Neutral Citation Number: [2022] EAT 16

Case No: EA-2020-000270-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 February 2022

Before :

HIS HONOUR JUDGE MARTYN BARKLEM

- -

Between :

MISS S LEWIS **Appellant**

- and -

THE GOVERNING BODY OF TAI'RGWAITH PRIMARY SCHOOL **Respondent**

- -
- -

Mr R Quickfall for the **Appellant**
Mr J Walters (instructed by Neath Port County Borough Council) for the **Respondent**

Hearing date: 16 November 2021

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JUDGMENT

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SUMMARY

UNFAIR DISMISSAL

An ET found that a teacher had been unfairly dismissed following an incident in which a young child had been pulled to the floor. This was because of procedural faults in not making reasonable attempts to ensure that the witnesses to the incident could attend in person at the disciplinary hearings. It went on to find that each of the awards for basic and contributory awards should be reduced by 100% because of the claimant's blameworthy conduct.

The EAT rejected the claimant's appeal of perversity – the ET had been obliged to make its own findings of fact when addressing contributory fault, and it was its own conclusions as to the evidence which were relevant. Although pithily stated in the concluding paragraph, all the relevant questions set out in the case law were addressed by the ET, and the final paragraph had to be read in conjunction with the remainder of the reasons. When procedural flaws which had been identified by the ET had no causal link to the dismissal there was no requirement as a matter of law that some compensation had to be paid. In such circumstances a 100% deduction was perfectly lawful.

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HIS HONOUR JUDGE BARKLEM:

1. In this judgment I shall refer to the parties as they were below. This appeal is against the decision of an ET sitting in Swansea over 11 days in December 2019 (Employment Judge Beard sitting with Mr W Davies and Mrs M Humphries) written reasons having been sent to the parties on 4th February 2020. Claims were before the ET of disability discrimination, victimisation and other forms of unfair dismissal. Each was dismissed, and the appeal is concerned only with the ET's finding of "ordinary" unfair dismissal under s98 of the **ERA 1996**, and more specifically the decision subsequent to that finding that both basic and compensatory awards be reduced by 100%.

2. The appeal was permitted to proceed to proceed to a full hearing by Mr Matthew Gullick QC sitting as a Deputy High Court Judge in relation to all grounds. The final ground concerned an assertion that the ET's finding at paragraph 25.5 of the reasons that the claimant had lost her temper, acted inappropriately and used unnecessary force was perverse and therefore wrong in law. That assertion was required to be further particularised, and a 35 paragraph document was drafted setting out particulars of alleged perversity.

3. The claimant was represented at the EAT hearing by Mr Quickfall of counsel who did not appear below, and the respondent by Mr Walters of counsel who did. Each has submitted helpful skeleton arguments augmented by oral submissions for which I am grateful.

4. The events with which the appeal is concerned happened as long ago as 15th March 2016. The claimant was a foundation years teacher who had been employed at the Tai'rgwaith Primary School from September 2001. There was in her class at the material time a child – his name is on the papers but I will adopt the ET's practice of calling him "Child B" - who had learning

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difficulties. It is common ground that, on the day in question Child B rose from the ground where he had been sitting with other children whereupon the claimant took his arm and pulled him back to the ground. I have used deliberately neutral language because precisely what took place in those few seconds is at the heart of what followed leading, ultimately, to this appeal.

5. The ET was scathing both as to the behaviour of some of the people involved in the aftermath of the incident as well as procedures which were adopted. There is little purpose in my setting out its findings in detail: suffice it to say that the ET found the school and its Head to have been effectively dysfunctional and to have adopted what it called "knee jerk" procedures.

6. The mother of Child B raised a complaint. Following a slow police investigation which did not result in proceedings being taken further the matter was dealt with by an investigation carried out by a Mr Parry acting on behalf of an organisation called Servoca. The ET found the resulting report thorough and well balanced. It came to no conclusions but set out the evidence gathered, with pointers as to strengths and weaknesses that might be considered. The ET rejected criticism from the claimant that Mr Parry ought to have interviewed two teaching assistants further once it became clear that their accounts were so different from that of the claimant saying, at para 21.4.

