United Kingdom Employment Appeal Tribunal

Appeal No. UKEAT/0280/15/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 January 2016

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MR P CHOKSI — APPELLANT

ROYAL MAIL GROUP LTD — RESPONDENT

Transcript of Proceedings

APPEARANCES

For the Appellant	MR ROBIN ROBISON (of Counsel) Free Representation Unit Ground Floor 60 Gray's Inn Road London WC1X 8LU
For the Respondent	MR STEPHEN PEACOCK (Solicitor) Weightmans LLP 100 Old Hall Street Liverpool L3 9QJ

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

How should section 98(4) **Employment Rights Act 1996** be viewed when conduct gives rise to two

allegations (grounds A & B), both of which the dismissing officer finds proved but only one of which (ground A) is regarded as justifying dismissal, when on appeal the manager conducting the appeal disagrees and regards both as justifying dismissal and then the Employment Tribunal concludes that dismissal on ground A was not reasonable but accepts that the appeal manager was acting reasonably to conclude that the dismissing manager was wrong to think that ground B did not justify dismissal? What constitutes the dismissal in those circumstances? Is the situation analogous to a rehearing appeal curing a defect in the dismissal process? Because the Employment Tribunal had not considered these questions the matter was remitted to the same Employment Tribunal to do so.

HIS HONOUR JUDGE HAND QC

1. This is an appeal from the Judgment and Written Reasons of an Employment Tribunal comprising Employment Judge Professor Neal, sitting at London (Central) on three days in November 2014. Oral Reasons for the Judgment were given on 14 November 2014, and the written form of the Judgment rejecting the Appellant's claim of unfair dismissal was sent to the parties on 24 November 2014. The Written Reasons for that conclusion were sent to the parties on 6 March 2015. The Appellant, who was the Claimant below, was represented by counsel at the Employment Tribunal and at the hearing of this appeal has been represented by Mr Robison under the auspices of the Free Representation Unit. The Respondent has been represented by the senior employment partner of its solicitors, Mr Peacock.

2. After a career with the Respondent lasting 27 years the Appellant, who was by then working as an Operational Support Manager, was summarily dismissed for gross misconduct. On 10 October 2013 28 files containing obscene material had been discovered in a folder on cloud storage belonging to his cloud storage account, provided by the Respondent. I infer from paragraph 11(12) that the presence of those files in that storage had been discovered by the Respondent's internal security section and they had informed the police. On 24 October 2013 the Appellant was arrested at his work, taken to the police station, interviewed, charged and then released on bail. All that is said of the police investigation in the Reasons of the Employment Tribunal is set out in paragraph 11(4), which reads:

> **"(4) Those police-led matters bear relatively little upon what happen [sic] internally within the Respondent's organisation. However, it is noted at the outset that everybody involved with the case in the Respondent's organisation was aware of the nature of the police investigation - even though it was eventually said that a**

specific piece of material which was the core focus for the police investigation was not to be taken into account in internal investigations and proceedings. The Tribunal finds that it was clearly the case that the circumstances were notorious throughout all of the relevant stages."

3. My understanding is that the Appellant had been charged in respect of the file that is being referred to in paragraph 11(4) quoted above. In terms of this appeal and, for that matter, the hearing before the Employment Tribunal, the police proceedings are obviously irrelevant, and it is irrelevant as to what became of the charge. In any event, I simply do not know what happened.

4. Not surprisingly for an organisation of its kind and size, the Respondent operates what it hopes is a secure IT system. Employees who are provided with IT facilities, presumably by some kind of computer network, are only able to access the system through what might be called "accounts". These are personal to the employee and password protected, as is access to the system itself. The most obvious access to the system is likely to be from computers located at work, but the system can be accessed remotely from personal computer equipment located elsewhere. Like all similar systems, anyone accessing it will reach a warning at a very early stage in the "logging-on" process about unauthorised access. This is referred to more than once in the papers and in the Reasons of the Employment Tribunal. Employment Judge Neal described it as a "graphic warning". Moreover, use of the system - or, if it is more appropriate to call it so, the network - is subject to a code of conduct, one of the fundamental principles of which is that passwords are personal to the individual employee and should not be shared. Another fundamental principle of the code of conduct in relation to IT systems is that pornographic material should not be accessed, stored or published on or via the Respondent's network.

