Appeal No. UKEAT/0001/11/JOJ

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 21 June 2011

Before

HIS HONOUR JUDGE McMULLEN QC

MR T HAYWOOD

MR R LYONS

ROYAL MAIL GROUP LTD — APPELLANT

MR K KELLY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SEBASTIAN NAUGHTON (of Counsel) Instructed by: Eversheds LLP Kett House Station Road Cambridge CB1 2JY
For the Respondent	MISS EMMA SMITH (of Counsel) Instructed by: Messrs Edwards Duthie Solicitors 292-294 Plashet Grove East Ham London E6 1EE

SUMMARY

PRACTICE AND PROCEDURE – Delay in Employment Tribunal judgment

UNFAIR DISMISSAL – Reasonableness of dismissal

Inexcusable delays in promulgating the Reserved Judgment and Reasons 18 months after the evidence caused a factual error but not an error of law justifying the setting aside of the badly constructed Reasons.

The Employment Tribunal did not hear a complaint that Steps 1 and 2 were not completed and should not have ruled against the Respondent on this. In any event as a matter of construction of the materials given to the Claimant, Steps 1 and 2 were met. Finding of automatic unfair dismissal set aside.

The finding of procedural and substantive unfairness was upheld as at a meeting said to be an appeal the panel interviewed all the complainants and witnesses in the absence of the Claimant and he did not know what they said. It followed that the failure of the Employment Tribunal to make a finding on Respondent's case under s98A(2) while an error of law did not vitiate the unarguably right decision.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the reasonableness of a decision to dismiss. It is the judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed. We will refer to the parties as the Claimant and the Respondent.

Introduction

2. It is an appeal by the Respondent in those proceedings against a Reserved Judgment of an Employment Tribunal under the chairmanship of Employment Judge Moore sitting at Bedford, registered with Reasons on 1 June 2010. The parties were represented respectively by Miss Emma Smith and Mr Sebastian Naughton of counsel, and we will so correct the record. The Claimant claimed unfair dismissal; the Respondent contended it dismissed him for gross misconduct having followed a fair procedure. The Tribunal upheld the Claimant's case and decided a remedy hearing would follow. The Respondent appeals. Directions sending the appeal to a full hearing were given in chambers by HHJ Peter Clark. He also directed the Employment Tribunal to answer questions relating to delay in promulgating its Judgment and in the treatment of evidence given by the Respondent's principal witness, Mr Buckley. That has been done, and we are grateful to the Employment Judge for providing those Reasons.

The legislation

3. The relevant provisions of the legislation are not in dispute, but not a single word of them was mentioned in this Judgment, so we will. Section 98 of the **Employment Rights Act 1996** provides for a reason for dismissal to be given by the Respondent (see section 98(1) and (2)), and fairness is determined by section 98(4), which provides as follows:

"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."

4. Those provisions are contained within the Act at Part X under the heading "Fairness. General". Separately inserted into this statute is section 98A, and this is headed "Procedural Fairness", and so, as a matter of construction, Parliament's drafter has delineated specifically general and procedural fairness. Section 98A provides as follows:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) one of the procedures set out in Part 1 of Schedule 2 to the Employment Act 2002 (dismissal and disciplinary procedures) applies in relation to the dismissal,

(b) the procedure has not been completed, and

(c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.

(2) Subject to subsection (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of section 98(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure."

5. The Schedule provides the statutory dispute resolution procedure, since repealed without mourning, in the following form:

"Step 1: statement of grounds for action and invitation to meeting

1(1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2(1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless—

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it."

6. There is also provision for Step 3 appeal, but no point has been taken about this.

7. The **Employment Tribunal Rules of Procedure 2004** require reasons to be given and for them to include the following matters:

"(6) Written reasons for a judgment shall include the following information—

(a) the issues which the tribunal or chairman has identified as being relevant to the claim;

(b) if some identified issues were not determined, what those issues were and why they were not determined;

(c) findings of fact relevant to the issues which have been determined;

(d) a concise statement of the applicable law;

(e) how the relevant findings of fact and applicable law have been applied in order to determine the issues; and

(f) where the judgment includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been calculated or a description of the manner in which it has been calculated."

The issue

8. The issue is whether the Respondent fairly or unfairly dismissed the Claimant, and there were subsidiary issues in relation to procedural fairness.

