Neutral Citation Number: [2023] EAT 75

Case No: EA-2022-000048-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 April 2023

Before:

MATHEW GULLICK KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MS DESPINA CHARALAMBOUS	**Appellant**
- and -	
NATIONAL BANK OF GREECE	**Respondent**

- -
- -

Mr Rhys Johns (instructed directly) for the **Appellant**
Mr Rad Kohanzad (instructed by **Peninsula Business Services Ltd**) for the **Respondent**

Hearing date: 19 April 2023

- -

JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant's appeal against the Employment Tribunal's finding that her dismissal for misconduct had been fair was dismissed. The Employment Tribunal had not erred in law when it found that the claimant's dismissal was fair despite the manager who took the decision to dismiss not conducting the disciplinary hearings himself. **Budgen & Co v Thomas** [1976] ICR 344, EAT, was not authority for the proposition that a dismissing officer must always have direct communication with an employee in order for a misconduct dismissal to be fair. In any event, the Employment Tribunal looked at the procedure adopted by the respondent as a whole: it found that any procedural unfairness in the initial decision to dismiss was sufficiently addressed by the internal appeal, which involved a meeting between the claimant and the decision-maker. That conclusion was also not erroneous in law.

MATHEW GULLICK KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. In this judgment, I shall refer to the parties as they were before the Employment Tribunal: as "the claimant" and "the respondent".

2. This is the claimant's appeal against the judgment of an Employment Tribunal sitting at London Central (Employment Judge Adkin, Ms L Moreton and Ms C Brayson), which was sent to the parties with written reasons on 20 December 2021. There had been a hearing of seven days' duration between 16 and 24 November and a further day for deliberation in chambers on 25 November.

3. The claimant made claims of direct race discrimination, of unlawful detriment and automatic unfair dismissal on the ground of having made protected disclosures, and of unfair dismissal. All the claims were dismissed. The judgment and written reasons run to 46 pages of single-spaced text and the written reasons are 300 paragraphs in length. On any view, the decision of the Employment Tribunal is a thorough and detailed examination of the claims that were made and the evidence that was given.

4. This appeal has been permitted to proceed to a full hearing on one ground, which relates to the decision of the Employment Tribunal on the claim for unfair dismissal under the provisions of Part 10 of the **Employment Rights Act 1996**. The Employment Tribunal found, for reasons which I will set out more fully later in this judgment, that the claimant had been dismissed because of her conduct, one of the potentially fair reasons in section 98(2) of the **1996 Act**, and that, applying section 98(4) of the **1996 Act**, the dismissal was fair. This appeal does not concern the Employment Tribunal's finding about the reason for dismissal. It concerns the finding about the fairness of the decision to dismiss, in particular in light of the procedure adopted by the respondent during the disciplinary process.

5. Before the Employment Tribunal, the claimant represented herself and the respondent was

represented by Mr Robert Cater, a litigation consultant employed by Peninsula Business Services Limited. On appeal, the claimant is represented by Mr Rhys Johns of counsel and the respondent by Mr Rad Kohanzad of counsel. I am grateful to both counsel for their conspicuously clear and cogent arguments.

Background

6. I take this summary of the background to the appeal from the Employment Tribunal's much more comprehensive written reasons.

7. The respondent is a bank, which has its headquarters in Athens, Greece. Prior to her employment by the respondent, the claimant had a career in banking, having worked for HSBC and the Bank of Cyprus UK. On 28 May 2014, the claimant commenced working for the respondent as a relationship manager in the private banking department of its London office.

8. The Employment Tribunal set out in its written reasons a number of incidents and matters that had arisen during the course of the claimant's employment, including the claimant's dissatisfaction with certain aspects of the respondent's employment practices and the making of two protected disclosures by the claimant, one in 2017 relating to a suspicious transaction and another in 2019 relating to alleged breaches of the Financial Conduct Authority ("FCA") rules. It is not necessary to set these matters out in any further detail for the purpose of determining this appeal other than to note that there had been involvement from an official of the claimant's trade union, Mr Geoff Saunders of UNITE, and that the claimant had also instructed a solicitor, Mr Tim Johnson.