> **"In those circumstances it is obvious that the investigation did not need to return of the teaching assistants as to what was an issue. What would have been obvious to anyone reading the report and its appendices was that the claimant was being accused of mishandling the child in the way described by the teaching assistants. The issue for resolution in the disciplinary process would be who was giving a truthful account."**

7. The grounds of appeal assert that the ET erred in law in the following respects:

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1. Failing to distinguish between the basic and compensatory award is in its consideration of contributory fault;
2. Failing to consider whether the procedural failings contributed to the dismissal and, if so the extent of the contribution;
3. Failing properly or at all to consider the extent to which the claimant was blameworthy;
4. Failing to consider whether it was just an equitable to reduce the basic and compensatory award is to nil by reason of the blameworthiness of the claimant and-or to set up the particular features which led it to consider that it was just an equitable to reduce the basic and compensatory award to nil;
5. Failing to make adequate factual findings and-or to give adequate reasons for adopting the exceptional course of reducing both the basic and compensatory awards by 100% on the basis of contributory conduct.
6. The finding of the tribunal at paragraph 25.5of the decision that the claimant lost her temper, acted inappropriately, and in the circumstances, used unnecessary force, was perverse and therefore wrong in law

8. Certain of the ET's findings in relation to the disciplinary and appeal hearings need to be set out in order properly to understand the issues on appeal.

"22. The final disciplinary hearing was held on 7 June 2017 and the appeal hearing on 22 September 2017.
22.1. The claimant sought the attendance of the two teaching assistants that had given evidence of her mishandling of Child B at the disciplinary hearing and the appeal.
22.2. The witnesses did not attend. Heidi Morgan told the tribunal she would have had no difficulty in attending. The impression the tribunal gained from her evidence was that, essentially, she was being discouraged from attending by being told that she did not have to.
22.3. The respondent relies on the fact that witnesses cannot be forced to attend. We do not consider that any real effort was made to ask them to attend, see Carla Davies email to Mr Thomas p. 862.
22.4. This was a case where there was a stark difference of evidence as to a specific event. The hearing was to take place before a panel who had no evidence other than written documentation and whatever evidence the

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claimant chose to give.
22.5. In our judgment, in the specific circumstances, where a decision was likely to be career ending, and there was such a difference in testimony, a reasonable employer would have made efforts to ensure witness attendance after the claimant had requested it.
22.6. The respondent's approach to place reliance solely on the report, in our judgment, fell outside what a reasonable employer would do in these specific circumstances. It is instructive that when questioned members of the disciplinary and appeal panels indicated that they would have been assisted by hearing such evidence."

23.In both the disciplinary and the appeal the claimant was found to have manhandled Child B by pulling him to the ground and of failing to report that she had done this. The claimant argued that this did not amount to gross misconduct.
23.1. The tribunal heard Mr DiBenedictis, Ms Scott and Ms Emma Williams, all who have a professional connection with teaching give evidence that such an assault would potentially amount to gross misconduct, as would failing to report such an action.
23.2. Leaving that aside, in the tribunal's judgment, the lawful use of force by a teacher is limited to occasions of preventing danger or disorder in the classroom.
23.3. The facts accepted by disciplinary and appeal panels, which were based on the accounts given by the teaching assistants did, not point to any such disorder or danger and as such the use of force clearly fell within the category of gross misconduct.
23.4. It was not the claimant's contention that the two panels held any animus toward the claimant. Rather her position was that they had been manipulated by the headteacher and the evidence he had arranged to be gathered into dismissing the claimant.
23.5. Having viewed the evidence of Heidi Morgan and Kathryn Pugh the tribunal find that there is no substance in an argument that they were suborned into giving false evidence by Mr Thomas. In our judgment both the disciplinary and the appeal panels had rejected the claimant's account of events.
23.6. In the case of the disciplinary panel this was on the basis that the claimant's account did not match the classroom circumstances. Mr Humphries told us that the description of the computer table by the claimant did not accord with reality, there were no hanging cables for instance.
23.7. That was a logical basis to reject the claimant's account and prefer the written evidence of the teaching assistants who they considered, on the evidence that they were aware, of had no reason to lie. The claimant complains that the panel were not near the classroom to view it. Mr

