Neutral Citation Number: [2022] EAT 117

Case No: EA-2021-000498-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 April 2022

BEFORE:

HIS HONOUR JUDGE AUERBACH

- -

BETWEEN:

ST MUNGO'S COMMUNITY HOUSING ASSOCIATION **Appellant**

-V–

MR M FINNERTY

Respondent

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- -

Fergus McCombie (instructed by **Ashfords LLP DX**) for the **Appellant**
Joshua Hitchens (instructed by **Pattinson & Brewer**) for the **Respondent**

Hearing date: 21 April 2022

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The respondent provides support to homeless people including social housing provision. The claimant was a Housing Management and Lettings Co-Ordinator. He was summarily dismissed following a disciplinary process. His internal appeal was unsuccessful. The matter arose from an incident at one of the respondent's properties involving the claimant and a resident who was facing eviction for threatening behaviour. The conduct for which the claimant was dismissed was, firstly, assaulting the resident during the course of the incident, and, secondly, omitting this from his incident report. The employment tribunal found that the claimant was both unfairly and wrongfully dismissed. Appeals from both decisions were upheld.

In relation to unfair dismissal the tribunal had erred by failing to take the correct approach to the evaluation of whether the sanction of dismissal was within the band of reasonable responses open to the respondent for the conduct found, and had fallen into the substitution error. **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 and **Graham v Secretary of State for Work and Pensions** [2012] EWCA Civ 903 considered and applied.

In relation to wrongful dismissal the tribunal concluded that the claimant's conduct was a breach of contract but not a fundamental breach. In relation to the implied duty of trust and confidence that was not a legally permissible conclusion. If the tribunal had some other contractual term in mind, it was not clear what it was, and the decision was legally unsafe.

HIS HONOUR JUDGE AUERBACH:

Introduction – the Facts and the Employment Tribunal's Decision

1. The respondent in the employment tribunal is a charity which works with homeless people and makes social housing provision. The claimant was employed by the respondent as a Housing Management and Lettings Co-ordinator. Following a disciplinary hearing he was summarily dismissed for the given reason of conduct. His internal appeal against dismissal was unsuccessful. In a judgment and reasons arising from a hearing held at Cambridge by CVP in February 2021 the tribunal (Employment Judge K J Palmer) upheld the complaints of both unfair and wrongful dismissal. This is the respondent's appeal against both decisions.

2. The witnesses before the tribunal included the claimant, the manager who took the decision to dismiss, Adam Rees, and the manager who determined the appeal against dismissal, David Fisher.

3. After addressing preliminaries the tribunal's reasons continue as follows:

> **"4. The dismissal arose out of an incident at a housing project which took place on 2 August 2018. The claimant had visited the project and was confronted by a resident who was in the process of being evicted for previously threatening to use a knife on a contractor. The resident wanted to confront the claimant about the decision to evict hm. The incident took place at about 10am on the morning of 2 August. There was also a postman present who at the time was attempting to deliver mail.**
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> **5. In the bundle was an extract from the CCRV system at the project which showed footage from two cameras, one showing the outside of the front door of the building and the bin store nearby and one showing the inside of that front door inside the building and this included footage of part of the staircase and the hallway. The footage in the bundle ran for some 11 minutes. Mr Rees had the same footage in front of him at the disciplinary hearing and in fact it was the sight of the footage which prompted the respondent to pursue the disciplinary proceedings against the claimant as it was at variance with an incident report which the claimant had filed on the day.**
>
> **6. Of great significance however is that no sound was available on the footage and therefore the context of the incident is incomplete. I will not seek to recount in detail the 11 minutes of footage which we have all viewed and I**

have watched on several occasions.

7. Essentially however, the postman attempted to deliver post and rang the doorbell as there was a parcel to deliver which he could not fit through the letterbox and which needed a signature. The claimant came to the door from an office down the hallway which is out of shot. At the same time or very closely associated with the claimant's arrival the resident came down the stairs with his terrier dog possibly a Pitbull type breed. It was here that the claimant says he was confronted by the resident. He says the resident was shouting and swearing at him and threatening to stab him, cut him and kill him. The claimant also says the resident was trying to sic his dog on him. None of this can really be seen in the CCTV footage as there is no sound, it just looks like there is a conversation, perhaps an animated one. In his letter of dismissal Mr Rees opines that the resident was trying to engage with the claimant but that the claimant seems uninterested. I accept the claimant's evidence that he was subjected to a substantial and very threatening barrage by way of a verbal attack by the resident and this is partially borne out in the CCTV footage because the resident does appear to be in an agitated state. The claimant says he was bouncing about readying himself to attack. I accept that, I accept the claimant's evidence on this point.

8. The claimant also knew that the resident had a history of threatening people with knives because that is why he was being evicted. The claimant quite reasonable feared for his life, he walked away out of shot then suddenly he appeared again and ran at the resident pushing him through the door and outside into the bin store. The resident did not seem to fall over for very long and was soon back up on his feet. The postman was still present at this time. Thereafter after the resident gained entry back into the property an altercation ensued and the CCTV shows the resident eventually pulling one knife from his waistband and then we see later him brandishing two knives and at various points he slashes at the claimant and tries to kick him. The claimant on two occasions picked up a fire extinguisher to defend himself during the course of the rest of the footage.

