Appeal No. UKEAT/0059/19/VP

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 March 2020

Before

THE HONOURABLE MRS JUSTICE EADY

(SITTING ALONE)

TAI TARIAN LIMITED APPELLANT

HOWELL WYN CHRISTIE RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR GERAINT PROBERT (of Counsel) INSTRUCTED BY Hugh James 2 Central Square Cardiff CF10 1FS
For the Respondent	MR GEORGE POLLITT (of Counsel) INTSTRUCTED BY Slater and Gorden Haywood House Dumfries Place Cardiff CF11 OJH

SUMMARY

Unfair dismissal – reason for dismissal – fairness

The Claimant was dismissed for making homophobic remarks to a tenant ("T") of one of the Respondent's properties. In upholding the Claimant's complaint of unfair dismissal, the Employment Tribunal ("ET") found that, having accepted that other evidence demonstrated the Claimant was not in fact homophobic, the Respondent had not established a genuine belief that he was guilty of the conduct alleged. In any event, considering the question of fairness, the ET concluded that the Respondent had acted unreasonably in accepting T's account, when she had refused to provide further evidence. The ET further found that the Respondent's investigation was unreasonable, and it had been outside the range of reasonable responses to have dismissed an employee with 14 years' service. The ET also considered whether there should be any **Polkey** reduction, but found there was no likelihood of dismissal if a fair procedure had been followed. The Respondent appealed.

Held: allowing the appeal

In finding that the Respondent had not established the reason for the Claimant's dismissal, the ET had failed to explain why it rejected the evidence given as to the decision-taker's stated belief in the Claimant's misconduct. The ET had inferred that acceptance that the Claimant was not in fact homophobic necessarily meant that the decision-taker could not have believed that he had made homophobic remarks; that, however, treated evidence going to propensity to be determinative, something the decision-taker had expressly rejected. There was no proper evidential basis for the ET's conclusion on the question of reason.

As for the issue of fairness, the evidence did not go so far as to establish that T had simply refused to give further evidence; merely that she had declined to do so due to personal circumstances. More generally, in its assessment of T's account, the ET had failed to demonstrate good reasons for rejecting the view adopted by the Respondent. There was no proper basis for concluding that T's account had been embellished; the ET itself having only found there to be "slight differences"

in the evidence she had given in her two interviews. On this, and its view as to T's potential ulterior motive, the ET had impermissibly substituted its view for that of the Respondent in terms of T's credibility and/or had reached a perverse conclusion. The ET had further fallen into the error of substitution, in finding the Respondent had acted unreasonably in failing to further investigate whether an anecdote T said had been shared by the Claimant might have been brought to her attention by another tradesperson. The Respondent had considered this possibility but rejected it, as it could not explain why T would have known that the Claimant was involved in the incident in question; the ET had failed to apply the band of reasonable responses test to the decision taken by the Respondent on this point, preferring its own view as to the further steps required. The ET's finding on sanction revealed a similar error of substitution, failing to recognise the particular issues facing the Respondent as a social housing provider. In the alternative, the ET's **Polkey** finding also revealed an inconsistency of reasoning.

Although the appeal would be allowed, it could not be said that the ET's findings meant there was only one answer to this claim. The case would be remitted to a differently constituted ET for re-hearing.

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THE HONOURABLE MRS JUSTICE EADY

Introduction

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1. This appeal relates to a claim of unfair dismissal. In upholding that claim, it is said that the Employment Tribunal ("the ET") fell into the error of substitution and/or reached a perverse conclusion.

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2. In giving this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal, against the Reserved Judgment of the ET sitting at Camarthen (Employment Judge Howden-Evans, sitting alone on 18 June 2018), the

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Judgment being sent out to the parties on 4 November 2018 (the apparent delay in the completion of the Judgment arising from failings within the ET administration rather than from any fault of the Employment Judge or the parties). Representation before the ET was as has it has been today.

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3. The ET found that the Claimant had been unfairly and wrongfully dismissed. The Respondent appeals against the ET's finding of unfair dismissal; no challenge is pursued in respect of the finding on the Claimant's claim of wrongful dismissal. This appeal was permitted

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to proceed to a Full Hearing after an Appellant-only Preliminary Hearing before Laing J.

The Facts

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4. The Respondent is a housing association, based in the Neath Port Talbot area of South Wales. It has some 9,000 social housing properties. The Claimant was employed by the Respondent for over 14 years, working as a carpenter. His service started on 13 April 2003 and

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he was summarily dismissed on 22 September 2017.

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5. The Respondent professes a commitment to equality and diversity. As it states in its Equality and Diversity Policy:

> **"'6.7.1 We will challenge and address discriminatory behaviour or acts of harassment by or towards customers, staff, board members, service users or contractors. If such behaviour is encountered, we will take appropriate action which may include dismissal….'"**

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6. The Respondent's Employee Handbook also states:

> **"'…Tai Tarian will not tolerate direct or indirect discrimination or harassment…against any person with a protected characteristic as described in the Equality Act 2010……It is the responsibility of all staff in their daily actions, decisions and behaviour to comply with all relevant legislation and to ensure that they do not discriminate against colleagues, customers, suppliers or any other person associated with Tai Tarian.'"**

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7. As the ET records, the Claimant attended equality and diversity training with the Respondent on 20 June 2017.