The decision

9. Since the majority Judgment of the Court of Appeal in **Brent London Borough v Fuller** [2011] ICR 806 it has become clear that generosity has to be extended to Employment Tribunal Judgments. Mummery LJ, said the following:

> **"26. … Tribunals with wide legal and practical experience of work situations and of the operation of unfair dismissal law have reached opposite conclusions. …Perhaps it would not be out of place to make a few general comments about these differences, which lawyers and non-lawyers sometimes find unsatisfactory, even inexplicable.**
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> **27. Unfair dismissal appeals to this court on the ground that the ET has not correctly applied s.98(4) can be quite unpredictable. The application of the objective test to the dismissal reduces the scope for divergent views, but does not eliminate the possibility of differing outcomes at different levels of decision. Sometimes there are even divergent views amongst EAT members and the members in the constitutions of this court.**
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> **28. The appellate body, whether the EAT or this court, must be on its guard against making the very same legal error as the ET stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the ET without committing error of law or reaching a perverse decision on that point.**
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> **29. Other danger zones are present in most appeals against ET decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.**
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> **30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the ET, but then overlooked or misapplied at the point of decision. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

10. He was following what he had said in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220, which is this:

> **"43. It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question - whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."**

11. It is with regret that we say this is the poorest quality Judgment, even applying Mummery LJ's majority guidance. It is the product of very substantial delay. The hearing began on 15 and 16 January 2009, submissions were heard on 21 September 2009, the Tribunal met to consider those on 14 January 2010, and the Judgment was promulgated on 1 June 2010. It is, we think, as a result of those delays, that this imperfectly written Judgment has emerged.

There are at least 50 typographical errors; many of the sentences make no sense at all. It is not right that an Appellant has to work out its appeal by inferring what the Tribunal meant, and it is not fair in this case for counsel for the Claimant in responding to this appeal to have to defend such a badly written Judgment. Nevertheless, the gist of what the Tribunal was deciding is to our mind clear.

12. The Claimant was employed by the Royal Mail as a driver from 1989 until he was dismissed on 18 January 2008 from its mail centre at Hemel Hempstead. In 2007 there was very substantial industrial unrest within the Royal Mail, including very long strikes. At Hemel Hempstead the Claimant, as a union representative, was involved in picketing; he was on strike, and there were three incidents when there was, it is said, abuse and aggression shown to those employees of the Respondent who crossed the picket line. The matters included confrontation with Kevin Cottingham, a manager, and instructions given by Mr Cottingham, lawfully, it is said by the Respondent, for the Claimant to take down certain posters that were stuck outside. These events took place on 5, 8 and 9 October 2007. The last, involving Mr Ali, was relatively insignificant; it was not itself regarded as gross misconduct by the Respondent, but the aggregate of the events was, and he was dismissed summarily.

13. The investigation into the events was imperfect, and Mr Naughton, for the Respondent, accepts there were flaws in the approach of the manager, Mr Bedi. But the principal case advanced by the Respondent was that this matter went to a full rehearing before the National Appeals Panel, set up for the regulation of discipline in this industry. As one expects in such a major employer, there is a sophisticated procedure, and in this case a panel was convened under the chairmanship of Professor Roy Lewis. Professor Lewis is a barrister, a member of the ACAS panel of arbitrators, highly experienced in employment relations, and a former

Employment Judge. He sat with persons nominated from both sides of the industry (trade union and management), and they made findings which were agreed by all of them. They divided in the outcome in that the original decision of summary dismissal was replaced by dismissal on notice. The decision to dismiss at all was the decision of Professor Lewis and Mr Adrian Buckley; Mr Mick Kavanagh from the trade union-nominated panel considered the matter was not serious enough to warrant dismissal at all.

14. The procedure adopted for the investigation of the complaints made by those crossing the picket line was that Mr Newell conducted a fact-finding interview on 17 October 2007 where the Claimant's representative, Mr Groom, was present. A further fact-finding interview was conducted by Mr Bedi, a manager at Watford, on 21 November 2007. Both of those meetings were preceded by two letters indicating the wish to interview the Claimant concerning the allegations of intimidation and using abusive behaviour towards some members of staff (10 October 2007), and a further reference on 15 October 2007 to his being continued on suspension because of "a risk of confrontation as some members of staff have made allegations concerning you intimidating them and using abusive behaviour during the recent IA issues" which, we take it, are the underlying trade disputes. He had in fact been placed on precautionary suspension for alleged misconduct, where it is said, "you are alleged to have used intimidating and abusive behaviour towards other members of staff over the period of 4 October up to and including 9 October 2007" (10 October 2007; first letter).