9. The incident which led to the claimant's dismissal occurred on 23 January 2019. At the material time, the manager of the respondent's London office was Mr Marinos Vathis. He held the title of UK country manager. At 10.02 pm on 23 January, the claimant wrote an email to Mr Vathis, copying in a number of other senior managers and also Mr Saunders, her trade union representative. Mr Johnson, the claimant's solicitor, was "blind copied" into the same email (that is, he was also sent the email but this would not have been apparent to the other recipients). The email

was marked confidential. In the email to Mr Vathis, the claimant noted that two of her colleagues were taking voluntary redundancy and suggested that she should assume the position of senior relationship manager with a commensurate salary increase. As an attachment to the email, the claimant provided a spreadsheet file containing a breakdown of all private clients as at 31 December 2018 (the end of the preceding month) including commissions, turnover, total assets, year-end comparisons, foreign exchange transactions and total assets by currency. This information was self-evidently highly confidential. Both Mr Saunders and Mr Johnson, who were among the recipients of the email and the attachment, were not employees of the respondent.

10. At 12.18 pm on 24 January 2019, the claimant forwarded the email that she had sent the previous evening, with its attachment, to her external personal email account and copied in her brother (who worked for a different bank) at his personal email account. At the time, the respondent was not aware that this had happened or that the claimant had also sent the email of 23 January to Mr Johnson, although it discovered these matters later.

11. At 1.17 pm on 24 January, the claimant forwarded the email that she had sent the previous evening to Mrs Andrea Herrera, the respondent's HR manager, again copying in Mr Saunders. She apologised for not having copied the email to Mrs Herrera in the first place. At about 2.00 pm, the claimant was asked to go to Mr Vathis' office. He asked her if she realised that she had sent confidential information to Mr Saunders when she had copied him into her email of the previous evening. The claimant said she had not realised that she had done this, that she had been tired and that she would tell Mr Saunders that it had been an accident and he should delete the email. The claimant was, however, suspended pending a disciplinary investigation.

12. On 25 January 2019, Mr Vathis notified the FCA in writing that there had been a data breach as a result of the sending of the claimant's email of 23 January to an external recipient. He explained that the claimant had been suspended and that “the one and only external recipient” (which must have been a reference to Mr Saunders) had been contacted and that he had confirmed in writing that he had deleted the attachment to the claimant's email. Mr Vathis considered that

there was a low risk of loss to the respondent's customers in these circumstances and that the respondent did not consider it necessary to inform them about the breach. The FCA responded on 29 January, not suggesting any further action but asking that the respondent should keep the FCA informed.

13. On 28 January 2019, the claimant, who was suspended, attended an investigatory meeting with Mr Vathis. Mrs Herrera was present as note-taker. The Employment Tribunal noted in paragraph 104 of the written reasons that although the claimant stated she wished to be "transparent" she was not candid in this meeting: she failed to disclose all of the people to whom the confidential information had been sent, despite being asked by Mr Vathis if she had sent the email to anyone else. The Employment Tribunal found that this was because the claimant did not want Mr Vathis to find out who else she had sent the email to: she was concerned about how it would look. During the meeting, the claimant lobbied Mr Vathis for a promotion, explaining that she was frustrated at work and that she had not been given a sufficiently senior role.

14. On 31 January 2019, at Mr Vathis' request, the claimant provided a written account of her actions. She said that sending the spreadsheet with client information had been an innocent mistake and that she had been busy and under pressure. She reiterated her request for a promotion. She again did not disclose that she had sent the email of 23 January to external recipients other than Mr Saunders.

15. On 6 February 2019, the respondent sent a letter inviting the claimant to a formal disciplinary hearing. The letter stated that the allegation against the claimant was as follows:

> **"Taking part in activities which caused the bank to lose faith in your integrity, namely unauthorised disclosure of confidential client information to a third party on 23.01.19 by e-mail, which was a representative from the UNITE Union. You divulged sensitive and confidential information in the form of a spreadsheet containing clients' names, their fixed deposit and call account balances and other details of their bank accounts. If these allegations are substantiated, we will regard them as gross misconduct. If you are unable to provide a satisfactory explanation, your employment may be terminated without notice."**

Appended to the letter were the note of the investigatory meeting and copies of the General Data Protection Regulation and the FCA's code of conduct.

16. The disciplinary meeting took place on 12 February 2019. Mr Michael Hood, the respondent's country risk manager, conducted the hearing. He was assisted by Mrs Herrera. The claimant was accompanied by Mr Saunders, her trade union representative. The Employment Tribunal found that although the meeting had been described as a disciplinary hearing, it was really more in the nature of a further investigatory meeting. The claimant agreed with Mr Hood that disclosure of confidential information to third parties without prior authority or consent could be gross misconduct. It was suggested to the claimant that it was difficult to accept that what had happened was an accident, given she had sent the email twice (so far as the respondent knew at that point, once on the evening of 23 January and once on 24 January), both times copying in Mr Saunders. The claimant said she had been tired. She said she felt she was being targeted and described the referral to the FCA as malicious. Again, the claimant did not disclose that she had sent the email with the spreadsheet containing confidential information to her solicitor or to her brother.