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8. It was shortly after that training that, in late June or early July 2017, one of the Respondent's tenant's ("T") informed the Respondent's work inspector, Mr Mike Cole, that the Claimant had made homophobic comments. An initial investigatory interview took place, with Mr Cole's manager, Mr Jamie Grieg, meeting with T on 4 July 2017.

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9. A record of that interview with T was within the ET Hearing bundle, and the ET summarised its content as follows:

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> **"25. P134 records an "Interview by Jamie Greig 4th July 2017" during which someone gave the following account "when [the claimant] first arrived at her property she felt he didn't really want to undertake the work….on the doorstep he made a comment "What am I going to do here then".**
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> **Jamie Grieg's note of this interview goes on to record, "[Redacted – presumably T's] statement started by me asking a few questions on how [the claimant] had come to discuss with her his pet hate against homosexual people.**
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> **"[Redacted – presumably T] was very nervous but started to explain that [the claimant] started by asking her a number of questions and at the time it felt like a world wind of conversations. He asked her questions about who she knows in the area including people from school etc. he made reference to his apprentice who was also from this area. He then made reference to the apprentice and a time they were working in a customer's home who was gay (homosexual), the work involved working on a bedroom door handle that became stuck in the locked position, that lead to apprentice becoming locked in the bedroom with the gay customer. [The claimant] went on to say that he did not rush to free the lock as he found it hilariously funny that the apprentice had to spend time in the bedroom with the gay person….[Redacted – presumably T] also stated that [the claimant] had made it clear that he was married and asked if she had a boyfriend. [Redacted – presumably T] said that he [sic] didn't and then [the claimant] asked if this was by choice or was she swinging the other**

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way….[The claimant] went on to say that is a woman's world and if something was to happen then it would be likely the law would favour the woman….[Redacted – presumably T] told me that she felt very uncomfortable with him but she was so glad that her brother had not been downstairs to hear the way [the claimant] had spoken about gay people as he had not long come out to the family that he was gay and this would probably have affected him a lot more. She did however advise her brother and he felt confined to his room. She also felt that his safety may be in jeopardy and she felt very insecure. [Redacted – presumably T] was very clear that [the claimant] never returns to her home again to undertake work, she was also a little concerned that her details regarding this complaint are not disclosed to [the claimant] in case of any repercussions that may accrue."

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10. The record of that interview was considered by the Respondent's investigation officer, Ms Ester Harris, who then attended a further interview with T, this time conducted by the Respondent's Head of Organisation Development, Mr Wayne Gwilym, on 7 July 2017. On that occasion T's account was recorded as follows (again taking this from the ET's findings):

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"The tenant's interview on 7th July

28. Sometime around 5th July 2017, Ester Harris was asked to interview the tenant. On 7th July 2017, she attended an interview with T and M that was conducted by Wayne Gwilym, the respondent's Head of Organisation Development. Ester Harris's notes from this meeting were p136 & 137 of the bundle. Wayne Gwilym started this interview by apologising for the employee's behaviour. When asked to explain in their own words what happened, Ester Harris records T gave the following account:

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"'the tradesman [the claimant] arrived at the property and just seemed to be talking a lot, much of which they cannot remember the specifics of. T said he was here for an hour waiting for an inspector to arrive….T said the tradesman was talking about who T knew from the area that he might know. [The claimant] talked about lone working and that sometimes he has someone with him but would normally work alone. He suggested that anything could happen because they were alone. He said it's a "woman's world' and T could say he was "coming on to them" and get away with it. If something were to happen it would be alright for the woman as things go in favour of the woman. Asked how T responded, T said she just laughed nervously and folded her arms.

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T said the tradesman told her he was married with children and asked whether T was. When talking about his apprentice Junior, the tradesman relayed a story where they were renewing a handle on a door and Junior got locked in a bedroom with a person they thought was gay. The tradesman proceeded to say how he doesn't like gay people, they are a pet hate of his and that he felt it would be funny to leave Junior in the bedroom with him. T said that although Junior did ring him he did not rush to assist.

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T explained that the tradesman continued to voice his negative opinion about gay people. T was then concerned about her brother as he is gay and T did not want him to feel uncomfortable so asked him to stay upstairs.

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T explained they were due to leave for work and they were concerned leaving the tradesman there with T's brother so T asked their Nan to come. Their nan arrived as the inspector arrived. Wayne apologised again and M explained that T was worried and T does suffer with anxiety. T said they did not want him to lose his job…..

29.Ester Harris's note of this meeting ends with 'I asked M if T was alright as I conveyed how upset I would be if I was T's mother. At this point M became visibly upset and also recalled how the tradesman's attitude was negative from the time he knocked the door saying that he didn't know what he was supposed to be doing.'"

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The "M" in that record referred to T's mother, who had left the flat shortly after the tradesman had arrived at T's flat and could therefore only assist in terms of her perception, as recounted at the end of the record of the interview.

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11. On 10 July 2017, the Claimant was suspended pending an investigation into an allegation of gross misconduct. The letter confirming his suspension explained that it was alleged: "*That you made offensive and discriminatory homophobic comments to a tenant whilst working on a job. The tenant has raised a formal complaint regarding your behaviour and comments.*"

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12. An investigatory interview with the Claimant took place on 18 July 2017. It was conducted by Ms Harris and the Claimant was accompanied by his trade union representative. The Claimant was given no further information as to the allegation against him, with Ms Harris explaining that the tenant, who suffered from anxiety, had requested anonymity.