15. The relevance of the two fact-finding interviews goes to the contention that the Respondent failed to carry out Steps 1 and 2 of the statutory procedure. The notes which are before us reveal a description of the three incidents complained of being put to the Claimant on 17 October 2007. At the second meeting on 17 November 2007 counsel has assisted us by

indicating that there had been prior disclosure to the Claimant and his representative of all the paperwork, including five statements by complainants, each of which was the subject of detailed examination. These appear to have been the copies of the documentation which had been sent under cover of a letter on 13 November 2007.

16. As a result of this sequence of meetings, the Claimant was dismissed summarily by Mr Bedi. He appears to have viewed the matter as one relating to mitigation, and it is said without dispute that he apparently had a closed mind as to what the purpose of the investigation was: not to decide the guilt or innocence of Mr Kelly, but to hear his points about mitigation. It is accepted by Mr Naughton that the Bedi stage of the proceedings contained a number of flaws, and so reliance is placed upon the National Appeals Panel conclusion.

17. The conclusion of the Tribunal is best seen in paragraph 11 of its Judgment, which we reproduce, warts 'n' all:

> **"Dismissal is admitted in this case it follows therefore that pursuit to the *Employment Rights Act 1996* it is the Respondents who have the burden of showing the reason for the dismissal and that it is one of the potentially fair reasons contained within that section. In this case the reason alleged is a reason related to conduct. This is a case to which the statutory dismissal procedures apply and breach of those provisions by the Respondent renders this dismissal automatically unfair.**
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> **The 1st step of the statutory procedure is for the Respondents to put in writing to the Claimant the reason why they are contemplating dismissal. It is a mute [sic] point in this case whether or not that step has been complied with on balance we have concluded that the vague reference to the abusive behaviour and the need for investigations mentioned in Mr Kenyans [sic] and Mr Newell's letter are sufficiently vague so is [sic] not to apply, however, the point falls away in the fact of the very clear breach of step 2 the 2nd step requires the employer to call a meeting with the Claimant and provides that the meeting should not take place until such time as is explained to the employee the grounds for concluding in the statement his reasons on contemplating dismissal and until such time as the employee has had an opportunity to prepare. It is quite evident that Mr Beddy [sic] did no such thing. Our findings in this regard are of course confirmed by report in finding of the National Appeal Panel. It follows therefore that we find this dismissal to be automatically unfair.**
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> **We then turn our minds to the question as to whether this was a mere procedural failings [sic] or whether the dismissal was also substantively unfair. And we remind ourselves of the principal [sic] in *British Home Stores v Burchell* [1980] ICR 303. It is for the Respondents to satisfy us that they had both a genuine and reasonable belief that the Claimant was guilty of the alleged acts of misconduct. A genuine belief has its ordinary meaning of a fair and reasonable investigation. That investigation is required to be impartial and at the disciplinary hearing it is necessary for the accused employee to be able to address the question of his guilt**

or innocence. It is clear from Mr Beddy's evidence and the documents which record his conduct of his dealings with the Claimant that is [sic] important feature was never within his contemplation it is clear that he did not recognize that there was not any scope for the Claimant to do other than advance what we would recognize as mitigation. Accordingly he was never afforded the opportunity to either question his accusers in person or have questions put to them by Mr Beddy. The subsequent appeal did not satisfy the test of reasonableness when measured against the standard of the reasonable employer the panel embarked upon its task by questioning the Claimant first. It was not a process which rested on evidence either to available [sic] and the panel set about gathering evidence afresh. The Claimant was not present throughout that process and did not hear that evidence and thus was denied the opportunity of dealing with it we have found the appeal to be manifestly unfair accordingly we find this dismissal to be both procedurally and substantively unfair."

18. On its way to reaching those conclusions the Tribunal made a number of errors; one of which is to say that it heard no evidence from the appeal panel, for it said this:

"…The record of this appeal commencing (sic) at page 231 of our bundle. The panel was chaired by Mr Roy Lewis who was accompanied by a Mr Kavannah (sic) and a Mr Buckley. None have (sic) been called to give evidence before us."