9. Ultimately and perhaps ironically it was the resident that called the police who attended and he was arrested. He was subsequently charged and convicted. The claimant was not charged with any crime. The claimant gave a statement to the police immediately after the incident which was in the bundle before me. It was not before Mr Rees at the time of the dismissal however it was before Mr Fisher who conducted the appeal. In it the claimant admits that he punched the resident referring to the charge and the push seen on CCTV. The claimant in evidence before this Tribunal confirmed that he was referring to the charge and the push in his police statement. He does not then reveal that in the incident form he fills in a little while later at the project which is a form produced by the respondent. He admits that.

10. So, it was on the basis and that failure that the disciplinary process ensued. Essentially there were two allegations against the claimant, the first was that he had charged at and pushed the resident and essentially initiated violence and the second was that he had misled the respondent. The

> **dismissal letter cites these two allegations, the push or the punch on the resident described as an assault and the statement by the claimant that he had ben unable to retreat to the office and lock himself in and call the police as he was being threatened with a knife by someone who had instigated the incident by threatening him with a knife.**
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> **11. The respondent says that these are not borne out by the CCTV footage. The respondent's Mr Rees cites the respondent's Disciplinary Policy & Procedure and respondent's Code of Conduct and he places great store by these two documents. He finds against the claimant on both counts in a lengthy dismissal letter. He takes into account he says a variety of mitigating factors including the claimant's 20 years of unblemished service, the difficult circumstances of the incident, the fact that the resident was known to threaten people with knives, the fact that the claimant had to defend himself against an attacker ultimately armed with two knives and the fact that the claimant had dropped his phone and could not call the police. What he did not do was to hear any evidence from the postman.**
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> **12. Mr Rees admitted in evidence that the respondent had made a perfunctory attempt to contact the postman but had failed to follow up that attempt. In my judgment he also did not consider fully and properly, nor did Mr Fisher on the appeal just how differently the incident might have appeared if the CCTV had had sound attached. Both of these facts are in my judgment critical. Mr Rees was particularly swayed by the fact that the push on the resident was in breach of the respondent's Code of Conduct. Ultimately, the claimant appealed and the appeal was heard by Mr Fisher who had some fresh evidence in front of him but he ultimately upheld the decision of Mr Rees and the dismissal of the claimant".**

4. The judge directed himself as to the law relating to unfair dismissal referring to the provisions of section 98 **Employment Rights Act 1996**, **British Home Stores Ltd v Burchell** [1980] ICR 303 and **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17, as well as noting that he must not substitute his own view but must ask whether the decision to dismiss fell within a band of reasonable responses.

5. I will set out the judge's conclusions in relation to both unfair and wrongful dismissal in full:

> **"17. This has not been an easy case to decide and I consider that the respondent could have conducted a fuller investigation by seeking evidence from the only corroborating witness, that is the postman. They realty should have tried harder to contact to contact the postman and seek his evidence. That aside the investigation was perhaps all it could be in that they had considered the CCTV footage which was pretty much all they had before**

them other than the evidence put forward by the claimant. I am therefore inclined to agree that they passed the first of the two limbs of the Burchell test which is that they had a genuinely held belief pursuant to a reasonable investigation, but was it reasonably Held? I think not. I do not think that it was sufficient to justify dismissal.

18. They should have taken into account the fact that had they heard the abuse and the very significant threats to the claimant from the resident the whole incident would have been properly contextualised. The actions of the claimant in running at the resident before he then produced two knives would be much more understandable in the context of the verbal abuse and threats that he was being subjected to.

19. It is important to remember that the adherence to policies such as the Code of Conduct is admirable but note sacrosanct. Such a policy is only guide. Policies such as the Code of Conduct are not applied in a purely tick box manner. Mr Rees and Mr Fisher should have looked at the matter in the round. Every case turns on its own facts.

20. In the circumstances I consider the claimant's reaction was understandable. His behaviour was not perfect and was not ideal. Another employee might have run into the office and locked the door – he did not. He ran at and pushed the resident. Yes, he did it before the resident had actually produced the knives but the resident had been threatening to produce knives and to cut him and to attack him, even kill him and the claimant was well aware that the resident had a history of threatening people with knives. So, he was right to be frightened for his life ultimately that was proven to be the case as he was attacked by a man wielding two knives who had a history of violence.

21. As for his failure to replicate the police and admission in the incident report and subsequently his failure to correct that, this also was not ideal. I accept however that he was so traumatised by the incident that he did not see the significance of filling in the form at the time. I can understand how he would feel that he had already given his account of the incident by giving a statement to the police and that was enough. On that particular day he had probably suffered quite enough having had to deal with the attack by the resident. The police charged the resident who was convicted – they did not charge the claimant and they saw the same CCTV and knew of the push or punch. The claimant has subsequently and not surprisingly suffered from PTSD as a result of the incident and was off sick for some time prior to the dismissal.