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13. For his part, the Claimant was unable to think he would ever say anything of the nature alleged and he denied ever expressing negative opinions about gay people to a tenant. When asked why he thought this complaint might have been made, the Claimant explained that he was a foster carer and that parents of children he was fostering might make allegations by way of revenge, albeit he was not meant to be sent to such parents' properties in his work; the Claimant also alluded to the fact that Neath Port Talbot was a small community. The Claimant accepted there had been an occasion when the apprentice, referred to as "Junior", had been locked in a bedroom in a tenant's property, but denied ever having spoken about this to other tenants. More generally, he referred to his long service and observed that if he was bigoted or discriminatory it would have emerged before now.

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14. An investigation interview also took place with the apprentice (Junior), who confirmed that there had been an incident when he was working with the Claimant when he had been locked in a tenant's bedroom and that this had become a bit of a joke with his colleagues, although it was not something he said he would discuss with tenants. Junior also confirmed that he had never witnessed the Claimant speaking inappropriately or using homophobic language.

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15. Ms Harris produced a report of her investigation, which concluded that there was sufficient evidence for her to recommend this matter proceed to a gross misconduct hearing. That hearing ultimately took place on 6 September 2017, chaired by the Respondent's Deputy Director of Assets, Mr Andrew Carey. In advance of the hearing, the Claimant had been given a copy of Ms Harris's report, the note of Junior's interview and a record of the second interview with T; however, neither the Claimant nor Mr Carey saw the earlier note of interview with T. In addressing this apparent omission in her evidence to the ET, Ms Harris explained that she had not considered that T had really changed her account between the two interviews and so it was unnecessary to disclose both sets of notes.

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16. During the course of the disciplinary hearing, the Claimant - again accompanied again by this trade union representative - asked for details of the tenant who had made the complaint, as he was otherwise unable to properly defend himself. The Claimant again denied having made homophobic comments, pointing out (as the ET records) that, "*he has gay friends and has worked in the entertainment industry for many years where there are several gay people*." The Claimant also raised concerns that Mr Gwilym had apparently apologised to T before the matter had been properly investigated and he pointed out certain discrepancies in T's account. Asked why he had not brought any character references, the Claimant explained that he had understood he was not allowed to contact anyone, but confirmed that he could provide such statements; in any event, the

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hearing received evidence from Junior who described the Claimant as an "*all-round good bloke*". Mr Carey took time to make his decision but, by letter of 3 October 2017, confirmed that he had found the allegation to have been proven against the Claimant and had concluded that summary dismissal was the only option.

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17. The Claimant appealed against that decision and an appeal hearing took place before the Respondent's Chief Executive, Ms Linda Whittaker, on 12 October 2017. In reaching her decision, as well as the documentation before Mr Carey and the report from that hearing and the Claimant's representations on appeal, Ms Whittaker had also seen the earlier interview note with T and she also had character references submitted by the Claimant. Those references included many statements from tenants who had experience of the Claimant's work and spoke well of him. One reference, however, was from a long-standing friend of the Claimant who explained that she was a lesbian living with her partner for some 16 years and could not believe that an allegation of homophobia had been made against him.

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18. In giving his account at the appeal hearing, the Claimant - who was again represented again by his trade union - accepted that he might have engaged in banter at times, but considered that the complaint from T might have been the result of her having a grudge against him. He referred to an occasion when he had had an accident at work on 27 June 2017 in a property where the tenant - described the Claimant as "*typical council*" - had been annoyed because it had not been possible to do the repair work as she had wanted. This tenant, the Claimant explained, had refused to sign a disclaimer relating to asbestos under the floor and this had meant the Claimant was working on a ladder on a protective floor covering when he had had his accident.

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19. During the course of her evidence before the ET, Ms Whittaker referred to having spoken to Mr Cole, as his version of events had differed from the Claimant's, but said she had made no note of that conversation and had not told the Claimant about it before reaching her decision. During the course of the appeal hearing, Ms Whittaker had spoken of possibly interviewing T herself, but that was not something sought by the Claimant, his trade union representative saying she had some concerns about this, although ultimately it was a matter for Ms Whittaker. In any event, this did not happen due to T's personal circumstances. Ms Whittaker confirmed, however, that she had checked and found out that T had indeed been the tenant at the property where the Claimant had previously had his accident, but she had not considered that this was a matter that ought to be disclosed to the Claimant. Otherwise, Ms Whittaker had accepted the Claimant's character references at face value, which she acknowledged confirmed that he was not homophobic, but she did not consider this meant the allegation made against him was false.

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20. On 30 October 2017, Ms Whittaker communicated her decision to the Claimant, confirming that she was upholding the decision to dismiss. In reaching that decision Ms Whittaker was satisfied that the incident alleged by T had occurred. Her conclusion in this regard was founded on the implausibility of T knowing the story relating to the apprentice Junior being locked into the bedroom at another property by any other means, and the lack of any reason why T should be motivated to otherwise lie about the Claimant. Ms Whittaker also referred to inconsistencies in the Claimant's account of why his being a foster carer might have motivated a false allegation, although in cross-examination before the ET she accepted that she might not have accurately recorded the dates in this regard. As for the Claimant's contention that he was not prejudiced or homophobic in any way, Ms Whittaker expressed her view that "*this does not then automatically mean the allegation against you is false*."