5. The Appellant did not dispute that he was well aware both of the prohibition against password sharing and that against the storage of obscene material on the Respondent's system. When confronted with the fact that a folder had been found in his cloud storage containing 28 video files, his reaction was that he was totally unaware of the presence of such files in his cloud storage until he was arrested by the police. He said that he had not put them there but he could not explain how they had got there. He steadfastly and consistently maintained, however, that there was a widespread practice, which he acknowledged was in breach of the code of conduct, of password sharing amongst the Respondent's employees. This practice was necessary to facilitate efficient working, he said.

6. Mr O'Donovan, who was Head of Engineering at the department in which the Appellant worked but who was not his line manager, was given the task of investigating and, it seems, if necessary of carrying out any disciplinary procedure. Normally such an investigation would have been carried out by the Appellant's line manager, but he was on annual leave and in any event had not been "conduct code trained" (see paragraph 11(13) of the Reasons). On 25 October 2013 Mr O'Donovan suspended the Appellant, and he interviewed him on 18 December 2013. At this meeting the Appellant clearly stated his position in these terms (see paragraph 11(22) of the Reasons):

> **"(22) The Claimant's first response - and this has remained his consistent position throughout - was that he had no knowledge at all of the existence of those files in his account. He maintained that he was not aware either that they were there or how they might have found their way there. In consequence, he was unable to explain anything more than that."**

7. Mr O'Donovan at a stage in the investigation was provided with "a technical report", although this was not disclosed to the Appellant until very late in the procedure. According to paragraph 11(23) of the Reasons, it:

> **"(23) … contained detailed information about each of the total of 28 (and relevant 27 files) which had been discovered on the "Cloud" account of the Claimant. These indicated various transaction dates for activity within the Royal Mail computerised systems. However, the information set out in that list … did not indicate (certainly in relation to the time when Mr O'Donavan [sic] was undertaking his investigation - and, it also emerged, over the entire period up until the commencement of this hearing before the Tribunal) whether there had been access to those files and, if so, by whom and on what date."**

8. I have not seen the technical report and do not know to what level of detail it descended. Plainly, there must have been some investigation of metadata, because of the reference to various transaction dates, but I would gather from paragraph 11(23) that it was not possible to identify when the offending files had been placed there, by whom and who had accessed them. Employment Judge Neal clearly took the view that this technical report was not a basis from which any of the witnesses for the Respondent could "properly form any technical view as to what may have happened" (see paragraph 11(24) of the Reasons).

9. On the other hand, Mr O'Donovan (see paragraph 11(26) of the Reasons):

> **"(26) … was under the impression that the report with which he had been furnished informed him of computer transactions linked to the actions of the Claimant. …"**

10. It was accepted by the Respondent that the technical report did not prove that - it only proved that the files were in the Appellant's cloud storage - but, of course, the presence of the files opened up the inference that the material had been put there deliberately, and it was an obvious fact that the files had been put into an account that was password protected with a password applicable to and known by the Appellant. It was probably in anticipation of such an inference being drawn that the Appellant explained and asserted that there was a widespread practice at the Respondent and in particular at the Greenford sorting office, which I understand to be a very large sorting office, where the Appellant worked, of password sharing. He acknowledged that this was in breach of the code of conduct and also of the "acceptable use" procedures.

11. Consequently, the investigation proceeded along twin tracks. Firstly, that the Appellant was the person responsible for placing the files in the cloud storage, though the exact process by which the files had been placed in the cloud storage was never identified by the technical report. Various references are made to the material having been uploaded, but, if I have grasped some of the technical discussion in either the disciplinary hearing or the appeal hearing correctly, there appear to have been a variety of methods by which the material could find its way there. The other track was that he had shared his password with others in fundamental breach of procedure. As to that, he conceded not only was he aware of the code of conduct but also, he did not log on and off very frequently because his habit was to leave his machine open and sleeping. Also he was aware of the various, as they were described, "pop up warnings" about authorised use.

