of contract amounting to gross misconduct. However, there was no such contractual element in this case and an analysis on that basis was not required. The ET was entitled to conclude that the employer had acted reasonably in treating the reason for dismissal, namely the claimant's conduct as described, as being a sufficient reason to dismiss in all the circumstances.

THE HON. MR JUSTICE CHOUDHURY (PRESIDENT):

Introduction

1. This is an appeal against the judgment of the London Central Employment Tribunal ("the tribunal"), Employment Judge Emery ("the judge") presiding, dismissing the claimant's claim of unfair dismissal. I shall refer to the parties as the claimant and respondent as they were below.

Background

2. The claimant was employed by the respondent Association as a Senior Policy Adviser from June 2014 until his dismissal for gross misconduct on 24 May 2019. His portfolio included professional regulation and whistleblowing. His line manager was Mr Daniel McAlonan, Head of the Regulation, Education and Training team. Mr McAlonan's line manager was Ms Stella Dunn, Head of the Professionalism and Guidance function, and her line manager was Mr Raj Jethwa, Director of Policy.

3. By an email dated 22 January 2018, the claimant wrote to Mr McAlonan with some comments on a report that had been produced by Ms Dunn. Mr Jethwa saw the comments and considered some of them to be inappropriate in that the tone of the claimant's email was dismissive of Ms Dunn. This feedback was communicated to the claimant by Mr McAlonan. On 29 January 2018, the claimant raised a concern about this feedback and sought an assurance that management did not share Mr Jethwa's views as to the tone of the email. This concern subsequently became a grievance and a grievance hearing about the matter was held on 14 March 2018. This was the first of several grievances raised by the claimant about his managers. The grievance was not upheld. The claimant appealed and the appeal decision of Mr Patrick Murphy, Director of Corporate and Finance Services, was issued on 2 July 2018. Mr Murphy did not himself consider the tone of the claimant's email to be dismissive, and the appeal was allowed in part.

4. On 22 February 2018, the claimant wrote to Mr McAlonan to raise his concerns about not

being included in certain catch-up meetings conducted by management. The claimant asked to discuss his concerns informally. It does not appear that this matter went any further at this stage.

5. However, the claimant's concern about not being included in certain meetings was raised on 23 August 2018 and again on 27 November 2018. The claimant asked to discuss these concerns informally with Mr McAlonan. Ms Dunn asked to join in that discussion. However, the claimant rebuffed this request stating that he was only seeking an informal discussion with his line manager in accordance with the grievance policy. The informal discussion followed, after which the claimant was asked whether he wished to move to the formal stage of the grievance procedure. The claimant said that whilst he was not keen to move to the formal stage, he did not wish to "give up his ability to do so" as he had a similar concern about another incident recently.

6. The claimant was given until 21 December 2018 to decide whether he wished to proceed to the formal stage. The claimant responded by raising a grievance that he was being subjected to an "arbitrary deadline" and asked for it to be withdrawn. This was the claimant's third grievance.

7. By this stage, Ms Dunn was beginning to feel that the claimant's repeated criticisms of her management amounted to bullying.

8. On 14 January 2019, the claimant raised two further grievances, one about not being invited by Ms Dunn to attend a meeting, and the second about the imposition of a deadline to decide whether he wished to pursue the formal grievance process. Mr Jethwa offered to discuss the claimant's concerns as Mr McAlonan was on paternity leave. The claimant did meet with Mr Jethwa eventually on 31 January 2019 after initially expressing a concern that it would be inappropriate for Mr Jethwa to be involved. Mr Jethwa made it clear that attendance at meetings was a matter of judgment for managers and that it was not appropriate for these issues to be heard as grievances. Mr Jethwa offered an informal discussion with him and Ms Dunn about ways of working but the claimant said that he would prefer to discuss this with Mr McAlonan in the first instance. Mr Jethwa made it clear that this was not an issue that could be resolved by McAlonan given that it concerned the decisions of more senior managers. The claimant was told that if he persisted with grievances on this issue it may be

treated as a disciplinary issue.

