



**LABOUR
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CAYMAN ISLANDS GOVERNMENT

Department of Labour & Pensions
2nd Floor, Mid Town Plaza, Elgin Avenue
P.O. Box 2182 Grand Cayman KY1-1105, Cayman Islands
Direct Ext: (345) 244-4031 / 244-4010
Labour Appeals Tribunal General Email: LAT@gov.ky

LABOUR APPEALS TRIBUNAL (Gazette Issue No. 05/2024)		
Chairperson	Deputy Chairpersons	Members
Robert Jones	Trisha McElroy Ryan Charles	Isidora Eden Dorothy Davis Garth Clarke Richard Lewis Betty Baraud Janet James

Decision

Matter:

Date of Hearing:

5 May 2023

Location:

Department of Labour & Pensions, Midtown Plaza, George Town, Grand Cayman

Attendees

Original Panel:

Teresa Pitcairn, Chairperson
Isidora Eden, Member
Janet James, Member

Replacement Panel

Robert Jones, Chairperson
Ryan Charles, Deputy Chairperson
Richard Lewis, Member

For the Appellant

Alastair David - HSM Chambers

For the Respondent

Peta Symons – Symons & Symons, Attorney-At-Law

The Proceedings were recorded.

The Proceedings were closed to the press and the general public.



A. Introduction

1. This appeal arises from the Ruling of the Labour Tribunal dated 23rd March 2021 (“the Ruling”), following the Labour Tribunal’s hearing on 16th February 2021.
2. (“the Complainant”) was employed by both names are used on the company’s letterhead and on the Complainant’s contract of employment but in any event “the Employer”, or from 22nd March 2006 until dismissal, which was recorded by a letter dated 12th June 2020 (“the Termination Letter”).
3. By Complaint filed with the Department of Labour & Pensions (“the Department”) dated 17th August 2020 (“the Complaint”), the Complainant claimed that was unfairly dismissed and that was entitled to severance pay and compensation for unfair dismissal.
4. The Labour Tribunal’s Ruling upheld the claim that the Complainant was unfairly dismissed from employment and awarded the Complainant severance pay of one week’s salary for each of years of continuous service in the sum of and compensation for unfair dismissal of salary in the sum of to total
5. This is the Employer’s appeal against the Labour Tribunal’s Ruling. The Employer says that the Labour Tribunal made an error of law in finding that the Complainant was unfairly dismissed.¹

B. Background

6. By the Termination Letter the Employer wrote to the Complainant in terms that -

“This is to advise you that effective today that you have been terminated from your employment with due to misconduct, specifically refusing to take instruction from management. Also, your aggressive outbursts on several occasions.

Please hand back all the company tools & equipment in your possession to the main office by

Although, we are deeply disappointed in your actions, we want to thank you for the service you have given to the company over the years and wish you all the best in your future endeavours”.

¹ See the Employer’s Grounds of Appeal/Skeleton Argument (“the Grounds of Appeal”) at paragraphs 16, 21, 24, 26, 28, 29 and 34



7. The immediate background to the Employer writing to the Complainant in these terms is evidenced by "Meeting Minutes ...Meeting June 12th, 2020 – 7.30am" (which should have read 11th June 2020 but in any event "the Meeting Minutes") which were in terms that –

"The meeting started at 7:30 in [redacted] office. Meeting was held by managers and [the Complainant]."

The agenda was to resolve why [the Complainant] was not following the requests of management.

As a first order of business, it was asked by [redacted] to [the Complainant] why [redacted] was not following instructions as requested by [redacted] at the works site. [The Complainant] immediately replied that [redacted] does not care" [redacted] was asked why [redacted] keeps hanging up phone call[s] from [redacted] and not answering calls. [The Complainant] replied. "Listen to me man don't send people to my site without asking me first". [The Complainant] then went into a long story about where [redacted] had been for the last 6 years and that [the Complainant] was the driving force behind the company during that time.

The conversation then elevated into a heated exchange. [The Complainant] then began shouting at [redacted] stood up from [redacted] seat and began to wave [redacted] arms around. [redacted] went closer to where [redacted] was sitting and at that time [redacted] stood up as [redacted] felt the situation may escalate. It was at that time that [the Complainant] grabbed the end of the conference room table throwing it into the air. The contents on the table (coffee, phones, office wares) etc. Spilled over. A heavy-duty stapler which was on the table broke [redacted] glasses.

It was at this time [redacted] picked up the phone to call the police. [The Complainant] continued shouting for a short time after[,] then left the room.

[the Complainant] called [redacted] from the car park to ask if [redacted] was fired. [redacted] was told to leave and come back on Tuesday when a decision had been made.

After a brief meeting with the Managers it was decided in the best interests of the company that [the Complainant] be fired. There were several reasons for this decision. This being the final straw in a long history of outbursts by [the Complainant] in which [redacted] challenged management".

8. The aforementioned [redacted] described [redacted] in [redacted] witness statement dated 27th November 2020 as a "part owner" of the Employer and the aforementioned [redacted] described [redacted] in [redacted] witness statement, also dated 27th November 2020, as "one of the owners" of the Employer.



9. In witness statement described the above-mentioned as "a project administrator and part of the management of the company".

10. In Complaint the Complainant said -

"On Monday the 8th of June, sent an email to and copied me to notify that a new worker was starting on Thursday and to find out which site would be going on. Between Monday and Thursday, I was not notified about this new worker coming to work with me. Then on Thursday, June 11, 2020, called me to say that had a new worker on the way to the job site starting on that day. I told that can't send a worker to the site so haphazardly as I needed to be notified in time so that I could make preparation for the new worker as PPE needed to be provided for the worker. said that if I didn't want the worker on the site, will let know and hung up the phone.

I was at the office and came to me and said that is coming by the office to see me. went into the office with and I also went in with [the] three of them but was told to wait outside until I was called. After fifteen minutes I was called into the conference room with [the] three of them present. said to me "First you are good at running multiple jobs but from what I have been here (sic), everything I do you object to so from now on you won't be running multiple jobs, you'll just be on one job". I said to "Now you are trying to play god on me and I was the one who had lunch with you and and asked you to come back and work with this company and now you are trying to tell me what I can and cannot do". Then said, 'its not about that it is about the new worker[']'. went on to say to me "why do you care if this guy comes on your site or not because you are never on your sites. I have been on both of your jobs yesterday (June 10th, 2020) and you were not at any of them[']". I said to "What are you talking about? I was at the office all day searching for panels for '. Then I turned to and asked, "Wasn't I here all day?" and remained silent.

As a result of failure to speak the truth, I got upset and frustrated and proceeded to lift the conference room table and in a raised voice asked, again "Wasn't I here yesterday?". then responded and said, "I did not say you were not here". I then said to 'You are a liar' and responded, "You are fired!" I said to "You can't fire me cause you didn't hire me, I was the one who had lunch with you and asked you to come back and work with the company and this is how you repay me[']".

Throughout all of this meeting said nothing other than asking me to "Calm down, clam down". When they observed I was upset[.] They then told me to go outside and calm down. I went outside and I called and asked, "Am I fired? said does not know needs to have a meeting with then told me to go home and come back on Tuesday (June 16th, 2020) (Monday 15th being a public holiday). I went home as instructed.