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Humphrey's evidence was that he was very familiar with the classroom, the tribunal accepted that to be the case.
23.8. The appeal panel rejected the claimant's evidence because they could not reconcile the version in her evidence before them with the description of what she had done that the claimant gave to the mother. They considered that if the claimant was "guiding" Child B as she contended, she would not have described this as pulling to the floor to the mother. This again was a perfectly rational reason for rejecting the claimant's account.

24.3.6. We do not consider the addition of that information ***[relating to Kathryn Pugh – see below for the full context of this brief passage]*** **to be inconsistent but to be more information. We agree that it is information which might have had an impact at the disciplinary or appeal hearings (and adds to our concerns about failing to call the witnesses). However, in terms of its cogency it did not alter the core of Kathryn Pugh's evidence."**

55. The claimant complains of unfair dismissal. The tribunal consider this claim to be well founded. The respondent did not make reasonable attempts to ensure the attendance of the witnesses the claimant asked for. This was in circumstances where there was a significant issue over key facts which were in dispute. Essentially the claimant contended that she had not used unnecessary force on Child B whereas the other witnesses said that she had. There was nothing in the appeal hearing which would have overcome this failing. This was a situation where a finding that the claimant had used unnecessary force on the child was likely to be career ending for a teacher who had been in the profession for many years. Whilst it was not open to the respondent to force the attendance of witnesses which had left employment, it was not beyond it to encourage the attendance of those witnesses. It was outside the band of reasonable responses to approach the matter as the respondent had done. On that basis the claimant's claim of unfair dismissal is well founded"

9. The ET went on to deal with the question of contributory fault in the following brief and final paragraph:

56. However, the tribunal also found that the claimant used unnecessary force in dealing with Child B. This led to the dismissal of the claimant. The use of unnecessary force is clearly blameworthy conduct, and in our

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> **judgment seriously blameworthy. It was that conduct for which the claimant was dismissed and we consider the claimant contributed to that dismissal to the extent of 100%. In respect of the basic award we consider that the claimant's conduct prior to dismissal is of such a nature, it being in absolute conflict with her duties as a teacher, that it would be just and equitable to reduce any basic award to nil. In respect of any compensatory award we consider that given the level of culpability the claimant's award should again be reduced to nil.**

10. Mr Quickfall's submissions were principally focussed on ground 6, seeking to persuade me that factual findings made by the ET as to an event which must have taken at most a matter of seconds were not ones it could validly have made. That involved detailed analysis of the decision itself, witness statements made by various witnesses and a transcript of certain parts of the evidence before the ET. Mr Morgan characterised this as an impermissible attempt to re-argue the case below. He relied on **Piggott Bros & Co Ltd v Jackson 1991** IRLR 309 in which Lord Donaldson MR said that a Tribunal decision could only be regarded as perverse if it was not a "permissible option" and that:

> **"The EAT will almost always have to be able to identify a finding a fact which was supported by any evidence or a clear self-misdirection in law by the tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option and has to be characterised as perverse."**

11. The paragraph which is characterised by Mr Quickfall as perverse is paragraph 25.5. In order to put it into perspective the whole of paragraphs 24 and 25 need to be examined:

> **24. The tribunal having heard evidence from the claimant and from Heidi Morgan and Kathryn Pugh about the events of 15 March 2016 prefer the evidence of the teaching assistants and reject the claimant's account.**
> **24.1. Kathryn Pugh gave a compelling account, including a physical demonstration, of the actions of the claimant.**
> **24.2. Heidi Morgan gave an account which was more reserved but as compelling.**

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24.3. The claimant argued that the accounts given by these two individuals were inconsistent. She compared those used in the disciplinary process with accounts they reportedly gave to the police and were reported in the PASM process, and with those they gave to the tribunal. The claimant also argues that Kathryn Pugh and Heidi Morgan demonstrate an attitude towards the claimant which is hostile.