12. It appears that Mr O'Donovan, perhaps not surprisingly, came to an early conclusion that the Appellant had acted in breach of the code of conduct in that he had disclosed his passwords to others, as he accepted and asserted he had done. During the course of the investigation the Appellant proffered eight names of employees or former employees of the Respondent who he said would confirm that the practice of password sharing existed and was widespread. It seems likelier that the Employment Tribunal was under the impression that there were six names proffered, but examination of the material shows that there were eight in fact. In one way or another Mr O'Donovan had made contact with six of those. No attempt was made to contact two former employees whose names were in this list, one of whom had been identified by the Appellant as somebody who might have had a grudge against him.

13. The names given to Mr O'Donovan can be identified by a consideration of documents that appear in the appeal bundle from page 82 onwards. At page 82 are interview notes of a conversation between Mr O'Donovan and a Mr Vin Khokhani on 20 December 2013. The notes are not grammatically complete. Mr Khokhani is noted as having said that he had never used the Appellant's login or password. He was asked a question about working in the resource room, and his answer is recorded as "Replied yes, but I never it". There is obviously a verb missing, and, given that the verb used by Mr Khokhani in his previous recorded answer had been "used", it seems at least possible that the verb that is missing is "used". If sense is to be made of this, it might be that Mr Khokhani was accepting that he knew what the Appellant's password was but he had never used it.

14. At page 83 is Mr O'Donovan's note of an interview with Mr Patel. He accepted that he knew the password and had used it on his own computer years ago. Exactly what that estimation amounts to chronologically appears never to have been more clearly identified. At page 84 are Mr O'Donovan's notes of his conversation with Mr Shah. He said he had never used the Appellant's password or login. Again, that might be viewed as perhaps ambiguous, but his last reply was that he "hadn't anyones [sic] log in or password"; so, it seems that that should be interpreted as him not knowing the Appellant's password. There was a conversation between a Mr Spencer and Mr O'Donovan, which is noted at page 85. Mr Spencer accepted that he knew the Appellant's password as it had been shared with him but this was because the Appellant was a pilot for the Windows 7 uplift programme. I would understand that to mean that he was one of those chosen to be involved in a migration from one operating system to another. He was asked about inappropriate files, and he said that the Appellant had indicated that he needed to get rid of a lot of photographs and music files. He was asked whether he had downloaded any inappropriate files; perhaps not surprisingly, he said no.

15. Another name that had been supplied was Mr Greg Wilde. He had a telephone conversation with Mr O'Donovan in which he said that he did not know the Appellant's login details. He did not make any comment about whether or not password sharing was widespread at Greenford, although perhaps it might be inferred from his description in his email at page 86 that he was suggesting that this was a busy open-plan area with a lot of comings and goings. Whether that should be taken as a refutation of any

widespread practice of password sharing is not obvious to me. Mr Davda was interviewed later by Mr O'Donovan; he denied ever using the Appellant's password, and he was not aware of anybody else doing so.

16. The infromation provided as a result of these conversations cannot be described as being very detailed. Whether or not that is capable of being explained by some findings made by the Employment Tribunal is perhaps difficult to be entirely confident about, but at (the second) paragraph 11(31) the Employment Tribunal say this:

> **"(31) Mr O'Donavan [sic] swiftly took the view that he had little need to go further into the "password sharing" issue, because the Claimant had volunteered that information and had effectively confessed his misconduct and breach of the codes in respect of it."**

17. That in turn found its way into the Employment Judge's reasoning process at paragraph 39, which reads:

> **"39. … as regards the "password sharing" there was little or no investigation needed, since the Claimant had accepted what he had done."**

18. Looked at in one sense, that is obviously correct. The Appellant had accepted that he had indulged in password sharing; so, there was no need to investigate whether he had or he had not. If, however, that is meant to exemplify Mr O'Donovan's approach to the investigation of this matter generally, that opens up the question as to what is necessary in terms of an investigation in circumstances of this kind, in particular where an employee has been accused of a very serious piece of misconduct and has asserted that there is an explanation as to why he may not have been responsible for one aspect of it, which explanation involves an admission or confession that he has been acting in breach of other aspects of the code of conduct. The Employment Tribunal appear at paragraph 39 to have endorsed the proposition that little or no investigation was needed, but they do not say that Mr O'Donovan had not been very diligent in his investigation because of that, and it would be reading far too much into the Employment Tribunal's Judgment and into the factual matrix for this Tribunal to reach any conclusion about it other than that the investigation was what it was and it stopped where it did.