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Some five days following the meeting, on the 17th June 2020 . gave me a dismissal letter, said to me that cant believe they came to a decision to let me go. said "I can't believe we did this". They took sides with

11. Ir 27th November 2020 witness statement says –

2. *I have known the Claimant for a long time. I considered to be my friend and therefore what transpired on 11 June 2020 was a surprise to me.*
3. *On 11 June 2020, it came to my attention that wanted to have a meeting in regards to the Claimant and behavior. had two issues which wanted to discuss with the Claimant and they were:*
 - *The fact that continued to work multiple sites during the Covid Pandemic, when had been told to work only one site; and*
 - *manner on the phone*
5. *It was my understanding that the reason why a meeting was requested by was because had spoken to the Claimant earlier on the 11 June 2020 and the Claimant had been rude and refused to have a new employee on site. I also understand that the Claimant hung up on*
6. *From what was explained to me, the Claimant had taken issue with a new starter being placed on the ' and had objected strongly to placing that individual at the site (despite this being part of job"). I have also spoken to ' about the statement that the Claimant has produced saying that the new starter would not have PPE, this is not correct as the new starter would have had PPE given to at the office. has also confirmed that the issue of PPE was not raised, it appears that the Claimant's issue was that did not want someone on site who was not familiar with.*
7. *Both myself and worked with the Claimant on a daily basis and this was not the first time that had hung up on either of us and therefore I understood that a meeting was needed to address this and the other issue.*
8. *Before the meeting, I met with (another owner of the business) to discuss matters. We agreed that we needed to speak with the Claimant but we had not made a decision to dismiss This was a meeting to set out our position and to get version of events.*
9. *When the meeting started took the lead but the meeting soon degenerated as a result of the Claimant's behavior. The Claimant was told to stay on one site, i.e., the project but didn't want to do this. started yelling "I don't care" and "listen to me , you can't keep me pinned down, I won't do it". At one point : said, "you will have to fire me because I will not be held to one job". At this point responded saying words to the effect of "You might be fired if you don't do your job, but that is not up to me". We certainly did have discussions about where the*



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- Claimant was the day before and the Claimant did say that had been at the office all day looking for panels but however...while I could confirm that was at the office on 10 June 2020, wasn't there all day.*
10. *At the point that said the Claimant might be fired, the Claimant came around the conference table towards and walked right up to was sitting but it appeared that because of the way that the Claimant had walked over to had become concerned and e got up and backed away. The Claimant then proceeded to pick upon the end of the table and slam it back down causing Coffee to spill and a heavy-duty stapler to fall off and break glasses.*
11. *While this was going on was asking the Claimant to calm down and leave the office, however the Claimant refused to [do] this and continued to be aggressive shouting at that "You are just like the rest of them" and "didn't take you long to become one of them". was telling the Claimant to leave and it was only at the point that picked up phone and said was going to call the police that the Claimant left the room.*
12. *A few minutes later, the Claimant rang me to ask if. was fired and I told to come back next week, the first working day being Tuesday, so that we could discuss matters.*
13. *I would describe myself, as being gob smacked after the meeting. I don't think in my wildest of dreams I could have expected the meeting to go so badly and for the Claimant to act in the way that did...*
16. *On Tuesday morning, the Claimant didn't attend work and therefore I called and asked where was and I was told that was busy and would be coming in on the next day. I think it is fair to say that failed to attend work on Tuesday [and that] did not help situation.*
17. *and I were faced with a very difficult decision. The Claimant was an asset to the company. However, behavior on 11 June 2020 could not be tolerated. Therefore, after what we had both witnessed the decision was taken to dismiss the Claimant.*
18. *I see that the Claimant says that I said "I can't believe we did this" when I notified the Claimant of dismissal. My recollection is that I said "I can't believe what just happened" which was referencing the meeting on the 11 June 2020. On 17 June 2020, I explained to the Claimant that had gone too far and that the way in which acted had caused to lose job. This was an incredibly hard decision for the business to reach, the Claimant is a good worker, was an asset to the company and dismissing would make things harder in the short term. What I did not say to the Claimant or give any indication to was that I did not support the decision to dismiss I did support the decision. The Claimant went too far on the 11 June and I think knows that, and put the Respondent in an almost impossible position.*
19. *I genuinely don't think we had another other option but to dismiss the Claimant, was a friend, but behavior was so bad that had to be dismissed. had to threaten to ring the police*



before would leave the office. The Claimant's shouting was heard throughout the building. The Claimant was disrespectful and aggressive in the meeting, if we had not dismissed, would be setting a bad example to all the other employees".

12. In 27th November 2020 witness statement says -

15. The Respondent has a duty of care towards our employees and we can't have members of staff making outburst and behaving in the way that the Claimant did in the meeting of 11 June 2020. The Claimant's behavior was unacceptable and could not be tolerated. The Claimant had lost control of and could have injured anyone of us in the room by actions. As it turned out, my glasses were broken, however, by lifting the table in the manner that did, we could have been injured. Because of the dangers of our job, we have to have confidence that staff will act appropriately at all times. We deal with dangerous tools and dangerous situations all the time and we can't have an employee who can lose control so easily and put and others at risk.

16. Just so the Tribunal understand[s], the Claimant is a very good A person we could trust to get the job done. However, we felt we had no other option but to dismiss The Claimant's behavior in the office was so poor, so disrespectful that we had no option.

17. The decision was taken therefore by myself and to dismiss the Claimant".

C. The Law

13. The Labour Act (2021 Revision) ("the Labour Act") provides that-

51(1). Subject to subsections (2) [redundancy] and (3), a dismissal shall not be unfair if the reason assigned by the employer for it is –

- (a) misconduct of the employee within section 52(1);*
- (b) that it is under section 52(3), namely misconduct following the receipt of a written warning;*
- (c) that it is under section 53(2), namely failure of the employee to perform that person's duties in a satisfactory manner following the receipt of a written warning;*
- (d) that the employee was redundant;*
- (e) that the employee could not continue to work in the position that person held without contravention (on that person's or on the employer's part) of a requirement of this or any other law; or*



- (f) *some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held,*

and under the circumstances the employer acted reasonably

- (2) *[redundancy]*

(3) The question whether an employer has acted reasonably for the purposes of this Part shall be determined in accordance with equity and the substantial merits of the case having regard to all the circumstances.²

52.(1) An employer may terminate forthwith the employment of an employee where the employee has been guilty of misconduct in or in relation to that person's employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has-

- (a) conducted themselves in such a manner as clearly to demonstrate that the employment relationship cannot reasonably be expected to continue, ..."*

(emphasis added)

C.1 The Law - The reason assigned by the employer

14. Section 51 of the Labour Act refers to the reason assigned by the employer for the dismissal and the Labour Act is premised on the fact that there must be a reason for a dismissal. An employer cannot dismiss an employee capriciously. And whilst the Labour Act simply says that the reason is that assigned by the employer, and in many cases the reason will be self-evident, in those cases where it is not self-evident, a primary question may arise as to what the reason was.

15. When ascertaining the reason, in Abernathy v Mott Hay and Anderson [1974] (CA) ICR 323 Lord Denning MR said at [329 C] -

"The employer has under the Industrial Relations Act 1971 to "show" the reason for the dismissal. That is clear from section 24(6). It must be a reason in existence at the time when he is given notice. It must be the principal reason which operated on the employers' mind; see section 24(1)(a). It should, I think, be known to the man already before he is given notice, or he must be told it at the time".

² Broadly section 51 of the Labour Act reflects for present purposes the provisions of the equivalent statutory provisions in the UK, which are currently to be found in section 98 of the Employment Rights Act 1996 but when considering UK case law, reference is also made to section 98 of the Employment Rights Act 1996 in its previous incarnations, primarily section 24 of the Industrial Relations Act 1971 and section 57 of the Employment Protection (Consolidation) Act 1978.



16. And since it is the reason in existence at the time when the notice of dismissal is given, the fairness of any dismissal falls to be judged on the basis of the facts known to the employer at the time the decision to dismiss is taken (W Devis & Sons Ltd v Atkins [1977] (HL) ICR 622³).

C.2 The Law - Under the circumstances the employer acted reasonably (that is, in accordance with equity and the substantial merits of the case).

17. The Labour Act requires that an employer act reasonably when deciding whether or not to dismiss and when adjudicating on the reasonableness of an employer's decision, a Labour Tribunal must not simply substitute its own views for those of the employer and decide whether it, the Tribunal, would have dismissed on those facts. It must make a wider enquiry to determine whether a reasonable employer could have decided to dismiss on those facts. In Iceland Frozen Foods v Jones [1983] (EAT) ICR 17 Browne-Wilkinson J said at [24 F] -

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by sections 57(3) of the Act of 1978 [section 51(1) of the Labour Act] is as follows; (1) the starting point should always be the words of section 57(3) themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstance of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band, it is unfair".