22. The claimant did not behave ideally but in all circumstances I do not consider that the decision to dismiss him falls within a band of reasonable responses of an employer faced with the circumstances with which they were faced. Perhaps a more appropriate sanction by the respondent would have been a warning or even a final written warning. He did not fully explain why he gave two versions of events, one to the police and one to the respondent and he had the opportunity to correct that and his reasons for not doing so were not wholly consistent. So, he is not blameless. Nevertheless in applying

> **in Burchell test I find on balance that the respondent's belief was not reasonably held. I also consider that the decision to dismiss does not fall within the band of reasonable responses of an employer faced with the evidence the respondent were faced with. I have not substituted my own view but looked at what a respondent would have done in those circumstances. For that reason, I find that the claimant's claim for unfair dismissal succeeds.**
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> **23. I have considered all the authorities on wrongful dismissal and the fairness of the dismissal is of no consequence in a wrongful dismissal case. I do consider that the claimant behaved in a way which was a breach of contract but in my judgment it was not a sufficiently serious breach to amount to a repudiatory breach entitling the respondent to dismiss him without notice. His wrongful dismissal claim therefore also succeeds and he will be entitled to damages for the notice pay he would otherwise have received."**

Grounds of Appeal

6. There are five grounds of appeal, the first four relating to the unfair-dismissal decision and the fifth one relating to the wrongful-dismissal decision. Each is developed in the notice of appeal but the headline grounds are expressed in the following way:

(1) The tribunal misapplied **Burchell** in that it wrongly interpreted the reasonable belief test by failing to ask whether the beliefs the respondent held were reasonable.

(2) The tribunal erred by imposing its own view of the misconduct incident in judging the question of the reasonableness of the respondent's belief.

(3) The tribunal substituted its own view of the fairness of dismissal as a sanction.

(4) The wrong test was applied in respect of the sanction of dismissal and/or inadequate reasons for that finding were given.

(5) This in substance asserted that the tribunal had found that the claimant was in breach of contract but not fundamental breach, but in respect of the implied duty of trust and confidence it was not legally open to it so to find; and if the tribunal had in mind some other contractual term it had not said what it was or how it had arrived at that conclusion.

Arguments

7. In his skeleton argument Mr McCombie identified that grounds one and two both relate to the tribunal's apparent conclusion that the respondent did not reasonably believe that the claimant was guilty of misconduct. Grounds three and four both relate to the tribunal's conclusion that the respondent did not reasonably conclude that dismissal was the appropriate sanction for the conduct found. The thrust of Mr McCombie's primary argument in relation to grounds 1 and 2 was, in summary, that there is nothing in [18] to [22] to support a conclusion that the respondent did not have a reasonable basis to conclude that the claimant was guilty of the misconduct with which he was charged. This is an issue which forms part of the **Burchell** tests and is distinct from the issue of whether, if the **Burchell** tests are satisfied, the sanction of dismissal was one that was reasonably open to the respondent in respect of the found conduct.

8. Indeed, Mr McCombie suggested in his skeleton that on one reading the tribunal was not deciding as a distinct matter that the respondent did not have a reasonable belief that the conduct had actually occurred at all. Rather, it had, in the way it expressed itself at [17], confused or elided that question with the question of whether the sanction of dismissal was reasonably open to the respondent in respect of the factual conduct found, taking into account all the circumstances of the case.

9. Alternatively, the tribunal had not applied the band of reasonable responses approach to the question of whether the respondent reasonably concluded that the conduct had occurred. It erroneously reasoned from the proposition that other views could have reasonably been taken, to the conclusion that the respondent's view was itself unreasonable. Further, given the evidence which the tribunal identified was before the managers who conducted the disciplinary process, it was in any event plainly reasonably open to them to conclude that the claimant was guilty of the conduct of which he was accused, as such. The tribunal therefore in any event wrongly concluded otherwise and/or wrongly substituted its own view.

10. In relation to grounds 3 and 4 Mr McCombie submitted that, despite warning itself not to do so, the tribunal have plainly committed the substitution error. The judge was clearly of the view that in all the circumstances of the case, he, the judge, would not have regarded the claimant's conduct in charging at and pushing the resident, or his conduct in relation to the content of his incident report, in asserting that it was the resident who had instigated the incident by first threatening him with a knife, as separately or together warranting the sanction of dismissal. That was having regard to what the judge considered to be the explanation for that conduct and all the mitigating circumstances.

11. Mr McCombie submitted that the judge had then wrongly reasoned from this view of his own, that it was therefore not reasonably open to the respondent to have taken a different view of whether dismissal was warranted. At [18] to [22] the judge repeatedly expressed his own view. He also failed to engage with the fact that the explanations and matters relied upon by the claimant in mitigation, which commended themselves to the judge, had all been fully considered in the dismissal and appeal decision letters, which gave cogent reasons why they were not found sufficiently compelling or acceptable by Messrs Rees and Fisher. The judge did not engage with their detailed reasoning at all. The tribunal asserted that points had not been considered or sufficiently considered, which were, on examination, fully considered in the dismissal and appeal outcome letters. The tribunal had not explained why it was not reasonably open to the managers to take a different view of whether these features relied on in explanation or mitigation meant that the claimant ought not to be dismissed.

12. Ground 4 contended that the judge's observation at [22] that "[p]erhaps a more appropriate sanction" would have been a warning or a final warning also showed that he had not engaged with the question of whether dismissal was reasonably open to the respondent as a sanction, and had applied the wrong legal test.