19. The other strain or track of this matter was pursued with some vigour, and Mr O'Donovan (see (the second) paragraph 11(32) of the Reasons):

> **"(32) … came to the view that the Claimant had been directly responsible for downloading the offending files. …"**

20. Consequently, after having interviewed the Appellant on 18 February 2014 Mr O'Donovan wrote to him on 18 March 2014 in these terms: "… my decision is that you will receive a Major Offence". He goes on in that letter to say that the Appellant will be summarily dismissed stating his reasons in the letter to be:

> **"… you have fully admitted to the Breach of Royal Mail IT Security Policy and from the information available to me including evidence from POSIS [Post Office Security Investigations Service] it is my belief you were also responsible for the downloading of video files of an obscene nature into your account profile."**

21. The reasoning process that lay behind that conclusion was set out in written form by Mr O'Donovan in a document titled "Rational [sic] used in reaching decision to Dismiss Mr P Choksi" (see pages 58 and 59). The most important part relating to password sharing is what is the fifth paragraph on page 58:

> **"Mr Choksi also argues that this practice is widespread. He offers no evidence to support this, and the witness statements suggest that it was widely seen as inappropriate to share passwords. In the migration to Windows 7 the importance of password protection were [sic] made clear. Even if there were others who shared passwords Mr Choksi ought to have shown leadership appropriate to his position as an MS2, which is in the upper half of our middle management structure. In some ways its [sic] similar to a motorist caught speeding who claims other people were also speeding. I consider that Mr Choksi knew full well sharing his password was inappropriate, and he is accountable for this. Of itself, I would consider this a serious matter, but one which could be dealt with using action short of dismissal."**

22. The rest of his reasoning document deals with why he concluded that it was the Appellant who had stored the files in the cloud. Under the Respondent's disciplinary procedures an appeal is provided for. It is an appeal to an independent appeal officer, who in this case was Mr Miranda. He was found by the Employment Tribunal to have reheard the case. This is not a surprising finding, given that in the notes of the appeal hearing at paragraph 3.1 he said this:

> **"The Appeal is a rehearing, that means your reasons and evidence should be complete to include material already presented at your formal conduct interview, anything you wish to expand upon and any new evidence which has come to light since then."**

23. It is perhaps entirely understandable, given that statement seems to relate to what should have been done by way of preparation for the appeal, that when the Appellant (at page 66) made reference not only to the names that he had put forward to Mr O'Donovan in support of his contention that password sharing was widespread he added two further names, those of Mr Tim Rowse and Mr Surtej Janjua. This

was in the context of what is called the Connect 2010 project. Mr Miranda seems to have been familiar with it. He asks at page 67 whether this is in the context of moving from Lotus Notes to Microsoft Outlook, and he seems to have drawn a distinction in the next part of the note between the process of managing software change and managers doing their normal day-to-day work. In the context of that, the Appellant accepted that he had no further names to put forward.

24. In his reasoning document - which starts at page 93 - Mr Miranda refers to this in paragraph 1.2 at page 94 and refers to it again in paragraph 3.15 at page 99. This reads:

> **"3.15. Although at appeal Mr Choksi originally stated that other people had shared their passwords with him, on further questioning he admitted that this was relatively recently and only because he was part of the Connect 2010 project upgrading users from Lotus Notes to Microsoft Outlook."**

25. That is how Mr Miranda seems to have approached the question of two further names. In other words, he did not think it worthwhile making further enquiries of these two employees, nor did he make any enquiries of any of the other names that had been put forward. His discussion in the appeal hearing refers to them, and he refers to them in the course of his reasoning process as set out from page 93 onwards, but at no point did he conduct anything that could be described as an investigation. To that extent it seems difficult to regard his appeal as being a rehearing in the forensic sense of that word.