18. But it has been said that the band of reasonable responses test is too wide. In Thames Water Utilities Ltd v Newbound [2015] EWCA Civ 677 Lord Justice Bean said-

"61. The "band of reasonable responses" has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook s98(4)(b)

³Per Viscount Dilhorne at page 676 "It [the reason for the dismissal] must refer to the reason shown by the employer and to the reason for which the employee was dismissed. Without doing very great violence to the language I cannot construe this passage as enabling the tribunal to have regard to matters of which the employer was unaware at the time of dismissal, and which therefore cannot have formed part of his reason or reasons for dismissing an employee".



*of the 1996 Act, which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss "in accordance with equity and the substantial merits of the case". This provision, originally contained in s24(6) of the Industrial Relations Act 1971, indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the tribunal's consideration of a case of this kind to be a matter of procedural box-ticking. As EJ Bedeau [the Employment Tribunal Judge] noted, an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer. The authority he cited as an example among decisions of this court was *Bowater v NW London Hospitals NHS Trust* [2011] IRLR 331, where Stanley Burnton LJ said:*

"The appellant's conduct was rightly made the subject of disciplinary action. It is right that the E[m]ployment T[ribunal], the E[m]ployment A[p]peal T[ribunal] and this court should respect the opinions of the experienced professionals [in this case who decided that summary dismissal was appropriate. However, having done so, it was for the to decide whether their views represented a reasonable response to the appellant's conduct. It did so. In agreement with the majority of the I consider that summary dismissal was wholly unreasonable in the circumstances of this case".

C.3 The Law - An employer may dismiss an employee if the employee is guilty of serious misconduct

19. The Labour Act provides that an employer may dismiss an employee if that employee is guilty of misconduct and in *British Homes Stores Ltd v Burchell* [1978] (EAT) WL 57387 IRLR 379 at [379 and 380], a misconduct case, Arnold J said -

"The case is one of an increasing familiar sort in this Tribunal, in which there has been a suspicion or belief of the employee's misconduct entertained by the management, it is on that ground that dismissal has taken place, and the tribunal then goes over that to review the situation as it was at the date of the dismissal. The central point of appeal is what is the nature and proper extent of that review...

What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question...entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element.

First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which formed that belief on those grounds, at any rate at the final stage at which formed that belief on those grounds, had carried out as much investigation into the matter as



was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances”.

20. In the undated Skeleton Argument filed by its attorneys and put before the Labour Tribunal, the Employer correctly identifies the role the principles set out in Burchell play in a misconduct case. The Employer says –

“2. In an Unfair Dismissal claim, the Tribunal will have to consider the oft quoted criteria set down in the case of British Home Stores Ltd v Burchell [1978] IRLR 379 which sets out that a dismissal on grounds of misconduct will be fair if at the time of dismissal:

- The employer believed the employee to be guilty of misconduct.*
- The employer had reasonable grounds for believing that the employee was guilty of that misconduct.*
- At the time it held that belief, it had carried out as much investigation as was reasonable”.*

21. In the undated Skeleton Argument, the Employer also correctly identifies the role the principles set out in Iceland Frozen Foods play as regards the duty to act reasonably. The Employer says –

“3. The Tribunal will also have to consider whether or not under the circumstances the employer acted reasonably”.

22. And the Employer also correctly identifies the need to adopt a fair procedure, when it goes on to say in its Skeleton Argument –

“...It is averred that this incorporates into whether or not the dismissal was within a range of reasonable responses and whether the procedure followed was fair”.

23. As far as procedure is concerned, in Whitbread plc (t/a Whitbread Medway Inns) v Hall [2001] (CA) I.C.R 699 Lady Hale said -

“14. In this case, however, as the conduct complained of by the employer was admitted by the employee, Mr Gorton [Counsel for the employer] argues that the only question for the tribunal was whether dismissal fell within the band of reasonable responses to it. If it did, it was not for the tribunal to substitute its own decision for that of the employer. The tribunal should not have been concerned with the reasonableness of the process by which the employer arrived at the decision...



16. For my part, I find it impossible to read into these cases⁴ the proposition that the employer is free from any requirement to act in a reasonable fashion once the alleged misconduct is admitted. Section 98(4) of the 1996 Act requires the tribunal to determine whether the employer "acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and further to determine this in accordance with "equity and the substantial merits of the case". This suggests that there are both substantive and procedural elements to the decision, to both of which the band of reasonable responses test should be applied".

D. The Labour Tribunal Hearing

24. Before the Labour Tribunal the Employer's position was that -

"4. It is the Respondent's case that;

- i. They believed the Claimant to be guilty of serious misconduct*
- ii. That they had reasonable grounds for believing that the employee was guilty of that misconduct*
- iii. That at the time of the dismissal, they had carried out as much investigation as was reasonable*
- iv. The dismissal was within the range of reasonable responses and the procedure followed was fair ...*

13. It is [the] Respondent's position that the Claimant's actions amount to serious misconduct. If this is accepted, it is further averred that any dismissal must be within the range of reasonable responses. As the EAT held in the case of Wilson Devonald v Suckling UKEAT/0131/10 DM at paragraph 14:

We note that, having found that the misconduct amounted to gross misconduct, which seems to us is prima facie a dismissible offence, we would have thought it is extremely difficult to characterise a decision to dismiss on the grounds of that misconduct as outside the range of reasonable responses. We do not see how it can easily be said that no reasonable employer could fairly have dismissed the Complaint for what was complained of".⁵

⁴ Royal Society for the Protection of Birds v Croucher [1984] ICR 604 and Boys and Girls Welfare Society v Macdonald [1977] ICR 693.

⁵ Employer's undated Skeleton Argument.

25. In the undated 'Claimant's Submissions of Law and Fact' the Complainant's attorney, after dealing with the question of misconduct and setting out what that attorney says were inconsistencies in the Termination Letter, and the subsequent case put forward by the Employer, went on -

"One of the central issues for the determination of the Tribunal is as follows:-

(a) Why did the Respondent dismiss the Complainant? what are the reasons for the dismissal and did it act reasonably in advancing the reason for its dismissal

Letter of Dismissal

In its written reason for dismissal of the Complainant dated June 12, 2020 (received by the Claimant a few days later) the Respondent sets out the following allegations:

- 1. Misconduct, specifically refusing to take instructions from management*
- 2. Your aggressive outbursts on several occasions*

It is clear that the employer's main or principal reason for the dismissal was the failure to take instructions from management. The question therefore is how fair is this reason...

b. It is well established that the employer must have a reasonable belief of the guilt of the employee of that specific misconduct at the time of dismissal, i.e. failing to take instructions from Management. The Complainant avers that the Respondent had no such reasonable belief of refusing to follow instructions from management at the time of dismissal for the mere reason that the Respondent fired for outburst at the meeting of June 11, 2020 and not for any refusal to follow instructions. If the Respondent entertained any genuine belief at the time of dismissal, it was in respect of the incident of June 11, not in refusing to follow management's instructions which was its principal reason for the dismissal.

c. The reasonable belief must be in relation to the reason specified by the employer. So that there has to be a nexus between the reasonable belief and the dismissal. If, as the Claimant believes, the Respondent's reasonable belief was in relation to alleged misconduct during the incident on the 11th June, 2020, then this in our view makes the dismissal patently unreasonable and grossly unfair. To specify one type of misconduct for dismissal and then dismiss for a different type of misconduct is plainly wrong.

We submit that there were no findings at the meeting of June 11, 2020 capable of providing any evidence to support the allegation of failing to take instructions from management. Instances of this specific alleged misconduct were neither cited nor found to be proven. This supports the unreasonableness of the action taken by the



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Respondent and the unfairness of decision to dismiss. Had there been findings that produce evidence in support of the allegation of failure to follow management's instructions, the strength of those findings would likely have made the dismissal fair.