19. HHJ Peter Clark, on receiving the Notice of Appeal, in which it was indicated that Mr Buckley did give evidence, directed the Judge to respond, and the Judge said this:

"The Tribunal did hear evidence from Mr Buckley there is a typographical error in the Judgment which was overlooked it was Mr Lewis and Mr Kavannah [sic] from whom we did not hear. Mr Buckley gave evidence of the appeal process. Whilst I do not have a clear recollection of the nuances of our discussion it is clear that we considered his evidence since notes made during the course of our discussion contain verbatim references to his evidence during cross examination. In reference to Mr Kelly he said 'He could not have been given a lawful order whilst not on duty' and 'I don't think Cottingham should have encroached on Kelly's space'. Manager was not a perfect model, he was stupid – no evidence that Cottingham sought to diffuse [sic] the situation."

20. It is plain that very considerable evidence was given by Mr Buckley; his witness statement is of seven pages, and the Judge's note of his cross-examination by Miss Smith extends for several pages (probably about an hour in court). He described what had gone on at the National Appeals Panel; as the Tribunal found in its conclusions at paragraph 11 Mr Buckley relied entirely upon the written report of the panel, which is some 14 pages.

21. The panel heard evidence and submissions from and on behalf of Mr Kelly. It then interviewed 15 people, including the principal complainants, and those involved in the

Cottingham event, about which there was a very substantial disagreement between the Claimant and Mr Cottingham's people. The panel then interviewed Mr Kelly again, and, as Mr Buckley made clear to the Tribunal and the Tribunal found, all of this, apart from the interviews where the Claimant himself was the subject, were conducted without him. The Tribunal found this to be manifestly unfair. We are told that this procedure no longer is operated by the Respondent and the trade unions. The decision makers in the case were the panel; it was not advisory, and it did not make recommendations. It made the decision on behalf of the Respondent, which was to dismiss with notice. The reason why there was an attenuated decision from that of Mr Bedi, who had dismissed summarily, was because the relevant procedure for dealing with trade union representatives in appendix 4 was blatantly disregarded, as the panel itself said. Nevertheless, the decision was dismissal for gross misconduct.

The Respondent's case

22. The Respondent contends first that the delay in this case is such as to strike down the Judgment. The delay is some 18 months from the beginning of the hearing, 15 January 2009, to 1 June 2010 in the promulgation of its Reasons. Acknowledging that delay is a matter of fact, Mr Naughton contends that there is a radical fault in the Tribunal's decision, and that the absence of any mention of Mr Buckley and his evidence is not a simple typographical error but goes to the heart of the Tribunal's decision-making. In the time that it was seised of this case it simply forgot about the principal witness for the Respondent, Mr Buckley, and that makes the decision wrong as a matter of law.

23. Secondly, the Tribunal is so wrong in many respects that it cannot be relied upon. Thirdly, the Tribunal made a decision without seeking the parties' submissions. This relates to the statutory procedure under section 98A(1). Mr Naughton contends, without opposition from

Miss Smith, that there was no point raised by anyone as to the breach of the statutory procedures, and the Tribunal should not have gone on to make the finding that there was a breach of Step 2. If it were an issue it should have been raised with the representatives and submissions made, and therefore the Respondent was taken aback by this decision. The finding that there was a breach of Step 2 precluded a finding in its favour on section 98A(2), which is the reverse **Polkey** [1988] ICR 142 HL and which entitles an employer on evidence being put forward where there has been merely a procedural error (by itself, as the statute says) to say that the dismissal would have occurred anyway and it would have been fair. It turns an unfair dismissal into a fair dismissal, and the Employment Tribunal failed to cite the schedule in which the Steps appear: it misunderstood the language used and made some elementary errors. On the material available here there was clearly compliance with Steps 1 and 2, and the Tribunal was wrong even if it were properly seized of this matter to make the decision which it did.

24. Finally, as in the majority of cases which come before this court and others, there is a Reasons challenge; it is said the Reasons are inadequate (see **Meek v City of Birmingham** [1987] IRLR 250). This is focussed upon the failure by the Tribunal to say what it found to be the substantive unfairness in this case, because the Tribunal in its conclusion of paragraph 11 cites both procedural and substantive unfairness. The decision should be set aside and sent to a fresh Tribunal.

