Appeal No. UKEAT/0020/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 30 and 31 May 2019
Handed down on 1 May 2020

Before

NAOMI ELLENBOGEN QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

UNIVERSITY HOSPITALS BIRMINGHAM NHS FOUNDATION TRUST APPELLANT

MR T REUSER RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NADIA MOTRAGHI (of Counsel) & MR ALEX SHELLUM (of Counsel) Instructed by: Mills & Reeve LLP 78-84 Colmore Row Birmingham B3 2AB
For the Respondent	MR BEN COLLINS (One of Her Majesty's Counsel) Instructed by: Eastwoods Solicitors Limited 16-18 New Bridge Street London EC4V 6AG

SUMMARY

UNFAIR DISMISSAL

WHISTLEBLOWING, PROTECTED DISCLOSURES

CONTRACT OF EMPLOYMENT

The employment tribunal found that the Claimant had been unfairly dismissed, contrary to section 94 of the **Employment Rights Act 1996** ('the ERA'), and wrongfully dismissed, but had not been automatically unfairly dismissed, contrary to section 103A of the **ERA**.

On the Respondent employer's appeal from the findings of unfair and wrongful dismissal, no error of law had been demonstrated. The Tribunal had not: (a) substituted its own view for that of the Respondent; (b) misinterpreted section 98(4) of the **ERA**; (c) approached the evidence in a way which amounted to a serious procedural irregularity and/or a breach of natural justice; (d) erred in its approach to, or assessment under, **Polkey v AE Dayton Services Limited** [1988] ICR 142, HL; (e) erred in its approach to and assessment of contributory fault; or (f) misinterpreted the test for wrongful dismissal.

On the Claimant's cross-appeal from the tribunal's dismissal of his claim for automatic unfair dismissal, the matter would be remitted to the same tribunal, for it to consider the Claimant's submissions to the effect that, whilst his conduct had provided the opportunity for dismissal, the principal reason for the latter had been his (acknowledged) protected disclosure.

NAOMI ELLENBOGEN QC, DEPUTY JUDGE OF THE HIGH COURT

1 This is an appeal and cross-appeal from the judgment of Birmingham Employment Tribunal (Employment Judge Broughton, sitting alone), sent to the parties on 9 October 2018 ('the Judgment'). I refer to the parties as they appeared below. The Tribunal found that the Claimant had been dismissed unfairly, contrary to section 94 of the **Employment Rights Act 1996** ("the ERA"), and in breach of contract. It reduced his basic and compensatory awards for unfair dismissal by 50%, by reason of his own conduct. The Claimant's claim of automatic unfair dismissal, contrary to section 103A of the **ERA**, was dismissed.

2 Before me, as below, the Claimant was represented by Mr Ben Collins QC and the Respondent by Ms Nadia Motraghi of Counsel. In this appeal, Mr Alex Shellum of Counsel also appeared for the Respondent. I am grateful to all Counsel for their assistance.

The Facts

3 I begin by summarising the facts giving rise to the claims, drawn from the Judgment. The Claimant is a consultant ophthalmic surgeon. There is no dispute that, prior to the events giving rise to these proceedings, he had been an experienced, long-serving and highly regarded surgeon, with a clean record.

4 On Friday, 27 May 2016, the Claimant permitted a non-clinical member of staff to assist him in the operating theatre, in connection with urgent decompression surgery. The operation proceeded smoothly and successfully. The Claimant's position was that, immediately prior to surgery, the nurse who had previously agreed to assist him refused to do so and that, on contacting Ms Watson, the Respondent's General Support Manager, he had been informed that no other support was available. In those circumstances, Ms Watson had offered personally to assist him. She had been unqualified and untrained to do so. The Claimant's position was that the urgency

of his patient's need for the relevant surgery (before the tribunal, acknowledged by the Respondent) justified his decision to proceed with Ms Watson's assistance. Her role had been to hold still a retractor which the Claimant had put in place, in order to hold back the patient's eyelid.

5 On 31 May 2016, following a bank holiday weekend, an incident report was completed, with the result that, on 2 June 2016, Dr Steyn, a divisional director, spoke to the Claimant. Nothing then happened for a little over two months, for which delay, the Tribunal found, the Respondent could offer no explanation. During that period, the Claimant was neither excluded from practice nor placed under any restrictions. On 11 August 2016, Dr Ryder, Deputy Medical Director, informed the Claimant that there was to be an investigation under the Maintaining High Professional Standards in the Modern NHS ('MHPS') policy. Two allegations were put to the Claimant at that time: first, that he had allowed an untrained member of staff to assist him by holding an instrument, when she had not been qualified to provide such support; and, secondly, that the operation ought to have been cancelled, as there had been no-one suitable to support the Claimant in theatre.

6 A further few weeks elapsed, during which the Claimant continued to practise without restriction. On 30 September 2016, a second incident occurred. The Claimant attended a Local Negotiating Committee ('LNC') meeting, leaving a trainee to cover the remainder of his list of cataract operations. The Claimant had received written confirmation that he could attend that meeting from Mr Negi, the Clinical Director of Ophthalmology, on 23 September 2016. An incident form was submitted.

7 On 10 October 2016, the Claimant was immediately excluded owing to concerns over his conduct. The specified concerns were that the Claimant had attended the LNC meeting at a time when he had had pre-existing clinical commitments and that he had done so following explicit

advice from his clinical director not to do so. It was further said that his absence from theatre had led to a patient safety issue. On 13 October 2016, the Claimant was informed that the second incident would be added to the scope of the MHPS investigation.

8 The tribunal found that the principal reason for the Claimant's exclusion was the allegation that he had failed to follow a direct management instruction, even though the Respondent knew, or ought to have known, that allegation to be false. The exclusion was lifted on 20 December 2016, when the Claimant was able to prove that the allegation was without substance, and he continued to practise, without restriction, until his dismissal on 5 June 2017.

9 By letter dated 9 January 2017, the Claimant and a colleague raised their concerns over an alleged lack of nursing support during operations and, specifically, the nurses' inconsistency in agreeing to assist on some occasions, whilst refusing on others, seemingly without just cause. It was not in dispute that this amounted to a protected disclosure.

10 On 27 February 2017, the Claimant was informed that, in Dr Ryder's opinion, there was a case of misconduct which ought to be put before a disciplinary panel, in relation to the following allegations:

10.1 On 27 May 2016, the Claimant allowed an untrained member of staff to assist him in the operating theatre; and

10.2 On 30 September 2016, the Claimant attended an LNC meeting when he had a pre-existing clinical commitment.

It was further said that leaving a junior unsupervised, on 30 September 2016, had possibly led to potential harm; an issue which also needed to be considered by the disciplinary panel. No allegation of gross misconduct was made.

11 The disciplinary hearing took place on 1 June 2017 and resulted in the Claimant's dismissal, on 5 June 2017. In relation to the first allegation, the Respondent concluded that the Claimant had shown a wilful disregard for clinical standards and safe medical practice. In relation to the second allegation, it was common ground that the Claimant had not put in place adequate supervision arrangements during his absence at the off-site LNC meeting and that that had had the potential to undermine patient safety. Whilst viewing allegation one to be the more serious, the panel seemingly upheld each allegation as constituting gross misconduct. That remained the position on the Respondent's pleaded case, but not before the tribunal. The Claimant was dismissed with immediate effect and accorded a right of appeal, which he did not exercise, having lost trust and confidence in the Respondent. On the same date, the Respondent made a referral to the GMC Fitness to Practise Team; a referral which the Tribunal found to have contained a number of material inaccuracies, whether through lack of the requisite care and attention or by design. On 8 May 2018, the GMC reported, determining that there should be no further action taken against the Claimant.

12 I have summarised above the facts and matters which led to the Claimant's dismissal and associated referral to the GMC. Throughout its own summary of the facts and its consequential findings, the Tribunal was highly critical of a number of employees of the Respondent, variously concluding as follows (in the order in which those conclusions appear in the Judgment):

12.1 the delays at the early stage of the process suggested that the Respondent had not, in fact, viewed the matter as being particularly urgent, or considered there to have been a material ongoing risk to patient safety, or to the integrity of the investigation;

12.2 key documents had not been disclosed by the Respondent and had only come to the Claimant's attention following his data subject access request. No adequate explanation for their non-disclosure in these proceedings had been offered;

12.3 what was really going on in the mind of the Respondent, which had resulted in the Claimant's exclusion, was far from clear. In his evidence before the Tribunal, Dr Rosser, Medical Director and Disciplinary Panel Chair, who had approved the Claimant's exclusion, appeared to have provided an explanation after the event, filtered with the benefit of hindsight, as distinct from explaining what had been going on in his mind at the relevant time;

12.4 Doctors Rosser and Ryder ought to have known that, contrary to the allegation as originally framed, the Claimant's attendance at the LNC meeting had been approved;

12.5 information provided by Dr Ryder to the National Clinical Assessment Service ('NCAS'), in October and November 2016, had been materially inaccurate and, before the Tribunal, Dr Rosser had been *'in more than considerable difficulty in attempting to justify that correspondence. He sought to write it off as a documentary error but that seems highly unlikely*';

12.6 the Claimant's exclusion had been continued at a time when Dr Ryder should have known that the principal issue with regard to the second allegation was untrue;

12.7 at no stage during the investigation or disciplinary procedure had the Respondent had specialist assistance in considering the Claimant's assertion that the operation the subject of the first allegation had been a sight-sparing procedure, which, if delayed any further, would, in all likelihood, have caused permanent loss of vision;

12.8 there was no evidence that the Respondent had investigated the Claimant's assertion that others would have done as he had done on the date of the second incident;

12.9 the principal reason for the Claimant's exclusion had been the allegation that he had attended the LNC meeting, despite explicit advice not to do so from his Clinical Director, as opposed to the reason given by Dr Rosser to the tribunal. Dr Rosser's explanations, for the imposition and lifting

of the Claimant's exclusion, had come about, consciously or otherwise, with the benefit of hindsight to fit the Respondent's subsequent narrative;

12.10 the Respondent had not viewed matters as seriously as it had subsequently claimed, notwithstanding the fact that, on the face of it, the allegations faced by the Claimant had been serious; a state of affairs further confirmed by the fact that, in clear breach of the MHPS, at no stage had the Claimant been advised that the matters in question potentially amounted to gross misconduct and could lead to his dismissal;

12.11 for a hearing of such importance, the notes of the disciplinary meeting had been inadequate;

12.12 it seemed far more likely that Dr Rosser had sought to change his evidence to the Tribunal on his view of the urgency of the operation the subject of allegation one, having received independent expert evidence. Such evidence ought to have been available to him at the disciplinary hearing. The experts, seemingly, had confirmed the Claimant's opinion that the operation needed to be carried out urgently and it had become common ground that that meant on the day in question. Dr Rosser's failure to acknowledge the reasons for his initial error potentially cast doubt over his credibility in other areas;

12.13 despite suggesting otherwise in its response form, the Respondent had conceded before the Tribunal that, on its own, incident two would not have warranted anything more than a warning, let alone summary dismissal;

12.14 the suggestion that the Claimant ought to have been aware that dismissal was a potential outcome of the process lacked credibility;

12.15 correspondence dated 2 June 2017 suggested some inappropriate level of involvement between Doctors Rosser and Ryder which went right back to their discussions about excluding the Claimant on grounds which they ought to have known to be false;

12.16 when making a referral to the GMC Fitness to Practise Team, certain comments made by Dr Rosser about the Claimant, whilst having some basis, had not been entirely accurate and, arguably, further confirmed Dr Rosser's apparent bias against the Claimant. Notwithstanding the fact that it was common ground that the Claimant had been a 'whistle-blower', Dr Rosser had stated that the Claimant had '*not been involved in any whistle-blowing episode or other attempts to raise concerns within the organisation'*. The Respondent's case was that this had been an oversight, although Dr Rosser's explanations in cross-examination had been, to some degree, inconsistent and unconvincing;

12.17 Dr Rosser had been aware of the Claimant's concerns about his referral to the GMC since around the time at which the Respondent had received the claim form. He was asked when he had notified the GMC of his errors and claimed to have done so orally, to his local liaison officer, although that had not been mentioned until the issue had been put to him expressly. If true, it was surprising that no mention had been made of it in the GMC's findings. There had been no evidence to support Dr Rosser's assertion and, given the seriousness of his failing, it appeared unsatisfactory that he had not put an apology and clarification in writing;

12.18 the GMC had been given inaccurate and misleading information and those failings had been serious. The Claimant's submission had been that Dr Rosser had misled the regulator deliberately and had subsequently sought to conceal his actions from the tribunal. It seemed more likely that his actions had reflected a predisposition within the Respondent against the Claimant. This was evidenced by the Claimant's exclusion the previous year, procedural failings, certain unsustainable findings and the strong language of the dismissal letter and GMC referral. Those indicated, at the very least, a lack of appropriate care and attention to very serious matters;

12.19 Both Dr Ryder and Dr Rosser knew, or ought to have known that the exclusion had been unfounded before it had even been put in place. That had only come to light from documents which had not been disclosed but which were obtained by the Claimant through a subject access request;

12.20 No action was taken against Mr Negi in relation to what appeared to be a false allegation. This, coupled with the tribunal's earlier, more detailed findings in relation to the exclusion, potentially suggested a level of bias and collusion at a senior management level against the Claimant. At the very least, it suggested a very serious lack of due care and attention to an important matter;

12.21 It appeared that Dr Ryder had given NCAS seriously misleading and inaccurate information. This further supported the tribunal's view on apparent bias and/or incompetence at a senior management level. The contemporaneous documents appeared to show a sham exclusion and an NCAS notification that could not be justified as mere clerical errors;

12.22 MHPS required that the investigator must obtain appropriate independent professional advice wherever issues of professional conduct arose. No such advice had been obtained. Had the Respondent had such information at the relevant time, there would have been less risk of confusion over the Claimant's alleged lack of insight and a greater chance of leniency on the part of the Respondent, giving appropriate recognition to the difficult choice that the Claimant believed himself to face in the moment and the ultimate good result for the patient;

12.23 It seemed that Mr Berry, Deputy Workforce Director of the trust to which Dr Rosser had been seconded at the relevant time, may have been uncomfortable with the decision to dismiss, given the Respondent's failure to have warned the Claimant that this was a potential outcome. The fact that his discomfort had been indicated in an e-mail to Doctors Rosser and Ryder, but not to the other panel member, again raised concerns as to what was really going on;

12.24 The disciplinary panel had been chaired by Dr Rosser, notwithstanding that he had been involved in preliminary discussions about whether the Claimant should be allowed time off in

relation to the second incident. In October 2016, he had been in possession of the relevant information which confirmed that the Claimant's exclusion had been on a false basis, but he had approved it, nevertheless. Thus, he had not been sufficiently impartial;

12.25 Whilst the Claimant had had the MHPS policy and had not complained, that did not completely absolve the Respondent of the catalogue of failings which ultimately rendered his dismissal unfair;

12.26 Dr Rosser had not been sufficiently independent. There was a strong suspicion of bias, given his approval of the exclusion on grounds which he ought to have known were false. This appeared to be further confirmed by the omissions and unjustifiably strong language of the GMC referral;

12.27 The Claimant's failures in connection with the first incident had been serious and he should have done more. The tribunal accepted that they were the principal reasons for dismissal. As the allegations had been largely admitted, it had been reasonable for the Respondent to find the Claimant culpable. However, the tribunal did not accept that the Respondent genuinely viewed the incidents as potentially gross misconduct. They had not been labelled as such until the dismissal itself. The Claimant had not been excluded or restricted for the best part of a year, other than for a highly questionable period of two months on seemingly false pretences; and

12.28 There was significant evidence that Dr Rosser, and others in senior management, were predisposed against the Claimant, prior to his protected disclosure, for reasons which remained unclear.