13. In relation to wrongful dismissal Mr McCombie submitted that the respondent had relied upon the claimant's conduct having destroyed the relationship of trust – effectively a breach of the implied duty of trust and confidence, which is in its nature a fundamental breach. The judge for his part had failed to explain how the claimant's conduct could be in breach of contract but yet not a matter of fundamental breach. If he had in mind the implied duty of trust and confidence, that was an error or law. If he had in mind some other contractual term of which the claimant was in breach, he had not identified what term it was or why he was in breach of that term, but not fundamental breach.

14. For the claimant Mr Hitchens first reminded me in his skeleton of some well-known statements in the authorities to the effect that an appellate tribunal should not hold the way in which a judge's reasons are expressed to an over-exacting or hypercritical standard of textual analysis. Rather, it should look at them in the round and consider the substance and whether they sufficiently convey why the parties have won or lost. Secondly, he reminded me of the authorities concerning the high hurdle faced by a perversity challenge in relation to findings of fact. Thirdly, he referred me to a *dictum* in **Royal Society for the Protection of Birds v Croucher** [1984] IRLR 425 to the effect that, while the **Burchell** guidelines are invaluable, ultimately what the tribunal always has to do is consider fairness in all the circumstances in accordance with what is now section 98(4) **Employment Rights Act 1996**. Mr Hitchens' general theme was that this appeal represented in reality an impermissible attempt to challenge the employment tribunal's proper findings of fact.

15. In relation to grounds 1 and 2 the tribunal correctly directed itself as to the law, including specifically reminding itself to beware of the substitution error. The tribunal had rightly considered when applying section 98(4) the wider factual context and circumstances of the case and all of the evidence available to the respondent, which was also before the judge, when determining whether its belief and conclusion were reasonably held.

16. Ground 2 amounted to a criticism of the judge for not drawing a rigid bright line between reasonable belief in misconduct and whether the sanction was within the band of reasonable responses. That was too exacting an approach to the framing of the decision. This ground in substance amounted to a perversity challenge. The tribunal had properly considered and concluded that the respondent did not have reasonable grounds to believe that the claimant was not acting in self-defence, nor to believe that he had been dishonest in his incident report. There was no reason to suppose that what was said at [7] affected the judge's consideration of reasonableness and belief. At worst what the judge said at [20] was superfluous, but it did not betray an error of law. As to [21] the judge was entitled to have regard to the police report as relevant to whether the respondent had reasonable grounds to believe that he had been deliberately dishonest in his internal incident report.

17. As for ground 3 the judge reminded himself to avoid the substitution error, but he was plainly entitled, indeed bound, to determine whether the respondent acted unreasonably in treating the conduct found as a sufficient reason to dismiss. The authorities establish that dismissing an employee for a first offence will be unfair unless the conduct is sufficiently serious. The judge was bound to consider whether the respondent had a reasonable basis for considering this conduct to be sufficiently serious in all the circumstances of the case. Again, this was an unsustainable perversity challenge. The judge was not bound to defer to the respondent's reason in its dismissal letter or to what it said were its subjective concerns as expressed in its policies and procedures. The judge had to decide for himself where the boundaries lay. As for ground 4, on a fair reading of the decision as a whole, the judge had not applied the wrong legal test. If the respondent considered this part of the reasons to be inadequate or unclear, it should have sought further reasons or clarification from the tribunal as discussed in **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2049 at [22] – [25].

18. In relation to ground 5 the judge made a finding that there was a repudiatory breach of

contract which had to be set in the context of the overall reasons and findings in the decision as a whole. This was a factual finding that cannot be challenged on appeal. As to the term that the judge had in mind this was not stated. Mr Hitchens observed that there was much reference to the respondent's policies and procedures, but he was not in a position to say whether it had been argued that these were contractual. If the respondent considered the position to be unclear from the decision, it should have sought additional or clarified reasons, rather than appeal.

Discussion and Conclusions

19. Once the tribunal has, as here, decided that the dismissal was for a reason related to conduct, it must then apply section 98(4) **Employment Rights Act 1996**, which provides:

> **"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."**

20. The underlying principles and guidance in this area are well established and have been often stated by the EAT and the Court of Appeal over the years but I start with a reminder of some of them.

21. First, while the tribunal must always apply the words of section 98(4), in cases where the reason for dismissal is found to be a reason which relates to the conduct of the employee, **Burchell** identifies issues which will almost always be relevant to the section 98(4) enquiry. However it is not exhaustive; and, in any event, if all the **Burchell** questions are answered in the employer's favour, the tribunal will at least also need to consider whether the imposition of the sanction of dismissal for the conduct found was within the band of reasonable responses.

22. Secondly, the tribunal must not substitute its own decision for that of the employer, but must apply a band of reasonable responses approach. This long-established principle, and the concept of a band of reasonable responses, can be traced back to the speech of Lord Denning MR in **British Leyland UK v Swift** [1981] IRLR 91, though **Iceland Frozen Foods Limited v Jones**, which distilled the principles established by the authorities up to that point, is more commonly cited.

