Appeal No. UKEAT/0096/17/BA

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 October 2017

**Before**

**HER HONOUR JUDGE EADY QC**

**(SITTING ALONE)**

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SECRETARY OF STATE FOR JUSTICE — APPELLANT

MS L PINKERTON — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

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For the Respondent

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**SUMMARY**

**PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity**

**UNFAIR DISMISSAL - Reasonableness of dismissal**

*Fair hearing - whether ET findings made on basis of points not raised by Claimant*

*Unfair dismissal - fairness of dismissal - whether ET fell into substitution trap/reached perverse decision*

The Claimant, an experienced prison officer, used physical force towards a prisoner. The prisoner's account of the incident was contradicted in certain respects by CCTV footage but the recording was never put to him. After a disciplinary hearing, where the CCTV footage was viewed, it was concluded that the Claimant had assaulted the prisoner (she had not acted in self-defence) and should be summarily dismissed. The Claimant claimed this was unfair. The ET agreed, finding the failure to return to the prisoner with the CCTV evidence rendered the investigation unfair. Further, as it was unsafe to rely on the prisoner's account of the incident and as the ET did not consider the CCTV footage supported the Respondent's conclusions, the decision to dismiss had been unfair. The Respondent appealed.

Held: *allowing the appeal and remitting the case to a different ET*

To the extent there was a failing in the disciplinary investigation, it did not render the dismissal unfair because the decision had not been based upon the prisoner's account but on what could be seen on the CCTV recording (this was not a case where the decision depended upon which account was preferred). The recording provided reasonable grounds for the decision notwithstanding it had not been put to the prisoner. It was, moreover, perverse to find the decision to dismiss was based upon the prisoner's account. In assessing the Respondent's finding that the Claimant had not acted in self-defence, the ET had fallen into the substitution trap, basing its conclusion on what it had itself taken from the CCTV recording rather than asking what the Respondent could reasonably have concluded (in particular, at the point in the

footage when the alleged assault took place). Some of the points relied on by the ET had emerged during the evidence and had not been specifically raised in the pleadings; that did not necessarily render the hearing unfair but meant the ET may not have had the benefit of full representations from the parties on all the matters that had apparently weighed with it.

**HER HONOUR JUDGE EADY QC**

## Introduction

1. In this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Reserved Judgment of the Employment Tribunal sitting at North Shields on 4 to 7 October 2016 (Employment Judge Buchanan sitting alone between 4 and 7 October 2016, with a further day in chambers; "the ET"), sent to the parties on 12 January 2017. Representation below was as it has been on the appeal. By its Judgment the ET upheld the Claimant's complaint of unfair dismissal and wrongful dismissal (the finding of unfair dismissal being subject to a reduction of 35 percent for contributory fault).

2. The Respondent's appeal against the unfair dismissal finding was permitted to proceed to a Full Hearing by the Honourable Mrs Justice Laing DBE on the following grounds: (1) the ET reached perverse conclusions as to the reasonableness of (a) the Respondent's investigation, and (b) its decision on the issues of assault and/or unprofessional language, and/or fell into the error of substitution in these regards; (2) there were procedural errors that gave rise to fair hearing issues. The Claimant resists the appeal, relying on the Reasons provided by the ET.

3. Given the perversity challenge on the ET's findings, Laing J also suggested it might be necessary for the CCTV evidence to be viewed at the Full Hearing of the appeal. That was arranged and, with the parties' consent, I viewed two recordings of the incident considered as part of the investigation and disciplinary process in this case and also viewed by the ET.

A **The Background**

4. At the time of the events with which the ET was concerned, the Claimant was an experienced Band 3 Prison Officer at HM Prison Durham and, as such, was subject to the Respondent's Conduct and Discipline Policy ("the Conduct Policy"), which provides that staff are expected to meet high standards of professional and personal conduct and, in their relationships with prisoners, must not provoke, use unnecessary or unlawful force, and must not assault a prisoner or use offensive language to a prisoner; use of unnecessary force is given as a specific example of gross misconduct (it being explained that gross misconduct is conduct that is so serious as may make any further relationship and trust impossible and, further, that serious cases of general misconduct may also amount to gross misconduct if they are of a nature that makes any further relationship and trust untenable). Separately, HM Prison Service Order 1600 ("the Order"), entitled "*Use of Force*," provides as follows:

> **"The use of force will be justified and therefore lawful only:- if it is reasonable in the circumstances; if it is necessary; if no more force than is necessary is used; if it is proportionate to the seriousness of the circumstances."**

The Order also gives guidance as to how situations might be controlled to avoid the use of force and sets out the reporting and recording requirements (see para. 11.8 of the ET's Judgment).

5. On 20 July 2015, at around 7.15pm, whilst on duty on B Wing, the Claimant was involved in an incident with Prisoner A, during which the Claimant used physical force towards Prisoner A. The Claimant did not complete a record of this incident; she had reported it to her line manager, Senior Officer Brown, who had advised against the completion of any paperwork.