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The ET's Decision and Reasoning

21. The ET first considered the reason for the Claimant's dismissal. Whilst accepting that Mr Carey had genuinely believed T's account to be true and, therefore, that the Claimant was guilty of the gross misconduct alleged, the ET noted that he had not known any reason why T should have embellished her account. By the time of Ms Whittaker's decision, however, that was no longer the case; she was aware that the Claimant had an accident at T's property. Moreover, Ms Whittaker had accepted the Claimant's character references and had confirmed that she did not believe the Claimant was homophobic. In those circumstances, the ET did not accept that Ms Whittaker held a genuine belief that the Claimant had made homophobic comments as had been alleged.

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22. Even if Ms Whittaker had held such a belief however, the ET did not accept this was based on reasonable grounds; it was outside the band of reasonable responses for the Respondent to persist in relying on an anonymous account, and to prefer that evidence, when T had not been interviewed by either of the relevant decision-takers and had refused to provide further evidence. More generally, although a reasonable employer might conclude that T should be kept anonymous, given that decision, it was outside the range of reasonable responses to fail to take other steps to ensure the Claimant had a fair hearing. In particular, the Respondent had not looked for changes in T's account. The ET noted that the account T had given in her second interview was "*slightly different*" to that recorded in her first: in her first interview T had referred to the Claimant making a comment about her "*swinging both ways*", that was absent from her subsequent account. Nor had the Respondent considered why T might have reason to embellish what she had said. Essentially, it had required the Claimant to prove his innocence and had failed to look for evidence that might support his case; for example, failing to investigate whether other

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A tradespersons might have been to T's property and related the story about the apprentice Junior that had apparently weighed with the decision-takers.

B 23. The ET also found that the Claimant's dismissal was procedurally unfair. T's first account had been considered at both the investigation and appeal stages but not disclosed to the Claimant. Ms Whittaker had spoken with Mr Cole about both the incident involving T and about the

C Claimant's performance, but had given the Claimant no opportunity to respond to these matters. More generally, given the Claimant's 14 years' service, the ET concluded that the decision to dismiss "*…based solely upon the complaint of an anonymous tenant that was asking for him to not be dismissed, fell beyond the band of reasonable responses open to a reasonable employer of*

D *a similar size and with similar administrative resources.*"

24. For all those reasons, the ET concluded that the Claimant's complaint of unfair dismissal

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25. As to whether there should be any **<u>Polkey</u>** reduction (see **<u>Polkey v A E Dayton Services Limited</u>** [1987] UK HL 8) or reduction for contributory conduct, the ET was clear, there should

F not. Had the Claimant been provided with T's first account, he would have been able to highlight the fact that she was embellishing her story, which was relevant to credibility and "*could have tipped the balance in his favour*." Had there been a fair procedure, therefore, there was no

G likelihood that the Claimant would have been dismissed.

26. In the ET's view it was more likely than not that T had embellished her account. Given

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in his character references, that demonstrated that it was highly unlikely that he would ever make homophobic comments. In the circumstances, the ET did not consider there was any contributory conduct on the Claimant's part.

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27. Having thus had to reach its own view as to what had had happened when determining the question of contributory fault, the ET was also satisfied that the Claimant had committed no repudiatory breach of contract and that his claim of wrongful dismissal should also be upheld.

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28. For completeness, I note that a Remedy Hearing subsequently took place, which led to a basic award being made of sum £9,699.00, a notice payment of £3,760.20 being awarded, and a compensatory award being made of £17,026.42.

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<u>The Appeal and the Parties' Submissions; Discussion and Conclusions</u>

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29. The Respondent raises some seven separate grounds of appeal. Although not pursued in this order in the Notice of Appeal or the Respondent's skeleton argument, it is convenient to address these in an order that relates to the ET's reasoning, as set out above.

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The Reason for Dismissal

Submissions

30. Starting then with the reason for dismissal, the Respondent objects (see Ground 4) that the ET's finding that Ms Whittaker did not have genuine belief in the Claimant's conduct was perverse, and founded upon the ET's own belief in his innocence rather than a genuine assessment of Ms Whittaker's state of mind. In support of its case in this regard, the Respondent observes that this is a highly unusual finding and notes that the Claimant had not in fact questioned the genuineness of the Respondent's belief in his pleaded case before the ET.

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31. For the Claimant, however, it is objected that this was a question of fact for the ET to determine on the evidence and was not a finding that the Employment Appeal Tribunal ("EAT") could interfere with on appeal. Insofar as this, and other grounds of appeal, raised questions of perversity, Mr Pollitt reminded me of the high threshold that an Appellant was required to meet to make good such a challenge; see **Stewart v Cleveland Guest (Engineering) Ltd** [1996] ICR 535 EAT.