9. In response, the claimant wrote to the Chair of the respondent raising an informal concern about Mr Jethwa's threat of disciplinary action and considered this to be an inappropriate interference in the grievance process.

10. By an email dated 20 February 2019, Mr Jethwa again proposed a meeting with him and Ms Dunn and stated that if the issue could not be resolved informally it would move to the formal grievance stage. The claimant was warned that if the grievance was regarded as frivolous or vexatious, it could result in disciplinary action.

11. On 25 February 2019, the claimant raised a further grievance with Mr McAlonan about Mr Jethwa's communications. By this stage, the claimant had raised around seven grievances.

12. On 12 March 2019, the claimant was invited to attend a grievance meeting on 21 March 2019 with the aim being to understand the nature of his grievance more fully. Following further correspondence, the claimant refused to attend, and the grievance meeting went ahead in his absence. The meeting was chaired by Mr Chris Darke, who concluded that the claimant's behaviour, in insisting that informal concerns that had not been resolved should remain informal without progressing to the formal stage of the process and in refusing to attend the grievance meeting, was frivolous and vexatious. It was further stated that his repeated instigation of the grievance process without following through amounted to an abuse of process. The grievance was therefore dismissed. As Mr Darke considered the claimant's conduct to be frivolous, vexations, disrespectful and insubordinate, he decided to invoke the disciplinary procedure.

13. On 10 April 2019, the claimant was invited to a disciplinary hearing to answer three allegations: (i) that he had submitted numerous, frivolous grievances against Ms Dunn and Mr Jethwa; (ii) that he failed to follow reasonable management instructions in relation to attendance at meetings; and (iii) that there was a fundamental breakdown of the working relationship between the claimant and senior management. The hearing took place on 20 May 2019 and was chaired by external Counsel, Mr Thomas Kibling. In a letter dated 24 May 2019, Mr Kibling set out his conclusions and

found each of the charges made out. He further concluded that the claimant's actions amounted to gross misconduct. The claimant was dismissed for that reason and given a payment in lieu of notice.

14. The claimant appealed but his appeal was not upheld.

15. The claimant issued proceedings claiming unfair dismissal.

The tribunal's decision.

16. The tribunal, having directed itself correctly in law, concluded that the reason for dismissal was the claimant's conduct:

> **"61. …which included the following: persisting in making multiple informal grievances; leaving open the open of option of proceeding to a formal process without taking the step to either do so or withdraw the grievance; persisting in seeking informal resolution from his line manager, including when he was on paternity leave, when the grievances were about more senior managers and when an informal meeting on 28 December 2018 had not resolved the issues; refusing to meet with Mr Jethwa and Ms Dunn; complaining about Mr Jethwa's line management instruction to him to the Council Chair; failing to attend the grievance hearing. I concluded that this was the actual conclusion reached by Mr Darko was (sic) that the claimant's actions were vexatious and unreasonable."**

17. The tribunal went on to conclude that it was reasonable for the respondent to conclude that such conduct was vexatious and unreasonable. Having also found that the conduct of the disciplinary investigation and the appointment of Mr Kibling as Chair of the Disciplinary Panel were reasonable, the tribunal reached the following conclusion as to the sanction of dismissal:

> **"67. I concluded that the dismissal was within the band of reasonable responses of a similarly sized and resourced employer in these circumstances. In doing so, I carefully considered the explanation that the claimant gave for his actions at the disciplinary hearing: that he was treating the grievance process as a shield, he was worried about the conduct he was experiencing at work. However, I concluded that whilst this was the claimant's viewpoint, it was within the range of reasonable responses for the respondent to view the claimant's actions as repeated complaints about legitimate actions taken by the respondent in respect of who attends meetings, complaints which the claimant was neither willing to progress to the formal stage, nor drop; and he then failed to attend the grievance hearing. There was significant evidence of the impact that this conduct had on the working relationship with Ms Dunn, I concluded that it was within the range of reasonable responses for the respondent to conclude that the grievances**