The grounds of appeal

13 The Respondent contends that the tribunal erred in law in each of the following respects:

13.1 by substituting its own view for that of the Respondent;

13.2 in misinterpreting section 98(4) of the ERA, including but not limited to, the taking into account of irrelevant factors;

13.3 by approaching the evidence of Doctors Ryder and Rosser in a way which amounted to a serious procedural irregularity and/or a breach of natural justice;

13.4 in its approach to **Polkey v AE Dayton Services Limited** [1988] ICR 142, HL, and assessment thereunder;

13.5 in its approach to and assessment of contributory fault; and

13.6 in misinterpreting the test for wrongful dismissal.

The cross-appeal

14 The Claimant contends that the tribunal erred only in its approach to his claim of automatically unfair dismissal. In short, it is said that, in reaching its conclusion that the relevant protected disclosure could not have been the principal reason for dismissal, the Tribunal took account of irrelevant, and failed to take account of relevant, matters.

The appeal

15 It is convenient to consider the grounds of appeal in the order set out below.

Ground 3: serious procedural irregularity/breach of natural justice

The parties' submissions

16 Ms Motraghi submits that:

16.1 fairness demands that parties should be given the opportunity to be heard on any issue in a case which is likely to be relevant to the decision and should know the case against them in advance of the hearing. A tribunal should not make adverse findings relating to a party's credit and honesty, including findings of bad faith, where such issues have not been raised by the other side in advance and have not been put. If a tribunal considers such matters to be relevant, it should put them clearly

to the impugned party and sufficiently in advance to afford that party the opportunity to deal with them: **Doherty v British Midland Airways Ltd** [2006] IRLR, 90, EAT;

16.2 a failure to alert parties to the possible significance of a finding of fact by the tribunal, which has been mentioned by neither party in evidence or submissions, will amount to a serious procedural irregularity, in depriving parties of the right to call evidence rebutting that finding of fact: **Gainford Care Homes Ltd v Kennedy** UKEAT/0155/14;

16.3 tribunals are required to determine the issues before them – they must only consider and rule upon the act of which complaint is made; if that act is not made out, it is not open to the tribunal to find another act of which complaint has not been made, to give a remedy in respect of that other act: **Chapman v Simon** [1994] IRLR 124, 129, CA;

16.4 natural justice is likely to require notice to the parties and an opportunity to make submissions where the new point raised might affect each party's presentation of its case, including the evidence which it might wish to present: **Sheibani v Elan and Co LLP** UKEAT/0133/12.

17 By reference to those principles, Ms Motraghi submits that the tribunal made the following errors:

17.1. albeit that it had not been pleaded as an aspect of unfairness in claim form, the Tribunal placed the issue of the Claimant's exclusion by Dr Ryder (and Dr Ryder's discussions with NCAS) 'centre stage' in its reasons. Based upon its view of the actions of Dr Ryder (who had not been a witness) and Dr Rosser, it drew very serious and unjustified inferences of *'bias and collusion at a senior management level'* (Judgment, paragraph 24.4) and of *'apparent bias'* (Judgment, paragraph 25.2). That criticism permeated the Judgment;

17.2. it made adverse findings against Dr Ryder, in respect of whom no notice of such findings had been given. That was in breach of natural justice and a serious procedural irregularity. The tribunal

A referred to Dr Ryder in 25 paragraphs, many of which were critical of him, and, in the Respondent's submission, tantamount to conclusions of bad faith or, at the very least, adverse findings relating to Dr Ryder's, and, therefore, the Respondent's, credit and honesty. Consequently, Dr Ryder and, given the seniority of his position, the Respondent, were significantly prejudiced by the tribunal's findings. Those findings were made notwithstanding an absence of any allegation of unfairness against Dr Ryder, or bad faith against Doctors Ryder or Rosser, in the Claimant's pleaded case. Dr Ryder appeared in five paragraphs of the claim form, all of which were under the heading, 'Background', by which no such allegations of bad faith or unfairness had been made;

17.3. The tribunal's findings went beyond the Claimant's case as advanced in his witness statement and during the hearing. Its trenchant findings against Dr Ryder had formed no part of the Claimant's pleaded case; Dr Ryder had not been a member of the panel whose decision constituted the act of which complaint was made (see *Chapman*). Dr Ryder's involvement had been limited to the suspension of the Claimant, which, in any event, had been lifted six months prior to the Claimant's dismissal. Thus, it was unsurprising that neither NCAS nor the fact of the Claimant's suspension had featured amongst the allegations raised in the claim form, nor had they featured as an issue in the Claimant's opening note for the tribunal. In closing submissions, the Claimant had impugned the actions of Dr Ryder, setting up a scenario for the tribunal in which Doctor Ryder and/or Dr Rosser were lying. This had been asserted at a point at which Dr Ryder, and, thus, the Respondent, had had no (effective) opportunity to provide evidence, or respond, albeit that, so Ms Motraghi told me, she did not think that the Respondent had submitted at that stage that further evidence would be required from Dr Ryder;

17.4. The tribunal failed to rule upon the act of which complaint was made – instead, making adverse findings in relation to different conduct by Dr Ryder, of which no complaint had been made. The tribunal had been obliged to put the Respondent on notice of the fact that it considered Dr Ryder's conduct to be relevant to the matters in dispute, and to do so in clear terms and sufficiently

in advance to provide the Respondent with the opportunity to address its concerns. It provided no such notice, thereby depriving the Respondent and Dr Ryder of the opportunity to call evidence rebutting the findings of fact which, ultimately, the tribunal made. That was a serious procedural irregularity and in breach of natural justice. Had allegations even nearing the matters found by the tribunal been raised at an earlier stage, the Respondent would have called Dr Ryder to give evidence, especially in light of the serious consequences which could flow for him (and others) in respect of GMC registration. Following an anonymous referral to the GMC, Doctors Ryder and Rosser were facing investigation;

17.5. The Judgment disclosed further serious procedural irregularities; for example, Dr Rosser was criticised for not knowing and/or recalling Dr Ryder's rationale or evidence base at the time of his decision to exclude the Claimant, and was tarred with involvement in collusion, bias and unfairness. It was not reasonable for the tribunal to have expected Dr Rosser to give evidence about another individual's state of mind or knowledge (and, *a fortiori*, to do so in relation to an allegation of unfairness which had not been pleaded) and then to have drawn adverse conclusions regarding his credibility and reliability when providing his recollection. As the Respondent's (unapproved) notes of evidence made clear, Dr Rosser had made very plain that he was not in a position to provide extensive evidence on exclusion – he had been a bit-part player. The only individual who, properly, could have given such evidence was Dr Ryder. Adverse findings made against Mr Negi were similarly irregular.

18 Mr Collins' response to the above submissions is as follows:

18.1. The Claimant's position, from the outset, had been that the Respondent had lacked a genuine belief that he was guilty of misconduct, or that misconduct was the true reason for his dismissal (Particulars of Claim, paragraphs 45 to 47). That position had arisen from a range of deficiencies in

A the disciplinary process and Dr Rosser's untrue statement to the GMC. The Claimant's concern over those deficiencies had been vindicated by the Judgment.

18.2. As Dr Rosser had chaired the disciplinary panel and written the dismissal letter, it was his B conduct which had been the focus of the hearing and the Judgment. In some cases, however, his conduct had involved dealings with Dr Ryder. Those dealings were, plainly, relevant.

18.3. Thus, for example:

C

18.3.1. the tribunal's finding of a suggestion of some inappropriate level of involvement between Doctors Rosser and Ryder (Judgment, paragraph 11.112), had arisen in the context of an e-mail sent to both doctors, but not to the other members of the disciplinary panel;

D

18.3.2. the tribunal's findings regarding the Claimant's exclusion were important in revealing that a member of the disciplinary panel (Dr Rosser) had been involved in earlier improper decision-making (see paragraph 24.3); and

E

18.3.3. Dr Rosser had given misleading information about the exclusion to the GMC (Judgment, paragraph 11.122).

18.4. Thus, Dr Ryder's actions had been of unavoidable significance to each party's case before the F tribunal.

18.5. As to the suggestion of unfair criticism:

G

18.5.1. disclosure was a matter for the Respondent, as a party, not any one witness. It was incontrovertible that the Respondent had failed to comply with its disclosure obligations (Judgment, paragraphs 11.27; 11.35 to 11.36; 11.49; 11.53; 24.3; and 25.1; and the Claimant's Closing Submissions, at paragraphs 37; 39 to 40; and 45 to 59). There was nothing unfair to the Respondent, or to Dr Ryder, in any of the tribunal's findings: the Respondent had failed

H

to comply with its disclosure obligations and then to provide the tribunal with any proper explanation for having done so;

18.5.2. the basis for the Claimant's exclusion had been that the Claimant had attended an LNC meeting, despite explicit advice from his clinical director not to do so (Judgment, paragraph 11.29). Simply, that allegation had been wrong (see, for example, paragraphs 11.34 and 11.37 to 11.38 of the Judgment). It was to be noted that Dr Rosser had approved the exclusion (paragraph 11.31) and that the tribunal had considered what was going on in the mind of *'the Respondent'* (paragraph 11.30). Given that the basis for the exclusion had been wrong, and that the true facts had been available to the Respondent, it was impossible to criticise the tribunal's conclusion at paragraph 11.122. That finding simply flowed from its earlier findings;

18.5.3. as the allegation regarding incident two had been false, Dr Ryder had given seriously misleading and inaccurate information to NCAS (see the last sentence of paragraph 11.44 and paragraph 11.45 of the Judgment);

18.5.4. where factually correct, none of the tribunal's criticism could conceivably be unfair. All of the matters which it had considered were important in understanding the Respondent's approach to the Claimant's dismissal and, in particular, Dr Rosser's decision-making process;

18.5.5. the Claimant had not been in a position to deal with any of the matters arising from undisclosed documentation until, belatedly, he had obtained the relevant documents;

18.6. As to the proposition that the tribunal had gone beyond the Claimant's case, it had been entitled to make findings which were supported by the evidence. Secondly, it had been invited by the Claimant to draw adverse inferences as to the integrity of the Respondent and of Dr Rosser (see, for example, the Claimant's Closing Submissions, at paragraphs 14 to 17; 31 to 33; 37 to 38; 44; and 47 to 49). Dr Rosser had not been unfairly *'criticised for not knowing/recalling Dr Ryder's*

rationale or evidence base'; he had been criticised, fairly, for his part in an improper exclusion process, on a basis which he knew, or ought to have known, to be false. At the latest, the Respondent had been on notice of that criticism since cross-examination of Dr Rosser. In any event, paragraph 6 of the Respondent's Grounds of Resistance made clear that it had been proceeding on the basis that it needed to defend exclusion as a matter which might render the Claimant's dismissal unfair. It must follow that its submission, on appeal, that exclusion was irrelevant to fairness is wrong;

18.7. The Claimant had made two data subject access requests, respectively of the Respondent (on 8 March 2018) and of NCAS (on 8 May 2018). He had received documentation (1,300 pages) from the Respondent on 24 May 2018, but had been concerned that certain documents were missing. Thus, he had made a further request on 19 June 2018. He had received documentation from NCAS (being correspondence between NCAS and the Respondent) on 25 June 2018, which had not been included within the Respondent's disclosure or provided in response to the Claimant's data subject access request of the Respondent. On 28 July 2018, the Claimant had chased the Respondent for the documentation which it had sought by its supplementary request. No further documents had been received from the Respondent by the time of the hearing before the tribunal, which had commenced on 30 July 2018. The correspondence received from NCAS had been provided to the tribunal by the Claimant, in a supplementary bundle, sent to the Respondent during the Friday afternoon which had preceded the first day of the hearing on the Monday. It had been available to both parties; had been put to witnesses (including Dr Rosser); and had been the subject of written and oral submissions, by both parties, at the close of the case. The proposition that the Respondent had not been given the opportunity to address the relevant material was wrong. The Respondent could have asked for more time, but had not done so. In accordance with **Meares v Medway Primary Care Trust** UKEAT/0065/10/JOJ, at paragraphs 47 to 49, any such request should have preceded argument. The tribunal had not been engaged in a frolic of its own; it had addressed the case which the Claimant had advanced;

18.8. There could have been no doubt in the Respondent's mind that the Claimant's case was that the tribunal should draw the inference that the Respondent's senior management (which included Doctors Rosser and Ryder) had been dishonest. Mr Negi's involvement had been almost self-evident because it had been he who had reported the Claimant on the basis that the Claimant had attended the LNC meeting, in the face of an express instruction to the contrary. The tribunal had referred to an e-mail proving that to be wrong. The evidence as to exclusion had been there to demonstrate that the process had been unfair and dishonest from the start, which informed the tribunal as to what had been going on in Dr Rosser's mind when he had dismissed the Claimant and shed light on the genuineness of the reason given. That ought to have been clear from the Friday afternoon before the hearing, but had been overwhelmingly so once cross-examination of Dr Rosser had commenced. Consistent with the position as now advanced by the Respondent, it could have objected to the relevant line of questioning (albeit untenably) as being irrelevant. Alternatively, it could have indicated that it required time to discuss the matters in question, or to put in a further witness statement, or to call Dr Ryder as a witness (if necessary, seeking an associated adjournment). Clear allegations of bad faith had been made in the Claimant's closing submissions. In the course of its own closing submissions, the Respondent could have submitted that the Claimant's argument lacked legitimacy and, at that stage, sought to adduce further evidence. Whilst the Claimant would have contended that any such submission or application would have lacked merit, it was not open to the Respondent to sit back, await judgment and then appeal on the basis that it had not been afforded natural justice;

18.9. There was no prejudice to the Respondent, or Dr Ryder, in any of this. The appropriate witnesses to call had been a decision for the Respondent. When the undisclosed documents had become available, it had been for the Respondent to decide whether to call Dr Ryder, in order to deal with them. It had always been obvious that they would need to be addressed, not least since Dr

Rosser had chosen to describe the exclusion process to the GMC, in a letter which had been highly controversial (Judgment, paragraphs 11.121 to 11.122);

18.10. As to the effect of the tribunal's findings on registration, it was right to say that all doctors had been referred to the GMC (as had the Claimant). Whilst the relevant findings might have informed the decision to refer, it would be for the GMC independently to determine the way forward. Dr Ryder would be able to tell the GMC that no-one had asked him to give evidence in these proceedings; in that respect, arguably, he was in a better position than was Doctor Rosser. Authority prior to **City of London Corporation v McDonnell** [2019] ICR 1175, EAT, was clear that fairness and natural justice are owed to the parties to litigation (who suffer the consequences of judgments), as distinct from particular individuals. Whilst *McDonnell* hints that an individual must be accorded a fair opportunity, if the Judgment were unfair to Dr Ryder, but not to the Respondent, what would be the proper consequences for this appeal? The tribunal's judgment could not be overturned, albeit that, in a judgment dismissing the appeal, something might be said which would be of assistance to Dr Ryder. Dr Ryder had not been a member of the panel which had dismissed the Claimant. His actions had fed into the dismissal because Dr Rosser had been a member of that panel and had been given the opportunity, in evidence, to address the false premise of the second allegation which had been put to the Claimant. The collusion found by the tribunal followed from Doctor Rosser's and Dr Ryder's knowledge that the relevant allegation had been untrue and from the absence of any disciplinary action against Mr Negi;

18.11. In those circumstances, Ground 3 disclosed no serious procedural irregularity.

19 In reply, Ms Motraghi contended that, during cross-examination of Dr Rosser, issues of bad faith and bias concerning the NCAS issue had not been put, whether in relation to him personally, or to Dr Ryder. If the Respondent's note of evidence were in dispute, the EAT would need to see the judge's note of evidence. It was not accepted that matters would have played out

differently, had such an application been made at an earlier stage. Accepting that the Respondent's notes of evidence did not constitute a full record of what had been said, it was clear that the Claimant had not gone as far as to put collusion to Dr Rosser. Ms Motraghi stated that the absence of Dr Ryder and the reasons for it had been raised on day one of the hearing. She read out various annotations which she had made to relevant parts of the Claimant's written closing submissions at the time, to the effect that none of the points made had been pleaded, including by amendment, and that they were serious and unsound allegations of which the Respondent's solicitor had not been put on notice and as to which there had been no opportunity to give evidence. The Claimant had been in possession of documents for weeks, or months, which it had 'dumped' on the Respondent on the Friday afternoon immediately prior to the hearing and without communicating a change of position. That was not how litigation should be conducted: the Respondent ought to have been put on notice of the very serious allegations to be made. 'Throwing allegations around' in closing submissions would not suffice. During evidence and in closing submissions, the Respondent had made the point that it was suffering prejudice in not being given the opportunity to put its case. The tribunal had then gone further in its findings. It was unrealistic to suggest that, at the stage at which closing submissions were being made, the Respondent ought to have sought permission to call Dr Ryder and/or Mr Negi. The Claimant would have objected, as would the tribunal. Ultimately, there must be prejudice to the Respondent, but prejudice to the individual must constitute an important part of that. If bias and collusion were being alleged, they ought to have been squarely put. Those words had not appeared in the Claimant's closing submissions and a challenge to the genuineness of the reason for dismissal, without more, did not equate with making allegations of such gravity.