The other critical issue for the Tribunal's consideration in its deliberation of this matter is the reasonableness of the dismissal as it relates to the alleged misconduct. The question here is whether, given all the circumstances, the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Complainant.

Put another way, by the standards of the reasonable employer, did the Respondent establish reasonable grounds for its belief that the Complainant failed to take instructions from Management and whether its investigation into the misconduct was reasonable in the circumstances.

In our view, the simple answer is NO. The alleged investigation into the Complainant's misconduct vis-à-vis failing to follow Management instructions did not produce any satisfactory evidence reliable enough to create reasonable belief to dismiss on the part of the Respondent. contended that the Complainant refused to follow instructions, while the Complaint disputed it. It was never resolved. Furthermore, the Complainant believes that the employer came to the meeting with a 'closed mind' with respect to guilt, accepting allegations so hastily and uncritically and in the process reaching a hasty conclusion to dismiss".

26. As the Complainant's attorney points out, the contemporaneous documentation (the Meeting Minutes and the Termination Letter) state that the reason for the Complainant's dismissal was the Complainant refusing to take instructions from management and the Complainant's alleged aggressive outbursts on several occasions. The Meeting Minutes say that the Complainant's conduct on 11th June 2020 was "the final straw in a long history of outbursts".
27. However, the witness statements of and do suggest that the real reason for the dismissal was the Complainant's conduct at the 11th June 2020 meeting. As has been mentioned above, whilst the Labour Act simply says that the reason for a dismissal is that assigned by the employer, in those cases where a question arises as to what the reason was, the first task of a Labour Tribunal is to be satisfied as to the real reason or reasons for the dismissal. In JP Morgan Securities plc v Ktorza 2017 WL 02610563 Richardson J said –

"37. It is well established that the Employment Judge's task [our Labour Tribunal] was to start with the reason given by the Respondent and review every aspect of it – investigation, fact finding, procedure and sanction – to decide whether taken as a whole the Respondent acted reasonably in treating it as a sufficient reason to dismiss".



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28. And in Fuller v The London Borough of Brent [2011] EWCA Civ 267, 2011 WL 722292 Moore-Blick LJ said-

"54. The first of the questions identified by the tribunal requires a finding of fact to be made about the employer's state of mind. Did it genuinely believe that the employee had committed the acts which are said to amount to gross misconduct? It is important for a tribunal considering that question to understand that it is not concerned with what actually happened but with what the employer believed had happened".

(emphasis supplied)

29. When asked by the Labour Tribunal Chairperson about the Employer's termination of the Complainant, for refusal to obey management instructions, gave as an example of such refusal the Complainant's refusal to stop moving from work site to work site. also cited the issue with the new starter employee and the Complainant's interactions with ⁶
30. But the transcript of the 16th February 2021 Labour Tribunal hearing also indicates that in answer to the questions put to , as to whether there had been any previous incidents similar to that on 11th June 2020, answered "no, never"⁷ and when the Complainant's attorney asked whether any warnings had been given to the Complainant about behaviour, or if any disciplinary action had ever been taken against said "No".⁸
31. More to the point, said "we were in [a] meeting and the problem is the meeting. If the meeting went on and the meeting[,] you know[,] didn't escalate to what [the Complainant] did in the meeting then ok".⁹ And when the Complainant's attorney referred to the Termination Letter seemingly mentioning previous outbursts on several occasions, said that the Termination Letter "talks specifically about the [11th June 2020] meeting cause there weren't any before, that was the only instance when [the Complainant] went ballistic".¹⁰
32. said that the reference in the Termination Letter to "aggressive outbursts on several occasions" was meant to be a reference to "several occasions in the meeting".¹¹ expanded "several occasions in my meeting where has, I mean it's just that again, it wasn't something we expected to happen in that meeting...[,] the meeting was supposed to be a normal company operation...meeting that we all had a[n] issue to resolve ...this is a company that you know[,] working for twenty eight years..., we probably have many meetings like this, a simple issue

⁶ The 16th February 2021 Labour Tribunal Transcript at pages 6 and 7 of 32

⁷ Transcript page 3 of 32

⁸ Transcript page 4 of 32.

⁹ Page 9 of 32.

¹⁰ Page 11 of 32.

¹¹ Page 11 of 32.



you know... and as a simple meeting, a simple resolution that turned into a huge blow up in the meeting...that meeting turn, just went south specifically".¹²

E. The Labour Tribunal's Ruling

33. In the "Background" section of the Labour Tribunal's Ruling the Labour Tribunal said *"The facts of the incident that resulted in the decision to terminate the complainant are in significant part agreed".¹³* Indeed, the recollection of both the Complainant and of of the 11th June 2020 meeting are the same in all material respects -

- A meeting was called.
- had discussions between themselves before calling the Complainant into the meeting.
- ran the meeting.
- The Complainant became upset.
- made some mention of the Complainant being fired.
- The Complainant became frustrated and the conference table was moved.¹⁴
- The Complainant was asked to leave the room.

34. Having set out its "Background" facts, in its "Observations" the Labour Tribunal found that -

"11. The employer's case is not helped by the confusing message in their statements and evidence. The termination letter dated 12th June makes it appear that the termination was based on 2 factors (1) failing to take instruction (2) aggressive outbursts. But

- *The statement of i states that [the Complainant's] failure to attend work on the 16th June was also a factor despite the date of the termination letter being 12th June.*
- *The employer conceded that there were not several aggressive outbursts but one*

¹² Page 11 of 32.

¹³ 23rd March 2021 Labour Tribunal Ruling at page 1 of 5 .

¹⁴ Although the parties evidence as to the circumstances of the table moving was not the same.



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- *Both owners' statements give the clear impression that the decision was solely based on the conduct at the meeting on the 11th.*

35. Given : oral evidence, it would appear that the Labour Tribunal satisfied itself that the real reason for the dismissal was the Complainant's behaviour on 11th June 2020 and the Complainant's dismissal had nothing to do with the Complainant failing to follow instructions from Management, or of having been guilty of aggressive outbursts on several previous occasions and that being the case, the outburst on 11th June 2020 could not have been *"the final straw"*.

36. In the course of establishing the real reason for the dismissal (the outburst on 11th June 2020), the Labour Tribunal also made findings of fact as to what exactly happened on 11th June 2020. However, although the facts of the 11th June 2020 meeting were to a significant part agreed, there was one area of conflicting evidence.

37. The Meeting Minutes mention the Complainant grabbing the end of the conference room table and *"throwing it into the air"* and in witness statement mentions the Complainant proceeding to *"pick upon the end of the table and slam[ming] it back down, causing coffee to spill"*. In Complaint the Complainant mentions getting frustrated and *"lift[ing] the conference room table"*. In that regard, in its "Observations" the Tribunal found that -

"8. [The Complainant] clearly acted badly at the meeting. reaction demonstrated what appeared to be a growing tension between and and perhaps a sign that the employment relationship was starting to come apart. This can happen with long serving employees who become too comfortable in their relationship with management and where new staff come in and attempt to assert authority over longer serving members of staff.

9. [The Complainant's] evidence was somewhat contradictory as to the events of the meeting, the letter from his Attorney both denied throwing the conference room table in the air and accepted lifting the table but at the Tribunal in his evidence [the Complainant] recounted that the table lifted by accident as he got up suddenly. We prefer the oral evidence of the Complainant who gave evidence in a mostly candid and convincing fashion and accept that the table lifting was not on purpose and that left the room immediately upon being asked to do so".

38. Having made this finding, the Labour Tribunal applied the facts as it found them to the law and said -

"12. Counsel for the Employer correctly cites British Home Stores v Burchell as containing the test for a fair dismissal on the grounds of misconduct being a threefold test. The test has to be applied in the context of whether in the circumstances the employer acted reasonably.



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13. The disparity between the termination letter and the focus at Tribunal could be perceived as a concern that if the dismissal was grounded on the failing to take instructions from that the employer clearly didn't come close to meeting its obligation to carry out a fair investigation under the third limb of the Burchell test.