> **were therefore vexatious, that the claimant's conduct had undermined the working relationship, that this was an irretrievable breakdown and amounted to conduct which was likely to breach the implied term of trust and confidence. I concluded that the claimant's appeal was properly considered at appeal stage.**
>
> **68. In conclusion: the respondent has proven the reasons for dismissal, its disciplinary process was reasonable, it collected and took into account all relevant evidence, the decision that the claimant had committed gross misconduct was reasonable in the circumstances, and dismissal was a sanction within the range of reasonable responses."**

18. Accordingly, the claimant's claim of unfair dismissal was dismissed.

The Grounds of Appeal

19. The claimant relied on six grounds, of which only Grounds 2 to 5 were permitted to proceed on the sift:

a. Ground 2 - The tribunal wrongly concluded that the claimant's actions could have been construed as gross misconduct. In accepting that it could, the tribunal failed to take into account the dictum of HHJ Hand QC in **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** UKEAT/0032/09 at [113] that ""gross misconduct" involves either deliberate wrongdoing or gross negligence";

b. Ground 3 – The tribunal wrongly concluded that the claimant's non-attendance at the formal grievance hearing was capable of constituting misconduct;

c. Ground 4 – The tribunal gave insufficient weight to Mr Jethwa's letter dated 20 February 2019;

d. Ground 5 – The tribunal erred in relying on Mr Kibling's incorrect interpretation of the grievance policy.

20. Ground 2 is the principal ground of appeal and I deal with that first.

Ground 2 – Error in construing conduct as amounting to gross misconduct.

Submissions

21. Mr Young of Counsel, who appears for claimant in this appeal, submits that although the tribunal directed itself correctly by referring to the decision in **BHS v Burchell** [1978] IRLR 379, it erred in concluding that the claimant's conduct in this case could be construed as gross misconduct. Mr Young acknowledged that the decision of Langstaff J in **West v Percy Community Centre** UKEAT/0101/15 made it clear that the tribunal is not required to consider whether there had been gross misconduct in a contractual sense in deciding whether the dismissal was fair or unfair within the meaning of s.98(4), ERA. However, where the tribunal does consider the question of gross misconduct, it is incumbent on the tribunal to do so by reference to the contractual test set out by HHJ Hand QC in **Westwood**.

22. Applying that approach, submits Mr Young, the question is whether the conduct in question amounted either to "a deliberate and wilful contradiction of the contractual terms" or "very considerable negligence, historically summarised as "gross negligence". The tribunal here did not assess the conduct in that way and so erred in law. In particular, it is not enough that the respondent considered the claimant's conduct to be vexatious and frivolous; the tribunal ought to have gone on to consider whether the conduct was, objectively, capable of amounting to gross misconduct. Mr Young also relied on another decision of HHJ Hand QC in **Eastland Homes Partnership Ltd v Cunningham** UKEAT/0272/13/MC in which it was held that an assessment of whether the conduct amount to gross misconduct was one of the circumstances that had to be taken into account in applying the test under s.98(4), ERA.

23. Mr Mitchell of Counsel, who appeared for the respondent as he did below, submits that the correct approach is as set out in the judgment of Langstaff J in **West v Percy** where it was made clear that the tribunal is not required to consider whether there has been gross misconduct in the contractual sense before reaching a conclusion in respect of unfair dismissal. Here, the tribunal gave a correct self-direction and considered whether

dismissal fell within the band of reasonable responses as it was required to do.

Discussion and conclusions

24. The starting point, as it must always be, is the terms of s.98, ERA:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
> **(a) the reason (or if more than one, the principal reason) for the dismissal and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
> **(2) A reason falls within this subsection if it-**
> **…**
> **(b) relates to the conduct of the employee…**
> **(3) …**
> **(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."**

25. It is notable that s.98(2) refers to "conduct" as being a permissible reason for dismissal, rather than "misconduct", gross or otherwise. It is well-established that "conduct" for these purposes need not be "reprehensible" or "culpable" in order for it to be a potentially fair reason for dismissal: see **Royal Bank of Scotland v Donaghay** UKEATS/0049/10 at [43] and **JP Morgan Securities plc v Ktorza** UKEAT/0311/16/JOJ at [42].