23. Next, the tribunal must take the band of reasonable responses approach both in respect of issues relating to process and the substantive decision in relation to sanction. Of course the authorities recognise that in order to do that the tribunal does have to decide for itself where the boundaries of the band of reasonable responses lie, including in relation to sanction. But in **Foley v Post Office** [2000] IRLR 827 at [53] Mummery LJ explained:

> **"In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to "reasonably or unreasonably" and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not."**

24. In **Graham** at [36] the Court of Appeal drawing on **Burchell, Iceland, Foley** and other earlier leading authorities (referred to in footnotes that I omit) encapsulated the position in this way:

> **"If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "*band or range of reasonable responses*" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be**

> **perverse. The ET must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "*a reasonable employer might have adopted*". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process and not on whether in fact the employee has suffered an injustice."**

25. A tribunal hearing an unfair dismissal complaint may also often have before it a complaint of wrongful dismissal. If the unfair dismissal complaint succeeds it may also often have to consider whether there has been contributory conduct. Consideration of each of those requires the tribunal to make its own findings about, and to evaluate for itself, the conduct in question, based upon the evidence that is available to it. In some cases there may also be a discrimination complaint which calls for further discrete fact-finding by the tribunal. In **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 Mummery LJ said, at [43]:

> **"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question - whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."**

26. Further on, at [46], he said this:

> **"Mr Marsh spoke of his experience that ETs often structure their reasons by setting out all their findings of fact in one place and then drawing on the findings at the later stages of applying the law to the relevant facts. It is not the function of appeal courts to tell trial tribunals and courts how to write their judgments. As a general rule, however, it might be better practice in an unfair dismissal case for the ET to keep its findings on that particular issue separate from its findings on disputed facts that are only relevant to other issues, such as contributory fault, constructive dismissal and, increasingly, discrimination and victimisation claims. Of course, some facts will be relevant to more than one issue, but the legal elements of the different issues,**

> **the role of the ET and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication."**

27. Finally, I remind myself that the EAT must itself beware of substituting its own decision for that of the employment tribunal. In **Fuller v London Borough of Brent** [2011] ICR 806 at [12] Mummery LJ encapsulated the point in this way:

> **"A summary of the allocation of powers and responsibilities in unfair dismissal disputes bears repetition: it is for the employer to take the decision whether or not to dismiss an employee; for the ET to find the facts and decide whether, on an objective basis, the dismissal was fair or unfair; and for the EAT (and the ordinary courts hearing employment appeals) to decide whether a question of law arises from the proceedings in the ET. As appellate tribunals and courts are confined to questions of law they must not, in the absence of an error of law (including perversity), take over the ET's role as an "industrial jury" with a fund of relevant and diverse specialist expertise."**

28. I turn then to the issues raised by the four grounds of appeal relating to the tribunal's decision that the claimant was unfairly dismissed. It is helpful to start by reminding ourselves of the conduct of which the claimant stood accused and for which he was dismissed. In summary it was twofold: (a) physically running at the resident and pushing him during the course of the incident. I will call that the charge of assaulting the resident; and (b) deliberately giving a false account of the episode in his internal incident report by omitting his assault on the resident from it and asserting that the resident had instigated the incident by first threatening him with a knife, whereas it was said the CCTV showed that the resident had only first taken out a knife in point of time after the claimant's assault on him.

29. I do not think that on a fair reading the tribunal was of the view that the respondent did not reasonably conclude that the claimant was guilty of that conduct in both respects, as such, in terms of what factually happened. It seems clear from the tribunal's decision that the respondent had before it uncontroversial evidence in the form of the CCTV in terms of the sequence of events,

including the order in which the claimant assaulted the resident and the resident for the first time produced a knife or knives. It also had uncontroversial evidence as to the contents of the written incident report that the claimant had completed.

30. So, I do not think the tribunal was saying that the respondent did not have a reasonable basis for these factual conclusions as such. Indeed the claimant does not appear to have disputed them as such. Rather, it seems to me that the substance of the tribunal's decision and conclusions turned on its view of whether the respondent reached a decision that was reasonably open to it in, in terms of its *evaluation* of that conduct and why it occurred, and in particular the explanations for his behaviour in both respects, and the mitigating circumstances, advanced by the claimant.

31. This is one of those cases, it seems to me, where that issue could, depending on how the conduct is defined, be framed as part of the **Burchell** test; but it also substantially overlaps with the question of whether dismissal was a sanction that was reasonably open to the respondent for this conduct, within the band of reasonable responses. The heart of the tribunal's decision, and why it concluded that the dismissal was unfair, was the judge's conclusion that it was not in the circumstances within the band of reasonable responses to dismiss, in particular because it was not within that band to view the claimant's assault on the client as a serious aggressive act warranting dismissal, rather than essentially an act of self-defence; and not within that band to view his initial incident report as deliberately and culpably dishonest in the account that he gave.

32. Correspondently, it seems to me that there is substantial overlap among the four grounds of appeal that relate to unfair dismissal. The heart of the challenge that they pose is the twin criticisms that the tribunal failed to take the correct approach to determining whether dismissal as a sanction was reasonably open to the respondent in respect of the found conduct, including, within that, the view that it took at the explanations for the conduct and the claimant's mitigation points; and that the tribunal instead committed a substitution error. It seems to me that both aspects of this

challenge are well founded. My reasons follow.