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Conclusions

32. In considering the arguments raised in this regard, it is helpful to return to the words of the statue where, at Section 98(1) and (2) **Employment Rights Act 1996** ("ERA"), it is provided:

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> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
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> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
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> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it...**
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> **(b) relates to the conduct of the employee…"**

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33. It is, therefore, for the Respondent to establish the reason for the dismissal, and that it is a reason that is capable of being fair for Section 98 purposes. In these circumstances (and given that the Claimant has the necessary length of service to engage the ET's jurisdiction), it was not fatal that the Claimant did not expressly contest the reason for dismissal in his ET1. Although a finding adverse to an employer on this question might be unusual, if it was unable to demonstrate a genuine belief in a reason that would be capable of being fair for these purposes, an ET would be bound to find that this important initial burden had not been met and, therefore, to uphold the claim of unfair dismissal.

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34. As for the approach that an ET is to adopt in determining the employer's reason, this was confirmed by Cairns LJ in **Abernethy v Mott, Hay and Anderson** [1974] ICR 323:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

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(words approved by the House of Lords in **W Devis and Sons Ltd v Atkins** [1977] AC 931).

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35. In a more recent consideration of this issue, in **Beatt v Croydon Health Services NHS Trust** [2017] EWCA Civ 401, Underhill LJ opined that the essential point is that the reason for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision: i.e. that which motivates them to do what they do.

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36. In the present case, in rejecting Ms Whittaker's evidence as to the reason for upholding the decision to dismiss, the ET considered it significant that she had accepted, on the basis of the Claimant's character references, that he was not in fact homophobic. The ET therefore concluded that, at the time of making her decision, Ms Whittaker did not hold a genuine belief that the Claimant had made homophobic comments as had been alleged.

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37. The Claimant had not put forward any positive case as to an alternative reason for his dismissal, and the ET did not speculate as to whether there was any other reason in Ms Whittaker's mind; neither he, nor it, was required to do so. That said, in rejecting Ms Whittaker's account of what had motivated her decision, the ET plainly drew the inference that her acceptance - based on what others had said about the Claimant - that the Claimant was not in fact homophobic, must mean that she could not genuinely believe T's allegations. Indeed, the ET appears to have concluded that Ms Whittaker was in some way giving a false account of her

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belief, underlining the word genuine when stating its finding that she did not have such a belief, although no basis for such a conclusion is provided.

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38. It is apparent from the ET's subsequent findings, relevant to contributory conduct and wrongful dismissal, that the ET did not itself believe that the Claimant had made the comments alleged against him. That, however, does not explain why it should have concluded that Ms Whittaker's evidence - as to what motivated her at the relevant time - should not be accepted as a statement of her genuine belief. At best, the ET's reasoning suggests that Ms Whittaker's acceptance that the Claimant was not homophobic must mean that she could not believe that he had made homophobic remarks; that, however, does not necessarily follow. As Mr Probert acknowledged in oral argument, this was a matter that might have gone to the question of propensity, and might have been relevant to the question whether there were reasonable grounds for the Respondent's belief, but, without more, it would not provide a proper basis for rejecting the evidence given as to what genuinely motivated the decision-taker at the relevant time. On the question of reason, I therefore accept the Respondent's contention that the ET reached a perverse conclusion. This may have arisen because the ET considered the issue of propensity to be decisive, but, whilst propensity might be relevant, it is not determinative. Alternatively, the ET may have confused the question of subjective belief - the employer's actual reason for the dismissal - with the subsequent question, whether there were reasonable grounds for that belief - part of the determination of fairness. The latter might assist in informing the ET's decision on the former question, but it would simply be wrong to see it as necessarily determinative.

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39. What does seem clear is that the ET's rejection of Ms Whittaker's evidence as to her belief was an expression of its own finding, based on what it had inferred from the evidence: that is, if the Claimant was not in fact homophobic he would not have made the homophobic remarks

alleged. That, however, does not provide an explanation as to why Ms Whittaker's stated belief - explained in her letter confirming the outcome of the Claimant's appeal - could not be genuine; it thus constitutes a purported finding of fact absent any proper evidential basis.

40. A finding in the Respondent's favour on the ET's approach to determining the reason for dismissal is not, however, the end of the matter. Although the ET could have found that the dismissal was unfair simply because - on its findings - the Respondent had been unable to show a *prima facie* fair reason, it did not adopt that course and went on to consider the broader question of fairness, the question to which this Judgment now turns.

Fairness

Submissions

41. The Respondent attacks the ET's findings on the question of fairness on a number of bases. Adopting the same order as the ET, the first finding under attack relates to the ET's conclusion that the Respondent did not have reasonable grounds for accepting the Claimant's guilt. Specifically, whilst accepting that the case of **Linfood Cash and Carry v Thomson and others** [1989] ICR 518 provided guidance rather than laying down a strict rule, the ET found it had been outside the band of reasonable responses for the Respondent to rely on the evidence of an anonymous complainant who had "*refused to provide further evidence*".

42. The Respondent complains (Ground 2) that this was a finding absent evidential foundation: there was no evidence that T had refused to provide further evidence, merely that she was unable to meet to Ms Whittaker due to personal circumstances. Given that there was evidence that T suffered from anxiety, there was no basis for drawing any adverse inference from this and, at the time, the Claimant had not suggested it was a necessary further step. Indeed, at

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the appeal hearing stage the Claimant's trade union representative had been resistant to further contact being made with T. As for the broader question of the reliance placed on T's evidence, the ET had misapplied **Linfood**. It had accepted that it was not unreasonable to protect T's anonymity (see paragraph 125 of the ET's Judgment) and had failed to identify what further evidence might have been required from T in these circumstances, failing to engage with the fact that - by the time of the appeal hearing - the Claimant had worked out the identity of the complainant and his case as to her motive for making a false allegation had been considered, but rejected, by the Respondent.