26. Whether or not dismissal by reason of conduct is fair or unfair within the meaning of s.98(4) depends not on the label attached to or characterisation of the conduct as gross misconduct, but 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. It is equally well-established that the determination of that question involves, in a case where the reason for dismissal is said to be the employee's misconduct, the following four-stage analysis, as pithily summarised by Langstaff J in **JJ Food Service v Kefil** [2013] IRLR 850:

> **"8. In approaching what was a dismissal purportedly for misconduct, the Tribunal took the familiar four stage analysis. Thus it asked whether the employer had a genuine belief in the misconduct, secondly whether it had reached that belief on reasonable grounds, thirdly whether that was following a reasonable investigation and, fourthly whether the dismissal of the Claimant fell within the range of reasonable responses in the light of that misconduct."**

27. There is no requirement in that four-stage analysis to determine whether conduct amounts to "gross misconduct", which involves a separate contractual concept. That was made clear by Langstaff J in **West v Percy**:

> **"24. A gloss has been put upon the approach to section 98(4) by cases such as Burchell, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 and subsequent decisions so often and so regularly that it has become entirely appropriate for a Tribunal to direct itself by reference to the four-stage test there involved. By contrast, gross misconduct is a contractual concept. Where there is misconduct, an employee may be dismissed, and he may be dismissed either with or without notice: but if without notice, there is likely to be an issue as to whether the misconduct is or is not gross. That is a contractual, not statutory, issue upon which the payment of the sum otherwise due during a notice period would depend if an action for wrongful dismissal were to be brought (no such action was brought in the present case). Whether there has been gross misconduct is a finding of fact dependent upon what actually happened. By contrast, a decision in respect of section 98 depends not upon what happened but upon asking what the employer thought had happened, which is a different enquiry.**
> **25. The absence of a proper consideration whether misconduct is or is not gross may entitle an employee who is about to be subject to disciplinary proceedings to obtain an injunction to restrain them (see the case of West London Mental Health NHS Trust v Chhabra [2014] ICR 194 SC). …**
> **26. It may be more usual that a dismissal is held fair where there is something that might be described as gross misconduct contractually, and as such within the terms of the employer's disciplinary procedure (especially if that is contractual) it would be held unfair. It may be unusual that a dismissal is held unfair where there is no gross misconduct. But in neither case is the presence or absence of gross misconduct, as such, determinative. Gross misconduct is, rather, a label that is applied by the courts in determining contractual issues, and though it may be a trigger for other actions, to proceed to determine a claim under section 98(4) by asking whether the label is appropriate or not is to take a completely unnecessary step. The question is whether what the employer thought had happened, in the circumstances in which the employer thought the conduct to have occurred, was or was not sufficient to justify the employer's actions so as to be held not unfair within section 98(4) ."**

28. I respectfully agree with that analysis.

29. Mr Young accepts that there is no requirement on a tribunal to determine whether misconduct was capable of amounting to gross misconduct but contends that where the tribunal does consider gross misconduct, it must do by reference to the contractual tests adumbrated in **Westwood**. It was suggested to Mr Young that if he were right about that then the tribunal would face an easier task and could avoid the contractual analysis by the

simple expedient of disregarding any reference to gross misconduct in its analysis. Mr Young accepted that that would be the outcome but contended that that was a necessary consequence of the tension between **West v Percy**, which confirms that the tribunal need not consider whether the conduct amounts to gross misconduct, and **Westwood** in which the tribunal was held to have erred in not considering whether the conduct was capable of amounting to gross misconduct in the contractual sense.

30. In my judgment, such an unattractive outcome would be reason in itself to doubt the soundness of Mr Young's proposition. However, the proposition cannot be accepted for the simple reason that there is no tension between **West v Percy** and **Westwood**; the different approaches taken to the question of gross misconduct in each case being readily explicable by the circumstances of each case.