33. Firstly, the tribunal's decision is replete from the outset with statements of the judge's own evaluation and assessment of the conduct of the claimant, the reasons for it and its culpability, the judge having viewed the CCTV and having heard evidence from the claimant himself. After the preliminary remarks, the tribunal's decision moves to a fairly full account of the incident itself at [4] – [9]. At [4] the scene is set in the description of the claimant being confronted by a resident who had previously threatened a contractor with a knife and the observation that the resident "wanted to confront" the claimant. These opening words themselves set a particular perspective on the context of the whole incident.

34. In [5] the judge refers to Mr Rees having the same CCTV footage in front of him, but then immediately proceeds at [6] to give his, the judge's, own observations of the significance of the lack of sound on the CCTV. At [7] the judge refers to the evidence which the claimant gave to the tribunal and says with respect to more than one point that he accepts that evidence. At [8] he says that because of what was known about the resident's past use of knives and why he was being evicted, that the claimant quite reasonably feared for his life. At [9] he says it was ironic that the claimant, not the resident, was arrested.

35. In the conclusions on unfair dismissal, the judge states at [20] that the claimant's reaction was understandable and that his behaviour was not perfect and not ideal, but he was right to be frightened for his life. At [21] the judge states that he accepts that the claimant was so traumatised that he did not see the significance of the filling-in of the report form at the time, and adds: "I can understand how he would feel".

36. These are all articulations of the judge's own evaluation of the claimant's conduct, the explanations for it, the context, and the mitigating circumstances and whether his conduct should be viewed as serious or culpable. In setting out his decision in this way the judge has not followed

Mummery LJ's advice in **London Ambulance v Small**. He has started with his own views and evaluation of the alleged conduct and his own conclusions about the explanations for the claimant's behaviour and his degree of culpability or blame, before proceeding to adjudicate the unfair dismissal claim. Further, he has in fact also continued to intersperse those conclusions of his own in the course of his adjudication of that claim.

37. Mummery LJ recognised, as do I, that there cannot be only one right way to write a judgment and that an appellate court should not and could not seek to prescribe a template for all occasions. What Mummery LJ was offering was effectively advice on best practice. What matters ultimately is what, reading the judgment fairly as a whole and in substance, the reader takes away about the judge's process of reasoning and analysis and whether it followed the legally correct approach. When the tribunal has correctly stated the law and reminded itself of the relevant principles, an appellate court should ordinarily assume that it has then followed its own self direction in the dispositive part of its decision unless unavoidably driven to the conclusion that it has not. The appellate court has not heard the evidence. The judge is not obliged to set it all out. He only needs to do sufficient to enable the parties to understand what was material to his conclusions and explain them.

38. But for the reasons that Mummery LJ so eloquently set out in **Small** a tribunal may sometimes, though the principle is well understood or even stated, lose its bearings and allow its own view improperly to infect its decision on fairness as indeed happened in **Small** itself. Following Mummery LJ's guidance is to be recommended because it imposes a discipline which assists the tribunal to keep on the right path, and it demonstrate overtly to the reader that its reasoning process has been sound and in accordance with the law.

39. In a case where the evidence available to the tribunal is materially different from that which was available to the employer, it may readily be apparent if the tribunal has wrongly drawn on

evidence before it in evaluating the employer's decision, overlooking that that must be judged on the basis of the evidence which the employer itself had before it at the time. I am mindful that this case cannot be said to plainly and obviously fall into that category. The judge made the point that Mr Rees had the same CCTV in front of him that the tribunal saw. It can also be said that both the respondent's managers and the tribunal had the claimant's incident report, and both the managers and the tribunal heard the account of the claimant himself. I have also not had the benefit of having heard the claimant's evidence, nor indeed that of the managers, that was given at the tribunal hearing, about what unfolded in the disciplinary process. It was the tribunal's task, not mine, to evaluate all of that.

40. Nevertheless, in judging the fairness of the dismissal the focus of the judge needed to be on the evidence that the managers had before them together with the evidence the judge had of what the managers themselves made of the evidence they had before them. The judge needed to focus on that, and not on his own evaluation of the evidence put before him about the incident, even though that may have substantially overlapped with the evidence that was put before the managers.

41. In this case, in my judgment, so extensive and repeated are the evaluative judgments, findings and conclusions stated in the first person by the judge himself, in the various passages to which I have referred, before even turning to engage with the issues raised by the unfair dismissal claim, and then stated again in the course of doing so, that it does give rise to a very real concern that the judge has failed sufficiently to keep in mind the distinction between his own evaluation of the evidence and whether it was reasonably open to the respondent's managers to come to any different view.

42. That does not by itself however necessarily demonstrate that the tribunal fell into error. Mr Hitchens makes the point that the tribunal was entitled, indeed required, to take a view as to where the boundaries of the band of reasonable responses lay and whether the dismissal fell outside those

boundaries in all the circumstances of this case. That was what, he said, this judge had in turn expressly stated that he had done. However, as the authorities explain, the tribunal must, to repeat, focus on what the employer made of the evidence, based on the information before it, not substituting its own view of the appropriate sanction but applying the standards of the hypothetical reasonable employer in considering the range of options that were reasonably open to it.