6. On the following day, however, Prisoner A completed a complaint form relating to the incident; the material part of which is set out by the ET at para. 11.3 of its Reasons as follows:

> **"On Monday 20.7.15 at just after 7 o'clock pm on the second landing on B wing I was assaulted by Officer Mrs Pilkington [sic throughout]. I was on the phone to my wife when the**

> **phones were cut off without any prior warning. I went and asked Miss Pilkington why she had done this as my wife is getting treatment for skin cancer and I was on the phone to her. Miss Pilkington said I don't give a fuck about your wife and you can fuck off and bang up. I said her language and attitude for a member of staff was disgraceful and walked away. The next thing I knew Miss Pilkington had come up behind she grabbed me by my throat pushed me backwards and pinned by my throat against the wall in a cell doorway cutting off my air supply in keeping me pinned there. The senior officer on the wing came over told her to leave go of me. She did this but then pushed me into the cell and started screaming at me for talking to her in such a manner. I told her to go on do it as I thought she was going to assault me again. I asked the senior officer in the doorway to do something about this. He told me to shut up it was my own doing and that he thought I was going to assault his officer. You will see from the wing cameras this isn't so as I had my back to her and was walking away when she assaulted me round the throat …"**

7. Further, on 27 July 2015, Prisoner A's solicitors wrote to the Prison Governor advising they had been informed of this incident and requesting the retention of any CCTV recordings.

8. The Respondent embarked upon an investigation into Prisoner A's complaint. The investigating officer obtained and reviewed the relevant CCTV recordings - subsequently referred to as "*the recording*" - and her account of what that showed is set out by the ET as follows:

> **"11.23. … [Janet Bolton, the investigating officer] states *"CCTV evidence shows Prisoner A approached the claimant at the gates leading to the office on to B2 and what appears to be an exchange of words with Prisoner A using a gesture towards the claimant then he turns his back and walks away. He gets as far as the pool table in the middle of B2 and appears to drop something, stopping to pick it up. The claimant appears to follow him down the landing and then goes towards him, physically takes hold of him at the pool table area and forcibly pushing him back into a cell approximately two metres away. I am unable to confirm that this was by the throat …".* In relation to the prisoner being seen in relation to his injuries the report states *"The prisoner states he was seen at 22:00 hours by a nurse as he had two puncture wounds in his neck. I am unable to confirm if the prisoner sustained any injuries as no record of a F213 or him being seen by any medical staff during night state. CCTV for this period has not been made available yet and there is no record on any of the nightshift logs of him being seen …".* The report goes on *"The officer states that she felt frightened at the time however it does not appear that any form of de-escalation or attempting to exit the wing through the gates directly behind her was considered, she walked towards the prisoner, used physical force to get him off the landing and into any cell and appears to be smiling as she exits the cell on CCTV demonstrating unprofessional behaviour."* The report also makes note that no report of any kind or reporting action of any kind was taken in relation to the incident."**

9. Meanwhile, the Claimant - after working for 10 days after the incident with Prisoner A and then having gone on leave - was suspended pending the outcome of the investigation.

10. As part of the investigation, interviews took place with Senior Officer Brown, two other prison officers and also Prisoner A. An attempt was made to interview other prisoners who might have witnessed the incident but none were willing to assist. The Claimant's past training record was investigated and it was found she had been last given training on control and restraint ("C&R") on 25 November 2014 (so, within a year of the incident). On 25 August 2015 the Claimant was interviewed, both before and after she had viewed the recording.

11. The investigation report recommended matters should proceed to a disciplinary hearing. That took place on 3 and 4 November 2015, conducted by Mr Timothy Allen, the Governing Governor of the prison. The Claimant was notified that she faced the following charges, which could constitute gross misconduct if found proven: *"That on 20 July 2015 at around 19:00 hours on B2 landing you assaulted/used unnecessary force on Prisoner A and that you were unprofessional in using abusive and disrespectful language towards Prisoner A*".

12. Prisoner A had been invited to attend the disciplinary hearing but declined to do so. The Claimant attended, represented by her Prison Officers' Association ("POA") representative. At the hearing, when presenting her report, the investigating officer stated she had shown the recording to Prisoner A during her interview with him and this had led him to change his account, the recording contradicting his original statement. The ET observed that the investigating officer's account was untrue in this respect:

> **"11.27. … [Janet Bolton] did not show the Recording to Prisoner A at any point and there is no reference to her having done so in the record of the lengthy interview conducted by her with Prisoner A. That point was not addressed by [Timothy Allen] at all during the disciplinary process or by [Alan Tallentire] in the subsequent appeal process."**

13. Evidence was also received from Senior Officer Brown, both as to the incident on 20 July and as to the failure to complete a report. Albeit he had not directly witnessed the incident,

he said it was not something he understood had required a report. Mr Allen also heard from other prison officers. Having taken time to review matters, he announced that he found the two charges proven. He then received representations on the mitigation. The ET accepted the Claimant's evidence that Mr Allen did not seem to be paying much attention or have much interest in the representations on mitigation. He adjourned for a further five minutes before announcing his decision that the Claimant would be summarily dismissed. Mr Allen explained that he considered that the Claimant had adopted a prepared stance in her evidence and, having viewed the recording, had concluded that the recording showed that:

> **"Prisoner A was at the far side of the pool table he bent down and picked up an item off the floor and appeared to toss it into the pool table. The item was not distinguishable but it must have been something small like a piece of paper. At this point Officer Pinkerton is still a couple of paces away from Prisoner A. She is then seen moving purposefully towards Prisoner A and grabbing him the by the upper arm and also pushing him back violently towards the wall near to cell 2-17.**
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> **…**
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> **In conclusion it is my assessment that Prisoner A did go up to the claimant when his phone call had been cut short. I believe that it is very probable a heated exchange was caused by a poor attitude or uncaring attitude by the claimant. I believe that Prisoner A had walked away from the heated argument and was not presenting any risk at all to the claimant. The claimant in my view had followed Prisoner A down the landing for a purpose. This purpose may have been to challenge him or it may have been for a more sinister purpose but I don't make any judgment on this point. However what is clear to me is that Prisoner A was not in my view presenting any risk and as such that any use of force was not necessary and therefore not legal."**

14. As for why he concluded that the Claimant should be summarily dismissed:

> **"… I have considered the potential as to what damage/risk this incident may have caused, and that these risks are so substantial that her actions could have precipitated a very serious incident of disorder, if other prisoners had become involved due to that perceived legitimacy of staff being lost due to her actions. More importantly I believe that any member of staff, who has the potential to be so unprofessional and resort to using unlawful force, whether it was planned or unplanned, and then fail to report the incident cannot be trusted not to do so in the future."**

15. In the dismissal letter sent to the Claimant, Mr Allen made detailed reference to the recording and what he concluded that it showed. He also referred to evidence from Senior Officer Brown that the Claimant had apologised to him for "*losing it*". He concluded:

> **"In conclusion, it is my assessment that [Prisoner A] did go up to you when the phone call had been cut short. I believe that it is very probable that the heated exchange was caused by a poor attitude or uncaring attitude by yourself, and that this was unprofessional. I believe that**

> **[Prisoner A] had walked away from the heated argument and was not presenting any risk at all to you at this time. In my view, you followed [Prisoner A] down the landing for a purpose. This purpose may have been to challenge him, or it may have been for a more sinister purpose but I [do not] make any judgement on this point. However, what is clear to me is that [Prisoner A] was not in my view presenting any risk and as such that any use of force was not necessary and therefore not legal."**

16. For its part the ET observed that Mr Allen had not referred the matter to the police, concluding he had not felt the case merited that action. That said, it continued:

> **"11.37. … [Mr Allen] would not have imposed the penalty of summary dismissal for the offence of unprofessional behaviour alone. It was [Mr Allen's] conclusion that the claimant had assaulted Prisoner A which was the rationale for the penalty imposed: [Mr Allen] did not accept that the claimant was acting in self-defence as she asserted. [Mr Allen] concluded that the claimant had not grabbed Prisoner A round the throat as he alleged and that Prisoner A either was not injured at all in the incident or if he was injured, then only in a very minor way. [Mr Allen] concluded that it was not possible to say what was in the hand of Prisoner A but that it was not a pool ball. [Mr Allen] concluded that the claimant could have seen what Prisoner A was doing on the other side of the pool table and he concluded that Prisoner A picked something up from the floor and not from the back of the table. [Mr Allen] concluded that the claimant had used unnecessary force and that she had planned to use force on Prisoner A."**

17. The Claimant appealed against Mr Allen's decision. There was a further hearing before Mr Alan Tallentire, then Deputy Director of Custody for Public Sector Prisons in the North East region, who upheld the decision to dismiss; he considered that the Claimant's failure to complete any paperwork was inconsistent with her feeling afraid or threatened during the incident and rejected any suggestion of any ulterior motive for the dismissal.

## The ET's Decision and Reasoning

18. The ET accepted that the reason for the Claimant's dismissal had related to her conduct. The decision to dismiss for that reason had, however, not been fair. Specifically, any reasonable employer faced with the conflicting accounts of Prisoner A and the Claimant would have shown the recording to Prisoner A and obtained his comment on what it showed, which was in stark contrast to his account. Further, Mr Allen had concluded that the Claimant was not acting in self-defence without having heard from Prisoner A on that point. When Prisoner A absented himself from the disciplinary hearing, any reasonable employer would have required

that the investigating officer to have reverted to Prisoner A to take his evidence on what the recording showed. Whilst the investigating officer had made a false statement about having done this, any reasonable decision taker in Mr Allen's position would have realised what had happened after having analysed the transcript of the investigation interview with Prisoner A and would have addressed the issue.

19. The ET concluded that a reasonable step, which could have provided important and exculpatory evidence on an issue of central importance, was not taken. Rejecting the Respondent's contention that there was sufficient other evidence to support the decision, it opined:

> **"15.4. … This was a matter of central importance to the case and no reasonable employer would have failed to have Prisoner A to see the Recording and to comment on it given the necessity to conduct a careful and conscientious investigation such as was referred to by [Elias J] in *A v B* …"**

20. The ET further considered whether there were reasonable grounds for Mr Allen's belief in the Claimant's misconduct. Although his conclusions were dependent in no small part on the statements of Prisoner A, there were strong reasons to doubt the veracity of aspects of that account, and yet there was no indication that this had weighed in Mr Allen's decision taking. A reasonable employer would have taken account of those clearly false aspects of Prisoner A's evidence; no reasonable employer would have failed to take account of the blatant discrepancies. Moreover Mr Allen had reached the conclusion that the Claimant was guilty of unprofessional conduct and abusive and unprofessional language but had similarly relied on the evidence given by Prisoner A in the investigation, which was strongly denied by the Claimant, was unreliable in other aspects, not supported by the recording (which had no sound), and could not be tested at the disciplinary hearing.