17. In a letter dated 22 February 2019, the claimant was invited to a further disciplinary hearing. She was notified that new evidence had come to light, namely that the email and attachment sent on 23 January had been “blind copied” to Mr Johnson and that it had subsequently been forwarded to her own personal email address and to her brother. This meeting was again conducted by Mr Hood. It was recorded and a transcript was prepared. The claimant was asked who Mr Johnson was; she said that he was her lawyer and that he would not do anything with the document he had been sent. The claimant confirmed that her brother, to whom she had forwarded the 23 January email, worked for another banking group. The claimant stated she had spoken to the Information Commissioner's Office and that a caseworker had told her that it sounded like an accident. She said that she had not acted intentionally. The claimant again reiterated that she wished to be promoted to senior relationship manager.

18. The Employment Tribunal noted that Mr Hood's role had been, essentially, to carry out a further investigation rather than to conduct a disciplinary hearing. It noted, however, that the

claimant had been able to put forward her mitigation in her meetings with Mr Hood. At this point, the conduct of the disciplinary process was passed to Mr Vathis. Mr Hood sent his notes of the meetings to Mr Vathis.

19. By letter dated 4 March 2019, Mr Vathis summarily dismissed the claimant. He considered that the claimant's disclosure of confidential information to third parties amounted to gross misconduct and that the disciplinary charge against the claimant was substantiated. It was found that the explanation that the disclosure had been made by mistake was unsatisfactory, given that the disclosure had been made on three occasions, to three different third parties, and where the covering email specifically referred to the spreadsheet having been attached. The Employment Tribunal found that the decision to dismiss the claimant had been taken by Mr Vathis, although he had taken advice from Mr Hood, from Ms Paraskevi Nazou (the respondent's compliance and data protection officer) and from internal audit before making his decision. The Employment Tribunal noted that the respondent's handbook required that a dismissal should be determined by the country manager: that is, by Mr Vathis.

20. On 7 March 2019, the claimant appealed against the decision to dismiss. There were three grounds of appeal:

i) that her action in sending the email of 23 January was being used as a pretext to force her exit from the respondent's employment;

ii) that dismissal was too severe a sanction, the claimant having made innocent mistakes as a result of work-related stress; and

iii) that the true reason for the respondent's actions was because the claimant was a whistleblower or because of her race.

21. The manager appointed to hear the claimant's appeal was Mr George Armelinios, the respondent's HR director. He was employed at the respondent's head office in Athens and was senior in status to Mr Vathis. On 20 March 2019, the claimant sent Mr Armelinios a nine-page letter expanding on her grounds of appeal, with ten attachments. Particular points raised were:

i) that it was unfair that Mr Hood, who had conducted the disciplinary hearings, was not the decision-maker;

ii) that the claimant's actions were being used as a pretext to remove her;

iii) that she was being dismissed because of whistleblowing or because of her race;

iv) that dismissal was unduly severe because the claimant's conduct was an innocent mistake caused by stress, which was not gross misconduct; and

v) a list of 15 matters raised in mitigation.

22. The appeal hearing took place on 21 March 2019. Mr Armelinios travelled from Athens specifically to conduct the hearing. Mrs Herrera took notes. Mr Saunders accompanied the claimant. Mr Armelinios considered his role was to focus on the decision to dismiss. He viewed confidentiality and client trust as being the cornerstone of banking. He decided that dismissal was reasonable in the circumstances and that the claimant's mitigation was not a sufficient excuse for such a serious data breach. He considered that the claimant's allegations about other matters, such as whistleblowing and race discrimination, were no more than "excuses" and that they were, in any event, management matters for the London office to deal with. Mr Armelinios dismissed the appeal in a letter sent to the claimant on 15 April. On 17 April, Mr Vathis and Mrs Herrera sent a further letter dealing with the claimant's other allegations. The claimant's claim that there was a plan to remove her was rejected, as were her other contentions in relation to whistleblowing, race discrimination and excessive workload.

The Employment Tribunal's Decision

23. As I have already indicated, this appeal concerns the Employment Tribunal's decision in relation to the claim for unfair dismissal rather than the claims in respect of race discrimination and whistleblowing.