26. As Employment Judge Neal found (see paragraph 11(42) of the Reasons), the Appellant and his trade union representative did not appear at the appeal hearing to have pressed this matter very hard. Employment Judge Neal records that by this stage the Appellant was feeling there was no further mileage to be gained from this. It seems clear, reading Mr Miranda's note, that he felt he had brought a wealth of experience to the appeal process. Indeed, he had a different view to Mr O'Donovan and one he expressed very trenchantly in the context of password sharing. His difficulty with what Mr O'Donovan had undertaken was that Mr O'Donovan had been both a fact-finder and a disciplinary tribunal, but his view was different to Mr O'Donovan on password sharing. At paragraph 5.16 he said this:

> **"5.16. … For the purposes of clarification, if I were to have found that Mr Choksi shared his password with colleagues, I do not agree with Mr O'Donovan's conclusion that it would have resulted in action short of dismissal."**

27. In the rest of his analysis he made it very clear that he took an adverse view of the Appellant's

credibility (see paragraphs 3.17 and 3.18), and at paragraph 3.21 he relied on his own experience, saying:

> **"3.21. I myself have been with the business almost as long as Mr Choksi, and in fact I was part of Royal Mail when computers were first introduced. I have also dealt with a number of IT cases involving information security and at no time, in any unit, has it been custom or practice to share passwords. Managers, especially those at Mr Choksi's level, are absolutely clear on the likely consequences of sharing login details."**

28. As I have already said, the extent to which Mr Miranda reheard the case is perhaps a matter of semantics, and I do not lose sight of the fact that this is a domestic disciplinary procedure and not a truly forensic process, but the relationship between Mr Miranda's appeal and the dismissal carried out by Mr O'Donovan is perhaps slightly unusual in the context of cases of this kind. This is not an example of a defect in a dismissal procedure having been cured by a later appeal; at least, it is not an example of that unless one considers that Mr O'Donovan's view that dismissal was not an appropriate sanction for the password sharing is a defect. In that sense, of course, it is cured by Mr Miranda taking a different and opposite view. One of the factors that I need to consider on this appeal is how those two opposing views bear upon section 98(4) of the **Employment Rights Act 1996** ("ERA"). Of course, I accept that Mr Miranda is entitled to bring his own experience to bear. I reiterate: this is not a judicial process. He is entitled to bring it to bear both in terms of his previous experience as a manager and in the context of his present role, which appears to be more or less the full time conducting of appeals. On the other hand, the extent to which a manager should bring his own experience to bear without testing it against the evidence of others is a factor that no doubt should be borne in mind.

29. Employment Judge Neal directed himself as to the applicable law at paragraphs 5 to 10 of the Reasons. It may be that his reference to the so-called **Burchell** test (**British Home Stores Ltd v Burchell** [1978] IRLR 379) at paragraph 10 is a little critical. He suggests that the test may not suffice in every circumstance. I would agree with that; indeed, it seems to me that the approach must always be to consider the words of section 98(4):

> **"(4) … 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."**

30. At paragraph 12 of the Reasons Employment Judge Neal does refer to section 98(4) and says that he turns to consider the statutory test:

> **"12. … in the light of submissions made in relation to the appropriate approach within the framework of what everybody agrees is a "slightly tweaked" *Burchell* case."**

It is, however, salutary to refer oneself to the words of section 98(4) rather than considering whether or not one needs to tweak the **Burchell** test in order to bring it into line with the facts of the particular case.

31. At paragraph 15 of the Judgment the Employment Tribunal reaches the conclusion that the Respondent was acting honestly in forming the belief that the Appellant had been responsible for the storage of these files in his cloud account and had been in breach of the code of conduct by password sharing. The Tribunal concludes at paragraph 16 that the Respondent had an honest belief in the culpability of the Claimant.