14. In any event, dismissing an employee is a remedy of last resort, summary dismissal will only be warranted where an employee has committed gross misconduct, i.e. has committed a fundamental breach of contract of employment. Most acts of misconduct by employees at work may merit a warning or other sanction short of dismissal but will not merit summary dismissal and only the most serious behaviour by an employee entitles an employer to dismiss summarily.

15. When considering what behaviour will cross this threshold, the Tribunal must also consider the context. The context here is that the employer works in the construction industry and some industrial language and forthright exchanges are not uncommon. Such was acknowledged by in evidence and fairly conceded that disagreements occur and that generally everyone calms down and moves on after a cooling off period. A further contextual point is that the employer (sic) worked with the employer for without so much as a verbal warning and was clearly considered a hard and competent worker.

16. Nevertheless, the employee doesn't work for free, good and honest service to your employer are to be expected but an employer should be prepared that after of service that if something does go wrong, they are to be expected to make a greater effort to try and resolve the problem short of dismissal than for a short-term employee.

17. We find that the meeting was a short one, that the behaviour of [the Complainant] was inappropriate and that the meeting was badly handled by the owners who should have been well aware that bringing [the Complainant] in, sitting outside whilst they met and then introducing to the meeting and allowing to run the meeting was likely to produce a flashpoint. We do find that the behaviour of [the Complainant] was inappropriate but that it amounted to a short verbal outburst and standing up suddenly and accidentally knocking against the table and left upon being asked.

18. In all the circumstances we find that the employer did not act reasonably in dismissing [the Complainant] and we find so whilst recognising the Tribunal's role as per the Burchell test.

19. As set out above, we do find that blame does attach to the employee and agree with the employer's Attorney that a Polkey reduction is appropriate in the circumstances. It appears to us that whilst the complaints made by about [the Complainant] were not fully substantiated, that there was clearly a fundamental issue between them, and parting of ways was increasingly inevitable given the failure of [the Complainant] to accept that the owners valued over. As such we reduce compensatory award to ”.



F. The Employer's Appeal

39. In the undated Grounds of Appeal filed by its attorneys, the Employer says -

"2. It is the Appellant's case that the Labour Tribunal ("the Tribunal") made a number of fundamental errors of law in their decision dated 23 March 2021. It is the Appellant's submission that the Tribunal erred in the following manner:

- i. The Tribunal substituted their view in regard to the incident of 11 June 2021, when they found at paragraph 9 of the Judgement that "We prefer the oral evidence of [the Complainant] who gave evidence in a most candid and convincing fashion and accept that the table lifting was not on purpose and that left the room immediately upon being asked to do so".*
- ii. The Tribunal substituted its view as to the reasonableness of the dismissal when holding at paragraph 18 of the Judgement "In all the circumstances we find that the employer did not act reasonably in dismissing [the Complainant] and we find so whilst recognising the Tribunal's role as per the Burchell Test".*
- iii. The Tribunal failed to follow the Burchell Test*

G. Discussion

i The Tribunal substituted their view in regard to the incident of 11 June 2021, when they found at paragraph 9 of the Judgement that "We prefer the oral evidence of [the Complainant] who gave evidence in a most candid and convincing fashion and accept that the table lifting was not on purpose and that left the room immediately upon being asked to do so".

40. The Employer's attorneys say -

"15. In effect the Tribunal substituted their view for that of the Appellant when reaching conclusions as to what happened on 11 June 2020. The Tribunal should have reviewed the evidence which was before the Appellant at the date of the dismissal and then reached their decision as to whether a reasonable employer would have concluded that there were reasonable grounds upon which to base a reasonable belief in the Respondent's guilt. The evidence before the Appellant in relation to [the] 11 June 2020 [meeting], is contained within the statement of it is clear from the Judgment that this evidence did not factor into the Tribunal's decision making.



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16. From the Judgement it is clear that the Tribunal proceeded on the basis of the facts which they found, not which was before the Appellant, and then concluded that the dismissal was unreasonable. The Tribunal's actions are the very definition of substitution. This amounting to an error of law".¹⁵

41. According to the Employer, the Labour Tribunal reheard what happened at the 11th June 2020 meeting and the Labour Tribunal's decision was based on the reasonableness of the Employer's decision to dismiss based on that version of events. The Employer says that the Labour Tribunal based its decision on the evidence it heard, rather than on the evidence known to the Employer on 11th June 2020. Once it had established what it believed were the facts, the Employer says the Labour Tribunal then went on to decide whether it would have dismissed the Complainant on those facts, rather than deciding whether it was reasonable for the Employer to dismiss the Complainant on the basis of the facts known to it.
42. In this respect it does appear as though the Labour Tribunal may have done what it should not have done. By relying on evidence given by the Complainant at the Labour Tribunal hearing (saying that lifting the conference table was an accident) rather than the evidence the Employer says it acted on when it took the decision to dismiss (that the Complainant threw the table in the air) it may have erred in law. Having placed weight on evidence that the Employer did not necessarily have, it must have slipped into a "substitution mindset".
43. In London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, 2009 WL 6334876 Mummery LJ identified the role of the Employment Tribunal/Labour Tribunal when he said -
- "42. The E[m]ployment T[ri]bunal used its findings of fact to support its conclusion that, at the time of the dismissal, the Trust had no reasonable grounds for its belief about Mr Small's conduct and therefore no genuine belief about it. By this process of reasoning the ET found that the dismissal was unfair. In my judgment, this amounted to the ET substituting itself and its findings for the Trust's decision maker in relation to Mr Small's dismissal..."*
- 44. ...It was not the role of the ET to conduct a rehearing of the facts which formed the basis of the Trust's decision to dismiss. The ET's proper role was objectively to review the fairness of Mr Small's dismissal by the Trust".*
44. In JP Morgan Securities plc v Ktorza supra Richardson J said -

"48. The Employment Judge [our Labour Tribunal] must avoid reaching conclusions of his own and starting from his own conclusions when he asks whether the Respondent acted reasonably. To do so may demonstrate a substitutionary mindset".

¹⁵ The Employer's Grounds of Appeal/Skeleton Argument page 5.



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45. And in Fuller v The London Borough of Brent supra Moore-Bick LJ said-

"54. It is understandable that in a case such as the present the tribunal should wish to make findings of fact about what occurred, if only to set the dispute in context, but there is a danger that, if it does so, it may inadvertently treat its findings as if they were facts which were known to the employer, even though that may not be the case. The same is true of inferences that may be drawn from the primary facts; it is the inferences drawn by the employer that matter (provided they are reasonable inferences and genuinely drawn), not those that the tribunal itself might draw".

46. In the Termination Letter the Complainant was alleged to have thrown the table in the air. However, in witness statement, which would have been made after some reflection, said
"10...The Claimant then proceeded to pick upon the end of the table and slam it back down causing Coffee to spill and a heavy-duty stapler to fall off...". The Labour Tribunal clearly wished to make findings of fact, if only to set the dispute in context (per Fuller) but it does not necessarily follow that the Labour Tribunal then found that the Complainant was not guilty of misconduct, based on the inferences that it drew.

47. It does not necessarily follow that the Labour Tribunal decided that the Employer did not act reasonably just because of this finding of fact. The Labour Tribunal, it appears, still reviewed the Complainant's dismissal objectively. It still found that the Complainant *"clearly acted badly in the meeting"*¹⁶ and that the Complainant's behaviour was *"inappropriate"*.¹⁷ Allowing the Complainant to clarify what said had happened on 11th June 2020 did not necessarily mean that the Labour Tribunal then went on to assess the reasonableness of the Employer's decision with the benefit of that insight.