24.3.1. In respect of the PASM minutes the tribunal recognise that no police statement was taken from these individuals and signed and approved by them.

24.3.2. What was reported to PASM was a police officer's discussion with these individuals. The tribunal do not consider that to be sufficient to allow us to conclude that inconsistent statements were made by the two witnesses.

24.3.3. The lack of formality in gathering that evidence, the lack of clarity as to whether the police officer reporting at PASM was the officer who had gathered their accounts, causes doubt as to accuracy.

24.3.4. We add to this that the witnesses did not confirm the accuracy of those reported words in evidence before us.

24.3.5. In particular, in respect of Kathryn Pugh, it was argued that she indicated that in oral evidence of Child B's interest in chicks across the room. It was argued that this not only supports the claimant's account but was inconsistent with her statement for the disciplinary process.

24.3.6. We do not consider the addition of that information to be inconsistent but to be more information. We agree that it is information which might have had an impact at the disciplinary or appeal hearings (and adds to our concerns about failing to call the witnesses). However, in terms of its cogency it did not alter the core of Kathryn Pugh's evidence.

24.3.7. We found no important inconsistency between the accounts given by Heidi Morgan to the tribunal and in her statement in the disciplinary process.

24.3.8. We were not persuaded that either witness had an axe to grind against the claimant. The evidence of disagreements was nothing more than everyday its character. Kathryn Pugh's concerns about the claimant's instructions as to how to act as her classroom assistant were not of a nature to lead us to doubt her evidence. In respect of Heidi Morgan, we saw no substance in allegations of a hostile attitude any disagreement was at a trivial level.

25.In contrast to our view of those witnesses the claimant was inconsistent in a much more telling way.

25.1. The word grabbed, used by the claimant before us and we find to Child B's mother, being replaced with the word guided is a fundamental change in our judgment.

25.2. The description of the child being pulled to the ground as given by the teaching assistants matches the word grabbed much more naturally.

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25.3. In addition to this the mother's description of what she was told matches more naturally the description of events given by the teaching assistants.
25.4. The claimant also changed the position of Child B in the various accounts she gave. In our judgment the claimant was attempting to minimise her actions when she described events.
25.5. The claimant saw Child B move. Having previously verbally instructed him not to on at least two occasions when he continued to move she lost her temper. The claimant then stepped into the group of children and pulled Child B by the arm to the ground. That was in our judgment, an inappropriate, and in the circumstances an unnecessary, use of force.

12. In terms of unfair dismissal, the ET's role was to examine the decision of the employer, and to make findings in terms of the information before the employer. The procedure adopted is an important part of the consideration. In assessing contributory fault, however, it is the ET's role to make its own findings of fact as to what happened, and, specifically, not to look at the employer's assessment of that conduct. In **Steen v ASP Packaging Ltd 2014** ICR 56 Langstaff P said:

"8. In a case in which contributory fault is asserted the Tribunal's award is subject to sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2) dealing with the basic award provides:

"Where the Tribunal considers that any conduct of the complainant before the dismissal or where the dismissal was with notice before the notice was given was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

9. Section 123(6) provides:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

10.The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be

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addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve a consideration of what it is just and equitable to do.

11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault, (2) having identified that it must ask whether that conduct is blameworthy.

12. It should be noted in answering this second question that in unfair dismissal cases the focus of a Tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is upon what the employee did. It is not upon the employer's assessment of how wrongful that act was; the answer depends what the employee actually did or failed to do, which is a matter of fact for the Employment Tribunal to establish and which, once established, it is for the Employment Tribunal to evaluate. The Tribunal is not constrained in the least when doing so by the employer's view of wrongfulness of the conduct. It is the Tribunal's view alone which matters.