32. The Employment Tribunal then turns to consider the investigation and asks whether the belief had been formed on the basis of a reasonable and adequate investigation. The Employment Tribunal came to the conclusion that the investigation was adequate, although, as I have already indicated, at paragraph 39 they seem to have taken the view that there was little or no investigation needed. At paragraphs 36 and 37 the Employment Tribunal say this:

> **"36. Returning to the issue of the statutory "test of reasonableness", in relation to the dismissal of the Claimant taken as a whole, it seems to the Tribunal that, as regards the reason of "misconduct" relating to the password misuse, and taking into account the clear procedures and explicit prohibitions about "password sharing" together with the knowledge of those acknowledged by the Claimant, the decision to dismiss was one which justifiably raised serious concern for the Post Office [sic]. That being the case, the issue becomes whether the decision to dismiss the Claimant fell within the "band of reasonable responses" open to the Respondent. The Tribunal has thought about this long and hard and feels that the decision was harsh. However, that is not the test - which is to determine whether the Respondent's action was within the band of reasonable responses open to them. It would be an error of law for the Tribunal to substitute its view of what the employer should have done for what they actually did.**
>
> **37. It seems to the Tribunal - particularly having regard to the way in which the Post Office's Code of Conduct is set out, with warnings spelled out in very serious terms, and with an additional "pop up warning" given whenever a user logs in to the system - that dismissal of an employee consciously acting in breach of the code must be within the band of reasonable responses open to the employer. This is further underlined by another matter which was mentioned during the course of the hearing - which, while not in itself decisive, serves to show the line of thinking adopted by the Post Office. That was the observation by Mr O'Donavan - with which the Tribunal in this case agrees - to the effect that a person in middle-management, such as the Claimant, with many years of experience and aware of some of the consequences that can arise from a deliberate failure to follow the procedures provided for, must make dismissal a sanction falling within the band of reasonable responses."**

33. Finally, at paragraphs 39 to 41 the Employment Tribunal reaches the following conclusion:

> **"39. … as regards the admitted "password sharing" that was not the case. Whatever the shortcomings in relation to the allegation touching the video files, as regards the "password sharing" there was little or no investigation needed, since the Claimant had accepted what he had done.**
>
> **40. There was no substantive or procedural shortcoming in relation to the dismissal for misconduct on the basis of the "password sharing", and the Tribunal has formed the view that dismissal was a response falling within the band of reasonable responses in respect of that particular offence.**
>
> **41. It therefore follows that, whilst the Tribunal may think that this was a "harsh" decision, the outcome must be that the dismissal of the Claimant by the Respondent was fair."**

34. And, at paragraph 43, in the alternative, the Employment Tribunal reaches the conclusion that there would be a 100 per cent reduction in the event that it was wrong to have found the dismissal fair in relation to password sharing. The other conclusion, with which I am not concerned, because there is no appeal, is that the Respondent had been entirely reasonable both in terms of investigation and in terms of sanction to conclude that the Appellant was responsible for the presence of the files in his cloud storage and that he should be dismissed on account of it. Little needs to be said about that save that the issue of whether or not the appeal had cured the defect of relying upon evidence that did not prove that the Appellant had been responsible for the presence of the files in his cloud storage was considered by Employment Judge Neal at paragraph 23. He took the view that Mr Miranda had been "in a position to cure that defect". The rest of the analysis is that he had not in fact cured it to the extent that the dismissal could be regarded as fair.

35. It was argued by Mr Robison on behalf of the Appellant that there had been an inadequate investigation. He pointed to the fact that Mr O'Donovan appeared not to have taken the matter very far and that Mr Miranda when given two further names had really done no investigation at all but simply reached a conclusion himself. He made these points; first, that when one looked at the material it was by no means clear that the material did show that there was no password sharing. Indeed, although it did not perhaps support the proposition that everybody was involved in password sharing, there was clearly some password sharing going on.