31. In **Westwood**, an experienced nurse was dismissed after being party to an incident during which an apparently intoxicated patient, who refused to leave after being discharged, was removed by being wheeled outside on a trolley and left there in the middle of the night. This conduct was considered to be in breach of Trust policy and a failure to provide appropriate care and treatment to a patient, and the nurse was dismissed for gross misconduct. The Trust's disciplinary policy expressly provided that "no employee will be dismissed for a first breach of discipline except in the case of gross misconduct". The employment tribunal considered that the nurse's conduct amounted to a momentary lapse in the heat of the moment and could not be seen as either "deliberate wrongdoing" or "gross negligence" such as to amount to gross misconduct. The Trust appealed, contending that the tribunal had erred in not treating the Trust's belief that there had been gross misconduct as dispositive, in that such belief was within the band of reasonable responses. The Trust's submission before HHJ Hand QC was that if what the nurse had done amounted to a breach of Trust policy, which had been stipulated as amounting to gross misconduct, then that was the end of the matter. HHJ Hand QC rejected that

submission stating as follows:

> **"109. We do not accept that submission. It is not clear to us what the breach of Trust policy actually was. The conduct complained of was taking the patient outside. Assuming that is a breach of Trust policy, it still remains to be asked – how serious a breach is that? Is it so serious that it amounts to gross misconduct? In our judgment that is not a question always confined simply to the reasonableness of the employer's belief. We think two things need to be distinguished. Firstly the conduct alleged must be capable of amounting to gross misconduct. Secondly the employer must have a reasonable belief that the employee has committed such misconduct. In many cases the first will not arise. For example, many misconduct cases involve the theft of goods or money. That gives rise to no issue so far as the character of the misconduct is concerned. Stealing is gross misconduct. What is usually in issue in such cases is the reasonableness of the belief that the employee has committed the theft.**
> **110. In this case it is the other way round. There is no dispute as to the commission of the act alleged to constitute misconduct. What is at issue is the character of the act. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract. What then is the direction as to law that the employer should give itself and the employment tribunal apply when considering the employer's decision making?**
> **111. Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee: see Wilson v Racher [1974] ICR 428, CA per Edmund Davies LJ at page 432 (citing Harman LJ in Pepper v Webb [1969] 1 WLR 514 at 517):**
> **"Now what will justify an instant dismissal? - something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract"**
> **and at page 433 where he cites Russell LJ in Pepper (page 518) that the conduct "must be taken as conduct repudiatory of the contract justifying summary dismissal." In the disobedience case of Laws v London Chronicle (indicator Newspapers) Ltd [1959] 1 WLR 698 at page 710 Evershed MR said:**
> **"the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions."**
> **So the conduct must be a deliberate and wilful contradiction of the contractual terms.**
> **112. Alternatively it must amount to very considerable negligence, historically summarised as "gross negligence". A relatively modern example of "gross negligence", as considered in relation to "gross misconduct", is to be found in Dietman v LB Brent [1987] ICR 737 at page 759." (Emphasis added)**

32. That case is not, in my judgment, authority for the proposition that whenever the label "gross misconduct" is used, a contractual analysis as to whether the conduct amounted to wilful contradiction of the contract or gross negligence is required. The need for the contractual analysis in **Westwood** only arose out of the fact that the misconduct relied upon was said to be in breach of Trust policy, such breach having been contractually stipulated to amount to gross misconduct. As the judgment in **Westwood** makes clear, that

is not enough on its own: it remains a question for the tribunal, where dismissal for gross misconduct in that case could prevent continuation in nursing as a career, whether such breach was sufficiently serious to be treated as warranting summary dismissal. In other words, that contractual context was merely one of the circumstances to be taken into account in determining whether the employer had acted reasonably or unreasonably in treating that reason as sufficient to dismiss. An employer that seeks to stipulate seemingly trivial or minor misconduct as gross misconduct warranting summary termination can expect careful scrutiny by the tribunal to determine whether dismissal for such misconduct was within the band of reasonable responses. Of course, there may well be situations where the employer is, as a result of the particular requirements of the industry or the environment in which work is carried out, justified in treating what might appear to the outside observer as minor matters as warranting summary termination. However, in general, the real question is and remains the statutory one of whether the employer acted reasonably or unreasonably in all the circumstances in treating the conduct as sufficient reason to dismiss.