24. No criticism is made of the Employment Tribunal's direction regarding the law on unfair

dismissal at paragraphs 169 to 178 of the written reasons. In those paragraphs, the Employment Tribunal referred to a number of cases, including **British Home Stores Ltd v Burchell** [1978] ICR 303, **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17 and **Sainsbury's Supermarkets Ltd v Hitt** [2002] EWCA Civ 1588, [2003] ICR 111, and also referred to the decision of the House of Lords in **West Midlands Co-operative Society v Tipton** [1986] AC 536 in relation to the fairness of dismissal procedures and the significance of appeals.

25. In relation to the whistleblowing claim, the Employment Tribunal found that the claimant had made two protected disclosures but had suffered no detriment in consequence. When dealing with the claimant's claim for automatic unfair dismissal consequent upon whistleblowing, the Employment Tribunal stated at paragraph 230 of the written reasons:

> **"We find that the principal reason for the dismissal was that the Claimant had committed an act of gross misconduct by sending confidential information relating to all private banking clients externally. This fell squarely within the definition of gross misconduct in the Respondent's policy."**

26. At paragraphs 236 to 284 of the written reasons, the Employment Tribunal dealt with the claim for unfair dismissal under sections 94 and 98 of the **1996 Act**. The Employment Tribunal found that the respondent had a reasonable belief that the claimant had committed misconduct and that there were reasonable grounds for that belief. The Employment Tribunal also found that the respondent's investigation had been reasonable. No complaint is now made regarding those findings on appeal.

27. The next issue which the Employment Tribunal addressed in the written reasons was whether the respondent had followed a fair procedure when deciding to dismiss the claimant. In doing so, the Employment Tribunal focused on the role played by Mr Vathis in taking the decision to dismiss. At paragraphs 252 to 265 of the written reasons, the Employment Tribunal stated:

> **"252. The next matter that the Tribunal has considered carefully is, the ambiguity as to the role of Mr Vathis, who carried out an initial investigatory meeting but then stood back and allowed Mr Hood to carry out two further meetings before taking the decision to dismiss himself.**
>
> **253. We considered whether it might be argued that it was unfair that Mr Vathis was not present at a disciplinary hearing. We note that in the referral to the FCA there is a reference to a disciplinary committee. Mr Hood says that he**

was not a member of this committee whereas Mr Vathis says he was. Both men have told us no recommendation was passed over from Mr Hood, although the notification to the FCA which refers to a disciplinary committee taken together with Mr Vathis' evidence that Mr Hood and Mrs Herrera suggests otherwise.

254. We have considered the ACAS code on Disciplinary and Grievance Procedures 2015, which contains the following:

> **'6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.**
>
> **7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.'**

255. We consider that the ideal model in disciplinary cases is that there is an investigation stage which is carried out by one manager and a separate and distinct disciplinary hearing carried out by a separate decision-maker on disciplinary sanction. Ordinarily that decision-maker would be present at a disciplinary hearing.

256. There are two ways in which the process followed by the Respondent in this case was less than ideal.

257. First, there was a blurring of this distinction between investigation and disciplinary. Mr Vathis met with the Claimant on 28 January 2019. He explained that this was not a disciplinary hearing but that he wanted to understand a few things. We find that this was because he was principally trying to manage the breach. There was however inevitably an element of investigation at this meeting. Mr Vathis then invited the Claimant to put certain matters in writing before handing the matter to Mr Hood, who carried out further investigation, although these were described as 'disciplinary' hearings.

258. It would have been better had Mr Vathis immediately handed over responsibility for the investigation to Mr Hood after the suspension on 24 January 2019. We have borne in mind however, that Mr Vathis did need to take steps to manage the breach of confidential information. Further investigation was dealt with by Mr Hood. This was not a situation in which Mr Vathis was a 'witness' to events and ought therefore not to be involved at all. The breach was solely capable of investigation by consideration of the emails sent by the Claimant.

259. Second, is the way in which the decision to dismiss was taken.

260. We have considered carefully who the decision-maker was in this case. Ordinarily the decision-maker as to disciplinary sanction would be present at a disciplinary hearing. In this case the decision to dismiss appears to have been a separate paper exercise, albeit based on a recommendation. Although Mr Hood described his role to ask as simply carrying out the meetings which questions were asked, his witness statement deals in detail with the rationale for dismissal. This fortifies asking our conclusion that there was more than simply the handover of documentation from Mr Hood leading to Mr Vathis' decision. We find that he must have handed over in effect a recommendation for dismissal.