21. Returning to the detail of Mr Allen's conclusions, the ET further observed:

> **"15.8. I conclude that [Mr Allen] reached other conclusions that no reasonable employer would have reached and which fly in the face of the evidence available. First, the conclusion reached that Prisoner A did not have a pool ball in his hand and that the claimant could see from where she was standing what was in the hand of Prisoner A are conclusions no reasonable employer could have reached from a reasonable viewing of the Recording. On any reasonable view of the Recording it is just not clear what Prisoner A had in his hand and threw towards the pool table and it is not possible reasonably to conclude that the claimant could see what Prisoner A was doing from her position at the other side of the pool table. Secondly, [Mr Allen] concluded that the altercation between the claimant and Prisoner A was caused by her uncaring attitude and unpleasant comments about the wife of Prisoner A yet it is clear from the Recording that Prisoner A approached the claimant at the gate to the wing in a clearly aggravated state, gesticulating towards the claimant and in a manner which can reasonably be described as aggressive and that Prisoner A clearly instigates all that follows. Thus that second conclusion also can only arise by accepting the evidence of Prisoner A which was not tested before him at the disciplinary hearing and which was patently unreliable on other important points. No allowance was made for the unreliability of that evidence and thus those two conclusions also are conclusions which no reasonable employer would have reached. Thirdly, [Mr Allen] concluded from viewing the Recording that Prisoner A was not posing any risk to the claimant when force was used and that the claimant had followed Prisoner A up the wing for a purpose. Those are conclusions which no reasonable employer could reach from a viewing of the Recording and yet those conclusions arose solely from the viewing of the Recording. In addition [Mr Allen] concluded that the claimant had switched off the phones that evening without warning and in so doing he accepted the evidence of Prisoner A and rejected the evidence of the claimant and Senior Officer Brown to the contrary. That matter was not pursued with Prisoner A by [Janet Bolton] during the investigation and any reasonable employer would have had that matter further investigated given the concerns with the evidence of Prisoner A before reaching such a conclusion in the face of evidence of two prison officers."**

22. As for the decision that the Claimant should be dismissed for her misconduct, the ET further took the view that Mr Allen had unreasonably failed to give consideration to the mitigation put forward for the Claimant, in particular:

> **"15.10. There was considerable mitigation in this case which did not feature in [Mr Allen's] deliberations. The claimant had a clean disciplinary record and had worked for the respondent for 12 years. She had recently helped to save the life of a prisoner from a cell fire. The incident leading to dismissal had lasted for a very few seconds, no discernible injury had been caused to Prisoner A, Prisoner A had clearly instigated the incident and could clearly been [sic] seen behaving in a manner towards the claimant which was aggressive and confrontational. There were no consequences arising from the incident in terms of disorder such as [Prisoner A] says he feared could have resulted. The incident had clearly resulted from the switching off of the phones which was something the claimant was obliged to do at the time she did it and was recognised as a potential flash point in terms of behaviour. Any reasonable employer would take account of and assess the weight of that mitigation. [Mr Allen] failed to do so and thus acted as no reasonable employer would act. I conclude the decision to dismiss was preordained before any mitigation was advanced and thus no reasonable consideration was given to that mitigation."**

23. For those reasons - not remedied by the appeal - the ET concluded that the Claimant's dismissal had been unfair, observing:

> **"15.14. In terms of penalty, I make it clear that if a prisoner [sic] officer is found to have assaulted a prisoner by use of unnecessary or disproportionate force then, absent mitigation, it**

> **will be a rare case where the penalty of summary dismissal will be outside the band of a reasonable response and nothing in this Judgment should be taken as suggesting otherwise. However, before the question of the reasonableness of the penalty can properly be considered, there must have been a reasonable investigation and reasonable grounds for the conclusion reached and there must be a reasonable consideration of the mitigation available - *Arnott* … For the reasons I set out above I conclude that those requirements are not satisfied and thus the question of the reasonableness of the penalty imposed in this case does not arise."**

**The Relevant Legal Principles**

24. The ET was concerned with the question whether the Claimant had been fairly dismissed. No issue is taken with its finding as to the reason for the dismissal; the reason relating to the Claimant's conduct and thus capable of being fair - see section 98(1) and (2) of the **Employment Rights Act 1996** ("ERA").