33. Viewed in that light, it becomes apparent that there is no "tension", as Mr Young put it, between the decisions in **West v Percy** and **Westwood** at all: both cases confirm that whether an employee is in breach of contractual obligations is a potentially relevant consideration in that that is merely one of the circumstances to be taken into account in considering whether the dismissal was fair or unfair within the meaning of s.98(4). The point was made clearly by Langstaff J in **West v Percy** when discussing the effect of **Eastland v Cunningham**, another of HHJ Hand QC's judgments upon which Mr Young relies:

> **"27. In the course of his submissions in support of this argument Mr Woodward took us to Eastland Homes Partnership Ltd v Cunningham UKEAT/0272/13, an unreported decision of this Tribunal of 7 January 2014, HHJ Hand QC sitting alone. That was an extempore Judgment. It considered the converse case to the present in many respects. In that case an Employment Judge had found that conduct did not amount to gross misconduct and that**

> **therefore a claim for unfair dismissal should succeed. The Judge also rejected a claim that there had been wrongful dismissal but did not explain why. In the context of unfair dismissal he did not explain or discuss why it was unreasonable for the employer to have characterised the conduct as gross misconduct, which in that case was completely linked as a matter of fact with the employer's decision to dismiss him. He recognised that Burchell , Jones , Foley , Sainsbury's Supermarkets Ltd v Hitt [2003] ICR 111 , London Ambulance Service NHS Trust v Small [2009] IRLR 563 , Graham v SSWP [2012] IRLR 759 , Barchester Healthcare Ltd v Tayeh [2013] IRLR 387 , and JJ Food Service Ltd v Kefil [2013] IRLR 850 did not suggest that any finding as to the reasonableness of the characterisation of conduct as gross misconduct was called for. He concluded nonetheless that it could be said to be part and parcel of all of the circumstances, and it was all of the circumstances that had to be taken into account in reaching a decision under section 98 .**
> **28. We do not regard this case as requiring a Tribunal always to consider whether there has been gross misconduct contractually as between employer and employee, and in particular as having to do so before reaching a conclusion in respect of unfair dismissal. Circumstances which would show that an employee was in breach of his contractual obligations to an employer will undoubtedly be of potential relevance. So also will be a situation in which it can be shown that the employee was not in any such breach. However, these are part and parcel of all of the circumstances, by which matters have to be assessed under section 98(4) . It was this last point which HHJ Hand was emphasising in Eastland v Cunningham . We do not think that it can be said of this Judge that his conclusion was in error because he did not consider the question of gross misconduct, as such, as a necessary step in reaching his conclusion."**

34. I therefore reject Mr Young's submission that the tribunal in the present case erred in its approach to the issue of gross misconduct. This is not a case where any contractual analysis was necessary: the claim was not one of wrongful dismissal and the respondent did not seek to rely upon any contractually stipulated act as amounting to gross misconduct. In particular, it was not necessary in the circumstances of this case to determine whether the claimant's conduct amounted to a "wilful contradiction of the contractual terms" or was "grossly negligent" (although that is not to say that the conduct complained of here could not amount to the former given the tribunal's conclusion that it was likely to amount to a breach of the implied term of trust and confidence: [67]). Instead, the respondent relied upon the numerous grievances raised by the claimant which were considered to be frivolous or vexatious and the failure to comply with reasonable and lawful instructions. The tribunal carefully went through the stages of determining whether the respondent believed that those were the reasons for the dismissal, that it had reasonable grounds for that belief, that it had carried out as much investigation as was reasonable in

the circumstances and whether dismissal was within the band of reasonable responses: see [60] to [67] of the judgment. No error of law is disclosed.