43. Mr Hitchens is right that the tribunal must consider all the circumstances of the case when considering whether the employer has exceeded the reasonable bounds. It is not bound to defer to the employer's view. Otherwise no such decision could ever successfully be challenged. But, nevertheless, the tribunal's task is still to evaluate the fairness of the decision in fact taken by this particular employer on this particular occasion, and whether the view that it took of the relevant considerations and the way in which it evaluated the evidence, when it came to its decision to dismiss, was reasonably open to it. That requires the tribunal to engage with the evidence it has about the employer's own reasoning, whether that be the dismissal and appeal outcome letters, live evidence of the managers concerned, or otherwise. That should be the tribunal's starting reference point, because it is that to which it should apply the band of reasonable responses test.

44. There may be cases where the employer's reasoning as applied to the evidence before it is defective, because it is in some way contradictory, misrepresents the evidence that it had, or otherwise is found not to be within the range of conclusions reasonably open to the hypothetical reasonable employer. **Graham** was such a case. The Court of Appeal held that the tribunal in that case had properly found that aspects of the employer's reasoning were defective; and the employer's purported conclusion that the conduct in that case was so serious as to warrant dismissal was at odds with the way that it had permitted the employee to continue working following her suspension. There may be other cases where the conduct in question is so obviously trivial that the tribunal can confidently say without the need for much further analysis that no reasonable employer would have dismissed for it.

45. But in this case it appears to me the tribunal failed to perform that task of considering the evidence about the employer's reasoning, and applying the band of reasonable responses test to that, before concluding that the respondent had exceeded the reasonable band in deciding to dismiss.

46. The tribunal refers at [5] to the fact that Mr Rees had the CCTV in front of him. At [7] it refers to an opinion expressed by Mr Rees in the letter of dismissal, and then the judge says that he accepts the claimant's evidence on this point. The judge does not consider, however, whether it was open to Mr Rees to form the opinion which he did, or if not, why not. The judge notes at [9] that the claimant's police statement, which did refer to his assault on the resident, was not before Mr Rees but was before Mr Fisher; but the judge does not then consider what Mr Fisher made of it or how it fitted into the overall picture. At [10] and [11] the judge summarises some features of the reasoning in the dismissal letter, but does not say any more about it, or whether the judge had any criticism to make of it, although the comment that Mr Rees placed "great store" by the disciplinary policy and the code of conduct give a hint of the criticisms to come. At [12] the judge refers to the lack of greater effort to contact the postman, but it appears at [17] that ultimately this was not something that he considered meant that the respondent had not conducted a reasonably sufficient investigation.

47. The two matters that are highlighted at [11] and [12] and later at [18] and [19] in relation to which the judge appears to have considered Mr Rees or Mr Fisher's reasoning to be defective were (a) the great store placed on the respondent's disciplinary policy and procedure and the code of conduct, and (b) a failure sufficiently to consider just how differently the incident might have appeared if the CCTV had had sound attached. The judge says at [18] that, had they taken into account the verbal abuse and threats made by the resident to the claimant, the context would have appeared different, and at [19] that the code of conduct was not sacrosanct and there was a failure to look at the case in the round and at the case on its own facts.

48. But, what the judge did not do is explain the basis for his conclusion that the managers had failed to consider and evaluate those very features or come to conclusions about them that were beyond those reasonably open to them. As far as the lack of sound on the CCTV is concerned the criticism was plainly not that there was a soundtrack but the managers failed to obtain or listen to it. There was and is no issue that there was no sound recorded on the CCTV, so none was heard by either of the managers or the judge. The judge's conclusions about how matters would have appeared had there been sound appear therefore to have based on his evaluation of the claimant's own account, to which [20] and [21] are dedicated.

49. But the judge does not engage with the fact that the dismissal and appeal letters for their part refer to what the claimant had to say in the course of the disciplinary process about these very same issues. These document how the claimant advanced his case in the internal process, that he had been verbally abused and threatened by the resident prior to assaulting him, and was acting in self-defence, and that he did not deliberately misrepresent the position in the incident report because he had been so traumatised when he wrote it that he did not fully record the events. These documents also set out what Mr Rees and Mr Fisher said they made of these submissions, and why, on analysis, they did not find them sufficiently persuasive or acceptable. The judge does not address why these conclusions were not reasonably open to the managers.

50. Nor does the judge engage with what these letters said about the disciplinary policy, code of conduct, and the significance which these managers attached to these documents. Once again, the dismissal and appeal outcome decisions give very detailed consideration to such matters as the provisions in those documents referring to the importance of accurate incident reports, and refer to training provided and procedures in place for dealing with stressful or threatening situations and the use of de-escalation techniques in such situations; but none of this is considered in the tribunal's decision. If the judge considered that, on these matters the managers' reasoning was defective and

led them to reach decisions which were outwith the band of reasonable responses, then it was incumbent upon the judge to engage with that reasoning before stating his conclusion to that effect at [22], which was once again mingled with the judge's own evaluation of the claimant's conduct.

51. In oral submissions Mr Hitchens made two particular points about all of this. Firstly, he reminded me that the judge was not obliged to set out or analyse all the evidence before him. The judge plainly had before him the dismissal and appeal outcome letters and it must be assumed that he took their contents fully into account in reaching the conclusions that he did. It could not be said that no reasonable tribunal could have taken the view that the managers' conclusions were themselves beyond the band of reasonable responses. Secondly, if the respondent considered the judge's reasons insufficient the proper course, *per* **English v Emery, Reimbold & Strick**, would have been to seek for clarification or an expansion of them.