25. The touchstone in this case for the ET (and on appeal) was section 98(4) of the **ERA**, which relevantly provides as follows:

> **"(4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
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> > **(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**
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> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

26. In a misconduct dismissal case the standards laid down by Arnold J, giving judgment for the EAT, in **British Home Stores Ltd v Burchell** [1980] ICR 303 provide useful guidance where an employer has established its honest belief in the misconduct in issue. The question for the ET, applying a neutral burden of proof, is whether the employer had reasonable grounds in mind on which to sustain that belief, and whether, at the stage the employer formed its belief, it had carried out such investigation as was reasonable in all the circumstances. The employer's decision-making in these regards is to be judged against the band of reasonable responses test.

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27. At the heart of the Respondent's case on this appeal is that the ET failed to direct itself in accordance with that guidance. It argues that, in its findings on the investigation, as to whether there was an assault, and as to the language used, the ET failed to test the decision reached by the Respondent judged against the range of reasonable responses, effectively substituting its own view/alternatively, reached a perverse view. As the ET observed (see its self-direction on the law in this case), in **A v B** [2003] IRLR 405, the relevant circumstances for section 98(4) purposes would include the gravity of the charge and the potential effect upon the employee; disputed serious allegations of criminal misbehaviour - particularly where these might have an impact upon the employee's future career - must be the subject of the most careful investigation, albeit usually conducted by a layman and not lawyers. The requirement is not that the employer adopts the safeguards of a criminal trial, but that a careful and conscientious investigation of the facts is carried out; an inquiry should focus no less on any potential evidence that might exculpate or point towards the employee's innocence as the evidence that might prove the charges in question.

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28. A similar approach was adopted by the Court of Appeal in **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721, in which Elias LJ emphasised "… *it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where … the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite*" (para. 13). Further, where there is an allegation of misconduct and the evidence consists of diametrically conflicting accounts of an alleged incident with no or very little evidence to provide corroboration one way or the other, Elias LJ observed that an employer is not obliged to simply believe one account and to disbelieve the other. In that case the ET had been entitled to find the dismissal unfair where the employer had failed to test the evidence of the accuser where it had been possible to do so, "*It is common*

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*experience that if part of a story begins to unravel, other aspects may do so also. Doubts begin to emerge, and the interpretation of actions changes*" (para. 57).

29. Moreover in **Salford Royal NHS Foundation Trust v Roldan** the Court of Appeal observed that, where it was not disputed that the ET had properly directed itself in accordance with **Burchell** principles (as further explained in **A v B**), unless there was a proper basis for saying that the ET had simply failed to follow its own self direction, the EAT should not interfere with the decision unless there was no proper evidential basis for it or unless a conclusion was perverse - a very high hurdle; see **Yeboah v Crofton** [2002] IRLR 634 CA. Certainly it is not for the EAT to substitute its view for that of the ET, and see per Mummery LJ in **Brent London Borough Council v Fuller** [2011] ICR 806 CA:

> **"28. The appellate body, whether the Employment Appeal Tribunal or this court, must be on its guard against making the very same legal error as the tribunal 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 tribunal without committing error of law or reaching a perverse decision on that point.**
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> **…**
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> **30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law as stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal 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 employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focussing 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."**

**Submissions**

*The Respondent's Case*

30. The Respondent first addressed the fair hearing issues it contends arose in this case, relying on **Chandhok v Tirkey** UKEAT/0190/14. It was unfair for the ET to make a finding of a particular substantive or procedural defect in the investigation or disciplinary process without first raising the matter with the parties, given there was nothing in the ET1 on that point. Although the burden under section 98(4) **ERA** was neutral and an ET claim did not need to be

A the subject of detailed pleading in the same way as the High Court, it still needed to set out the complaint and the Respondent was entitled to rely on that as the case it needed to meet.

B 31. Turning to other grounds of challenge, the Respondent contended that the ET reached a perverse conclusion that the investigation had been unreasonable: the evidence of the recording was unchallenged and was part of the evidence the dismissing officer found persuasive; this was not a **Roldan** case where the dismissing officer had to choose between two accounts - he C could clearly see for himself what had happened. As for the ET's concern regarding the failure to show the recording to Prisoner A, although the Claimant contended the standard of investigation needed to be high, she made no specific complaint of any investigatory failing D (her statement suggested she understood that Prisoner A had been shown the recording); it was not a matter raised at any stage before closing submissions. In any event, given Prisoner A had moved prisons and had not been compellable, there was no basis for concluding he would have E accepted he had been a threat to the Claimant so as to exculpate her and inculpate himself; showing Prisoner A the recording would have been pointless and could not materially have affected the quality of the investigation - Prisoner A's account could be seen to have been false and examination of the reasons for dismissal demonstrated his statement had not been relied on F in any material way. The same point could be made in relation to the second issue of concern for the ET - the failure to re-interview Prisoner A; this, again, was not something raised by the Claimant but was, in any event, a bad point.

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32. As for the ET's finding on the decision on the assault, the Respondent contended this was perverse and/or amounted to the substitution of the ET's view for that of the employer. H The question for the Respondent had not been whether the Claimant had applied force - that was admitted and clearly visible on the recording - but whether the force applied was unlawful.