Ground 3: discussion

The parties' pleaded case

20 I begin by considering the Claimant's pleaded case, settled by Mr Collins. At paragraphs 3 to 32 of his Particulars of Claim, under the heading 'Background Facts', he summarised the course of events running from the Claimant's receipt of notice, from Dr Ryder, that an investigation was being initiated under the MHPS policy to Dr Rosser's referral of him to the GMC, on 5 June 2017, containing the untrue statement that he (the Claimant) had not been involved in any whistleblowing episode or other attempt to raise concerns within the organisation.

21 Paragraphs 33 to 41 appeared under the heading, *'The Allegations'*. They opened with the following paragraph, *'The disciplinary panel failed to deal with the allegations before them adequately in a number of respects.'*. Paragraphs 34 to 41 set out the alleged errors in the panel's approach to the incidents, respectively of 27 May and 30 September 2016.

22 The claims being pursued by the Claimant were then set out at paragraphs 42 to 51. Under the heading 'Unfair Dismissal', the allegations of unfairness were summarised as being:

22.1 a failure to conduct a fair investigation or to apply a fair procedure;

22.2 the absence of reasonable grounds on which to conclude that the Claimant had been guilty of misconduct or gross misconduct;

22.3 the Claimant's lack of acceptance that the Respondent had held a genuine belief that the Claimant was guilty of misconduct or gross misconduct;

22.4 that the decision to dismiss had fallen outside the range of reasonable responses open to the Respondent.

23 At paragraph 43 of the Particulars of Claim, under the sub-heading, 'Investigation and Procedure', six specific instances of the Respondent's alleged failure to have conducted a fair investigation or to have applied a fair procedure were identified. The first was expressly referable to the investigation and related to the investigator's failure to have obtained independent specialist medical advice, in accordance with the MHPS policy. The second expressly related to the allegedly inappropriate constitution of the disciplinary panel and that panel's own failure to have obtained independent specialist medical advice. Allegations three to five, related, variously, to failures to have sought evidence; review records; address the concerns raised by the Claimant in January 2017; and to notify the Claimant of the possible sanctions and that the latter could include his dismissal. None of those allegations was expressly related to any particular aspect of the investigative and/or disciplinary process. Under the sub-heading, 'Genuine Belief', the Claimant pleaded the following:

> **"45.In view of the range and extent of the deficiencies in the disciplinary process as set out above, and Dr Rosser's untrue statement to the GMC on 5 June 2017, the Claimant does not accept that the Respondent had a reasonable belief that he was guilty of misconduct or that misconduct was the true reason for his dismissal.**
>
> **46. The Claimant's primary case is that the reason or principal reason for the panel's decision to dismiss the Claimant was that he had made a protected disclosure, as set out above, in the letter of 9 January 2017.**
>
> **47. Without prejudice to the foregoing, the Respondent is put to proof as to the genuineness of its belief that the Claimant was guilty of misconduct and that misconduct was the true reason for his dismissal."**

24 For current purposes, I need not summarise the balance of the section which addressed the claim of unfair dismissal. Thereafter, the claimant separately and briefly identified his claims for automatically unfair and wrongful dismissal and set out the remedies which he was seeking. Each such matter was addressed in a single, brief paragraph, which alluded to no additional alleged facts.

25 The Claim Form was received by the tribunal on 18 October 2017. In the usual way, the claims had been pleaded prior to disclosure in these proceedings. They had also been pleaded

prior to the Claimant's receipt of the documentation provided in response to his data subject access requests, respectively of the Respondent and of NCAS.

26 The Grounds of Resistance are dated 17 November 2017 and were settled by the Respondent's solicitors. At paragraphs 3 to 30, they recounted, in summary form, the instigation of the investigation; the expansion of its scope following the second incident; the Claimant's exclusion; his raising of concerns by letter dated 9 January 2017; the actions and report of the Case Investigator; the invitation to attend a disciplinary hearing and the hearing itself; the constitution of the panel; the (absence of any) need for any panel member to have specific experience or expertise in ophthalmology; the rationale for the panel's ultimate decision, including sanction; and the referral of the Claimant to the GMC.

27 Each of the claims advanced in the Particulars of Claim was then addressed, in brief. In addressing the claim for unfair dismissal, at paragraph 31 the Respondent asserted, generally, that: the dismissal had been for conduct; had been fair and reasonable in all the circumstances; and a fair procedure had been followed. It continued:

> **"In particular it is averred that:**
>
> **(a) The Respondent believed the employee to be guilty of misconduct.**
>
> **(b) The Respondent had reasonable grounds for believing that the Claimant was guilty of that misconduct.**
>
> **(c) At the time it held that belief, the Respondent had carried out as much investigation as was reasonable.**
>
> **(d) The decision to dismiss the Claimant falls squarely and fully within the band of reasonable responses."**

28 For current purposes, the balance of the Grounds of Resistance need not be addressed.

The material witness statements

29 Dr Rosser was the sole witness called by the Respondent. The copy of his witness statement which appears in the EAT bundle is unsigned and undated. It runs to 18 pages and

predominantly addresses the conduct of the disciplinary hearing and the panel's conclusions, under Dr Rosser's chairmanship. In so doing, it describes the regard which the panel had to the investigation report and the material which had been available to the investigator. It does not address the Claimant's exclusion or the subsequent lifting of that exclusion.

30 The Claimant's witness statement is dated 5 July 2018 and runs to 20 pages. The Claimant addresses the patient history and clinical need for the procedure the subject of the first disciplinary allegation. He explains how the second incident came about. He then addresses his exclusion and the protected disclosure which he made. Under the heading, *'Disciplinary process and hearing'*, in five short paragraphs, he refers to the hearing; the constitution of the panel; the absence of suitable clinical input at any time during the investigation; the Respondent's failure to warn of the potential for dismissal; and the way in which each party presented its case. The Claimant then recounts the fact of his dismissal and that he found it to be shocking and incomprehensible. Following an account of the GMC referral and its outcome, the balance of his witness statement addresses matters relevant to remedy and refers to testimonials to his professional career and standing. In general, the Claimant's witness statement recounts material events but does not detail the specific criticism to be made of the process adopted by the Respondent. It was signed ten days after receipt of the material provided by NCAS in response to the Claimant's data subject access request. That material would have been in the Respondent's possession, but, as noted above, had not formed part of its disclosure in these proceedings and had not been copied to the Respondent's solicitors by the Claimant's solicitors at that time.

The parties' written submissions

31 The Claimant's opening note for the tribunal hearing summarised the facts and the issues for determination, consistent with his pleaded case. The final paragraph under the heading, *'The Claimant's case'* stated, *'The procedural failings in this case are so fundamental, and the*

treatment of [the Claimant] *by the Respondent (including the misleading referral to the regulator) has been so unusual, that the tribunal will be invited to conclude that the likely explanation is that the true reasons for dismissal relate not to misconduct but in reality to whistle blowing.'* There was no opening note on behalf of the Respondent (or, at least, none which has been provided to me).

32 The Respondent's written skeleton argument, provided at the conclusion of the hearing, ran to 28 pages. It summarised relevant caselaw, much of which relied upon in this appeal. The unfair dismissal claim and the various pleaded elements of it were considered in detail over 14 pages of text. They did not address any asserted collusion or bias on the part of any Respondent employee. Paragraphs 100 and 101 addressed the Claimant's exclusion, which was submitted to have been of remote relevance to the Claimant's dismissal: *'It is no part of* [the Claimant's] *pleaded case that there was an issue with exclusion, or that it in some way infected the ultimate decision to dismiss, nor was it suggested prior to the start of the hearing to the Respondent as such (despite the Claimant obtaining the documents via his SAR).'* The Respondent went on to submit that the fundamental facts regarding the exclusion suggested that the Respondent had adopted a proportionate approach.

33 The Claimant's closing submissions, dated 2 August 2018, ran to 30 pages. His consideration of the Respondent's actions began at paragraph 14, which was in the following terms:

> **"These submissions start by considering the actions of the Respondent. That is because those actions underpin a great deal of the analysis which the tribunal is required to undertake – not only because of the need to consider procedural fairness as with any unfair dismissal case, but also because they reveal the mindset of the Respondent's managers, because they are essential to assess the credibility of Dr Rosser, and because they are important in order to draw inferences as to the reasons for dismissal"**

A At paragraphs 15 to 17, Mr Collins went on to itemise the key aspects of the Respondent's conduct of which the Claimant was critical, asserting that the important point was that the Respondent had sought to blame the Claimant for everything, including its own failings and that, *'In those circumstances the tribunal is entitled to be sceptical as to the Respondent's motivations and openness.'*. The Claimant then turned to address each conduct issue, in turn. In so doing, he asserted specific failings, also said to indicate that Dr Rosser lacked credibility. Under the heading, *'Exclusion'*, the Claimant contended that the explanation contemporaneously given for his being allowed to return to work was false and known by Doctors Ryder and Rosser to have been so, even before the exclusion had been imposed. That had been apparent from material which had not been disclosed by the Respondent but had been obtained through a subject access request. The detail was set out at paragraph 37 and, at paragraph 38, Mr Collins stated: *'Those facts inevitably give cause for concern as to the integrity of Dr Rosser and Dr Ryder.'* In similar vein, at paragraphs 39 to 44, Mr Collins referred to the Respondent's failure to have disclosed relevant correspondence with NCAS. From the copy correspondence obtained from the latter, he submitted that it was clear that Dr Ryder had knowingly misled NCAS. At paragraph 44, he stated, *'Dr Rosser sought to explain the discrepancy (here, as elsewhere) by reference to poor paperwork. That, with respect, does not begin to do justice to the inconsistencies. The conclusion, sadly, must be either that Dr Ryder lied (to NCAS and/or to* [the Claimant] *and/or to Dr Rosser) or that Dr Rosser lied (to the tribunal). In the absence of any disclosure from the Respondent of any documents recording the decision, it is impossible to tell who has told the truth to whom).'* Mr Collins went on to submit that the tribunal was entitled to draw adverse inferences from the '*baffling gaps in the documentation'*. That was said to go to the genuineness of the explanations given by Dr Rosser for the Respondent's actions: *'the approach of the Respondent in general and Dr Rosser in particular, must give the tribunal real cause for concern as to its, and his, motivation.*'

34 At paragraphs 60 to 63, Mr Collins addressed the constitution of the disciplinary panel, amongst other criticisms, submitting, *'The panel was chaired by Dr Rosser, notwithstanding that he had been involved for months in the decision-making in the case. We now know that he had been aware since October that the exclusion had been on a false basis, but condoned it, nevertheless. He could not therefore be an impartial Chair.'* In connection with the claim of unfair dismissal, Mr Collins invited the tribunal to conclude that the range of serious inconsistencies in the Respondent's evidence meant that the Respondent could not satisfy the tribunal that the genuine reason for dismissal had been the Claimant's conduct; that the '*myriad breaches identified above'* meant that neither the investigation nor the procedure were remotely or reasonably fair; that there were no reasonable grounds upon which the Respondent could have concluded that the Claimant had been guilty of gross misconduct; and that dismissal had not been within the range of reasonable responses.

35 During the hearing of this appeal, I was informed that Counsel's written closing submissions had been exchanged on the final day of the hearing. Each party had considered the other's for no more than an hour. The points made in writing had then been expanded upon orally, as the tribunal was taken through the parties' respective submissions.

The case on unfair dismissal

36 From the documents summarised above, it is clear that the Claimant's case on unfair dismissal had been that none of the requirements in **BHS v Burchell** [1980] ICR 303 had been satisfied. In issue were: (1) the fact of the Respondent's belief that the Claimant had been guilty of misconduct; (2) whether the Respondent had had in its mind reasonable grounds upon which to sustain any such belief; and (3) whether, at the stage at which it had formed any such belief on reasonable grounds, the Respondent had carried out as much investigation into the matter as had

been reasonable in all the circumstances of the case. Informing the Claimant's case was the way in which the various aspects of the investigative and disciplinary process had been handled and the light which those shed on the reason for and fairness of his dismissal. Explicit in the claim for automatic unfair dismissal was that the true reason for dismissal was not as asserted by the Respondent. The nature and extent of the flaws in the process which the Claimant was able to identify or explore expanded as greater information became available to him, in particular upon receipt of the documentation provided by NCAS, and the realisation that the Respondent had failed to disclose it. At that point, Dr Rosser's state of knowledge and its relevance to his impartiality were brought more sharply into focus.

37 The authenticity and material content of the relevant documentation are not in dispute before me. As one of the parties to the correspondence, the Respondent does not suggest that the relevant material had not been in its possession, albeit that it had not been disclosed, or produced in response to the Claimant's subject access request. Whether or not it was expressly suggested to Dr Rosser in the course of cross-examination that there had been collusion with others (which the parties were unable to agree), the Respondent knew, and made submissions on the fact, that he had been questioned over the Claimant's exclusion and that the genuineness of his asserted views and beliefs was in question. In other words, the contention was that, on behalf of the Respondent, Dr Rosser was asserting a position which was untrue.

38 The nature and extent of the Tribunal's findings as to the flaws in the Respondent's process and the knowledge and conduct of Dr Rosser, as Chair of the disciplinary panel and author of the dismissal letter and referral to the GMC, were based upon its findings of fact having heard his evidence and considered the available documentation and its source. Where Dr Rosser's conduct involved dealings with Dr Ryder, the latter were relevant in shedding light on one or more of the three limbs of the *Burchell* test. It was for the Respondent to consider which witnesses

A to call and the Tribunal cannot properly be criticised for making findings which did not take account of the position of a witness from whom, at the Respondent's election, it had not heard, where such findings were legitimate on the evidence which was available to it.