36. Secondly, Mr O'Donovan had not been bothered to pursue employees who had left. Of itself and standing by itself that was just one aspect of the investigation, but Mr Robison put it that the finding of the Employment Tribunal about the fact that Mr O'Donovan did not feel the need to investigate, and the

Employment Tribunal itself accepted that there was not much need to investigate, characterised the extent to which an investigation was necessary. This was, submitted Mr Peacock, really the same error that had been identified by the Court of Appeal in **Whitbread plc v Hall** [2001] EWCA Civ 268 where at paragraphs 2 and 15 Hale LJ, as she then was, had identified an error of thinking that if somebody admitted misconduct it was therefore not necessary to go much further. She said this at paragraph 16:

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

37. There was also in that case an issue about the extent to which an appeal might be relevant in cases where a defect has occurred in the dismissal procedure. It really comprises the single sentence at the end of paragraph 19: "The appeal had not been a proper rehearing sufficient to cure the defect".

38. Mr Robison also relied upon the Judgment of this Tribunal in **ILEA v Gravett** [1988] IRLR 497. That was in the context of his submission that the Employment Tribunal had failed to properly consider what he described as the third limb of **Burchell**. He relied upon paragraph 14 of the Judgment, which reads:

> **"14. … The employer must prove on the balance of probabilities - more likely than not -**
>
> **(i) that he believed - again on the balance of probabilities (not beyond reasonable doubt) - that the employee was guilty of the misconduct and**
>
> **(ii) that in all the circumstances based upon knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. We use the word 'sufficient' because other relevant evidence may later come to light which may point one way or the other. Its existence will not *of itself* mean that insufficient evidence was known." (Original emphasis)**

39. It does not seem to me that is actually a criticism of an investigation in relation to a decision under section 98(4). It is, as it seems to me, more directed towards the conclusion as to whether or not misconduct had occurred. Nevertheless, I accept his proposition, even though I do not accept that the **Gravett** case is authority for it, that the sufficiency of an investigation is pervasive. It applies not only to identifying whether misconduct has occurred but also to identifying whether the background circumstances necessary to be taken into account pursuant to section 98(4) have been established with sufficient clarity. His case is that this was a partial investigation that overlooked evidence that existed and

stopped short of asking other people whose identities had been put forward either in the original disciplinary procedure or at the appeal.

40. Mr Robison had, however, another point, which emerged during the course of submissions and relates to the disagreement between Mr O'Donovan and Mr Miranda as to the correct sanction. This was not a point that was covered by the existing Notice of Appeal except insofar as it might find a home at ground 8 of the grounds of appeal, which alleges that the Tribunal had misdirected itself as to whether the decision to dismiss was a reasonable response, and the case of **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17 is cited. That does not really apply to the point that emerged during the course of argument. It is a point, as it seems to me, to which the Employment Tribunal was to some extent alert, because they referred to it in the course of their factual analysis at paragraph 11(37). I have already referred to it above, but for convenience I shall repeat it:

> **"(37) … [Mr Miranda] had little to add in respect of the "password sharing" matters other than to state that it was his view that this was such a serious offence that it would warrant a termination of employment even on a first occasion."**

41. At first sight, Mr Peacock was inclined to adopt the position that the inconsistency between Mr Miranda and Mr O'Donovan had never been raised at the Employment Tribunal, but on reflection and having considered paragraph 11(37) he accepted that perhaps the Tribunal had been alert to that point. He was prepared to accept that the grounds of appeal should be amended to include in ground 8 the following:

> **"The Employment Tribunal failed to consider that the dismissing officer, Mr O'Donovan, would not have dismissed for password sharing alone whereas Mr Miranda, the appeals officer, would have done so; this is relevant to the reasonableness of the Respondent in adopting a sanction of dismissal."**

42. Mr Peacock's argument was that this was quite clearly serious misconduct on the part of the Appellant. The findings of fact at paragraphs 11(8), 11(10), 11(11), 11(26) to 11(28), 11(30) and the first iteration of 11(31) made it very clear that the Appellant was quite clearly as a senior manager in flagrant breach of an important principle directed towards maintaining the security of the IT system. Secondly, Mr Peacock argued that the Employment Tribunal had recognised that there was a limited need for investigation given that the Appellant had admitted the misconduct. He referred to the second iteration of paragraph 11(31) in this context. Thirdly, Tribunal had directed themselves quite correctly as to the law at

paragraphs 5 to 10 and in their discussion had correctly applied the law to the facts in paragraphs 12 to 37. They warned themselves against the danger of substituting their own view for that of the employer, and that is what had directed their approach: they realised that this was, as they put it, a harsh judgment upon the Appellant, but in the ultimate analysis they had made no error. He was, after all, a senior manager, and section 98(4) **ERA** required consideration of what was reasonable and what was not reasonable in terms of the decision made by the employer to dismiss on the misconduct of the employee.