A The question for the ET was whether the dismissing officer's decision was one that he could reasonably have reached. It was common ground the use of force was unlawful unless the Claimant acted in self-defence. Whether or not she had was a fact finding exercise to be conducted by the Respondent, not the ET. To conclude, as the ET apparently did - see paras. 15.6 to 15.8 - that no reasonable employer could reach that conclusion was plainly wrong given the evidence available to the Respondent: the recording, sufficient in itself; the Claimant's own admission that she had "lost it" and had failed to complete the relevant paperwork; and the fact that she had received relevant training. The ET had undertaken the fact finding afresh and had then considered whether the Respondent *should* have reached the conclusion it did, rather than assess whether it *could* have done. The ET had been entitled to undertake that exercise for the wrongful dismissal case but not on the unfair dismissal claim. Moreover the ET was wrong to conclude the Respondent relied on Prisoner A's account; although that had started the process, it was in no way relied on to establish the Claimant's culpability in the assault; see in particular the disciplinary outcome letter.

33. Next, issue is taken with the ET's apparent finding that it was unreasonable for the Respondent to conclude that Prisoner A did not have a pool ball and the Claimant could have seen this. That was perverse given what could be seen on the recording. In any event, the relevant test was whether it was reasonable for the dismissing officer to take the view that he did. Whilst it might not have been entirely clear from the recording what Prisoner A did have in his hand, it was reasonable for Mr Allen to have concluded that whatever it was it was not a pool ball (and the Claimant had not suggested otherwise in her appeal against dismissal).

34. Similarly, the Respondent objects to the finding that it could not reasonably have concluded Prisoner A was not posing a threat to the Claimant. It was part of the Claimant's

case that she was acting in self-defence but even if that was her subjective belief, the Respondent was entitled to look at all the surrounding circumstances. Allowing that the recording was open to interpretation, it could not be said the Respondent reached an unreasonable conclusion. In particular, given the body language shown on the recording, the Respondent could conclude that Prisoner A was not being aggressive towards the Claimant at the point she used force. Similar points could be made in respect of the ET's conclusion that no reasonable employer could conclude the Claimant had followed Prisoner A with some purpose.

35. Separately the Respondent objects to the ET's finding on the question of unprofessional language. That was not a matter relied upon as a reason for the dismissal: Mr Allen found it probable that the heated exchange with Prisoner A was caused by poor attitude but that did not relate to specific words used by the Claimant. In any event it was not a point put to him.

36. Turning to whether the ET reached a perverse conclusion that there had been a failure to take account of the Claimant's mitigation and thus that the decision to dismiss was pre-ordained, Mr Allen's evidence was that he typed as he heard the evidence and entered his notes into a template document, listening to what was said as he typed. There was an adjournment of some five minutes before he announced his decision. A note of the Claimant's mitigation was included in the template notes taken by Mr Allen and referenced in the dismissal letter. The Claimant accepted she could not say what was in the document before Mr Allen and there was nothing in the ET's Reasons to explain its apparent rejection of his evidence on this point.

37. Finally, on the failure to correct errors on appeal, there was no suggestion that the matters found by the ET were put to the appeal officer; that was specifically so in terms of the purported failure of the appeal officer to deal with the error made by the investigation officer.

*The Claimant's Case*

38. On the question whether the ET made findings on matters that were not properly before it - having not been raised by the pleadings or identified in advance in the list of issues or at the hearing - this is not a **Chandhok** case. There the EAT was concerned with the striking out of a claim and the matter in issue (caste discrimination) was the gateway to the claim, on which it would stand or fall. The present case was pleaded as one of unfair dismissal. Allowing that the ET1 had to do more than simply start the ball rolling, it was apparent that this was a case where the question of reasonable grounds and the reasonableness of the Respondent's investigation had been put in issue; it met the **Chandhok** requirement (para. 18) that "*each party [should] know in essence what the other is saying, so they can properly meet it*".

39. As for the points taken on the unfair investigation finding, the ET found that there was a stark contrast between Prisoner A's account and what was shown on the recording (ET para. 15.3). This went to a central point that the Respondent had no evidence from Prisoner A as to whether the Claimant was entitled to use force against him to act in self-defence. It was a matter that the investigating officer had the opportunity to comment on in her evidence and it could not be assumed Prisoner A would not have accepted he had been mistaken about the incident if shown the recording (which would have been exculpatory of the Claimant), alternatively his response might have further undermined his credibility. Until the investigating officer revealed that she had not, in fact, returned to Prisoner A for his comment on the recording, the Claimant did not know this step had not been taken. She could not, therefore, have raised it any earlier than during the ET hearing. In any event the Respondent was able to address this issue in closing submissions and did so. And, more generally, on the failure to re-interview Prisoner A, having been caught red-handed, it should not be assumed he would not have accepted he had previously lied about the nature of the incident; that could have had a

considerable bearing on the Respondent's determination that the Claimant had caused the altercation with her "*uncaring attitude*". To the extent the Respondent was suggesting this would have made no difference, that was a **Polkey** point for the Remedy Hearing.