B 39 Ms Motraghi correctly submits that (put broadly) a party is entitled to know the case which it has to meet. I emphasise the word 'party'. The primary question here was whether the Respondent, not Dr Ryder as an individual, had been given adequate notice of the case being C advanced against it. Again, broadly put, the Respondent's case was that all was not as it appeared to be on the surface and that the Respondent had engaged in a process which had been improperly motivated and based on untruths. That case was clear, at the latest, by the time of closing submissions, though it seems to me that it must have been clear from the content of Dr Rosser's D cross-examination by the Claimant, to which the Claimant's closing skeleton argument alluded. Whilst there was no agreed note of that cross-examination before me (and I refused a late application by the Respondent for production of the Judge's notes), the integrity of the E Respondent's position, including by reference to exclusion, was squarely in play, albeit that the Respondent's submission to the tribunal was that the exclusion was irrelevant.

40 In **McDonnell**, Choudhury P considered an appeal, by grounds 3 and 4 of which the F following contentions were made:

40.1 the judge had breached the requirements of essential fairness and natural justice and/or reached a perverse conclusion by finding that the sole or principal reason for the claimant's G dismissal had been that he had made protected disclosures on a basis that had not been argued by the claimant, or put to the chair of the disciplinary panel (Mr Bennett) and which were contrary to the evidence given by Mr Bennett;

H

40.2 the judge had breached the requirements of essential fairness and natural justice and/or reached a perverse conclusion by finding that the dismissal was unfair on the basis of matters not advanced by the claimant, and not put (or not adequately put) to the employer's witnesses and/or which was contrary to the evidence before the judge.

41 In his conclusions on Grounds 1 to 3 (which he upheld), Choudhury P held, at paragraph 53,

> **"The difficulty with the tribunal's judgment does not lie with its structure; it lies in the fact that some of its conclusions, as we set out here, were based on a flawed interpretation of the evidence of the decision-maker in this case in circumstances where that interpretation was not put to the witness."**

42 Choudhury P then moved to Ground 4, which he characterised as follows, at paragraph 55:

> **"The challenge here is to the tribunal's finding on ordinary unfair dismissal and the reasonableness of the investigation. [Counsel for the employer] submits that the judge made a number of criticisms of the process which had not been advanced by the claimant and which were either not explored or not adequately explored with the employer's witnesses."**

43 At paragraphs 56 and 57, he held as follows:

> **"56. In our judgment, none of these points amounts to anything more than a challenge to findings of fact which were open to the tribunal to make. Whilst it might be right to say that some of the points or criticisms made by the tribunal were not directly put to the witnesses, the matters to which they relate are ones in respect of which the tribunal was entitled to conclude that the employer had not sufficiently evidenced or explained its position. Furthermore, the conclusions about Mr Cogher's investigations were not based on a misinterpretation of the evidence on a key issue, as was the case with Mr Bennett's evidence. The tribunal was entitled to conclude, for example, that Mr Cogher had not sufficiently investigated the claimant's complaints against Mr Gill and Mr Nelson because Mr Cogher's evidence on this issue was cursory. Similarly, the tribunal was entitled to conclude that the investigation into the new allegation against Mr Gill raised at the disciplinary hearing was inadequate. The tribunal referred to the very short timeline for the investigation and the absence of detail in the employer's evidence. In those circumstances, the tribunal was entitled to draw the inference that the investigation into that matter was "very brief" and "inadequate".**
>
> **57. Unlike the position under grounds 1, 2 and 3, the tribunal's conclusions as to the employer's shortcomings in its investigations and its procedures would not involve any finding of bad faith; nor as we have said above, was it based on a flawed interpretation of the evidence. Thus, the principal justifications for upholding those grounds, notwithstanding the fact that they also involve challenges to the tribunal's interpretation of the evidence and findings of fact, does not apply to this challenge to the tribunal's findings in respect of ordinary unfair dismissal. <u>We must make it clear that a ground of appeal does not arise simply because a particular point or evidential matter was not put to a witness or explored with a witness by a judge or party</u>. Whether or not it does will depend on whether it can be said that, in the particular circumstances of the case, <u>such as where there is, in effect, a finding of bad faith arising out of a clear misinterpretation of evidence</u>, <u>the failure to give a witness the opportunity to answer the point amounts to a serious procedural irregularity</u>: see para 50 above.' (emphasis added)"**

44 The position in this appeal is different. The decision-makers here were Dr Rosser and his fellow panel-members. Only Dr Rosser was called to explain the panel's decision to dismiss the Claimant and its rationale and the tribunal concluded that *'he was the driving force behind the dismissal'* (Judgment, paragraph 27.5). It is not in dispute that Dr Rosser's knowledge of the events relating to exclusion was put to him. The events of October 2016, and the involvement of Doctors Rosser and Ryder in them, were a matter of record in internal correspondence and/or in correspondence between the Respondent and NCAS. The Tribunal's findings as to the matters of which each doctor ought to have been aware at the relevant time were derived from that correspondence, as is clear from paragraphs 11.35 and 24.3 of the Judgment. At paragraph 11.36, the tribunal recorded that Dr Rosser could offer no adequate explanation for the Respondent's failure to have disclosed the relevant correspondence in these proceedings. At paragraph 11.75, having recited Dr Rosser's account of the reason for exclusion, the tribunal held, *'I think it is far more likely that the contemporaneous documentation reflected the reality of the respondent's position at the relevant times.'* The tribunal's view that there had been *'an inappropriate level of involvement between Dr Rosser and Dr Ryder'* again derived from matters apparent from the correspondence (Judgment, paragraphs 11.111; 11.112 and 27.4). Its conclusions as to the apparent bias of Dr Rosser against the Claimant expressly arose from the terms in which he had referred the Claimant to the GMC and his earlier approval of the Claimant's exclusion on grounds which he ought to have known were false. On the same bases, the tribunal concluded that he had not been sufficiently independent (Judgment, paragraphs 11.125 and 32).

45 At paragraph 21 of the Judgment, the tribunal replicated the list of challenges to the fairness of the dismissal which it had to determine, as set out at paragraph 15 of the Claimant's closing submissions. It noted (Judgment, paragraph 22) that, *'For the most part, those failures were not disputed, although the Respondent understandably sought to suggest that the Claimant*

should also accept some responsibility and that , in any event, they were not serious enough to undermine the fairness of the dismissal.' It then went on to address each basis of challenge, in turn. So far as material to the ground of appeal under consideration.

45.1 It disbelieved Dr Rosser's account of his approach to the GMC referral.

45.2 Regarding exclusion, at paragraph 24.4 the tribunal held, *'No action was taken against Mr Negi in relation to what appeared to be a false allegation. This, coupled with my more detailed findings in relation to the exclusion earlier in this judgment, potentially suggests a level of bias and collusion at a senior management level against the claimant. Again, at the very least, it suggests a very serious lack of due care and attention to an important matter.'* (emphasis added) There is a degree of diffidence in that finding, which is, once again, rooted in the facts apparent from the correspondence.

45.3 The tribunal's conclusions regarding the seriously misleading and inaccurate information supplied by Dr Ryder to NCAS expressly harked back to its earlier findings deriving from the contemporaneous correspondence (Judgment, paragraphs 25.2 and 25.3).

45.4 Its overview was that, *'In the specific circumstances of this case, the failure to warn the Claimant that he may be dismissed was potentially enough on its own to take the respondent's actions outside the band of reasonable responses. The other failings only confirm that view.'* (Judgment, paragraphs 30 and 31).

46 Each of the above criticisms focused on the process adopted by the Respondent, through the 'driving force' behind the dismissal. References to apparent bias and collusion were diffidently expressed and were related to that decision-maker, whose explanations for his acts, in

light of his knowledge and earlier involvement in the process, were found to have been unsatisfactory. In the language of Choudhury P, in *McDonnell*, Dr Rosser had had an opportunity to answer those points and to explain his and the Respondent's position in light of the correspondence. It is not suggested that the Tribunal's interpretation of the contemporaneous documentation was impermissible. Thus, any finding amounting to bad faith did not arise out of a clear misinterpretation of the evidence. In short, the criticism of Dr Ryder arose from the facts apparent from the correspondence and it was Dr Rosser's knowledge and involvement in those matters which led to the tribunal's criticism of him, after he had been given an opportunity to give evidence on the matters in question and the parties had made submissions on that evidence.

47 Furthermore, I note the following passage from **Meares**, per Langstaff P (as he then was):

> **"48. The principle as it seems to us is clear and we have stated it. One aspect of the principle, however, may merit further discussion. That is the observation in paragraph 39 in Doherty that if a point is made as to bad faith it has to be made clearly in advance. That begs the question: in advance of what? [Counsel for the Appellant's] submissions would tend to argue in advance of the hearing itself. [Counsel for the Respondent's] submissions would argue in advance of the decision being made.**
>
> **49. It seems plain to us that provided that a reasonable opportunity is made or available for the Claimant to rebut any suggestion which is adverse to her, the critical time before which it must be made is the time at which the Tribunal begins to consider its decision after receiving evidence and submissions. In this particular case, for instance, if Miss Meares had been taken at a disadvantage by the submission made at the conclusion of the case that she lacked good faith, or by the questions that alleged that she had a motive other than that which she put forward for writing the letter as she did, then we would have thought it was open to, and indeed we would have expected, counsel to have asked for an adjournment or to call further evidence or to recall Miss Meares to deal with the point. We would have expected some objection if such an important point had not been properly ventilated beforehand. None of that happened."**

48 That observation is equally apposite here. Unlike the position in *McDonnell* (to which Choudhury P referred at paragraph 52), Ms Motraghi had been concerned by certain aspects of the Claimant's case at, and to some extent before, the time of Mr Collins' closing submissions. At that stage, any of the applications contemplated at paragraph 49 of *Meares* could have been made and it is unclear why such an expectation would have been unrealistic. I do not accept Ms Motraghi's submission to the contrary and do not see why the objections now raised are considered to have any greater prospect of success on appeal, following the tribunal's judgment.

A The fact that an application might have been resisted before the tribunal did not preclude it being made, although, as I have previously held, I do not consider that, in the event, the tribunal is to be criticised for its approach.

B

49 Whilst I recognise Dr Ryder's (and Mr Negi's) inevitable concern at the findings which impugn their personal conduct, those findings had been drawn from the relevant contemporaneous documentation and/or from facts which (at least by the time of the hearing before the tribunal) were not in dispute. No doubt, the GMC will be informed that neither of them gave evidence before the tribunal, whose findings are not, in any event, binding upon the regulator. As the GMC demonstrated in its approach to the referral of the Claimant in this case, it reaches independent conclusions, based upon its own investigation which is not directed towards the same issues. In any event, Mr Collins is right to submit that any personal injustice felt by an individual, would not, without more, demonstrate an error of law for the purposes of an appeal brought by the Respondent.

C

D

E

50 In all the circumstances, Ground 3 of this appeal fails and is dismissed.

F

Ground 1: substitution of the tribunal's view for that of the Respondent

51 Ms Motraghi advanced the following propositions of law, of which she submitted that the tribunal's approach had fallen foul in numerous respects:

G

51.1 A tribunal must not substitute its own view for that of an employer when assessing the reasonableness of a decision taken to dismiss (**Iceland Frozen Foods Ltd. v Jones** [1983] ICR 17 [24-25]; **Foley v Post Office, HSBC Bank Plc. (formerly Midland Bank Plc.) v Madden** [2000] ICR 1283 [1292-1293]; **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387). The

H

proper approach was to consider whether the employer had acted within a 'band of reasonable responses';

51.2 Similarly, a tribunal must not substitute its own view for that of an employer as to whether or not an investigation into alleged misconduct had been reasonable (**J Sainsbury plc v Hitt** [2003] ICR 111, CA, [28]). It is not for a tribunal to make its own assessment of the credibility of witnesses on the basis of the evidence which it has received, nor is it entitled to interfere simply on the grounds that it prefers one witness over another. Cross-examination by experienced advocates in the tribunal might produce a picture of the evidence different from that which had emerged before the employer. Thus, a tribunal must not substitute its own evaluation of a witness for that of the employer (**Linfood Cash and Carry Ltd v Thomson** [1989] ICR 518);

51.3 A tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal; it must not conduct a rehearing of the facts on which the employer's decision to dismiss was based and then use its own findings of fact to substitute its view for the grounds on which the employer formed its belief and acted when taking the decision to dismiss (**London Ambulance Service NHS Trust v Small** [2009] IRLR 563). A Tribunal will slip into the 'substitution mindset' where it embarks upon its own fact-finding forensic analysis, rather than considering the reasonableness of the employer's conduct of the disciplinary process (**Royal Free Hampstead NHS Trust v Shah** UKEAT/0505/12);

51.4 The use of emotive language in a tribunal's reasoning may be such that, whilst endorsing the band of reasonable responses test, the reality disclosed is that the it has substituted its own view for that of the employer (**Royal Bank of Scotland Group plc v Wilson** UKEAT 0363/08,

in which the tribunal had held that the dismissal had fallen 'well outside' the band of reasonable responses, as being a 'gross over-reaction' to an 'error of a technical nature' and that the claimant had done no more than 'cut a bureaucratic corner'. Upholding the respondent's appeal, the EAT held that the question for the tribunal had been whether it had been reasonable for the respondent to have taken the view that the matter had been serious, rather than technical, and that this had depended, at least in part, upon whether it had brought home to the claimant, by its training and procedures, the nature of his role and the reasons why the respondent considered the training and procedures which it had implemented to be important. The tribunal's language and approach had been redolent of substitution.)

52 I consider, in turn, below, each alleged error of substitution on the part of the tribunal advanced by Ms Motraghi. Of the alleged examples of that error set out at paragraph 4 of her grounds of appeal, those at paragraphs 4(d); (f); (g); (i) and (m) were abandoned before me. In summary, the Respondent's case is that the tribunal, first, recast the factual issues in the disciplinary case against the Claimant and then found that his misconduct had been less serious than had been judged by the Respondent and his mitigation better than the Respondent could reasonably have concluded.

53 Mr Collins' overarching submission was that the tribunal had reminded itself, at paragraph 13.3 of the Judgment, of the guidance, respectively, in **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 and **BHS v Burchell** that, '*a tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer, nor should it impose its view of the appropriate sanction for that of the employer.'* Its approach to the evidence had been in accordance with that guidance. Further, in considering the fairness of

A the Claimant's dismissal, the tribunal had made express reference to the band of reasonable responses (Judgment, paragraph 30).

B 54 This had not been a case in which the employer's reasoning had been known and agreed, such that the questions for the tribunal had been limited to a consideration of whether undisputed reasoning had fallen within the band of reasonable responses. The Claimant had been clear, from the outset, that he did not accept that *'the Respondent had a reasonable belief that he was guilty of misconduct or that misconduct was the true reason for his dismissal'* (Particulars of Claim, paragraph 45). That had been the conclusion of the tribunal (Judgment, paragraph 36). It had been the case put to Dr Rosser, expressly on the basis that the reasons given for the dismissal had not been genuine. It followed that the task for the tribunal had not been simply to assess the Respondent's actions against the band of reasonable responses test. Rather, it had, first, had to make findings of fact as to what the Respondent had done and for what reason(s); and only then to assess whether the Respondent's actions had fallen within the band of reasonable responses. The issue of substitution did not arise in relation to the first question, which had required the tribunal to make findings of fact, on the balance of probabilities, as to, for example, the reason(s) which had been in the mind of the Respondent (which had taken its decisions largely through Dr Rosser) at the time of the decision to dismiss. Mr Collins submitted that the Respondent's grounds of appeal failed to recognise that important distinction, and that it was necessary to consider its asserted examples of alleged substitution against that background.

G 55 In my judgment, Mr Collins is right that the tribunal had to adopt the two-stage approach for which he contends. I turn to consider the individual examples upon which Ms Motraghi relies.