261. We are clear however that Mr Vathis was the ultimate decision-maker, and this is in compliance with the Respondent's handbook (113) which sets out that dismissal should be by the country manager.

> **262. Mr Vathis was not present at the disciplinary hearing.**
>
> **263. Did these procedural imperfections make the decision to dismiss unfair? We have concluded that it did not, for the following reasons.**
>
> **264. Mr Vathis did hand over the investigation after the initial meeting. The Claimant did have the benefit of a formally recorded pair of disciplinary meetings at which she was represented by a trade union representative, and she was able to set out her case, comment on the evidence and mitigating circumstances, which were recorded in the meeting minutes. Mr Vathis had the benefit of these matters in front of him when he took the decision to dismiss.**
>
> **265. There were two separate stages. There was the investigation on 28 January 2019. There was the disciplinary hearing which took place over two dates on 12 and 26 February 2019. While there was a blurring of distinction between investigation and disciplinary, two different people were separately involved. This at least avoided the problem of a single individual becoming blinkered through the investigation process and unable to take a step back and assess the fairness of disciplinary sanction. We find that Mr Vathis was, by the point that the decision to dismiss was taken on 4 March 2019 was** [sic] **in a position to take a step back. His last involvement had been in the meeting on 28 January 2019."**

28. At paragraphs 266 to 275 of the written reasons, the Employment Tribunal went on to consider the procedure adopted on appeal. Materially for present purposes, it stated:

> **"269. Was Mr Armelinios actually the decision-maker in the appeal? We found that he was. He had very clear view of this case, and in at least one material respect that differed from that of Mr Vathis.**
>
> **270. Was the appeal too superficial? Certainly as judged by his participation in the appeal hearing in which she** [sic] **asked very few questions and the length of the appeal outcome letter dated 15 April, it might be said that the appeal hearing was somewhat perfunctory.**
>
> **271. We have considered however that Mr Armelinios was provided with a substantial amount of documentation in advance by the Claimant and that she explained her position at length in the appeal hearing. He cannot have been in any doubt of the various matters that she relied upon as mitigation and/or reasons to doubt that the decision to dismiss her was fair, when he got to the point of making a decision in the appeal. It was his view that the points about race, whistleblowing and workload were no more than 'excuses' and management matters that needed to be dealt with by the London branch rather than by himself, as someone who was flying in from Athens for a few hours.**
>
> **272. It might have been better had Mr Armelinios done more himself, or through an independent investigator to consider these matters. However, he did not and our role is not to substitute what we would have done at any stage of the process.**
>
> **273. As to whether it fell outside of the range of reasonable responses procedurally, we consider that Mr Armelinios was independent. He was not answerable to Mr Vathis and was senior to him in the organisation. He took his own view of the case quite clearly. Stripping the appeal stage back to its basic element, he did provide an independent view of the case and make an assessment of whether dismissal was fair the circumstances. We find that he did make his own independent judgement and he was adamant, we find genuinely, that the circumstances of this case merited dismissal.**

> **274. Insofar as we have identified imperfections in the investigation/disciplinary stage as discussed above, this appeal process was capable of correcting those imperfections, since Mr Armelionios** [sic] **was independent and to that extent a fresh pair of eyes.**
>
> **275. Overall therefore viewing the procedure followed in the investigation, disciplinary and appeal process collectively we find that it did fall within the range of reasonable responses."**

29. The Employment Tribunal went on to find that dismissal was within the range of reasonable responses open to a reasonable employer. No separate complaint is now made regarding that finding on appeal.

The Law

30. Part 10 of the **Employment Rights Act 1996** provides statutory protection to qualifying employees, such as the claimant, against unfair dismissal by their employer. Section 98 provides, materially:

> **"(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— (a) the reason (or, if more than one, the principal reason) for the dismissal, and (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—**
>
> **...**
>
> **(b) relates to the conduct of the employee ...**
>
> **(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."**

31. It is established that, when considering the fairness of a dismissal, the range of reasonable responses test set out in the case of **British Home Stores Ltd v Burchell**, to which I have already referred, applies to the procedure adopted by the employer (see the decision of the Court of Appeal

in **Sainsbury's Supermarkets Ltd v Hitt**) and, further, that the fairness of the dismissal must be judged having regard to the procedure taken as a whole (see the decision of the Court of Appeal in **Taylor v OCS Group Ltd** [2006] EWCA Civ 702, [2006] ICR 1602). In particular, in the judgment of the court given by Smith LJ in that case, it was stated:

> **"43. It seems to us that there is no real difference between what the EAT said in Whitbread and what it said in Adivihalli. Both were consistent with Sartor. In both cases, the EAT recognised that the ET must focus on the statutory test and that, in considering whether the dismissal was fair, they must look at the substance of what had happened throughout the disciplinary process. To that extent, in our view, the EAT in the present case was right. However, in Whitbread, the EAT used the words 'review' and 'rehearing' to illustrate the kind of hearing that would be thorough enough to cure earlier defects and one which would not. Unfortunately, this illustration has been understood by some to propound a rule of law that only a rehearing is capable of curing earlier defects and a mere review never is. There is no such rule of law.**
>
> **44. There are at least two good reasons why there should not be any such rule of law. First, as the EAT recognised in Adivihalli, such a rule would place a fetter on the discretion of the ET when considering section 98(4) ...**
>
> **...**
>
> **46. ... What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.**
>
> **47. ... The use of the words 'rehearing' and 'review', albeit only intended by way of illustration, does create a risk that ETs will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if ETs realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage."**

The Appeal

32. For the claimant, Mr Johns submits that the Employment Tribunal fell into error when it found that the dismissal was fair notwithstanding that Mr Vathis, the decision-maker who made the decision to dismiss, did not conduct the disciplinary hearing. There are two strands to his argument.

33. Firstly, Mr Johns submits that the decision of this Appeal Tribunal in **Budgen & Co v**

Thomas [1976] ICR 344 ("**Budgen**"), a case apparently not cited to the Employment Tribunal, establishes that a dismissal will, at the very least as a starting point, be unfair if the manager making the decision to dismiss does not hear directly from the employee. He submits that the Employment Tribunal ought, on a proper application of the principle established by that authority, to have held that the dismissal was *prima facie* unreasonable, and so unfair, because Mr Vathis did not conduct the disciplinary hearing and so did not hear directly from the claimant.

34. Secondly, and in the alternative, Mr Johns submits that, insofar as no binding principle is established by the decision in **Budgen**, the Employment Tribunal's conclusion regarding the fairness of this disciplinary process was not one that it was entitled to reach and that the only conclusion a reasonable tribunal could have reached in this case was that the dismissal was unfair for the same reason, namely that Mr Vathis did not hear directly from the claimant before taking the decision to dismiss. Although Mr Johns does not submit that any defects in the appeal process were such as to render the dismissal unfair when taken on their own, he does submit that the appeal was not sufficient to remedy the unfairness which, on this argument, was caused at the first stage of the process.

35. For the respondent, Mr Kohanzad disputes that **Budgen** is authority for the proposition contended for by the claimant and submits that, in any event, it must be read in the light of more recent decisions on the application of the statutory test under section 98(4) of the **1996 Act**, in particular the judgment of the Court of Appeal in **Taylor v OCS Group Ltd**, to which I have already referred. Mr Kohanzad notes that a different view was taken about the significance of a hearing by this Appeal Tribunal in the case of **Parker v Clifford Dunn Ltd** [1979] ICR 463 and that the editors of **Harvey on Industrial Relations and Employment Law** state at paragraph D1-1506, having referred to both **Budgen** and **Parker v Clifford Dunn Ltd**, that:

> **"Query, however, whether it is always necessary to ensure that the person actually implementing the dismissal carries out the hearing. Fairness may be satisfied where an investigating officer provides a full report, including any potentially mitigating factors, to the officer dismissing."**

36. Mr Kohanzad submits that the Employment Tribunal's decision that the dismissal was fair,

with regard to the issue of Mr Vathis not having conducted a disciplinary hearing with the claimant, was one that was open to it for the reasons that it gave. He submits that, in any event, the Employment Tribunal found that any unfairness on this basis in the decision to dismiss was sufficiently addressed by the appeal process and that this, too, was a conclusion it was entitled to reach. Mr Kohanzad submits that the Employment Tribunal's conclusion that the respondent acted reasonably in dismissing the claimant is not susceptible of being set aside on appeal for error of law simply because I might have taken a different view if I were sitting as a tribunal of first instance.

Discussion

37. I will deal first with the claimant's argument that **Budgen** establishes a principle binding on the Employment Tribunal which it failed to apply.