40. As for the matters relied on in the challenge to the ET's findings on whether there were reasonable grounds for concluding the Claimant had committed an unlawful assault (not acting in self-defence), these were all matters before, and considered by, the ET which permissibly found the Respondent's conclusions were unreasonable. The exchange which had led to this incident had not been captured on the recording so it was a matter of believing either the Claimant's account or that of Prisoner A, and it was apparent, as the ET found, that Mr Allen had accepted Prisoner A's account and the findings on credibility were therefore material. On self-defence more generally, although the Respondent was entitled to look at all the circumstances, the Claimant's credit had been put in issue and it was apparent from the cross-examination of Mr Allen that he had accepted Prisoner A's account as to how the incident had started - the switching off of the telephones without warning and as to what the Claimant had said. More specifically, on whether the Respondent had reasonable grounds for not accepting the Claimant's account as to what she feared Prisoner A might have picked up from the pool table area, contrary to the Respondent's assertion, looking at the Judgment taken as a whole it was apparent that the ET had not gone so far as to find that no reasonable employer could have concluded that Prisoner A did not pick up a pool ball; the ET's finding (para. 15.8) was that it was unclear what Prisoner A had in his hand. The ET found it implicit from the Respondent's decision that Mr Allen concluded that the Claimant could see what was in Prisoner A's hand to the extent it was not a pool ball; that, the ET held, flew in the face of the evidence.

41. As for whether the Respondent had reasonably concluded that the Claimant did not feel threatened, the ET had found - as was clear from the recording - that Prisoner A had clearly instigated the incident and could be seen acting aggressively and confrontationally towards the Claimant (ET para. 15.10), and it was an incident which had arisen from something (turning off the 'phones) recognised as a potential flashpoint (para. 15.10 again). The ET was entitled to look at all the circumstances in reaching its conclusion. This was not an error of substitution.

42. As for the finding on mitigation, the points on mitigation were quite lengthy but summarised in very short bullet point form by Mr Allen after a mere five-minute adjournment. The Respondent's complaint was really as to the ET's explanation for its conclusion that mitigation was not taken into account but it was not obliged to accept Mr Allen's evidence on this and it was implicit from the ET's reasoning that it had not done so.

43. Lastly, on the failure to correct errors on appeal, this went nowhere given the ET's findings on the decision to dismissal; these points stood or fell with the proceeding grounds.

**Discussion and Conclusions**

44. Although much of the argument before me has focused on the fair hearing issues (in particular as to whether points were properly pleaded or put before the ET), in respect of many of the points of which complaint is made the real question is whether the ET fell into the substitution trap or reached a conclusion that was properly to be described as perverse.

45. I start, as the parties did, with the ET's criticisms of the Respondent's investigation and the failure to show Prisoner A the recording. Given this was something the investigating officer originally said she *had* done, the Claimant could not reasonably complain of this failure until it

later emerged this was not in fact the case (and I am not sure I would agree with Mr Royle's submission that the Claimant was then required to apply to amend her ET1 to make this point). The substantive issue was, however, whether this rendered the decision to dismiss unfair. It was the Respondent's case that it did not and Mr Royle addressed the point head on in his closing submissions before the ET: Prisoner A's complaint triggered the investigation but the dismissal decision was not based on Mr Allen having upheld his account.

46. The question for the ET was whether Mr Allen's decision was founded upon a reasonable investigation. As it observed (ET para. 15.3) Prisoner A's account was contradicted by the recording. The ET found that, once it became apparent Prisoner A was not going to attend the disciplinary hearing, a reasonable employer would have required the investigating officer to return to Prisoner A to obtain his comments. It is hard to see, however, that that would have been a reasonable expectation of Mr Allen; from what he had been told by the investigating officer he was entitled to understand that this step had, in fact, been undertaken. He therefore proceeded on the basis of what he had been told, that is, that Prisoner A had then changed his account.

47. To some extent the fact that the investigating officer had initially said she had taken this step and Mr Tallentire, the appeal officer, accepted in cross-examination that it was reasonable to expect this to have been done, suggests this *was* a potential failing in the investigation. That said, when it came to the decision to dismiss, it is apparent that Mr Allen proceeded on the basis that where there was a conflict between the recording and Prisoner A's account, he preferred that which he could see for himself from the recording. I return to this issue when addressing the subsequent points of challenge raised in this appeal, but the substantive answer to the ET's conclusion on reasonable investigation is that the decision taker had already assumed that

which the ET's further proposed investigation suggested; that is, that Prisoner A's account had been embellished and it was safer to rely on what could be seen on the recording. The ET's conclusion was founded upon an earlier error in the investigation, but one which made no difference to the evidential foundation (or fairness) of the decision to dismiss.

48. The next points taken by the Respondent can be considered together as challenging the ET's conclusion that there were no reasonable grounds for the Respondent's belief that the Claimant was not acting in self-defence and thus had committed an unlawful assault. On these points I again agree with the Respondent that the ET reached conclusions that are either perverse or show that it had fallen into the substitution trap. On the veracity of Prisoner A's statement, the ET had itself found that Mr Allen did not accept Prisoner A's account when this was contradicted by other evidence such as the recording or the absence of any record that Prisoner A had sought medical advice: "*the claimant had not grabbed Prisoner A round the throat as he alleged and … Prisoner A either was not injured at all in the incident or if he was injured, then only in a very minor way*" (ET para. 11.37). The ET also found (para. 11.36) that the decision to dismiss was based on Mr Allen's conclusion that the Claimant had been unprofessional and had resorted to using unlawful force. Looking at those conclusions against the reasons given by Mr Allen in the dismissal letter, it was perverse to find (as the ET apparently did at para. 15.6) that Mr Allen had thereby "*relied in no small part on the statements of Prisoner A*". Other than in respect of the initial exchange, which cannot be fully seen on the recording, the letter makes clear Mr Allen's conclusions are based on what he could see on the recording and on the other evidence *aside* from Prisoner A's statements.