H

(1) Judgment, paragraph 11.106

56 At paragraph 11.106 of the Judgment, the Tribunal had found: *'It seems to me that if the claimant's stark choice was as simple as "if I don't use an untrained member of staff to assist me this patient is going to lose his sight" then, in his view, he did nothing wrong, notwithstanding the technical breaches of procedure that would entail. It seems likely that this was the context in which he made such a comment.'* (emphasis added). Ms Motraghi contends that the Tribunal thereby substituted its own view that breaches which the Respondent had considered to have been serious were merely technical.

57 Mr Collins points to the fact that this aspect of the tribunal's judgment had been directed at the level of insight which the Claimant had demonstrated in relation to the potential gravity of his actions in relation to incident one; a concern which the tribunal held to have been valid (Judgment, paragraph 11.100). It was not in dispute that, at the disciplinary hearing, the Claimant had acknowledged that, when told that there was no one available to assist him, he should have done more to check that information and to search, himself, for some assistance, or to escalate the matter to more senior management (Judgment, paragraph 11.101). In issue was whether the Claimant had also said that he did not accept that he had done anything wrong (Judgment, paragraphs 11.102 to 11.103). The tribunal had resolved that dispute of fact in favour of the Respondent (Judgment, paragraph 11.104). Having done so, it had gone on to consider the context in which the comment had been made and what may have been meant by it. Paragraph 11.106 of the Judgment related to the Claimant's view and the context of his comment. The suggestion that that paragraph substituted the tribunal's view for that of the Respondent misunderstands its content and takes it out of context; an approach adopted in relation to the further alleged examples of substitution.

58 I agree with Mr Collins submission as to the context and proper construction of paragraph 11.106, which are clear from its wording and position in the Judgment.

(2) Judgment, paragraph 11.113

59 At paragraph 11.113, the tribunal found:

> **"…The Panel seemingly concluded that a refusal by the trained theatre staff to assist the claimant was on the basis they did not have the relevant qualifications or experience although, on the evidence before me, they appeared to have both. There was no dispute that the claimant allowed a non-clinical member of staff to assist him, and, before me at least, the claimant acknowledged that this exposed the patient to risk and was not acceptable, although the Panel concluded that the claimant did not demonstrate this level of insight at the time."**

Ms Motraghi contends that the first sentence did not reflect the Respondent's conclusion. During the hearing, Dr Rosser had informed the tribunal that it was a matter of judgement for each individual, as an autonomous practitioner, to determine whether s/he had the skills and experience to assist in a particular procedure. In any event, the tribunal had failed to confine its consideration of the facts to those found by the Respondent, which were within its purview as the investigating employer, and, therefore, impermissibly substituted its view. As to the balance of paragraph 11.113, the tribunal's presentation of an alternative to the facts found by the panel is said to disclose the tribunal's 'substitution mindset': the only proper question was the panel's reasonableness on the basis of its findings of fact. The tribunal engaged in impermissible substitution, by airing its views on an alternative factual finding.

60 Mr Collins submits that the above criticisms are misplaced and that no substitution is demonstrated. As to the first criticism, the tribunal had found (in a finding which is not challenged) that the Respondent had failed to have specialist assistance with its investigation and

disciplinary process (Judgment, paragraphs 11.63; 26.1 to 26.7; and 28.3). Thus, it had not been in a position to make a proper assessment of the clinical requirements of the operation which formed incident one. In particular, without specialist input into the nature of the procedure, the disciplinary panel could not even form a view as to the nature of the task with which the theatre staff had been asked to assist. The tribunal had been entitled to record its understanding, on the uncontroversial evidence before it, of the procedure. That was not to substitute its view for that of the panel. The second passage criticised does no more than record that (a) before the tribunal, it had not been in dispute that the use of a non-clinical member of staff had exposed the patient to risk and had not been acceptable; and (b) the disciplinary panel had not considered the same level of insight to have been demonstrated at the time of the disciplinary hearing. It neither reaches nor expresses any conclusion as to the reasonableness of the panel's view.

61 In my judgment, paragraph 113 is narrative in nature and is to be read in the context of the further failings which the tribunal had identified (to which Mr Collins referred in his submissions, summarised above). There is no impermissible substitution disclosed.

(3) <u>Judgment, paragraph 11.125</u>

62 Ms Motraghi criticises the following description by the tribunal of Dr Rosser's comments about the Claimant, in his post-dismissal referral to the GMC:

> **"…Those comments, whilst having some basis were not entirely accurate and arguably further confirm Dr Rosser's apparent bias against the Claimant. The comments seemed to be unjustifiably weighted against the claimant particularly as they were not balanced with any recognition of the failings of others, nor the failings of the disciplinary process, nor any appropriate recognition of the clinical success of the operation."**

63 Ms Motraghi submits that the 'comments' referred to were the factual findings of the Respondent. Whilst the tribunal would have tempered the Respondent's criticism of the Claimant,

it was inappropriate and an error of law for it to articulate its own view and make findings on that basis, thereby substituting its view of the Claimant's conduct for that of the Respondent.

64 Mr Collins' position is that, whilst the tribunal could not substitute its own view (and was confined to an analysis of the range of reasonable responses) when assessing the merits of the decision to dismiss; it could, and, indeed, had to, make findings of fact as to other matters; most significantly, the state of mind of the dismissing officer. Thus, it was wrong for the Respondent to suggest that the tribunal was not permitted to make findings about Dr Rosser's reasoning and motivation when he wrote as he did to the GMC. The tribunal had been entitled to form its own view as to the reasonableness of the terms in which he had written the letter of referral. It had been entitled to conclude that for a senior and highly experienced medical professional to write in such hyperbole to the regulator suggested bias against the Claimant, in particular given that Dr Rosser was the Responsible Officer, pursuant to the Medical Profession (Responsible Officers) Regulations 2010. Dr Rosser had not described the Claimant, as might be expected in a carefully drafted letter from a responsible clinician, as *'lacking in insight'*; he had described him, in personal terms, as being *'exceptionally arrogant'*. He had stated that the Claimant had *'demonstrated no reflection'*, notwithstanding the Claimant's acknowledgement that he should have done more (Judgment, paragraph 11.101). Thus, the tribunal's finding of a lack of balance had been neither surprising nor improper. This was the same letter in which Dr Rosser had misled the regulator as to whether the Claimant had made a protected disclosure (Judgment, paragraphs 11.126 to 11.128). The suggestion that the tribunal could not properly have concluded that it demonstrated bias on Dr Rosser's part was, in that context, surprising.

65 In my judgment, Mr Collins' submissions are to be preferred on this issue. In addition to the paragraphs of the Judgment on which he relied, I note that the tribunal's view that Dr Rosser's

actions had reflected a predisposition within the Respondent against the Claimant were expressly supported by the strong language of the GMC referral letter (amongst other matters), at paragraph 23.16. That was clearly a relevant consideration when assessing the fairness of the dismissal (see further, below).

(4) Judgment, paragraphs 23.16 and 24.4

66 As noted above, at paragraph 23.16 of the Judgment the Tribunal found, '*It seems more likely to me that Dr Rosser's actions reflect a predisposition within the Respondent against the claimant. This was evidenced by the claimant's exclusion the previous year, procedural failings, certain unsustainable findings and the strong language of the dismissal letter and GMC referral. These indicate, at the very least, a lack of appropriate care and attention to very serious matters.'*

67 Ms Motraghi submits that two errors of law are disclosed by that finding. First, the tribunal's language is so emotive that it is redolent of substitution, as in **Royal Bank of Scotland Group plc v Wilson.** Secondly, the tribunal substituted its own views for those of the Respondent as to whether the investigation into alleged misconduct had been reasonable, contrary to **J Sainsbury plc v Hitt**. The same error of law is said to have been demonstrated by the tribunal's findings at paragraph 24.4 (set out at paragraph 45.2 above). Here again, it is said, the language used ('*collusion'*; *'bias'*; *'serious lack of due care and attention'*) is redolent of substitution of the tribunal's views regarding misconduct investigations. Moreover, the tribunal's explicit reference to its earlier *'detailed findings'* is said to betray the truth of its substitution: the tribunal had clearly embarked upon its own fact-finding forensic analysis, rather than considering the reasonableness of the Respondent's conduct of the disciplinary process, contrary to **Royal Free Hampstead NHS Trust v Shah.**

68 Mr Collins submits that the issues identified are not those of substitution. Self-evidently, it had been part of the tribunal's function to assess what was in the mind of decision-makers. That is what it did at paragraph 23.16 of the Judgment. Of the two paragraphs criticised:

68.1 the first was a conclusion based upon findings about which the Respondent did not, or could not properly, complain: the decision to exclude (not the subject of any complaint of substitution); procedural failings (of which there were a surprising number); unsustainable findings (such as that regarding the urgency of the operation the subject of incident one) and the strong language of the dismissal letter and GMC referral. It had been open to the tribunal, in the face of all such evidence, to have concluded that there was a pre-disposition against the Claimant. That was a finding of fact about which the Respondent was not entitled to complain;

68.2 the second could not be the subject of proper challenge. The tribunal had made detailed findings as to the Respondent's treatment of the Claimant in the context of his exclusion, at paragraphs 11.29 to 11.38; 11.41 to 11.57; 11.71 to 11.78 and 24.1 to 24.3 of the Judgment. It had been critical of the Respondent's actions - inevitably, given its findings of fact. None of the findings of fact which had given rise to that criticism had been challenged in this appeal. The challenge to the conclusion at paragraph 24.4 was without substance.

69 Here again, I accept Mr Collins' submissions. The tribunal was entitled to make findings as to the fairness of the Respondent's process, based upon the evidence which it had received. Ms Motraghi's position, in my judgment, inappropriately conflates legitimate, strong criticism with substitution. In the paragraphs criticised, there is nothing intrinsically inappropriate in the language used, or which independently suggests that the tribunal considered the fairness of the

A Claimant's dismissal otherwise than by reference to the objective standards of the hypothetical reasonable employer.

(5) Judgment, paragraphs 26.6, 33 and 38

B

70 Ms Motraghi next criticises the tribunal's references, at paragraph 26.6, to the Claimant's *'alleged lack of insight'* and *'the ultimate good result for the patient'*, in connection with incident one. She submits that the tribunal similarly recast his level of insight at paragraph 38. The level

C of insight demonstrated by the Claimant at the disciplinary hearing, and the result for the patient in all the circumstances, were, she contends, quintessentially findings of fact for the Respondent to make. Those findings, properly made after seeing and hearing from the Claimant and his

D representative at the disciplinary hearing, had been that the Claimant had lacked insight and that the patient had been placed at increased and unnecessary risk. The tribunal had engaged in impermissible substitution in finding otherwise.

E

71 At paragraph 33, the tribunal had further concluded that the Respondent's failure to have appointed an independent expert had meant that *'the Respondent viewed the second incident as more serious than it was in practice'*. That had not been the Respondent's view and, in finding

F otherwise, the tribunal, again, engaged in impermissible substitution, Ms Motraghi submits.

72 Mr Collins submits that the criticisms made by the Respondent constitute further

G examples of the Respondent's objection to findings of fact which had formed a necessary and appropriate part of the tribunal's reasoning. One of the serious procedural failings in this case had been the Respondent's failure to have arranged for specialist advice (from an independent ophthalmic surgeon) to assist the investigation or the disciplinary hearing. The Respondent could

H not attempt and had not attempted to criticise the tribunal's conclusion that that had constituted a procedural flaw, i.e. that no reasonable employer would have failed to have obtained

independent specialist advice before reaching a decision to dismiss. The Respondent had made no criticism of the findings at paragraphs 26.1 to 26.5 of the Judgment, as to the effect on the investigation which such advice might have had (nor could it have done so), from which the conclusion at paragraph 26.6 flowed. The tribunal, properly, had had regard to the Respondent's change of position at the tribunal hearing, by which stage, the Respondent had seen the independent expert advice to the GMC and the opinion of Professor Rose (Judgment, paragraph 26.5), and had conceded, belatedly, that postponing the operation would have risked the patient losing his sight.

73 In Mr Collins' submission, if independent specialist advice would have made no difference, the relevant procedural flaw might not have rendered the dismissal unfair. It was necessary, therefore, for the tribunal to have made findings as to the difference which the missing advice might have made. That had been the exercise undertaken at paragraphs 26.1 to 26.6, leading to the conclusion at paragraph 33.

74 Furthermore, contends Mr Collins, the finding was relevant and appropriate for the purposes of the **Polkey** argument (considered at paragraphs 39 and 40 of the Judgment). The Respondent's criticism appears to focus on two matters:

74.1 First, it highlights the tribunal's use of the word 'alleged', at paragraph 26.6 of the Judgment. The tribunal had been right to use that word, since the nature and extent of the Claimant's lack of insight had been in issue between the parties. Secondly and fundamentally, the relevant paragraph addresses the disciplinary allegations, in which context, the word 'alleged' is unremarkable.

74.2 The Respondent also highlights the tribunal's reference to the *'ultimate good result for the patient'*, the basis of its objection to which is not clear, in particular given that both the GMC expert and Professor Rose had had regard to the outcome in their assessment of the case.

75 As I have observed earlier in this judgment, Mr Collins is right to note that the fairness of the investigation was squarely in issue. In that context, the issue was not simply whether a flaw could be identified, per se, but whether any such flaw had had a material impact on the fairness of the process. The tribunal properly directed its mind to that question, concluding that the absence of independent evidence was a material failing and going on to identify the effect of that failing and the position as it would have stood, had the requisite evidence been obtained. Paragraphs 33 and 34 of the Judgment addressed that effect, in the context of both incidents. As Mr Collins submitted, the finding was also a necessary component of the tribunal's *Polkey* analysis. For the reasons advanced by Mr Collins, Ms Motraghi seeks to place weight on the tribunal's use of the word 'alleged' which it will not bear.

76 The Respondent's criticism of both paragraphs is unwarranted.

(6) <u>Judgment, paragraph 36</u>

77 At paragraph 36, the tribunal stated that it did not accept that the Respondent had genuinely viewed the incidents as potentially gross misconduct and went on to explain that position. Ms Motraghi is critical of the tribunal's conclusion that, *'...No reasonable employer in the absence of the procedural failings, would have been able to classify the claimant's actions as wilful. When faced with an apparent lack of support to perform an urgent sight saving operation the claimant failed to properly consider alternative safer options but ultimately acted with the patient's best interests at heart and was successful in doing so.'*

78 Ms Motraghi submits that such a finding, which was contrary to the view formed by the Respondent, ignored considerable evidence (mostly undisputed) as to the serious nature of the Claimant's actions; the fact that the Claimant himself had agreed that the Respondent could take into account the potential consequences of his actions, and not simply the actual consequences; and the risks presented to the patient and others. The tribunal had substituted its own view of the matters about which the Respondent ought to have been concerned.

79 Mr Collins points to the tribunal's unchallenged conclusion, at the outset of paragraph 36, that the Respondent had not genuinely viewed the incidents as potentially amounting to gross misconduct. That finding of fact about Dr Rosser's state of mind, rendered the Respondent's complaint meaningless. Nevertheless and in any event, the assertion that the tribunal had 'ignored' evidence as to the serious nature of the Claimant's actions was wrong. On the contrary, the tribunal's ultimate conclusion had been that the Claimant's failures had been serious, that he should have done more and that it had been reasonable for the Respondent to have found him culpable (Judgment, paragraph 35). That, submits Mr Collins, is sufficient to dispose of the relevant complaint, but, for the avoidance of doubt:

79.1 the Respondent's position, and the Claimant's partial acceptance of it, were recorded at paragraphs 11.14 to 11.15;

79.2 the management case at the disciplinary hearing was recorded at paragraph 11.93;

79.3 the tribunal rightly recorded that, following the change in the Respondent's position as to the urgency of the operation, in light of the independent specialist advice, much of the focus had

been on the Claimant's level of insight. It found that that had been a valid concern on the part of the Respondent (Judgment, paragraph 11.100);

79.4 the tribunal addressed that issue (properly) and concluded that, had it been addressed by the disciplinary panel as it should have been, there would have been greater focus on the Claimant's failure to have thought of potential options for trained assistants and what those might have been (Judgment, paragraph 11.107).