48. Having accepted that the Complainant was guilty of misconduct (clearly acted badly"), the Labour Tribunal pointed out that summary dismissal would only be warranted if the Complainant acted in such a way as to commit a fundamental breach of contract of employment.¹⁸

49. The important passage of the Labour Tribunal Ruling seems to be paragraph 15. The Labour Tribunal says that when considering whether the Employer acted reasonably in adopting *"the remedy of last resort...the Tribunal must also consider context"*, that is, the objective test of whether the dismissal was reasonable in all the circumstances according to equity and the substantial merits of the case. The Labour Tribunal may have strayed in preferring the evidence the Complainant gave at the hearing over what the Employer knew at the time of the dismissal but it does not appear that the acceptance of the Complainant's evidence was the reason for finding that the dismissal was unreasonable.

¹⁶ Paragraph 9 of its Ruling.

¹⁷ Paragraph 17.

¹⁸ The Labour Act section 52(1) says that the employee must have behaved in such a way that the employer cannot be expected to take any other action. And for a discussion of the concept of fundamental breach see Pepper v Webb [1969] 1 WLR 514.



ii. The Tribunal substituted its view as to the reasonableness of the dismissal when holding at paragraph 18 of the Judgement “In all the circumstances we find that the employer did not act reasonably in dismissing [the Complainant] and we find so whilst recognising the Tribunal’s role as per the Burchell Test”.

50. The Labour Act provides that a dismissal shall not be unfair if it is for one of the reasons listed in s51(1) and under the circumstances the employer acted reasonably. Therefore, the Labour Tribunal must undertake a two-stage process. The first stage is for the Labour Tribunal to satisfy itself of the reason for the dismissal and that the reason is one of the potentially fair reasons set out in the Labour Act. The second stage will then be the assessment the Labour Tribunal must carry out as to whether the employer’s decision to dismiss for that reason was reasonable in all the circumstances.
51. In the present case it was necessary for the Labour Tribunal to make findings of fact as to the reason for the dismissal, based on the Employer’s state of mind at that time. This is because the reasons given for the Complainant’s dismissal in the Meeting Minutes and in the Termination Letter were the Complainant’s alleged long history of outbursts and/or aggressive outbursts on several occasions and/or refusal to take instruction from management. However, after hearing the parties it became apparent that these were not the reasons for the Complainant’s dismissal. Rather, was dismissed solely because of behaviour during the 11th June 2020 meeting.
52. If the Labour Tribunal found the dismissal unfair just because the Employer said it was for one reason when it was in fact for another, or if the Labour Tribunal found the dismissal unfair just because the table was moved by accident and that made all the difference, then it may have erred in law.
53. But the fact that the real reason for the dismissal was the outburst at the 11th June 2020 meeting and the fact that the Termination Letter had given another reason, or additional reasons, does not necessarily make the dismissal automatically unfair, as argued by the Complainant’s attorney. In the absence of bad faith, an employer saying a dismissal is for one reason whereas it turns out the dismissal was for another reason, does not necessarily make a potentially fair dismissal unfair. Sometimes employers mislabel the reason for a dismissal. Again, in Abernathy v Mott Hay and Anderson supra Lord Denning MR said at [329 D]-
- “But I do not think that the reason has got to be correctly labelled at the time of dismissal. It may be that the employer is wrong in law as labelling it [in Abernathy] as dismissal for redundancy. In that case the wrong label can be set aside. The employer can only rely on the reason in fact for which dismissed the , if the facts are sufficiently know or made known to the i ”.*
54. Immediately after the 11th June 2020 meeting the Complainant called and asked “Am I fired” and so it was clear to all that the reason for the Complainant’s dismissal was the Complainant’s behaviour on 11th June 2020 and all the parties appear to have appreciated the gravity of the situation at the time. Although having preferred the Complainant’s oral explanation for



actions over : previous explanation, the question for the Labour Tribunal remained “was it reasonable to dismiss for that conduct ?”.

55. Establishing, as the Labour Tribunal did, that the reason for the dismissal was solely the Complainant’s outburst on 11th June 2020, was important. This was not just a question of mislabelling. In this case it was a question of the Employer giving reasons that did not exist. Dismissing for the misconduct on 11th June 2020 may well have been reasonable, if it had occurred after repeated instances of misconduct, that is, if it had been “the final straw”¹⁹ but dismissing for the same misconduct, now correctly looked at as an isolated incident, might not be reasonable in all the circumstances.
56. At the Labour Tribunal hearing the Employer accepted that this was not a final straw situation. It was a dismissal solely for the Complainant’s 11th June 2020 behaviour. One always has to revert to section 51 of the Labour Act²⁰ and decide whether the dismissal is reasonable in all the circumstances. So, was the dismissal because of this one incident “*in accordance with equity and the substantial merits of the case having regard to all the circumstances*”.
57. It was not in dispute that the Complainant was upset, frustrated, raised voice and was told to calm down on a number of occasions. But the fact finding exercise the Labour Tribunal undertook allowed it to find that the 11th June 2020 meeting was handled badly, going some way to explain why the Complainant became upset and frustrated and why what started out as an investigative meeting “went south”. Was it reasonable for that investigative meeting to carry on until, the Employer says, the Complainant became so frustrated that he lifted the table, started shouting and approached in a threatening way.
58. The Labour Tribunal Ruling makes it clear that the Labour Tribunal did not find that the dismissal was unfair because it believed that the table lifting was an accident and not on purpose, as the Employer may have had every reason to believe it was. The Labour Tribunal found that the dismissal was unfair because it was not reasonable to dismiss in all the circumstances for the misconduct that the Employer accepted had occurred.
59. The Labour Tribunal also recorded in its “Background” that “[The Complainant] was a senior electrician at the company and had of good service behind, with no written or verbal warnings on file”²¹ and that “A further contextual point is that the [Complainant] worked with the employer for without so much as a verbal warning and was clearly considered a hard and competent worker. An employer should be prepared that after of service that if something

¹⁹ And although a wrongful dismissal case, rather than an unfair dismissal case, see Kerns v Glencore [2013] EWHC 3697 (QB), 2013 WL 6451128 at [76 and 77] for confirmation that the principles in ‘final straw’ cases apply “*mutatis mutandis when it is the employee who is said to be in breach of the implied term of trust and confidence*”.

²⁰ As directed in Iceland Frozen Foods.

²¹ Paragraph 2 of the ‘Background’ section of the Ruling.



does go wrong, they are expected to make a greater effort to try to resolve the problem short of dismissal than for a short term employee”²²

60. In Thames Water Utilities Ltd v Newbound supra Lord Justice Bean also said-

“76. The judge held that the claimant’s 34 years of service with a clean disciplinary record had not been given sufficient weight. Mr Jones [Counsel for the employer] submits that this was an error of law. The weight to be attached to the claimant’s record was, he submits, entirely a matter for the employers. They did take it into account, but as a major point against him; they decided that with his experience he should have known better, and the breach was so serious that a clean record over 34 years was simply irrelevant.

77. Mr Jones’ submission, which found favour with the EAT, is an attempt to stretch the band of reasonable responses to an infinite width. In assessing the reasonableness of the decision to dismiss, length of service is not forbidden territory for the employment tribunal. The fact that Mr Newbound was an employee of 34 years’ service with a clean disciplinary record was a factor the judge was fully entitled to take into account; it would have been extraordinary if he had not done so”.

61. In the present case the Labour Tribunal found that whilst the Complainant was guilty of misconduct, since the misconduct was not “the final straw”, it was not reasonable to dismiss the Complainant for it in all the circumstances. The Labour Tribunal found that it was an isolated incident, it found the flaws in the way the meeting was conducted were many and the Labour Tribunal was also particularly mindful of the Complainant’s unblemished long service record, which the Employer appears not to have taken into account.

iii The Tribunal failed to follow the Burchell Test

62. Given the Labour Tribunal’s finding that the Complainant was dismissed for behaviour on 11th June 2020, the ground of appeal that the Labour Tribunal failed to follow the Burchell test appears to be something of a red herring. The Labour Tribunal was alive to the Burchell test and referred to it in its decision. The Labour Tribunal said, *“The disparity between the termination letter and the focus at Tribunal could be perceived as a concern that if the dismissal was grounded on the failing to take instructions from that the employer clearly didn’t come close to meeting its obligation to carry out a fair investigation under the third limb of the Burchell test”*. The Labour Tribunal went through the process of finding out what the real reason was for the Complainant’s dismissal was because it was clear that the Complainant was not guilty of the misconduct that the Employer claimed he was guilty of.