35. Ground 2 therefore fails and is dismissed.

Grounds 3 to 5 –perversity

36. These grounds were taken together by Mr Young. As a general point in support of these grounds (and also of Ground 2), Mr Young sought to persuade me that the primary reason for the dismissal was the claimant's failure to attend the grievance hearing, that such non-attendance could not reasonably be considered a disciplinary matter, and that, as such, the analysis of fairness overall was contaminated and unsafe. I do not accept that submission.

37. It is quite clear, both from the contemporaneous correspondence and from the tribunal's findings, that the claimant's failure to attend the grievance hearing was just one of several reasons relied upon by the respondent in dismissing the claimant: see e.g. the dismissal decision letter, the contents of which are set out by the tribunal at [48] of the judgment. In any case, there can be little doubt that, in the circumstances of this case, the failure to attend the hearing could reasonably be construed by the respondent as wrongdoing. The claimant had repeatedly raised grievances which were not resolved at the informal stage. However, instead of then pursuing the grievances to the next stage, he sought to keep the grievances alive without actively pursuing them. The reason for so doing was that he was "scared" that pursuing the formal stage would mean that the process would be "closed off": [41]. However, the purpose of a grievance procedure is to resolve concerns about colleagues or the workplace; it is not a repository for complaints that can then be left unresolved and capable of being resurrected at any time at the behest of the employee. The employer cannot be expected to leave concerns unresolved for unlimited duration as this would destroy its ability to address legitimate concerns promptly and to ensure the well-being both of the employee raising the grievance and of those who may be the subject

of the grievance. It was clearly permissible for the tribunal in this case to consider that the employer was acting within the range of reasonable responses in regarding repeated attempts to subvert that purpose as vexatious.

38. Mr Young submits that an employee who raises an informal grievance that is not resolved cannot be obliged to pursue the grievance to the formal stage. The issue in this case, however, was not that the claimant was being obliged to do so, but that he neither withdrew his numerous grievances nor sought to pursue them beyond the informal stage, instead seeking to keep them in a state of limbo with all of the undesirable consequences described above. As the tribunal concluded, the respondent was entitled to regard that as vexatious. It is also relevant in this regard that a number of the grievances were about senior managers, and which Mr McAlonan, the manager at the informal stage, had no power to resolve. It thus does appear that the claimant was seeking to use the grievance procedure as a repository of unresolved complaints upon which he could draw at a time of his choosing, and without any thought or consideration given to the effect that such complaints had on others.

39. Mr Young makes a number of further points in support of his argument that the tribunal's conclusion that the respondent's response was within the band of reasonable responses was perverse. In my judgment, none of them gets even arguably close to crossing the high hurdle of establishing a perversity challenge:

    a. He contends that it cannot be reasonable or fair for an employer to "punish an employee for not proceeding with a grievance". However, as stated above, this was a case where the claimant sought to preserve his grievance without progressing it, allowing it to be resolved or withdrawing it.

    b. He contends that the correspondence from Mr Jethwa shortly before the grievance meeting made it clear that non-attendance by the claimant would simply be treated as a withdrawal and that it was therefore perverse in those circumstances to consider that

the respondent acted reasonably in disciplining the claimant for non-attendance. However, this ignores the fact that matters had moved on in further correspondence (which was shown to the EAT and which was before the tribunal) and in which it was made clear to the claimant that the request to attend was considered to be a reasonable request. Furthermore, there was nothing to suggest that the claimant was in fact withdrawing his grievances or wished to be treated as having done so. There were no findings to that effect and there is no challenge on the basis that the tribunal ought to have so found.

c. The final point made by Mr Young is that the wording of the grievance policy supports the claimant's position. However, even on the claimant's case, the policy only supports his position if one reads in the words, "if the employee raising a grievance wishes to proceed with it". Those words are not in the policy and the argument does not get off the ground for that reason alone. In any event, the claimant's arguments in this regard are premised on the notion that he is entitled to use the grievance procedure as a repository of unresolved complaints. For reasons already set out that is not correct.

Conclusion

40. For these reasons, and notwithstanding Mr Young's clear and careful submissions, this appeal fails and is dismissed.