38. The facts of **Budgen** were that the employee was suspected of stealing from the till in a shop where she worked. On her return to work from holiday, she was interviewed by the employer's security officer. The employee signed a document which admitted that she had disobeyed the rules about the proper operation of the till and, in that document, apparently admitted that she had put the money concerned into her overall. The employee was dismissed on the same day. The security officer had contacted management at head office and explained what had happened over the telephone. The employer's personnel manager decided that the employee should be dismissed. That decision was passed back to the manager of the store who communicated the dismissal to the employee. The Industrial Tribunal held that the dismissal was unfair, concluding that it could not be right that head office had decided to dismiss the employee before hearing her and that "a statement to a security officer is not a substitute for an interview with the management who will eventually dismiss". The Industrial Tribunal held that there should have been "an interview ... with some senior management whose responsibility it was to decide on punishment". Such an interview did not take place and the dismissal was, in the view of the Industrial Tribunal, accordingly unfair.

39. The Employment Appeal Tribunal dismissed the appeal, in a judgment given by Phillips J.

At page 348 of the report, this Appeal Tribunal rejected the employer's argument that a hearing had been unnecessary. It stated:

> **"… Whatever the circumstances, whatever the employee is alleged to have done, and however serious it may be, it is, in our judgment, always necessary that he should be afforded some opportunity of explaining himself to those persons in the management who will in the first instance take the decision whether or not he is to be dismissed.**
>
> **The fault of the employers is that pointed out by the industrial tribunal: they confused, and by their argument to this tribunal clearly still confuse, two quite different things. One is the process of investigating the complaint; the other is the process of deciding whether or not dismissal is the right penalty. Very often, those separate functions will be undertaken by the same person or body, and, when that happens, there is no problem. But if, as here, the investigation of what happened is undertaken as a separate exercise, then whatever the outcome of that investigation, and however serious the offence disclosed, it is still necessary, when a decision is being taken whether dismissal is to follow, for the employee to have an opportunity to say whatever he or she wishes to say to the person who will take the decision. It is not possible or desirable to elaborate that at greater length. The tribunal put it admirably in a single sentence which is short, pithy and correct: "A statement to a security officer is not a substitute for an interview with the management who will eventually dismiss." That really is what this case is all about."**

40. I reject Mr Johns' submission that **Budgen** is authority for the proposition that for a dismissal to be fair, at least insofar as the initial decision to dismiss is concerned, a decision-maker must themselves have direct personal communication at a meeting with an employee. At page 348H of the report in **Budgen**, this Appeal Tribunal held that it was necessary that an employee should be afforded "some opportunity of explaining himself" to those who will take the decision to dismiss and, at page 349B, that an employee should "have an opportunity to say whatever he or she wishes to say to the person who will take the decision". I do not regard **Budgen** as establishing that, in order for a dismissal to be fair, there must necessarily be a meeting between the employee and the dismissing officer. All the references by this Appeal Tribunal in its judgment to the employee having the opportunity to "say whatever he or she wishes to say" do not mean that such communication cannot, in principle, either be in writing or by way of a report to the dismissing officer.

41. I agree that it is desirable that such a meeting between the employee and the dismissing officer should take place. It is good practice and something which many employers' disciplinary procedures will expressly require. No doubt many dismissals will be found to be unfair if no such

direct meeting takes place. **Budgen**, where the entire process was conducted by the security officer relaying events to the personnel manager over the telephone, was one of those cases. But I do not regard **Budgen** as establishing that a dismissal must be unfair if such a meeting does not take place. As the editors of **Harvey on Industrial Relations and Employment Law** point out in the passage to which I have already made reference, it may be reasonable for an employer to dismiss where a full report, including potentially mitigating features, is provided to the dismissing officer. As Mr Kohanzad correctly points out, the Employment Tribunal in an unfair dismissal case is applying the broad statutory language in section 98(4) of the **1996 Act** and conducting an assessment of what "equity and the substantial merits" require in the particular case before it. This is not a process that should become "encrusted with case law": see the observations of Underhill J in this Appeal Tribunal in **Newcastle upon Tyne City Council v Marsden** [2010] ICR 743 at [16].

42. Nor is the case of **McLaren v National Coal Board** [1987] ICR 410, to which Mr Johns also made reference, authority for the proposition which he advances. In that case, the employee had been dismissed on the basis of a criminal conviction for assault without consideration of the circumstances of his case. The Employment Appeal Tribunal held at page 417 of the report that:

> **"If an area manager is simply going to say, 'There is a conviction; therefore there is a dismissal', it fails to take account of the principles laid down and proved, namely that a reasonable employer must himself make reasonable inquiries ..."**

In my judgment, this Appeal Tribunal was not purporting to state what inquiries must in every case be undertaken, nor was it purporting to state that, in every case, there must be a hearing in person before the dismissing officer. In any event, that case was remitted for further consideration because the Industrial Tribunal whose decision was overturned on appeal, having concluded that the initial decision to dismiss was fair, had failed to consider the significance of the appeal process in that case in which there had been a hearing involving the employee and the appeal officer.