63. Having found that the Complainant had not been guilty of a history of outbursts, it followed that the Employer could not have genuinely believed in the Complainant’s guilt for such a history of

²² Paragraph 15 and 16 of the Observations section.



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outbursts, or that the Employer had formed such a belief on reasonable grounds and specifically, according to the Labour Tribunal, the Employer could not have formed any such belief after reasonable investigations.

64. The reason the Labour Tribunal found that the Employee failed the Burchell test, or at least part of it, was because it could not have investigated the reasons given in the Meeting Minutes and the Termination Letter.
65. When one reads the transcript of the 16th February 2021 Labour Tribunal hearing one can understand the Labour Tribunal's reference²³ to the fact that the Employer had not carried out a reasonable investigation. The Meeting Minutes say that -

"After a brief meeting with the Managers, it was decided in the best interests of the company that [the Complainant] be fired. There were several reasons for this decision. This being the final straw in a long history of outburst by [the Complainant] in which . . . challenged management"

and as has been referred to above, the Termination Letter said -

"This is to advise you that effective today you have been terminated from your employment with . . . due to misconduct, specifically refusing to take instruction from management. Also, your aggressive outbursts on several occasions"

66. Yet it became clear during the Labour Tribunal hearing that there were no "outbursts on several occasions". In . . . oral evidence . . . explanation for the dismissal did not align with the explanation in the Meeting Minutes of this being *"the final straw in a long history of outbursts"* and the Labour Tribunal understandably scrutinized this explanation²⁴ and found it to be wanting.
67. Given that, it appears that the Labour Tribunal did follow the Burchell test. The Employer did not believe the Complainant guilty of a history of outbursts, with the incident on 11th June 2020 being the final straw. It did not have grounds for that belief and it had not carried out investigations that lead to that conclusion.
68. However, the Labour Tribunal was satisfied that the Complainant had been guilty of misconduct²⁵ and although not specifying as much, given that the misconduct occurred in the presence of . . . they self-evidently had reasonable grounds for believing the Complainant guilty of that misconduct and they did not need to carry out any further investigations to ground that belief.

²³ At paragraph 13 of its Ruling.

²⁴ At page 30 of the Transcript.

²⁵ "[The Complainant] clearly acted badly at the meeting", see the Labour Tribunal's Ruling at paragraph 8.



69. If there were errors by the Labour Tribunal it was not that it did not follow Burchell. It followed it to decide that the Employer had not complied with Burchell in finding that the Complainant guilty of a history of outbursts but did comply with Burchell in finding the Complainant guilty of misconduct on 11th June 2020

H. Procedural Fairness

70. During the course of the Labour Tribunal hearing the Labour Tribunal identified that before the 11th June 2020 meeting there were no real issues with the Complainant. The Labour Tribunal did find that there was some antagonism between the Complainant and the and the 11th June 2020 meeting was called to get to the bottom of that antagonism.
71. However, the way the Employer sought to get to the bottom of that issue was to convene a meeting and to call into the meeting room, whilst leaving the Complainant outside and when the Complainant was eventually called in, was sat across from who then presided over the meeting.
72. The Complainant's contract of employment provides that -
- 16 – Dispute Resolution If any employee has a complaint or wishes to discuss any issue regarding their employment in relation to other employees, pay, scheduling, working conditions, safety or otherwise, then the issues are to be referred to management. If the issue remains unresolved then it may be referred by either party to the Department of Employment Relations"*
73. Although the Complainant's contract of employment does not specify as much, in the case of an employee having an issue with management, rather than with another employee, or in the case of management having an issue with an employee, then fairness would require that the same or similar mechanisms apply, that is, a referral of the issue up the chain of command. However, if the issue is one between the employee and a particular member of management, it stands to reason that any referral is not to that particular member of management and/or that any meeting seeking to resolve the situation is not conducted by that member of management.
74. Yet the Meeting Minutes say that "As a first order of business it was asked by to [the Complainant] why ... was not following instruction". The Labour Tribunal found that the Employer handled the meeting badly and this appears self-evident. So much so that what began as an investigative meeting turned into a situation that resulted in an employee of with an unblemished record, being summarily dismissed.
75. In Whitbread v Hall supra reference was made to the reasonableness of the process by which an employer investigates misconduct but here the Complainant became angry and frustrated, which gave rise to the misconduct in question, because of the investigative process itself and the Labour



Tribunal clearly found this process wanting, when finding that the Employer's actions fell outside the band of reasonable responses.

76. These findings by the Labour Tribunal indicate that there were issues with the dismissal from a procedural perspective and in Iceland Frozen Foods v Jones supra Browne-Wilkinson J also said at page [25] -

"As to the alternative ground relied on by the industrial tribunal, namely, procedural unfairness, as we have said we do not think it the correct approach to deal separately with the reasonableness of the substantive decision to dismiss, and the reasonableness of the procedure adopted. The correct approach is to consider together all circumstances of the case. Both substantive and procedural and reach a conclusion in all the circumstances".

77. In all the circumstances the Labour Tribunal found the decision to dismiss unfair, given the equity and substantial merits of the case. Did it do so by substituting its views for those of the Employer, or did it do so by considering all the circumstances, which it says the Employer failed to do, and if so, is there a difference.

I. Conclusion

78. In London Ambulance Services NHS Trust v Small supra Mummery LJ said-

"43. It is all too easy, even for an experienced E[m]ployment T[ri]bunal, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with evidence and with an understandable determination to clear name and to prove to the ET that he is innocent of the charges made against him by 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 circumstance at the time of the dismissal".

79. Here the Labour Tribunal did not find the Complainant innocent of misconduct. It accepted that the Complainant acted badly. The issue is whether the Labour Tribunal dealt with the real question – did the employer act fairly and reasonably in all the circumstance at the time of the dismissal.

80. In its Grounds of Appeal the Employer says -

"12. In the case of HSBC Bank Plc (Formerly Midland Bank Plc) v Madden [2000] ICR 1283 it was held,



It was also made clear in Iceland Frozen Foods Ltd., at pp. 24 g-25 b, that the members of the tribunal must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the employer. Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

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.

(emphasis added by the Employer's attorneys)

81. The Employer's reference to the HSBC case is instructive. In the Grounds of Appeal, the Employer says -

"17. In a concurrent Judgment in the HSBC case, Rix LJ held:

I agree with the judgment of Mummery L.J. which I have had the advantage of reading in draft, and only wish to add a few words on what has been call the "substitution" point.

The possibility of an employment tribunal or of the Employment Appeal Tribunal substituting its own view for that of the employer in question could, in theory, arise in at least three different situations:

(1) Either tribunal may be tempted to substitute its own views as to the correct conclusion to be arrived at as to the employee's responsibility for the misconduct complained of.

(2) The employment tribunal is charged under section 98(4) of the Act of 1996 with the determination of the question whether the dismissal is fair or unfair and, in so doing, has to decide whether the employer acted reasonably or



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unreasonably in treating the section 98(2) reason as a sufficient reason for dismissing the employee.

(3) The Employment Appeal Tribunal may be tempted to substitute its own views as to the section 98(4) question of reasonableness or unreasonableness.

In my judgment only the second of those three alternatives is legitimate. As a matter of authority binding in this court, that determination required by statute is to be answered by the employment tribunal with the assistance of the "band of reasonable responses" approach set out in the judgment of Browne-Wilkinson J. in Iceland Frozen Foods Ltd. v. Jones (1983] I.C.R. 17.

The first and third of those three alternatives are illegitimate.

18. It is the Appellant's position, that the Tribunal have acted in the way that Rix LJ held to be illegitimate in that they have acted in a similar manner to alternatives one and three above".