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

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

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13. In the present case the ET noted the evidence which had been put before the disciplinary and appeal hearings, and held that the failure of the respondent to procure the attendance of certain witnesses had rendered the procedure unfair. But it then had to make its own findings, based on the evidence before it. At that stage the respondent's findings were irrelevant.

14. It is clear from the passages which I have cited above that the ET based its own findings on the evidence which it heard, amongst which "a compelling account, including a physical demonstration, of the actions of the Claimant". So the first **Steen** question had, in my view, been answered. The conduct was the conduct of the claimant towards the child. The second question, whether the conduct was blameworthy was addressed at paragraph 56, which used those very words.

15. The third question was whether the conduct which the ET had identified and which it considered blameworthy caused or contributed to the dismissal to any extent. Again, that is succinctly answered by the ET in paragraph 55. It did.

16. The final question requires an assessment of the extent of the appropriate equitable reduction. **Steen** requires a separate consideration of the two heads of award, basic and compensatory, but points out that it is very likely, but not inevitable, that they would be the same.

17. Mr Quickfall submitted that, as the ET made no findings as to the circumstances in which the force was used, such findings were impermissible, as was the finding that the reduction should be 100%. He also argues that the ET failed to consider whether the procedural failings contributed to the dismissal and, if so, to what extent. I shall turn to that in due course.

18. For the second part of the argument he relies on **Ingram v Bristol Street Parts**

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UKEAT/0601/06/CEA, a decision of the EAT presided over by Elias J, President, as he then was. At paragraph 28, Elias J rejected the argument that, there having been a finding of unfair dismissal, a claimant should receive some compensation. He said that there was no reason in principle why parliament should not take the view that no compensation at all should be awarded, even where the employer's procedural failings are significant, if the justice of the case does not merit it.

19. At para 29 Elias J went on:

> **29.Second, it is alleged that the finding of 100% contributory fault was in any event perverse given the procedural defects. Mr Sykes submitted that there could not be a finding of 100% contribution where the employer was at fault. We do not accept that. Whenever there is a finding of unfair dismissal, it must follow that the employer has not acted appropriately. If Mr Sykes were right, there could never be a finding of 100% contributory fault, yet there is House of Lords authority establishing otherwise: see Devis v Atkins [1997] AC 931. We accept the submission of Ms Palmer that the authorities establish that the employee's blameworthy conduct must be considered to determine the extent to which it has caused or contributed to the dismissal, not to the unfairness of the dismissal: see e.g. Gibson v British Transport Docks Board [1982] IRLR 228, paras 28-29. Mr Sykes referred to certain obiter comments of mine in the case of Kelly-Madden v Manor Surgery [2007] ICR 203; [2006] IRLR 17 at para. 61 which he submits supports the conclusion that where there are significant procedural errors by the employer, a finding of 100% contributory fault is never appropriate. I was not intending to lay down such a principle; indeed, I was purporting to follow the Gibson case and nothing I said in Kelly-Madden should be treated as inconsistent with it. Sometimes procedural failings by the employer will be causally relevant to the dismissal itself, and where that is so a finding of 100% contributory fault is unjustified. But that is not this case. It is plain beyond doubt that the blameworthy conduct of the employee was the sole factor resulting in this dismissal. The failing in procedure at best went to the peripheral issue of how long the admitted wrongdoing had taken place.**

20. In his skeleton argument Mr Quickfall asserts that the ET was obliged to consider the extent to

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which the failure to hear from any witnesses at the disciplinary of appeal hearings contributed to the dismissal. With respect, that is based on a misunderstanding of Ingram. The ET was, at this stage, dealing with conduct leading to the dismissal as opposed to matters relating to the unfairness of the dismissal. Mr Quickfall advances no basis for asserting a causal link between the procedural failures and the dismissal.