80 The Respondent was wrong to suggest that the tribunal had failed to consider potential, rather than actual, consequences. *'Potential consequences'* are risks. Risk is precisely what the tribunal considered – for example, at paragraph 11.114, when considering the risk of proceeding with an untrained assistant, the nature of that risk having been identified at paragraph 11.14.

81 The passage of which the Respondent was critical formed part of the 'overview' section of the Judgment and did little more than summarise the conclusions which had been identified at an earlier stage, founded on the evidence summarised above. There had been no substitution of the tribunal's view.

82 In my judgment, the passage criticised is unobjectionable, for the reasons advanced by Mr Collins. The tribunal's rationale was expressly framed by reference to the standpoint of the reasonable employer. In essence, the tribunal concluded that the nature and extent of the flaws which it had identified were such that an appropriate consideration of the circumstances could not have led to the same conclusion. That is an alternative (compressed) statement of the *Burchell* test and the tribunal's approach is not susceptible of criticism.

A

83 I have borne in mind Ms Motraghi's overarching submission that, cumulatively, the individual findings of which she is critical demonstrate that the tribunal saw its own view as providing the only correct standard of what the reasonable employer would have done, rather than asking itself whether the Respondent's approach had fallen within a range of reasonable responses. The tribunal had failed, she submits, to allow for the possibility of a range, as distinct from only one possible response.

B

C

84 I am unable to accept that submission, which would require me to hold that the whole is greater than the sum of the parts. There is no basis for such a conclusion. As Mr Collins submits, the Respondent's position does not acknowledge the tribunal's key findings that there had been a catalogue of procedural errors, summarised at paragraphs 29 to 34 of the Judgment, including the Respondent's failure to have warned the Claimant of the risk of dismissal (found to have been *'potentially enough on its own to take the respondent's actions outside the band of reasonable responses'*: Judgment, paragraph 30); Dr Rosser's lack of independence (paragraph 32); and the failure to have appointed an independent expert (paragraph 33), with the consequences considered above and identified at paragraphs 33 and 34 of the Judgment. On the evidence which it had received, the tribunal disbelieved the Respondent's asserted views of the gravity of the Claimant's conduct, advanced through Dr Rosser. It further found that no reasonable employer would have considered the allegations to have constituted gross misconduct in all the circumstances, or, in the absence of the identified procedural failings, would have been able to classify the Claimant's actions as wilful. It is apparent that the tribunal correctly directed itself as to the approach which it was bound to adopt as a matter of law (Judgment, paragraphs 13.1 to 13.8) and then adopted that approach.

D

E

F

G

H

85 It follows that ground 1 of the appeal is dismissed.

Ground 2: misapplication of section 98(4) of the ERA

86 In oral argument, Ms Motraghi took this ground of appeal together with ground 1, to which it was related. The tribunal is alleged to have made seven errors of law. In summary, those are:

86.1 Its failure to have tested the decision to dismiss against the band of reasonable responses;

86.2 its failure to have tested the Respondent's procedural shortcomings against the band of reasonable responses, as required by **J Sainsbury's v Hitt;**

86.3 its conclusion that the Respondent did not genuinely view the relevant incidents as gross misconduct because they had not been labelled as such until the dismissal itself (Judgment, paragraph 36), said to have constituted a misinterpretation of the requirements of section 98(4) and, in any event, to have been a non-sequitur;

86.4 its failure to have explained its conclusion, contrary to the Respondent's finding, that the Claimant's conduct had not been wilful;

86.5 its taking into account of the Claimant's exclusion and the post-dismissal referral to the GMC, each of which said to have been irrelevant to the fairness of the decision to dismiss but, together, forming *'the backbone of the criticism of Dr Rosser and the Respondent'*;

86.6 its failure to have considered how the test set out in **Stuart v London City Airport** [2013] EWCA Civ 973, CA applied to its findings, in circumstances in which neither the Claimant nor his representative had challenged, contemporaneously, certain procedural matters on which the Claimant later relied for his claim;

86.7 its reinterpretation of the disciplinary allegations so as to give greater prominence to whether the operation the subject of incident one ought to have been postponed, when the question had been whether the Claimant had misconducted himself in allowing an untrained member of staff to assist, in circumstances in which there had been many other individuals who would have been able to assist him.

87 Insofar as the above alleged errors are dependent upon the criticisms made under ground 1, the latter have already been considered and rejected, for the reasons set out above.

88 Ms Motraghi underpins all of her submissions with the following propositions of law:

88.1 a tribunal must make a distinction in its reasoning between the question of whether a claimant was in fact guilty of the misconduct alleged and the question of whether the employer believed that he was guilty: **Co-operative Group Ltd v Baddeley** [2014] EWCA Civ 658;

88.2 The band of reasonable responses test applies to whether the employer adopted a reasonable procedure, as it does to substantive unfairness: **J Sainsbury plc v Hitt** [2003] ICR 111, CA; **Whitbread plc (t/a Whitbread Medway Inns) v Hall** [2001] ICR 699, CA;

88.3 In determining the principal reason for dismissal, no account may be taken of events occurring subsequent to the dismissal, or of facts not known to the employer at the time of the dismissal, since those could not have formed part of the reason for dismissal: **W Devis & Sons Ltd v Atkins** [1977] IRLR 314, HL; and

88.4 In deciding whether a particular procedural step was required, the fact that the individual being investigated and/or his representative omitted to ask that such a step be taken will be relevant to that inquiry: **Stuart v London City Airport**.

89 None of these principles was controversial; in issue between the parties was whether they had been adhered to by the tribunal.

The parties' submissions

90 Ms Motraghi submits that the tribunal had erred in failing to have tested the Respondent's decision against the issues set out in **Burchell** and reaffirmed in **Reilly** and then had erred further by failing to apply the band of reasonable responses test. The structure of the Judgment, she submits, indicates that the tribunal had viewed its task as being to deal with the Claimant's challenges, rather than to address each of the limbs of the **Burchell** test. There is no section of the Judgment in which the tribunal conducted the required analysis or adequately engaged with those matters.

91 Further, for all of the reasons advanced under ground 1 of the appeal, the tribunal had held the Respondent to the standard set by the tribunal, rather than asking whether the Respondent's actions had fallen within the band of reasonable responses. In so doing, the tribunal had conflated the question of whether the Claimant had been guilty of the misconduct alleged

with the question of whether the Respondent believed that he was guilty. That had been in breach of the clear statement of law in **Baddeley.**

92 Repeating her criticism of the tribunal's findings at paragraph 11.125 of the Judgment (see paragraph 62ff, above), Ms Motraghi submits that the tribunal had erred in failing to have tested the Respondent's procedural shortcomings against the band of reasonable responses, as required by **J Sainsbury plc v Hitt.**

93 Ms Motraghi then attacks the tribunal's finding, at paragraph 36 of the Judgment: '*I do not accept that the respondent genuinely viewed the incidents as potentially gross misconduct. They were not labelled as such until the dismissal itself.'* That, she says, set the bar higher for the Respondent than is required by section 98(4) of the ERA, interpreted in line with the **Burchell** test, which requires only that the employer believes an employee to be guilty of misconduct. The question as to whether that misconduct is gross, or not, is separate from the section 98(4) enquiry. In any event, the fact that the incidents were not labelled as gross misconduct until the disciplinary hearing did not preclude the panel from genuinely believing them to have been matters of gross misconduct.

94 Furthermore, submits Ms Motraghi, the tribunal failed to give adequate reasons for its finding that the Claimant's conduct had not been wilful, contrary to the Respondent's finding. In particular, the tribunal had failed to take account of the Claimant's concession, under cross-examination, that there had been no policy or procedure which had entitled him to act as he had done, in seeking assistance from an untrained individual; and the fact that that Claimant had, on previous occasions, sought to escalate a nurse's non-cooperation, such that he was aware of the appropriate means of escalation. In its closing skeleton argument before the tribunal, at paragraph

94, the Respondent had alluded to the Claimant's position, as set out in his defence statement, that, sometimes, Dr Steyn, Mr Negi and 'Liam' would assist, once told that the consequence of the nurse's stance would be cancellation. A position to the same effect had been accepted by the Claimant under cross-examination.

95 Ms Motraghi contends that, in considering the reasonableness of the dismissal, the tribunal had had regard to the erroneous statement, in Dr Rosser's referral of the Claimant to the GMC, that he (the Claimant) had not been involved in whistleblowing. The GMC referral, amongst other matters, had formed the backbone of the criticism of Dr Rosser and the Respondent. Taking that post-dismissal action into account, as the backbone of the decision, fell foul of the principle in **W Devis & Sons Ltd v Atkins**. From the criticism made of the GMC referral, the tribunal had taken certain leaps of reasoning and formed unjustified conclusions, based upon irrelevant considerations, Ms Motraghi submits. For example, Dr Rosser had been asked how he had made the GMC aware of his erroneous statement, on the GMC referral form, that the Claimant had not raised any whistleblowing issues. His clear evidence had been that he had done so orally, to the GMC local liaison officer, with whom he regularly met (Judgment, paragraph 11.130). The tribunal had concluded that, *'[i]f true, it was surprising that there was no mention of this in the GMC's findings*' and, later, that, '*if Dr Rosser did inform the GMC it is, at best, surprising that they did not write to* [the Claimant] *to inform him of the new information received, nor was there any mention of it in their findings.'* (Judgment, paragraph 23.13). And yet, Ms Motraghi submits, there had been no evidence before the tribunal that GMC findings had to, or would usually, include corrections made to referral forms, or record whether the individual concerned had been involved in whistleblowing, or that such information would be provided to the person referred as a matter of course.

96 Ms Motraghi was also critical of the tribunal's analysis of the relevance of the lack of contemporaneous request by the Claimant for particular steps to be taken. Albeit citing the relevance of that consideration, as set out in **Stuart v London City Airport** (Judgment, paragraph 13.6), it failed to apply it. Similarly, the tribunal cited **Buzolli v Food Partners** UKEAT/0317/12/KN (Judgment, paragraph 13.7), in which the EAT had concluded that a decision to dismiss had fallen within the band of reasonable responses, notwithstanding the fact that, in advance of his disciplinary hearing, the claimant had not been informed that dismissal was a potential sanction, but (at paragraph 27 of the Judgment) had failed adequately to analyse the facts of this case against that principle.

97 Finally, Ms Motraghi submits that the tribunal's misinterpretation, or reinterpretation, of the disciplinary allegations to provide greater prominence to whether the operation in incident one ought to have been postponed, unjustly weighted its section 98(4) analysis in the Claimant's favour and ought not to have been the focus of its enquiry.

98 Mr Collins' position is that none of the criticisms made by ground 2 of the appeal bear analysis. The tribunal's application of the band of reasonable responses test (substantively and procedurally) is apparent from paragraphs 13.3 to 13.7 and 30 of the Judgment and from its references to '*no reasonable employer'*, at paragraph 36. It had also been addressed under, ground 1 of the appeal. In reality, the complaints made under ground 2 amount to a 'recharacterisation' of the points made under ground 1 and no error of law has been demonstrated.

99 Further, section 98(4) required the tribunal to determine, as a question of fact, whether the employer had genuinely believed that the employee's conduct warranted dismissal. That is what the tribunal had done, finding against the Respondent on the facts. That finding was not

susceptible of appeal. The Respondent was wrong to assert that the tribunal's conclusion that the Respondent had not genuinely viewed the incidents as gross misconduct was *'because they were not labelled as such until the dismissal itself'* (Judgment, paragraphs 36 and 27.6): as was plain from the Judgment, that matter was only one factor amongst a number considered in the decision. The tribunal had been entitled to take into account the fact that the Respondent had never suggested, either in internal correspondence or to the Claimant, that the incidents might amount to gross misconduct, particularly where, as the tribunal noted, there had been no exclusion on the basis of patient safety. The Notice of Appeal had misdescribed paragraph 36 of the Judgment, in asserting that the tribunal had found that the incidents had not been labelled as gross misconduct *'until the disciplinary hearing'*. In fact, the finding had been that the incidents had not been labelled as gross misconduct *'until the dismissal itself'*. That difference of categorisation was important.

100 The tribunal's finding that no reasonable employer would have been able to classify the Claimant's actions as wilful was explained in the very next sentence; the last sentence of paragraph 36. This had not been a planned decision to overturn policy; it had been a defective decision, taken in a crisis.

101 As to the GMC referral, Dr Rosser's actions in making the referral in the terms adopted were important in assisting the tribunal in making findings as to his state of mind at the time at which he had taken the decision to dismiss, and as to the reasons for dismissal. Thus, it was wrong to assert that the GMC referral had not been relevant to the exercise which the tribunal had been required to undertake. At sift stage, HHJ Auerbach had considered that complaint not to disclose even an arguable error of law, but had allowed it to proceed, given that the ground as a whole had

been arguable. His view of the merits had been correct and the Respondent's criticism was misplaced.

102 Mr Collins further submits that the Claimant's lack of contemporaneous challenge to the procedure had been dealt with impeccably by the tribunal. *Stuart* had been considered, expressly, at paragraph 13.6 of the Judgment. At paragraph 26.3, the tribunal had noted that a challenge could have been made to procedural flaws at the time. It went on to find that part of the reason why no such challenge had been made was that the Claimant had not been told of the risk of a finding of gross misconduct, or of dismissal. The tribunal found that, had a proper warning been given, the Claimant would have been legally represented. Legal representatives would have been bound to challenge the failures which had not been recognised, or addressed, by the Claimant's non-legally-qualified representative at the disciplinary hearing (Judgment, paragraphs 27.1ff and, in particular, paragraph 27.9). Further, the tribunal had noted the serious consequences of the failure, at paragraphs 26.4 to 26.7. Thus, it was impossible to criticise the tribunal's conclusions to the effect that independent specialist advice, an independent disciplinary panel and a warning of the risk of dismissal had been required, irrespective of whether they had been requested, or the subject of complaint by the Claimant. HHJ Auerbach had not been persuaded that this complaint was arguable and it was without substance.

103 Finally, submits Mr Collins, the Respondent is wrong to submit that, '*The question was whether the Claimant misconducted himself when he allowed an untrained member of staff to assist him in circumstances where there were many other individuals who were able to assist him.'* The question was whether the Respondent had been entitled to dismiss the Claimant in light of his conduct. That question had been answered carefully and conscientiously by the tribunal.

Ground 2: discussion

104 Much of ground 2 is an alternative expression of the points made under ground 1, to which my views and reasoning set out above apply and need not be repeated.

105 The first two alleged bases of challenge are without merit: the tribunal correctly directed itself as to the law at paragraphs 13.1 to 13.8, in which it stressed that the applicable test, substantively and procedurally, was framed by reference to the band of reasonable responses. In setting out its conclusion and reasons, the tribunal referred to that test and the conduct of the reasonable employer, notably at paragraphs 26.2, 30 and 36 of the Judgment. The fact that the tribunal did not set out each of its findings under the separate limbs of the **Burchell** test is not something of which legitimate complaint may be made, if all such elements were, in fact, considered and determined. The tribunal's findings collectively and clearly indicated its conclusion that none of those limbs had been satisfied and set out its rationale for so concluding. That disposes of the first two errors asserted under ground 2.