49. Whilst it is right as the ET went on to observe (para. 15.7) that Mr Allen found the Claimant had been guilty of unprofessional conduct and abusive and unprofessional language.

To the extent that these matters related to those aspects of the incident prior to the actual use of force by the Claimant, the recording could not assist (there was no sound and the Claimant could not properly be seen at the beginning). If that had been found to be the principle reason for the dismissal and if the ET had been satisfied that Mr Allen had reached his conclusion without then having regard to the credit issues going to Prisoner A's account more generally, then no issue could properly be taken. That, however, is not what the ET found. On the contrary, the ET concluded that Mr Allen would not have imposed the penalty he did for the offence of unprofessional behaviour alone; it was his conclusion that the Claimant had assaulted Prisoner A which was the rationale for the penalty imposed.

50. That said, this aspect of the evidence was part of the relevant background and I do not find that the ET impermissibly had regard to this when turning to the crucial question whether the Respondent had reasonable grounds for its conclusion that the Claimant had not acted in self-defence. On this the view taken by Mr Allen and the evidence available to him about the context in which the Claimant ultimately used force against Prisoner A was relevant; that included his view of the Claimant's journey towards Prisoner A and his conclusion as to whether she might reasonably have feared Prisoner A had picked up something from the pool table area which might have been used as a weapon against her. On these issues, however, I consider the ET fell into the substitution trap. Having viewed the recording, the ET formed its own view as to what it was reasonable to take from that evidence, without reviewing it from the perspective of a reasonable employer in these circumstances. More than that, however, it had to specifically address the Respondent's finding that the Claimant had not acted in lawful self-defence at the time she physically engaged with Prisoner A - the point that had led Mr Allen to decide she had to be dismissed. Mr Royle properly accepts that different views might be reached as to precisely what the recording showed at the crucial moment, but the ET had to ask

A what might a reasonable employer conclude at that stage, not simply what view it took from the preceding stages in the incident.

B 51. I also consider the ET erred in its conclusion on mitigation in this case. The Claimant had fairly raised her concern that Mr Allen had not been properly engaged with her case on mitigation as he was looking at his notes and flicking through his papers, but Mr Allen had explained his practice of taking notes while submissions were made and recording those into a C template document, on which he would then rely on when reaching his decision. On anyone's case he took a short adjournment, only five minutes, before announcing his decision. For the Claimant it is said it can implied that the ET had rejected Mr Allen's account. Given, however, D that his evidence gave an explanation for what the Claimant had observed, I do not think that is sufficient: the ET needed to make clear whether or not it had accepted his evidence and, if it had, to explain why that did answer the Claimant's point of concern.

E 52. If this last matter was the only point in issue it might have been something that could have been addressed under the **Burns/Barke** procedure. In this case, however, it is the final error in a series made by the ET. I suspect that the problem in this case arose in large part from F the fact that the ET was bound to form its own conclusions on the recording, and from the surrounding evidence, for the wrongful dismissal case. It had then to detach itself from those conclusions when determining the issues on the unfair dismissal claim. The issues which G seemed salient to it at that stage were not those which had been expressly identified in the pleadings or list of issues but matters that arose during the hearing.

H 53. I am reluctant to seek to prescribe how an unfair dismissal complaint is to be pleaded, not least because one size is unlikely to fit all. In many instances it will be sufficient to raise a

complaint about an investigation, or as to whether there were reasonable grounds for the employer's belief, without identifying every detail of every single defect. That said, an employer must have some idea of the case it is to address and, to the extent that matters then emerge during the course of evidence that then go to these questions, the ET must ensure that the parties have had the opportunity to address those matters. Although I would not have been persuaded to allow this appeal on the fair hearing points alone, I suspect that the criticisms the Respondent has raised in this regard help to explain how the ET went wrong.

54. For all those reasons, I allow the appeal.

55. Given the view I have formed - that there was an interplay of substitution error and perversity in this decision - the matter has to be remitted and the question then arises as to whether that should be to the same or a different ET? The Respondent says it should be to a different ET; the Claimant says the same.

56. I remind myself of the guidance laid down in **Sinclair Roche & Temperley v Heard & Anor** [2004] IRLR 763 EAT. Whilst I see some argument (as the Claimant suggests) that it is generally preferable for the same ET to making findings in relation to a wrongful and unfair dismissal claims arising out of the same facts, and I also accept that there is no suggestion of any potential lack of professionalism on the part of this ET, I do think it would be placed in a very difficult position if it had to reconsider this matter on a remitted hearing. In this case, I consider that the better course is for the unfair dismissal claim to be heard afresh before a differently constituted ET.