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43. For the Claimant, however, it is contended that the ET carried out an entirely proper assessment of the question of fairness, appropriately applying the **Linfood** guidance, in circumstances where the complainant had been afforded anonymity but had not been interviewed by the relevant decision-takers, at the dismissal and appeal stages. The evidence was that T had declined to give further evidence and so it was wrong to say there was no basis for the ET's finding that she had refused to do so. Given that there were questions as to whether T might have had reason to make a false allegation against the Claimant, the ET was entitled to find that further evidence should have been sought from her. The ET further considered the investigation had been unreasonable because the Respondent failed to look for changes in T's account, or for why she might have embellished that account, and failed to allow for the possibility that there was another explanation for why T might have known of the story relating to the apprentice Junior at another tenant's property.

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44. For the Respondent it is complained (Grounds 1, 5 and 6) that these findings reveal an error of substitution and/or are simply perverse. There was no proper basis for finding that T had embellished her story, or that it was outside the range of reasonable responses for the Respondent

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A not to conclude that she had. At most, T had referred to the Claimant making the "*swinging the other way*" comment in her first interview, but had failed to repeat that remark in her second. The ET had properly characterised the two accounts as slightly different, which was entirely consistent with T not wishing to repeat something of which she was unsure; even on the ET's findings, it did not amount to embellishment. As for the suggestion that T might have learned of the story relating to Junior from another source, the ET was plainly substituting its view for that of the Respondent, failing to address the question how T would have known that the Claimant would have been involved in the other incident involving Junior.

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45. On the first of these points, the Claimant is unable to recall whether the term "embellished" was used at the ET Hearing, but observes that questions were raised as to whether T's complaint was false, and had been made maliciously, and it had therefore been open to the ET to find that the account had been embellished. As for the possibility of there being an alternative source for the story relating to the apprentice Junior, in cross-examination Mr Carey had allowed for this as a possible alternative explanation. There had been no error of substitution. The ET had been careful to apply different tests when considering fairness (when it was assessing the employer's conduct and decision making against the band of reasonable responses test) and when looking at the question of contributory conduct and breach of contract (when it had to form its own view as the Claimant's conduct). As the EAT Langstaff P presiding had observed in **JJ Food Service Ltd v Kefill** UKEAT/0320/12:

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> **"17. A substitution mindset is all too easy to allege. There is a great danger which is readily apparent to those of us who sit day by day in this Tribunal that employers who do not like the result which a Tribunal has reached, but cannot go so far as to say it is necessarily perverse, seek to argue that the very fact of the result in the circumstances must indicate a substitution. That is not, in our view, a proper approach."**

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46. Finally, on the question of sanction, the Respondent again complains (Ground 3) that the ET fell into the substitution trap, failing to pay proper regard to the seriousness of a finding of

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this kind of misconduct on a social housing provider such as the Respondent. The Claimant contends however that this was a permissible conclusion reached by the ET, applying the band of reasonable responses test and permissibly having regard to the mitigating circumstances relevant to the Claimant as it was entitled to do; see **Strouthos v London Underground Ltd** [2004] IRLR 636.

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Conclusions

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47. In determining the question of fairness, the ET was bound to apply the test laid down at Section 98(4) of the **ERA**, which provides:

> **"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

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48. The burden of proof is neutral between the parties at this stage and the ET is required to ask whether the Respondent's conduct and decision making, at each stage, fell within the band of reasonable responses of the reasonable employer; it is not for the ET to step into the shoes of the Respondent, or to seek to substitute its view for that of the reasonable employer.

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49. Equally, however, appellant Tribunals must be alive to the fact that Parliament has charged the ET with carrying out the necessary assessment required for Section 98(4) purposes; the EAT must, therefore, be careful not to substitute its view for that of the first instance Tribunal; see **JJ Food Services Ltd v Kefill** (*supra*) and **Bowater v Northwest London Hospitals NHS Trust** [2011] EWCA Civ 63 per Longmore LJ at paragraph 19.

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50. Recognising the particular difficulties that might arise in a conduct dismissal where the complaint comes from a source that the employer does not wish to name, in **Linfood Cash and Carry v Thomson and others** [1989] ICR 518 the EAT provided helpful practical guidance, seeking to explain the kind of conduct that would fall within the range of reasonable responses for an employer in these circumstances (see pages 522G to 523E of that authority); in particular, the EAT observed as follows:

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> **"5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine then a decision will need to be made whether or not to continue with the disciplinary process.**
>
> **6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself that weight is to be given to the information."**

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51. In **Linfood**, the EAT did not however prescribe how the employer must conduct itself in order to fall within the range of reasonable responses; expressly recognising that this would always be fact and case specific. Moreover, it warned of the potential danger of substitution where an ET finds that it was not open to an employer to accept the evidence of a particular witness in such cases; see at pages 523G to 524B of that report:

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> **"If a Tribunal is to say that this employer could not reasonably have accepted a witness as truthful, it seems to us that that decision must be based upon logical and substantial grounds – good reasons. Instances might be – that the witness was a bare faced liar, who must have given that impression to the employer at the relevant time; that the witness was clearly biased – provided that such a bias should have been clear at the relevant time; that documents available at the relevant time clearly showed the witness to be inaccurate and that such documentary evidence was ignored by the employer.**
>
> **However, there could be other less obvious situations where mere vagueness and uncertainty would not be sufficient, and it should never be forgotten that cross-examination by experienced advocates may produce a picture not made evident during the disciplinary procedures. For the Tribunal merely to prefer one witness to another might well not be sufficient as this could be to substitute their own view. The employers have the peculiar advantage over the Tribunal of having an intimate knowledge of the geography, the nature and workings of the business and the various members of the staff."**

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52. In the present case, the ET permissibly criticised parts of the procedure adopted by the Respondent given the anonymity afforded to T. Accepting that maintaining T's anonymity was a decision that fell within the reasonable range, the ET considered it unfair not to have given the Claimant the opportunity to see both notes of T's interviews and to make such observations as he

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wished about the "*slight difference*" that existed between these. The ET also - albeit only when considering the question of contributory conduct - made criticisms of the apparent failure to ask why T had delayed in making her complaint, or to look for further evidence from other witnesses if T was not able to provide further assistance. Applying **Linfood**, the ET would be entitled to make those criticisms and, indeed, there is no specific point of challenge to those criticisms insofar as they relate to matters of pure procedure.

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53. The Respondent's objection goes to the ET's more substantive finding, that the failure to look further into what the ET apparently saw as T's embellishment fundamentally undermined the fairness of the investigation, and went to the question whether there was a reasonable basis for the Respondent's conclusion. The question raised by the appeal is whether the ET thereby erred, either by substituting its view for that of the reasonable employer, or by reaching a perverse conclusion on the evidence before it.

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54. In reaching its decision on fairness, it is clear that the ET took a strongly adverse view of T's account, apparently concluding that it was unreasonable for the Respondent to continue to accept her testimony when T had refused to provide further evidence, and given what the ET considered to be its failure to question why T might have embellished her account and to consider alternative ways in which T might have linked the Claimant to a story regarding the apprentice Junior. There are, however, a number of difficulties with the ET's conclusions in these respects.

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55. First, on the question whether T had refused to give evidence, the ET reached a conclusion that had no evidential foundation. The evidence was that T suffered from anxiety but had been prepared to submit to two interviews in the course of the Respondent's investigation. Thereafter, she had not been asked to give further evidence until the appeal stage, when she had declined to

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meet with Ms Whittaker at that time, due to her personal circumstances. That says nothing about whether or not T might have been prepared to give any further evidence absent those circumstances, and there was no proper basis for the ET's conclusion adverse to the Respondent on this point.

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56. Equally, in finding that the Respondent had acted unreasonably in accepting T's evidence without considering why she might have embellished her account, the ET proceeded on a basis that seems not to have been put and moved from a finding of "*slight difference*" to a possibility of embellishment. As the ET noted, there was a slight difference in the account given by T in the first interview with Mr Cole as compared to that given a few days later when she was interviewed by Mr Gwilym. Ms Harris' evidence was, however, that she had not felt there was any real difference and had not seen the need to disclose the two sets of interview notes to the Claimant. It was open to the ET to consider whether that decision - not to give the note of the first interview to the Claimant - had fallen within the range of reasonable responses. The question raised by this appeal, however, is whether the ET was then entitled to find that the Respondent had unreasonably failed to consider why T had embellished her account.

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57. That was the step that I am satisfied: (a) assumed a finding that the Respondent had not made, and the Claimant had not put, - that the account had been embellished; (b) ignored the questions asked by the relevant decision-takers relevant to this issue - that is, why T would make up an allegation of this nature against the Claimant; (c) is properly to be characterised as perverse, given the high degree of consistency between T's two accounts and the ET's own finding that there was only a slight difference between them; and (d) failed to engage with the fact that, by the time of the decision on the appeal, the Claimant had put forward a possible reason for why this tenant might make an allegation against him, relating to the accident he had had in her

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property only a few days earlier, and that point had been considered by Ms Whittaker, who had rejected the suggestion that there was any link.

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58. In its assessment of T's credibility, the ET failed to demonstrate any good reason – "*logical and substantial grounds*", to use the language of the EAT in **Linfood** - for finding that the Respondent could not reasonably accept her evidence as truthful. The ET was either seeking to stand in the shoes of the employer, and to impermissibly substitute the conclusions that it would have reached for those of the Respondent, or was making findings that went beyond the evidence before it. In either case and mindful of the need for caution in this regard, I am satisfied that the ET erred in its approach and its determinations on these points – and, therefore, its findings on the question of fairness, more generally - are rendered unsafe.

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59. Similarly, in finding that the Respondent had acted unreasonably in failing to entertain the possibility of another source being responsible for T knowing about the story relating to the apprentice Junior, the ET can be seen to have stepped into the employer's shoes, or to have reached a finding without evidential foundation. It is clear that consideration had been given to this possibility by the Respondent, but rejected because, even if Junior had related the story to other tradespeople, it would not explain why T would have known that the Claimant was involved (in particular, given that he had said he did not wear a name badge and T had not been able to identify him by name). The ET's suggestion - that the Respondent should have investigated whether other tradespeople had gone to T's property and might therefore have related the story themselves - failed to engage with the circumstances this Respondent had to consider: that is, why T should have been able to relate the story as if told to her by the Claimant when there was simply no reason for her to know that he had been involved other than the story being recounted when he was physically present.