106 In my judgment, the third alleged error is founded upon two false premises. First, as Mr Collins submitted, the tribunal's conclusion that the Respondent did not genuinely view the incidents as gross misconduct was founded upon all of the matters summarised at paragraph 36 of the Judgment and was not confined to the single basis upon which the Respondent relies for its submission. Secondly, the tribunal did not conclude that the mere failure to label the incidents as gross misconduct prior to dismissal (not the disciplinary hearing) precluded a genuine belief; it concluded that, as a question of fact, the Respondent had not held such a belief. That finding followed, and in part flowed from, its earlier adverse findings in relation to Dr Rosser arising from his involvement in connection with the Claimant's attendance at the LNC meeting, the Claimant's exclusion and Dr Rosser's associated knowledge and lack of independence. The

distinction which Ms Motraghi seeks to draw between simple misconduct and gross misconduct is misplaced. The tribunal's task had been to determine the (principal) reason for dismissal and, then, whether the dismissal had been fair or unfair. Under sub-sections 98(4)(a) and (b) of the ERA, as the tribunal set out (Judgment, paragraphs 13.1 and 13.2), that latter question depended on whether, in the circumstances, the Respondent had acted reasonably or unreasonably in treating the relevant reason as a sufficient reason for dismissing the Claimant and was to be determined in accordance with equity and the substantial merits of the case. That is what the tribunal did. In essence, it found that, in all the circumstances, in the absence of gross misconduct, dismissal would not have been fair, having earlier found (Judgment, paragraph 11.117) that the Respondent had been determined to dismiss and was attempting to make the case against the Claimant, a long-serving senior employee, as strong as possible. There is nothing in this complaint.

107 The fourth alleged error is also readily dispatched. The explanation for the tribunal's finding that no reasonable employer, in the absence of the procedural failings identified, would have been able to classify the Claimant's actions as wilful (Judgment, paragraph 36), was given in the immediately following sentence. I note the shift from Ms Motraghi's pleaded contention; *'failed to explain'*, to her submission; *'failed adequately to explain'*. The matters of which it is said that the tribunal failed to take adequate account in reaching its conclusion (being the Claimant's recognition that there had been no policy or procedure which allowed a non-trained person to assist in surgery; and his knowledge of how to escalate a complaint in the event of a nurse's non-co-operation) do not detract from the reason for the Claimant's actions in relation to incident one, which, on the tribunal's findings, had not been process-driven.

108 Mr Collins' submissions provide a complete answer to alleged error five: the terms in which Dr Rosser referred the Claimant to the GMC were found to have shed light on his relevant

A actions and motivation. The referral was not relied upon independently. That the Tribunal had had the distinction well in mind is clear from paragraphs 23.2 and 23.16 of the Judgment:

> **"23.2 The respondent suggested that these failings were both inadvertent and after the decision to dismiss and hence irrelevant. However, it seems to me that I am entitled, and required , to consider all the circumstances when, for example, considering whether to draw adverse inferences in the whistle-blowing claim. It is also potentially relevant in the context of assessing the independence and neutrality of Dr Rosser.**
>
> **…**
>
> **23.16 It seems more likely to me that Dr Rosser's actions reflect a predisposition within the Respondent against the claimant. This was evidenced by…and the GMC referral. These indicate, at the very least, a lack of appropriate care and attention to very serious matters."**

109 I also note the tribunal's recognition (Judgment, paragraph 20) that the challenges raised by the Claimant *'include those from which it is said I could, and should, draw inferences as to the real reasons for the Claimant's dismissal.*' The well-known principle in **Devis v Atkins** precludes a tribunal from having regard to matters of which the employer was unaware at the time of dismissal and which, therefore, cannot have formed part of its reason(s) for dismissing an employee. That is not what this tribunal did. This tribunal derived assistance from subsequent events in so far as they shed light on the actions and motivation of Dr Rosser, as the driving force behind the dismissal, and, thus, on the reasons for and fairness of the latter. That was a permissible exercise to which no criticism can attach. Ms Motraghi's submission to the effect that the tribunal had made impermissible leaps in reasoning does not take account of the tribunal's further observation, at paragraph 11.130, that Dr Rosser had not mentioned his alleged conversation with the GMC liaison officer, until the matter had been expressly put to him, or its wider findings as to his credibility, in connection with the GMC referral and other matters.

110 A complete answer to the sixth alleged error was provided by Mr Collins' submissions, set out above. Here again, no error of law is demonstrated.

111 Alleged error seven is also misconceived. The question to which the tribunal was obliged to have turned its mind, under section 98 of the ERA, was whether the Claimant's dismissal had been fair or unfair, having regard to the reason shown by the Respondent. The allegations faced by the Claimant at the disciplinary hearing were accurately recorded at paragraphs 11.87 and 11.88 of the Judgment. By reference to those allegations, the tribunal had to consider whether all limbs of the *Burchell* test had been satisfied. Necessary aspects of that question were the context in which the incidents in question had arisen and the extent to which that context ought to have been apparent to the Respondent.

112 Accordingly, ground 2 of this appeal is dismissed.

Ground 4: *Polkey*

The parties' submissions

113 The complaint here is that the tribunal failed to give a properly reasoned decision on this issue, including by addressing or evaluating the Respondent's submissions and setting out its reasons for rejecting them. The tribunal's finding that, had the Claimant been aware of the possibility of dismissal, he would have engaged a lawyer, who would have advised him to show additional insight and contrition (as he had done before the GMC), such that he would not have been dismissed, ignored the Respondent's submission that the process before the GMC was very different and did not require the Claimant's attendance. Even before the tribunal, the Claimant had demonstrated limited insight. It had been an error of law for the tribunal to have concluded that no deduction was to be made under **Polkey** principles.

114 Ms Motraghi submits that it is a trite principle of law that a tribunal may reduce a dismissed employee's level of compensation where it is found that the dismissal was unfair on procedural grounds and that the dismissed employee could have been fairly dismissed at a later

A date, or if a proper procedure had been followed**: Polkey v AE Dayton Services Ltd** [1988] ICR 142, HL. The statutory basis for so doing is the requirement for 'just and equitable' compensation, under section 123(1) of the ERA.

B

115 Determining whether an employee would have been dismissed in any event is necessarily a predictive exercise. Elias P (as he then was), had provided the following guidance regarding the correct approach in **Software 2000 Ltd v Andrews** [2007] IRLR 568, [54], as amended by

C **Ministry of Justice v Parry** [2013] ICR 311, [46] and affirmed in **Soll (Vale) v Jaggers** UKEAT/0218/16 [30]:

> **"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> D
>
> **(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)**
>
> E
>
> **(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.**
>
> F
>
> **(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.**
>
> G
>
> **(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role….**
>
> H
>
> **(7) Having considered the evidence, the tribunal may determine…**

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored." (emphasis added)

116 Per **Ministry of Justice v Parry**, the chance of dismissal should be assessed across the whole spectrum, from zero to 100%, and compensation should be reduced to reflect that chance. Tribunals are expected to consider making a **Polkey** reduction whenever there is evidence to support the view that the employee might have been dismissed if the employer had acted fairly. Tribunals need to consider both whether the employer could have dismissed fairly and whether it would have done so. The correct employer is the actual employer – not a hypothetical fair employer. Per **Hill v Governing Body of Great Tey Primary School** [2013] IRLR 274, EAT, [24] (Langstaff P presiding), the task for the tribunal is, *'…to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand*'.

117 Ms Motraghi submits that the tribunal had fallen foul of those principles. Its reasoning had been brief, inadequate and flawed. Insight and contrition which are offered only as a result of legal advice are not genuine. An internal disciplinary process is not the equivalent of a tribunal or GMC process. The tribunal had erred in failing to have considered the evidence to which the Respondent's submissions on **Polkey** had referred, let alone to have evaluated or given reasons for rejecting it. There had been clear evidence before the tribunal which had demonstrated that, in all likelihood, under direct questioning the Claimant would have demonstrated a lack of remorse, reflection, and insight, even with legal representation. Had that been the case, a fair panel would have reached a decision to dismiss him. The tribunal's finding at paragraph 47 of

the Judgment was also to be noted: '*However, it seems clear to me that the principal reason for dismissal was the claimant's use of an untrained member of staff in theatre and his perceived lack of insight, coupled with the additional supervision concerns raised by the second incident.'* It had been an error of law for the tribunal to conclude that there was no **Polkey** reduction to be made, in all such circumstances.

118 Mr Collins does not take issue with the legal principles outlined by Ms Motraghi. In short, his submission is that the tribunal had properly concluded that, had the procedural failings been rectified, the Claimant would not have been dismissed. Its conclusion on *Polkey* had been briefly set out because the findings required to reach it had appeared earlier in the Judgment. Those findings had been open to the tribunal to make and there was no error of law demonstrated.

Ground 4: discussion

119 In a lengthy judgment, the tribunal's **Polkey** findings were briefly stated. Nonetheless, it referred to:

119.1 the likelihood that the Claimant would have shown insight and contrition, having, in the immediately prior paragraphs (37 and 38), found that he had done so and that his allegedly contradictory failure to have admitted wrongdoing only made sense in the context of the Respondent's wrong conclusion that he should have postponed the operation the subject of incident one to another day. That was, itself, a summary of the tribunal's more detailed findings at paragraphs 11.100 to 11.115; and

119.2 its view that, had the Respondent's failings been rectified, matters would have played out as they had before the GMC, to which process it had earlier given detailed consideration, at paragraphs 11.133 to 11.141. That summary makes clear that the test which the GMC was applying differed from that which the Respondent (or the tribunal) had to apply, but the factual considerations were equally relevant to the latter and the Tribunal's conclusions as to the insight

demonstrated by the Claimant had followed an adversarial hearing during which he had been subjected to rigorous cross-examination, unlikely to have been less searching than questioning in the course of a disciplinary hearing.

120 No independent reason for the prospective dismissal of a well-regarded and very long-serving employee was proffered by the Respondent, whether before the tribunal or before me. In all those circumstances, I conclude that, when making its assessment, the tribunal did have regard to all of the evidence and, in particular, to any material and reliable evidence which might have assisted it in fixing compensation, and cross-referred to the relevant aspects of its earlier findings (in summary form) when addressing *Polkey*. Its findings, at paragraph 40, make clear its view that the Respondent could not have dismissed the Claimant fairly and would not have done so.

121 Whilst recognising that the tribunal could have expressed its conclusions in less compressed form, I must be wary of taking a fine-tooth comb to its judgment. The tribunal directed itself appropriately and it is not for this tribunal to interfere with its assessment.

Ground 5: contributory fault

The parties' submissions

122 The Respondent contends that the tribunal erred in its assessment of contributory fault, by undertaking an assessment of the relative fault of each party and concluding that the Claimant's failings had been *'at least as serious'* as the Respondent's (Judgment, paragraphs 40 to 41). Its focus ought to have been on the Claimant's conduct alone and, on that basis, would have resulted in a finding that the level of his contribution to his dismissal had been at or around 100%, given his admission that he had used a non-clinician to assist him in theatre and the criticism of that fact made by the GMC and his colleagues. Such conduct ought to have resulted

in the associated reduction of basic and compensatory awards, in accordance with sections 122(2) and 123(6) of the ERA.

123 Ms Motraghi submits that:

123.1 it is an error of law for a tribunal to consider the employer's conduct as a relevant consideration when deciding the matter of contributory fault: **Sandwell and anor v Westwood** EAT 0032/09;

123.2 a tribunal may make a finding of contributory conduct where the following factors are satisfied: **Nelson v BBC (No 2)** [1980] ICR 110, CA:

123.2.1 the relevant action is culpable or blameworthy;

123.2.2 it actually caused or contributed to the dismissal; and

123.2.3 it is just and equitable to reduce the award by the proportion specified;

123.3 reductions for contributory fault may be made if the employee ought to have known that his conduct was wrong. An employee's conduct at a disciplinary hearing, if in the mind of the employer when deciding to dismiss, may be taken into account when considering the reduction of compensation because of contributory fault: **Bell v Governing Body of Grampian Primary School** EAT 0142/07; **Nelson v Clapham t/a Clapham's Solicitors** EATS 0037/11]; and

123.4 tribunals are under a duty to provide sufficient reasons for findings of contributory fault: **Portsea Island Mutual Co-operative Society Ltd v Rees** [1980] ICR 260, EAT; **London Borough of Lewisham v James** UKEAT/0581/03.

124 In making the findings which it did, in the context of the matters summarised at paragraph 123 above, the tribunal had fallen foul of all such principles, Ms Motraghi submits.

125 Mr Collins' short submission is that there is no scientific mechanism by which the proportion by which an award is to be reduced is reached. It will depend upon the impression of the tribunal. Whilst it is the employee's conduct which must be considered, that can only be in the context of the dismissal, because the focus is on what is just and equitable having regard to the employee's contribution to the latter. As with its **Polkey** assessment, the tribunal was not required to spell out its earlier findings, nor was it obliged to undertake an arithmetical exercise in order to explain its finding of a 50% contribution. The cases which warned against consideration of an employer's conduct were concerned with different circumstances: in **Westwood,** the tribunal had refused to make any reduction, on the basis of the employer's conduct. As **Nelson** made clear (at page 124B), it is not right to examine too critically the precise words used by the tribunal. In this case, the reference made to the Respondent's conduct simply identified that its own failings were significant, which was a relevant consideration when assessing the extent of the Claimant's contribution to his dismissal. Assessments of contributory fault are broad brush. This ground of appeal essentially seeks to re-argue the case which was advanced below and does not identify any error of law.

Ground 5: discussion

126 Here again, one cannot but recognise the brevity with which the Tribunal's conclusions were expressed. The totality of its findings as to contributory fault are set out below:

> **"41 The claimant's failings were, however significant and serious. As serious, in fact, as the failings of the respondent. He subjected patients to avoidable risk in relation to both allegations.**
>
> **42 In those circumstances I consider that the claimant contributed 50% to his dismissal."**

127 Dealing with Ms Motraghi's criticisms in turn:

127.1 The reference to the Respondent's failings, in context, seems to me to be no more than a means of explaining the gravity of the Claimant's own failings, as viewed by the tribunal. I do

not consider that it indicates engagement in an impermissible balancing act, or focus on the wrong party's conduct;

127.2 With the **Nelson** criteria in mind, the tribunal found:

127.2.1 the relevant actions to have been culpable or blameworthy (Judgment, paragraph 41);

127.2.2 they actually caused or contributed to the dismissal (Judgment, paragraph 42); and

127.2.3 that it was just and equitable to reduce the award by the proportion specified (implicit in paragraph 42, bearing in mind the injunction at page 124B of **Nelson**: *'…there is an express finding, …that the extent of his contribution was 60 per cent. This is not in terms a finding that it was just and equitable to reduce the compensation by 60 per cent; it is rather a finding as to the extent to which Mr. Nelson's conduct was causative. Again, however, I do not think that it would be right to examine too critically the precise words used. The tribunal set out the terms of* [the equivalent statutory provision] *in full in paragraph 24 of the decision, and I have no doubt that they were finding that, under those terms, the fair reduction was 60 per cent.'* I acknowledge that the relevant statutory provision was not set out in the Judgment, but no complaint is made of that fact by Ms Motraghi.);

127.3 The tribunal found that a significant reduction for contributory fault was appropriate and its reference to the Claimant's failings clearly cross-referred to its earlier findings at paragraph 35, bearing in mind that, by the time of the tribunal hearing, the facts underlying each disciplinary allegation were not materially in dispute (Judgment, paragraph 11.98);

127.4 The tribunal did not find the Claimant's conduct at the disciplinary hearing to have contributed to his dismissal and was under no obligation to do so: that was a matter for its assessment;

127.5 In the particular circumstances of this case, in which the shorthand expression of the tribunal's reasons was clearly the product of its earlier detailed findings, I consider that those reasons sufficed.