52. I do not accept either of these submissions. Reading the decision as a whole, and making every allowance for the fact that the judge directed himself correctly as to the law, the generous way in which the decision should be read and the limited role of the EAT, this decision is in my view driven throughout by the judge's own evaluation of the claimant's conduct, the explanation for it and the degree of culpability that should or should not be attached to it. Where a tribunal comes to a conclusion that the respondent's decision to dismiss for conduct is beyond the band of reasonable responses, it needs to explain why it either considers it inherent that the conduct was so trivial that no reasonable employer could possibly dismiss for it, or otherwise to engage with the employer's reasoning and explain why it is defective, contradictory or otherwise was not reasonably open to it on the evidence that it had before it. That may not require a very detailed analysis by the tribunal, but it does require *some* analysis beyond a generalised criticism or mere assertion of the tribunal's conclusion.

53. Nor do I think that it was incumbent upon the respondent to seek further reasons or

clarification from the tribunal. Oral reasons were given, and written reasons were then requested and provided. Written reasons are not required merely to be a transcript of the oral reasons. There would be nothing wrong in the judge giving a fuller or better expressed account of his analysis and reasoning in the written reasons, provided of course that they were substantially consistent with his original oral decision and did not stray into territory that had not been canvassed or argued. What is contemplated in the passage in **English** to which Mr Hitchens referred me is to my mind no more than what may sometimes be permissible or appropriate in this area within the limits possibly in some cases of a reconsideration application or what in this jurisdiction is known as a *Burns/Barke* reference. In my judgment we are not in a permissible territory of either mechanism in this case.

54. Mr Hitchens made the point that the claimant was confronted by an individual who was known to have threatened violence in the past, was being evicted for that reason, threatened the claimant himself and, as the incident unfolded, pulled a knife on him. He said that the tribunal was perfectly entitled to conclude that no reasonable employer would have dismissed him for this found conduct given these dramatic events. But, given the evidence the tribunal had about what this employer does, and the nature of the claimant's particular job, his specific training, and the respondent's policies and procedures directed to how to handle such challenging and sensitive situations, and the evidence that the tribunal had, of the consideration which the managers concerned gave to all of that, I do not think that this tribunal properly applied the band of reasonable responses test to the actual decision that was taken in the particular circumstance of this employment and this incident.

55. I conclude that the tribunal did not apply the reasonable responses approach in the correct way when deciding whether it was reasonably open to the respondent to dismiss the claimant, and that the tribunal did fall into the trap of substituting its own view, perhaps for the very sort of reasons that Mummery LJ in **Small** so eloquently described can so easily happen in the passage from which I have cited. The appeal against the decision that the claimant was unfairly dismissed is

therefore allowed.

56. I turn to the appeal against the decision that the claimant was wrongfully dismissed. Where the employee has been summarily dismissed and the issue raised is simply whether he was in fundamental breach of contract, the employment tribunal has to decide that question for itself, making its own findings of fact, based on its appreciation of the evidence before it, and, as necessary, its own evaluation of the conduct in question, and correctly applying the law to it. It was not part of the grounds of appeal to assert that the tribunal's decision on wrongful dismissal was perverse, and Mr McCombie confirmed in the course of oral argument this morning that he did not seek to so contend.

57. As to the point raised by ground 5, it can be said that the judge has referred to the correct general contractual question that he had to answer, being whether the claimant's conduct amounted to a repudiatory breach. It might be said that the very expression throughout the decision of the judge's own evaluation of the claimant's conduct, which led him astray and into error in relation to unfair dismissal, itself sufficiently explained his own conclusion that the claimant's conduct did not amount to a fundamental breach for the purposes of the wrongful dismissal claim. That is to say, reading his decision as a whole, the judge did not think that the claimant had deliberately written a misleading incident report, nor that he behaved so badly in the incident as to make it untenable for the respondent to keep him in employment thereafter. It is tempting also to infer that the judge's reference to the claimant having behaved in a way that was in breach of contract may merely have been intended as a way of referring to the limited criticisms that the judge himself allowed of the claimant's behaviour, as being less than ideal and not wholly without fault.

58. However, it is well established that the nature and character of the implied duty of trust and confidence is that, if a breach of it is established, then such breach will inherently be fundamental – see **Morrow & Safeway Stores plc** [2002] IRLR 9 and the earlier authorities to which it refers.

While the judge here referred to having considered the authorities on wrongful dismissal, he did so in the context of making the point, entirely correctly as such, that the outcome of an unfair dismissal claim and of a wrongful dismissal claim do not necessarily go hand in hand. But his statement specifically that the claimant was in breach of contract, but not a fundamental breach, does leave me with a concern as to whether he has applied his mind to this aspect of the caselaw. Or, if he had in mind some other contractual term, he has not explained what it was.

59. Mr Hitchens again submitted that if clarification be thought necessary it could have been sought from the judge. But I do not think that this point would have been suitable for a *Burns/Barke* reference, and in any event, in this case in my judgment the time for that has now passed. For reasons I have given I conclude that the decision on wrongful dismissal is unsafe, as I cannot be sure if it was reached in a legally sound manner. I will therefore allow the appeal in respect of it as well.