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60. As for the ET's conclusion on sanction, it was, of course, entitled to have regard to the Claimant's length of service and any other mitigating factors. Equally, however, the ET was bound to have regard to the circumstances facing *this* employer, which included its commitment to equality and diversity, as recorded in its Employee Handbook and its Equality and Diversity Policy, as a social housing provider serving a diverse community. By apparently considering only one perspective in carrying out this assessment, the ET again fell into the substitution trap, explaining what it would have done, and demonstrating no appreciation of the particular circumstances of the Respondent, rather than assessing the decision taken against the band of reasonable responses open to reasonable employers in this situation.

Polkey

Submissions

61. Finally, the Respondent complains that the ET further erred in finding that there should be no **Polkey** reduction (Ground 7). It objects to the apparent jump, from the ET's finding that providing the Claimant with the notes of T's first interview could have tipped the balance in his favour, to its conclusion that there was "*no likelihood*" of his having been dismissed had that unfairness been rectified.

62. For the Claimant, it is urged that this was a permissible conclusion, reached by the ET after applying the correct test. It could be taken that this paragraph incorporated the earlier criticisms made the ET, as set out in its reasoning, and the EAT should read the Judgment holistically and not interfere with the conclusion reached.

Conclusions

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63. The ET's reasoning on the **Polkey** point is short and fails to take account of its earlier findings: on its face, the ET's conclusion in this regard is inconsistent. Having found that providing the Claimant with the first interview notes *could* have tipped the balance in his favour, the ET failed to allow for the possibility that it might not do so, when it went on to state that it was unpersuaded that there was any likelihood of his then being dismissed. It may be that the ET was meaning to incorporate certain of its earlier findings into its reasoning on the **Polkey** question - as to the unfairness of the Respondent's investigation and the absence of reasonable grounds to support the dismissal - although the reasoning does not make this clear. In any event, for the reasons I have already given, I am satisfied that these earlier aspects of the ET's decision are unsafe and cannot stand. To the extent that the **Polkey** finding simply related to one aspect of the earlier findings, the reasoning is internally inconsistent; to the extent that it was intended to do more, it fails because (for the reasons already provided) those earlier findings cannot stand.

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Conclusion and Disposal

64. The ET stated that it was aware of the different tests to be applied, to the determination of unfair dismissal on the one hand, and to the questions of contributory conduct and breach of contract on the other ("*Here, I am allowed to substitute my opinion*." ET Judgment, paragraph 129). The findings made in this case do not, however, reveal a practical application of the band of reasonable responses test in the unfair dismissal claim. As Laing J observed on the Appellant-only Preliminary Hearing in this matter, the reader is inevitably left with the impression that, "*the ET having decided that the Claimant was not guilty of the conduct (which it was entitled to do deciding the issues of contribution and wrongful dismissal) read back from those findings*". That is a point that can be made in respect of almost all of the ET's findings on the question of fairness and I allow the Respondent's appeal in this regard.

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65. Although the criticism of the ET's finding on the question of reason raises a different issue, applying a different test, Laing J's observation can still be seen to be apt. It seems that this ET would not have believed in the truth of allegations T had made, because it inferred that accepting that the Claimant was not in fact homophobic equally meant accepting he had not made the comments attributed to him. The former might be persuasive evidence to support the ET's conclusion, but it was not determinative and, more importantly, there was no basis for thinking it had been treated as being so by the relevant decision-makers within the Respondent. The ET might have been entitled to consider there was a question as to how Ms Whittaker's apparent acceptance of the character statements - to the effect that this is not how the Claimant would ever behave – could sit with the allegations that had been made. And it might well have considered that relevant to the question whether there were reasonable grounds for the Respondent's belief. That, however, does not seem to have been a question that the ET in fact went on to ask.

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66. In addition, there may also be perfectly legitimate questions as to the procedure followed by the Respondent; for example, whether it was outside the range of reasonable responses not to allow the Claimant the opportunity to respond to the additional matters Ms Whittaker took into account at the appeal stage (the notes of the first interview and her conversation with Mr Cole), or whether there were other errors in the investigation (referenced by the ET only when addressing the question of contributory fault) that also might have rendered the dismissal unfair.

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67. In the circumstances, whilst I uphold the appeal in its entirety, I consider that this is a case that must now return to an ET for consideration afresh. I have heard submissions from the parties on this question, and have had regard to the tests laid down in **Sinclair Roche and Temperley v Heard and Fellows** [2004] IRLR 763. Whilst I am mindful of the time that has passed since the events in issue in this case, I am satisfied that the remission has to be to a different ET for a

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complete rehearing. This is a case where the flaws identified in the ET's reasoning go to the heart of its findings, such as to undermine confidence in its continued involvement in this matter. This might have been due to the unfortunate administrative delay, which might have impacted upon the ET's ability to complete its task and reach its Judgment, but, in any event, this, coupled with the time that has now passed since the ET Hearing, means that the appropriate course is for this matter to be reheard by a different ET.