21. In my judgment the procedural failings in the present case had no causal link to the dismissal itself. As in Ingram, it was solely the conduct of the claimant which led to the dismissal. It is understandable that a claimant who has been held to have been unfairly dismissed should feel aggrieved that the unfair treatment should result in her receiving no compensation, but that is what the law permits. For that reason ground 2 fails.

22. Grounds 3, 4 and 6 are interrelated. I start with 6, the perversity argument. The ET set out clearly what the conduct in question was, and, at para 23 of the reasons noted the finding of having “manhandled Child B by pulling him to the ground”. It noted (para 23.1) the opinion of professionals who gave evidence that such an assault would potentially amount to gross misconduct, as would a failure to report such an action. It made its own finding (para 23.2) that the lawful use of force by a teacher is limited to occasions of preventing danger or disorder in the classroom. It noted (para 23.3) that evidence of the teaching assistants before the disciplinary and appeal panels had been that there was no such disorder or danger and as such the use of force fell into the category of gross misconduct. At the hearing itself the ET preferred the evidence of the teaching assistants as to the incident and rejected the claimant’s allegations that their earlier accounts were inconsistent with the evidence they gave to the ET (paras 24.3.6 and 24.3.7) and that they had an axe to grind against her (para 24.3.8)

23. In my judgment paragraph 25.5 is the simply the ET’s characterisation of the evidence which

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it accepted. The evidence had been of pulling a child onto the ground, a use of force which was not justified in the circumstances which the ET found as fact not to have been one of disorder or danger. To describe this as an unnecessary use of force is entirely consistent with its description of the evidence. The conclusion that the claimant had "lost her temper" seems to me to add little if anything to the finding of blameworthy conduct, but is a comment which the ET was entitled to make having seen and heard the evidence as explaining the claimant's behaviour on the day.

24. In the circumstances I accept Mr Walter's submissions that the detailed analysis of the evidence advanced by Mr Quickfall in support of his perversity argument leads nowhere. The ET's findings were based on evidence which was before them. It was their task to resolve inconsistencies and explain the basis for their conclusions. This they have done. I reject the suggestion that the findings in para 25.5 are perverse and dismiss ground 6.

25. Ground 3 asserts that the ET failed to consider the extent to which the claimant was blameworthy. Mr Quickfall argues that, given the conflicting evidence before the ET as to the claimant's conduct, it was wrong to find her blameworthy to such an extent that it was just and equitable for her not to recover any damages. I do not accept this submission. A tribunal's task is to decide between conflicting accounts. The fact that there has been some evidence pointing away from the ET's findings does not require it to temper its conclusions in any way. The ET clearly found that the claimant had been not just blameworthy but "seriously blameworthy". I see no error of law in the ET's approach and dismiss ground 3.

26. Ground 4 is, in my judgment, simply a re-casting of ground 3. The ET gave clear reasons for the findings that it made and took account of all relevant factors. I dismiss it.

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27. Ground 5 asserts a failure to make adequate factual findings and/or to give adequate reasons for adopting the exceptional course of reducing both awards by 100%. It is closely tied to ground 1, which asserts that the ET failed to distinguish between the two forms of award.

28. It is true that paragraph 56 is pithy, and that did cause me some initial concern. However, on a fair and careful reading it is evident that the ET had very much in mind the principles set out in **Steen**. Each of the four questions is answered in the paragraph, and the separate considerations which are required to be given as between the basic and compensatory awards correctly set out. I agree with Mr Walters that the case law is such that similar deductions from both heads of award is the norm, and it would normally be only when there is a divergence that a detailed explanation would be expected. Paragraph 56 cannot be read in isolation. It encapsulates the ET's detailed reasons for reaching the conclusions that it did. It cannot be said that the reasons for the separate decisions that each award should be reduced by 100% cannot be gleaned from the ET's reasons read as a whole. For that reasons, grounds 1 and 5 also fail.

29. The appeal is dismissed.

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