128 In those circumstances, I accept Mr Collins' submission that this ground of appeal, essentially seeks to reargue for the greater contribution for which the Respondent contended, unsuccessfully, before the tribunal. That is not permissible and I dismiss this ground of appeal.

Ground 6: wrongful dismissal

The parties' submissions

129 Ms Motraghi's final ground of appeal seeks to challenge the tribunal's application of the test for wrongful dismissal. It is said that the tribunal failed to set out the circumstances on which it relied for its finding that the allegations faced by the Claimant could not be said to have amounted to wilful misconduct, particularly in light of the matters summarised at paragraph 94 above. In so doing, it failed to appreciate that misconduct inconsistent with the express or implied conditions of service would justify dismissal; to consider the damage to the parties' relationship; and properly to evaluate whether the Claimant's acts met the threshold of seriousness for gross misconduct. The tribunal further erred in failing to provide reasons for its conclusion that the acts were not a matter of gross misconduct. It had misunderstood the GMC's findings to have provided corroborative evidence for its own conclusions: the GMC does not consider whether gross misconduct has been committed; its focus is on whether fitness to practise is impaired. The former exercise is, essentially, backward-looking, whereas the latter is forward-looking. The tribunal's

A view had also been wrongly premised on the assumption that concessions made by the Claimant before the GMC would have been made to the Respondent in the course of its internal process and would have led the Respondent to reach the same conclusion regarding his appreciation of risk, insight and reflection. Finally, at paragraph 52 of the Judgment, the tribunal had misrecorded, or misinterpreted, the Respondent's evidence: Dr Rosser's evidence had been that he had considered both incidents to have amounted to gross misconduct, but that the panel had considered there to have been the potential for a sanction short of dismissal, had adequate mitigation been presented (which it had not).

130 Ms Motraghi relies upon the following dictum of HHJ Hand QC, in **Westwood**, at paragraphs 111 to 112:

> **"111. Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee: see Wilson v Racher [1974] ICR 428, CA per Edmund Davies LJ at page 432 (citing Harman LJ in Pepper v Webb [1969] 1 WLR 514 at 517): 'Now what will justify an instant dismissal? - something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract' and at page 433 where he cites Russell LJ in Pepper (page 518) that the conduct 'must be taken as conduct repudiatory of the contract justifying summary dismissal.' In the disobedience case of Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698 at page 710 Evershed MR said: 'the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.' So the conduct must be a deliberate and wilful contradiction of the contractual terms.**
>
> **112. Alternatively it must amount to very considerable negligence, historically summarised as 'gross negligence'. A relatively modern example of "gross negligence", as considered in relation to 'gross misconduct', is to be found in Dietman v LB Brent [1987] ICR 737 at page 759."**

131 Noting that each case will turn on its own facts, on a consideration of all relevant evidence, Ms Motraghi characterises the tribunal's conclusion that the Claimant's conduct had not been wilful as *'startling'* and one which had no regard to the evidence received.

132 Further, in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013 (as amended) and the principles in **British Sugar plc v Kirker** [1998] IRLR 624, EAT, the

tribunal had been obliged to set out its reasons and to state them separately from its conclusions as to unfair dismissal. Those reasons needed to explain how the tribunal got from its findings of fact to its conclusions, albeit that that could be done economically: per Sedley LJ in **Tran v Greenwich Vietnam Community** [2002] IRLR 735. In this case, submits Ms Motraghi, the tribunal's conclusion had not complied with those requirements and, hence, the tribunal had erred in law.

133 Mr Collins submits that the tribunal had set out, in some detail, the reasons for its conclusion that the Claimant's actions had not amounted to gross misconduct. It was not required to repeat those findings in the section of the Judgment which addressed breach of contract (paragraphs 52 to 55), or in its overview (paragraphs 29 to 38).

134 It was impossible to derive from the Judgment the conclusion that the tribunal had *'failed to appreciate that misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal'*. The tribunal had gone into considerable detail in assessing the Claimant's dismissal; plainly appreciating the conduct which might or might not justify dismissal. It had been entitled to have regard to the findings of the GMC. It had not simply adopted those findings, but had stated that, *'to the extent that they are relevant and able to,* [they] *appear*[ed] *to confirm'* the tribunal's view that, had the Respondent's failings been rectified, the allegations would not have been considered as gross misconduct (Judgment, paragraph 53). That had been a careful and correct finding.

135 Paragraph 52 of the Judgment did not constitute a misrecording (or, indeed, any recording) of the evidence; it was a restatement of the conclusions reached earlier in the Judgment, at paragraphs 11.100-11.106.

Ground 6: discussion

136 At paragraph 13.9 of the Judgment, the tribunal correctly directed itself in accordance with **Westwood**, citing the passage of that judgment which held that gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee…and involve either deliberate wrongdoing or gross negligence. At paragraph 19, the tribunal again recorded its appreciation of the need for the Claimant's actions to be such as to be treated as a repudiatory breach of the contract of employment. Its findings as to the wrongful dismissal claim were set out at paragraphs 52 to 55 of the Judgment, in a section directed to that claim. Again, they were compressed; the issue is whether they were permissibly so.

137 Consistent with the dictum in **Westwood** which it had previously cited, the tribunal first considered whether the incidents could be said to amount to wilful misconduct, or gross neglect, holding that, when properly considering all the circumstances, they could not, for the reasons earlier stated. Paragraph 36 of the Judgment summarised the relevant circumstances, which themselves had been the subject of more detailed findings earlier in the Judgment (see above). In concluding that, and explaining why, no reasonable employer would have classified the Claimant's actions as wilful, the tribunal had made clear its view that those actions did not constitute gross misconduct. Whilst it was not convinced that any lack of demonstrated insight and acknowledgement of wrongdoing was relevant to the claim of wrongful dismissal (Judgment, paragraph 19), it found, at paragraph 38, that the Claimant had, in fact, acknowledged that which he ought to have done differently in relation to each incident. In the context of all such findings, it cannot be said, with any justification, that:

137.1 the tribunal had not separately considered the claim of wrongful dismissal or stated its reasons for its conclusions, albeit economically. The need for a separate identification of the

tribunal's rationale in relation to the claim of wrongful dismissal does not equate with a need to repeat the facts and matters to which those reasons allude;

137.2 the tribunal had not appreciated the need for the conduct in question to constitute a repudiatory breach of contract, or had failed to focus on the damage to the employment relationship;

137.3 the tribunal had not addressed its mind to the question of whether the Claimant's actions were properly described as 'wilful', or that its conclusion was startling (and I note that that characterisation is not synonymous with perverse). Mere misconduct would not suffice and the tribunal's explanation of its findings as to wilfulness (paragraph 36, final sentence) meant that, in its view, the definition of 'gross negligence' had not been satisfied. As to that conclusion:

137.3.1 it is noteworthy that, at paragraph 113 of **Westwood** (not cited by Ms Motraghi), the EAT had held:

> **"Consequently we think that the Employment Tribunal was quite correct to direct itself … that "gross misconduct" involves either deliberate wrongdoing or gross negligence. Having given a correct self-direction in terms of law, thereafter it fell to the Employment Tribunal to consider both the character of the conduct and whether it was reasonable for the Trust to regard the conduct as having the character of gross misconduct on the facts. The decision reached in that paragraph, whilst accepting that her conduct was "a failure of professional judgment" and a "serious one" and "fell short of the high standards demanded of a nurse", concluded that it could not be reasonably characterised as deliberate wrongdoing or gross negligence. In our judgment that was a decision open to the Employment Tribunal to make on the facts."**

In that case, the claimant was a staff nurse, in the accident and emergency department of the relevant NHS trust. During a night shift, she had helped another nurse remove an intoxicated patient who had been discharged, but had refused to leave. The patient had been left by the two nurses outside A&E, lying on a trolley.

137.3.2 As was made clear by the Court of Appeal in **Adesokan v Sainsbury's Supermarkets Ltd** [2017] ICR 590, at paragraph 24, the question for the tribunal was whether the negligent dereliction of duty was '*so grave and weighty'* as to amount to a justification for summary dismissal. That question involves an evaluation of the primary facts and an exercise of judgment.

137.3.3 The independent expert evidence before the GMC, as summarised at paragraphs 11.138 and 11.139 of the Judgment, had been that, owing to mitigating circumstances, the overall care in incident one had fallen below, but not seriously below, the standard expected of a reasonably competent consultant; and the failings in connection with incident two were not seriously below the required standard of care because the trainee had been sufficiently experienced to perform the relevant surgery. The GMC had accepted those conclusions (Judgment, paragraph 11.140). In particular in light of such evidence, it cannot be said that the tribunal had not properly evaluated the gravity of the relevant acts; in particular, it cannot be said that it had reached a conclusion which no reasonable tribunal could have reached on the available evidence. Nor is the tribunal to be criticised for referring to the GMC's findings *'to the extent that they are relevant…*' and I accept Mr Collins' submission that, whilst the exercise in which the GMC was engaged is not the same as that with which the tribunal was concerned, the accepted independent expert evidence had been directed towards matters which were equally relevant to the latter.

138 Having found that there had been no repudiation of the contract of employment by the Claimant, as a matter of law the tribunal was compelled to find that the Claimant's summary dismissal had been wrongful. That is sufficient to dispose of this ground of appeal. Even if Ms Motraghi were right in her contention, in relation to the second part of paragraph 52, that the tribunal had fundamentally misinterpreted Dr Rosser's evidence, that would advance the Claimant's position no further. In any event, in my judgment, that latter contention lacks merit, in light of the tribunal's clear finding, at paragraph 27.6, that, *'Dr Rosser acknowledged that, had the claimant shown more contrition and insight, they may not have dismissed. Effectively, it was his case that the lack of insight upgraded the seriousness of the offence to gross misconduct.'*

139 This ground of appeal is dismissed.

140 It follows that none of the Respondent's lengthy grounds of appeal has succeeded. In essence, this is a case in which the Respondent and its senior employees are, inevitably, troubled

by the strong adverse findings which the tribunal made. That is not, without more, a sufficient basis for an appeal to this tribunal, and no error of law or perversity has been demonstrated.

The cross-appeal

141 There is one ground of cross-appeal. The Claimant contends that, in finding (Judgment, paragraph 47) that *'the principal reason for the dismissal was the claimant's use of an untrained member of staff in theatre and his perceived lack of insight, coupled with the additional supervision concerns raised by the second incident'*, the tribunal failed to take account of his submission that, whilst the incidents in question had presented the opportunity for dismissal, the reason for the latter had been the (admitted) protected disclosure.

142 The tribunal had accepted the Claimant's submission that the Respondent had not genuinely viewed the incidents as gross misconduct (Judgment, paragraph 36). It had found that the allegations were not treated as potentially justifying dismissal until after the protected disclosure (paragraphs 45 and 27.1 to 27.9); and that the failure to have acted on that disclosure, or to have mentioned it to the GMC had given further grounds for suspicion (paragraphs 46 and 23.1 to 23.2). The suspicion in question can only have been as to the reason for dismissal. Nonetheless, the Respondent's submission that the fact that no action had been taken against the Claimant's fellow whistle-blower could not inform the tribunal's conclusion because no similar opportunity for her dismissal had arisen was not addressed. The same logic applied to the relevance of any predisposition against the Claimant on the part of Dr Rosser and his colleagues. Finally, the question was not whether the content of the protected disclosure had been taken into account when the Respondent considered the charge of misconduct (Judgment, paragraph 50), but whether the fact of that disclosure had been the sole or principal reason for dismissal. Accordingly, in reaching its conclusion, the tribunal had taken account of irrelevant matters and failed to take account of relevant matters and had thereby erred in law.

A

The parties' submissions

143 Mr Collins submits that, once the tribunal had found that the Respondent had not genuinely considered the Claimant's conduct to have amounted to gross misconduct, that conduct could not have been the principal reason for dismissal; it could only have been a pretext. The only remaining candidate as the principal reason for dismissal had been the protected disclosure.

B

C

144 Ms Motraghi submits that the question of whether the principal reason for dismissal had been the making of a protected disclosure was one of fact. Unless the tribunal's conclusion on the issue was perverse (noting the high threshold for such a finding) this tribunal could not interfere. Provided that a tribunal has properly directed itself in law and has reached a permissible conclusion on the evidence, the fact that it has, elsewhere in its reasons, used language apparently inconsistent with that direction will not necessarily amount to an error of law**: Jones v Mid-Glamorgan County Council** [1997] IRLR 685, 690. At paragraphs 13.1 and 13.14 to 13.15, the tribunal had set out the applicable legal tests, considering the issues and examining the facts at paragraph 23 of the Judgment and reaching conclusions as to the reason for dismissal at paragraphs 35, 44 and 47. It had concluded that, whilst there was certainly material from which it could draw adverse inferences in connection with the protected disclosure, it was not appropriate for such inferences to be drawn. Any contrary finding would have been perverse. The tribunal had not been obliged to record, in terms, its rejection of the submissions advanced by the Claimant: it had simply been obliged to apply the correct test to the available evidence. That it had done. Criticism of the tribunal's reference to the content, as distinct from the fact, of the disclosure was an exercise in semantics: it was clear from the tribunal's earlier detailed analysis that the tribunal had had regard to the fact of the disclosure. In short, no error of law was disclosed.

D

E

F

G

H

Cross-appeal: discussion

145 The tribunal's consideration of the relevance of the protected disclosure to the Claimant's dismissal was set out at paragraphs 44 to 51 of the Judgment. Nothing in those paragraphs identifies, or grapples with, the submissions made by Mr Collins, as summarised above. The tribunal's rationale, at paragraphs 48 and 49, did not answer that submission and, as Mr Collins rightly notes, the matters to which those paragraphs refer would be consistent with (though not probative of) a desire to take advantage of an opportunity for dismissal, where presented. At paragraph 13.14 of the Judgment, the tribunal recited section 103A of the ERA, emphasising its requirements in the following paragraph.

146 Given its finding (Judgment, paragraph 36) that it did not accept that the Respondent had genuinely viewed the incidents as potentially gross misconduct, its wider damning findings regarding the Respondent's approach and the fact that its rationale was not inconsistent with the Claimant's submissions, the absence of any reference to the latter, or explanation as to why the submission had failed is of concern. One is left with a primary finding that the principal reason for dismissal was as set out at paragraph 47, shored up with findings which, without more, provide no answer to the Claimant's submissions. In those circumstances, the cross-appeal is allowed and I turn to consider its proper disposal.

147 Mr Collins contends that only one answer presents itself to the question of whether the principal reason for dismissal had been that the Claimant had made a protected disclosure. On that basis, he asks me to substitute a finding to that effect. Ms Motraghi submits that there is more than one possibility, such as the predisposition against the Claimant, held by certain members of senior management, to which paragraph 49 of the Judgment refers. In those circumstances, the issue should be remitted to a freshly constituted tribunal.

148 In my judgment, neither contention is wholly correct. Whilst I agree with Ms Motraghi that there is more than one possible candidate for the principal reason for dismissal (including that which the tribunal found, at paragraph 47), having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, EAT and the narrow compass of the matter being remitted, it is not appropriate to remit it to a freshly constituted tribunal. I therefore remit it to the same tribunal, for it to consider the issue which is the subject of the cross-appeal and, in that context, its conclusions on the claim of automatic unfair dismissal. Whilst I do not anticipate that that exercise will require the hearing of further evidence, it will be a matter for the tribunal to determine the need, if any, for such evidence and/or for any further submissions on the issue in question.