43. The key point being made by this Appeal Tribunal in **Budgen** was that the employee should have an opportunity to explain her position sufficiently prior to a decision being reached. In the present case, the Employment Tribunal found at paragraph 264 of the written reasons that the

claimant had two formally recorded disciplinary meetings at which she was represented by her trade union representative and was able to set out her case, comment on the evidence and advance mitigation, all of which was recorded. The Employment Tribunal found that Mr Vathis had such matters in front of him when taking his decision. The Employment Tribunal also found that the officer who had conducted the hearing, Mr Hood, had given Mr Vathis what the Employment Tribunal described as "in effect a recommendation for dismissal".

44. For these reasons, I reject Mr Johns' submissions insofar as they relate to the authority of **Budgen** establishing a proposition which the Employment Tribunal failed to apply that should have led to the claimant's dismissal being found to be unfair.

45. Turning, then, to the second strand of the claimant's case in relation to the Employment Tribunal's decision, I consider that the conclusions which the Employment Tribunal reached regarding the fairness of the process adopted by the respondent in this regard, at paragraph 263 to 265 of the written reasons, were ones which it were open to it to reach on the particular facts of this case.

46. In my judgment, the Employment Tribunal was entitled to conclude that the respondent's actions were reasonable in the circumstances even though the process was, in the words of the Employment Tribunal, "less than ideal": see paragraph 265 of the written reasons. In my judgment, there is no error of law in the conclusions reached by the Employment Tribunal in those paragraphs, which address and take into account the relevant issue of Mr Vathis not having conducted the disciplinary hearing personally and reach the conclusion that nonetheless, in the particular circumstances of the case, the process was not unfair.

47. These conclusions are themselves dispositive of this appeal, which is dependent on the Employment Tribunal's consideration of the involvement of Mr Vathis in the decision to dismiss, in the circumstances which I have described, being affected by error of law. But, in any event, had it been necessary to determine the subsidiary question relating to the significance of the appeal process, then I would nonetheless have rejected Mr Johns' submission in relation to the

Employment Tribunal's conclusion about the appeal process, for the following reasons.

48. As the Court of Appeal found in the case of **Taylor v OCS Group Ltd**, to which I have already made reference, the process of dismissal must be looked at as a whole, including the appeal process. In **Budgen**, there does not appear to have been any appeal by the employee. In the present case, there was. The Employment Tribunal found at paragraph 274 of the written reasons that, insofar as it had identified what it described as "imperfections" at the first stage of the process, the appeal process had corrected them. The appeal officer, Mr Armelinios, did have a meeting with the claimant. The Employment Tribunal found at paragraph 271 of the written reasons that Mr Armelinios cannot have been in any doubt about the arguments being raised by the claimant as to why she should not have been dismissed. He was an official senior in status to the dismissing officer, Mr Vathis, and the Employment Tribunal found that he took his own independent view of the case, reaching his own conclusion that the circumstances merited dismissal.

49. In my judgment, Mr Johns' attack on the Employment Tribunal's reasoning in relation to the impact of the appeal process must also be rejected. This was, in my judgment, a full and careful assessment of the fairness of the appeal by the Employment Tribunal, which was not without criticism of the approach taken by Mr Armelinios: see paragraph 272 of the Employment Tribunal's written reasons. I do not consider that Mr Johns' description of Mr Armelinios having dismissed the appeal "out of hand" is an accurate label for the Employment Tribunal's findings in this respect: see paragraph 273 of the written reasons, where the Employment Tribunal concluded that, "We find that he did make his own independent judgment and that he was adamant, we find genuinely, that the circumstances of this case merited dismissal".

50. In my judgment, the Employment Tribunal's conclusion that the appeal process was sufficient to correct any imperfections in the decision to dismiss in the relevant respects was, again, one that was open to it to reach. This conclusion, too, involved no error of law. Had I been satisfied that the Employment Tribunal's conclusion about the fairness of the process in relation to the initial decision to dismiss had been affected by any error of law, therefore, I would nonetheless

have dismissed the appeal in light of the Employment Tribunal's conclusions about the fairness of the process when looked at as a whole, including the appeal.

Conclusion

51. For the reasons which I have given, this appeal is dismissed.