43. As to the amendment, Mr Peacock submitted that all that the disagreement between Mr O'Donovan and Mr Miranda illustrated was that this dismissal was within the band of reasonable responses. Some people might have regarded it as not necessary to dismiss in the circumstances, of which Mr O'Donovan would be an example, but others would take the view that this was serious, as Mr Miranda had done.

44. In my judgment, as always this type of case has a great deal of difficulty. I accept that although the investigation needs to be reasonable it does not need to be all-encompassing, it needs to be directed in the direction pointed to by the employee and his representatives and to consider probing the case put forward. The fact, however, is that the conclusion reached by Mr O'Donovan that there was not widespread password sharing and the same conclusion reached by Mr Miranda were not arrived at after the whole of the material had been considered. It does not seem to me, however, that that is a criticism that could amount to this being a less than reasonable investigation. Mr O'Donovan had been given names, he had discussed the matter with them, and he had reached his conclusions. It may be that others might have supplied further information, but this is an internal investigation; it is not a police inquiry, and it is not a judicial process. Had the matter stood by itself, I would have regarded this appeal as untenable.

45. What causes me pause for thought, however, is that Mr O'Donovan would not have even on the factual material that he had considered password sharing to be so serious as to warrant dismissal. Can this be cured by Mr Miranda? One only needs to state that proposition to see that it is very odd. If there had been no appeal in this case, the Employment Tribunal, as it seems to me, would have been, without Mr Miranda's appeal hearing, in the position of having to hold the dismissal relating to the storage of the files to be unfair on the grounds that it did and would have been left with the circumstance that Mr O'Donovan would not have dismissed the Appellant. In those circumstances, the dismissal would simply have been

unfair.

46. Can that be altered by Mr Miranda's subsequent appeal? It is true that there was an appeal and that the Appellant was thus putting in issue whether he ought to have been dismissed. Mr Miranda was, as it seems to me, not being unreasonable in reaching a different conclusion. It is true that he relied upon his own experience. He also appears to have thought that there were answers to some of the points that were raised - moreover, those answers made it unnecessary for him probably to investigate further - but it does seem a very odd situation that the Appellant is worse off by having appealed than he would have been had he not appealed.

47. This is a matter that strikes me as something that ought to have been taken into account by the Employment Tribunal in terms of whether or not this really was a sanction that fell within the band of reasonable responses. It was considering the dismissal; the dismissal took place in March 2014. It is of course correct that in some circumstances one should look more widely than the dismissal itself. The dismissal for some purposes is a process that includes the appeal - this was established in **West Midlands Co-operative Society v Tipton** [1986] ICR 192 - but it does not seem to me that must be so in all cases. The dismissal either substantively or procedurally could have a defect that was cured on appeal, a concept accepted by Hale LJ in the **Whitbread** case, but does that mean that a decision that would have been unfair because the dismissing officer had relied upon evidence that was not capable of proving that which he thought it proved, and in respect of the other aspect of the case he would not have dismissed, be turned into a fair dismissal because on appeal the appellate manager took a different view of the second matter.

48. In my judgment, that should have been explored by the Employment Tribunal and ought to have been considered first of all in terms of the band of reasonable responses and secondly as to whether or not if on appeal a dismissing officer takes a different and more extreme view then one can say that the dismissal that occurred earlier therefore is a fair dismissal. In my judgment, that is a concept that requires a good deal more thought than was given to it by this Employment Tribunal. Accordingly, I have reached the conclusion that there was an error of law and that this is a matter that must be remitted.