82. Whilst the general rule then is that the Labour Tribunal should consider the reasonableness of the employer's conduct and not substitute its decision as to what was the right course²⁶ when considering whether the employer's conduct was unreasonable, the Labour Tribunal will to some degree be substituting their judgment for that of the employer. The question arises as to what level of substitution is permissible. In this case the Labour Tribunal's decision that the dismissal was unfair was not because of the quality and weight of the evidence of one or other of the parties. The facts were to all intents and purposes agreed.
83. One can read into the Labour Tribunal's Ruling its assessment of the quality of the evidence given by the Complainant at the hearing, rather than evidence in *supra*; Complaint but the Appeals Tribunal is satisfied the Labour Tribunal did not find that the Employer's decision to dismiss was unreasonable because of that. Its reference to the handling of the meeting, the Complainant's length of service and previous clean record indicate that it considered the dismissal unfair by reference to Section 51(3), that is, "all the circumstances" and by doing so, was within the powers given to it by the Labour Act.
84. By looking at all the circumstances the Labour Tribunal did to some degree substitute its view of the dismissal for that of the Employer's. If the Labour Tribunal finds that an employer has failed to take something into account that it should have taken into account, then that is inevitable.
85. As has been mentioned, a Labour Tribunal must carry out an objective assessment of the way an employer handles a dismissal process and as the Employer identified in its Skelton Argument -

²⁶ Per *Iceland Frozen Foods supra*



"3. The Tribunal will also have to consider whether or not under the circumstances the employer acted reasonably. It is averred that this incorporates into whether or not the dismissal was within the range of reasonable responses and whether the procedure followed was fair".

86. It is perhaps unfortunate that some of the language used by the Labour Tribunal might suggest that it carried out its own enquiry into the Complainant's behaviour and then decided that it would not have dismissed the Complainant on the basis of the information the Complainant provided to it. However, the Appeals Tribunal must look at the Labour Tribunal's Ruling in the round to see whether or not the Ruling is free from legal error, and even if the Labour Tribunal had fallen into error, whether it was where it needed to be in the end.²⁷
87. As for the Labour Tribunal using language which might invite an appeal on the grounds of substitution and on the question of the Labour Tribunal's Ruling generally, the Employer says –

"25. It is further averred that the Tribunal failed to apply the Burchell test appropriately or...set out in the Judgment in sufficient detail how they applied the test so that the LAT can be satisfied that no error of law has taken place. The leading case of adequacy or inadequacy of reasons is the case of Meek v City of Birmingham District Council (1987] IRL 250 in which it was held:

"It has on a number of occasions been made plain that the decision of an [Employment] Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT ... to see whether any question of law arises; and it is highly desirable that the decision of an [Employment] Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted".

(Emphasis added by the Employer's attorneys)

26. If one reviews the Judgment in light of Burchell it is clear that the Tribunal have either not applied Burchill (sic) correctly or not put their mind to the various requirements of the Burchell test. In particular, it is not clear how the Tribunal have approached the second limb of Burchell[,] nor is [it] clear how they have approached...the range of reasonable responses test. If the Tribunal have applied their minds sufficient to Burchell then they have

²⁷ JP Morgan supra paragraph 34.



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not set out in sufficient detail the application of the facts to the law, as required by Meek, their findings and conclusions, thus erring in Law”.

88. The Meek case also mentions UCATT V Brain [1981] I.C.R 542, where Lord Justice Donaldson (as he then was) said, at page [551] -

"Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law ... The reasons are then recorded, and no doubt tidied up for differences between spoken English and written English. But their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given”.

89. In this case the Labour Tribunal was alive to the Burchell test and found that the Employer could not have investigated the matter properly if it found that the Complainant was guilty of historical outbursts. However, the Labour Tribunal was clearly satisfied that the Complainant had displayed misconduct at the meeting. It may not have explicitly said that the Employer had passed the Burchell test in connection with that offence but the Labour Tribunal was alive to the importance of not substituting its decision for the Employer and it seems it did not. It accepted that misconduct had occurred. What the Labour Tribunal had to decide was whether a reasonable employer would have dismissed the Complainant for that misconduct.
90. What the Labour Tribunal was most concerned with was that the ultimate sanction of summary dismissal was imposed on an employee of long-standing service, for no other reason than for misconduct that only occurred during a meeting that the Employer had handled very badly. In the circumstances, it appears to the Appeals Tribunal that the Labour Tribunal only substituted its view in accordance with the second, legitimate alternative espoused by Rix LJ in HSBC.
91. There can be a fine line between a Labour Tribunal legitimately substituting its own view, and illegitimately substituting its own view, and in this case the Appeals Tribunal is satisfied that the Labour Tribunal was on the correct side of that line. But even if there was an error of law on the part of the Labour Tribunal²⁸, for example, by the Labour Tribunal preferring the Complainant's version of events, or by the Labour Tribunal applying the wrong legal test, or by the Labour Tribunal not setting out its findings in sufficient detail, the Appeals Tribunal is satisfied that any such error did not affect the result.²⁹ Even if there was an error of law on the part of the Labour Tribunal at some stage, the Appeals Tribunal is still satisfied that the Labour Tribunal's decision was not perverse.³⁰

²⁸ And the Appeals Tribunal is not satisfied that there was.

²⁹ See JP Morgan supra at paragraph 56.

³⁰ see Fuller supra at paragraph 43 and 44.



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92. The Appeals Tribunal accepts that the Labour Tribunal applied an objective test, in accordance with its duty to do so under section 51(3) when it considered whether or not the dismissal was fair, so it did not err in law and so there is no ground for the Appeals Tribunal to dismiss the Complainant's claim, or to otherwise set aside the Labour Tribunal's decision.

J. Awards

93. Having found that the Labour Tribunal did not err in law, or even if it did, that any such error did not make its decision perverse, then the consequences of a finding of unfair dismissal are that the Complainant was not fairly dismissed pursuant to either s51(1) (a), (b) or (c) and so is entitled to severance.³¹ The award of severance is merely a mathematical calculation and "*shall consist of one week's wages, at the employee's latest basic wage, for each completed twelve month period of that person's employment with that person's employer and any predecessor employer*".³²

94. The Complainant's weekly wage was _____ and _____ was employed for _____ and so the Labour Tribunal awarded _____ and the Appeals Tribunal affirms that award.

95. If an employee is unfairly dismissed a Labour Tribunal may also order the employer to pay the employee compensation and the amount awarded shall not exceed one week's wage for each completed year of service.³³

96. When assessing the award of compensation the Labour Tribunal shall have regard to a number of factors³⁴, including the degree of unfairness of the dismissal and given that the Labour Tribunal did find that "*blame does attach to the employee...*" it was able to say "*...as such we reduce compensatory award to _____*" and it awarded the Complainant _____ or _____ for each completed year of service.

97. Having heard from the Complainant and from the Employer, the Labour Tribunal was of the view that there was a chance that the Complainant would have lost _____ job at some stage and so even though the dismissal was unfair, it believed it had grounds to reduce this compensatory award³⁵.

98. On such an issue of liability to pay compensation (as opposed to the issue of unfairness) the Labour Tribunal is required to make its own findings of fact, findings which by their nature will not have been known to an employer at the time of dismissal and the Appeals Tribunal sees no reason to question these findings by the Labour Tribunal in this case and so also affirms the compensatory award.

³¹ Labour Act section 40(1).

³² Section 41(1).

³³ Section 55(1) and (3).

³⁴ Section 55(2).

³⁵ In the UK this is referred to as "the Polkey question" after Polkey v AE Dayton Services Ltd [1988] 344

99. The total award then is that ordered by the Labour Tribunal of

K. Appeals to Grand Court

102. Appeals against any decisions of the Labour Appeals Tribunal are governed by section 79 of the Labour Act and such appeals are to the Grand Court (pursuant to the Grand Court Rules (2023 Revision) Order 55) and may be on a point of law only and any such appeal shall not operate as a stay of any award, order, or decision of the Appeals Tribunal, unless the Grand Court so orders.

Signed this  day of March 2024

Chairperson 