The Claimant's case

25. On behalf of the Claimant Miss Smith acknowledges the imperfect wording of the Judgment, but contends nevertheless that the meaning of the Tribunal is clear. As to delay, she contends that the Tribunal has made its decision and there is no error of law in the failure to cite

Mr Buckley. She acknowledges that the Judge has said that it is a typographical error, but in any event, with the notes that we are provided and the Judge's statement that Mr Buckley's evidence was considered by the members and him together, the Tribunal had in mind Mr Buckley's evidence. Mr Buckley's evidence is essentially to describe the procedure, which is visible on the face of the report from the National Appeals Panel and does not add substantially to that.

26. As to section 98A, she is unable to say that the point was raised, but contends that the matter should have been raised by the Employment Tribunal (see **Venniri v Autodex Ltd** [2011] UKEAT/0436/07). Since the Tribunal found a breach of Step 2, it could not have decided in the Respondent's favour on section 98A(2), albeit it did not say that. In any event all of this is insignificant when contrasted with the firm finding by the Tribunal that the decision was manifestly unfair, because the failure of the NAP to accord the Claimant the right to hear the evidence of his accusers and to put questions to it or to them through the chair made it unfair as a matter of substance, and no one can say with any confidence what would have been the result had this process been carried out in the way that it ought to have been.

The legal principles

27. The legal principles to be applied in this case emerge from the following authorities. A Tribunal is obliged to give Reasons; it need not follow slavishly the sequence set out in rule 36, but it must give as much of this material as is necessary (see the Judgment of the EAT, HHJ Hand QC and members, in **Greenwood v NWF Retail Ltd** [2011] ICR 896). When a delay arises, the central question is whether there has been such delay as to set up a procedural irregularity. That in itself is a question of law; see **Bangs v Connex South Eastern Ltd** [2005]

EWCA Civ 14. It is plain that absent some irregularity a delay is a question of fact and therefore not a question of law.

28. When considering the statutory procedures, the Judgment of Elias P (as he then was) in **Alexander v Brigden Enterprises Ltd** [2006] ICR 1277 provides instructive guidance, and is as follows:

> **"37. It must be emphasised that the statutory dismissal procedures are not concerned with the reasonableness of the employer's grounds, nor the basis of those grounds, in themselves. It may be that the basis for a dismissal is quite misconceived or unjustified, or that the employer has adopted inappropriate or vague criteria, or acted unreasonably in insisting on dismissing in the light of the employee's response. These are of course highly relevant to whether the dismissal is unfair, but it is irrelevant to the issue whether the statutory procedures have been complied with. The duty on the employer is to provide the ground for dismissal and the reasons why he is relying on that ground. At this stage, the focus is on what he is proposing to do and why he proposing to do it, rather than how reasonable it is for him to be doing it at all.**
>
> **[…]**
>
> **39. It is at the second step that the employer must inform the employee of the basis for the ground or grounds given in the statement. This information need not be reduced into writing; it can be given orally. The basis for the grounds are simply the matters which have led the employer to contemplate dismissing for the stated ground or grounds. In the classic case of alleged misconduct this will mean putting the case against the employee; the detailed evidence need not be provided for compliance with this procedure, but the employee must be given sufficient detail of the case against him to enable him properly to put his side of the story. The fundamental elements of fairness must be met."**

29. A Tribunal in those days before the repeal of the Regulations and the Schedule to the **Employment Act 2002** was required to raise the issue and to decide the issue; see **Venniri** at in the Judgment of HHJ Richardson three years before the instant Judgment, which says:

> **"34. In our judgment s98A(1) of the** Employment Rights Act 1996 **is part of the essential fabric of unfair dismissal law as presently enacted by Parliament. Whether there is an applicable procedure, whether there has been "non-completion" of that procedure, and whether that non-completion is wholly or mainly attributable to failure by the employer to comply with its requirements, are matters which the Tribunal should have in mind in every unfair dismissal case. It is not necessary for a claimant to raise s98A(1) explicitly; the Tribunal should have the matter in mind as an issue.**
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> **35. Now that the statutory procedures under the 2002 Act are becoming well known, it is to be hoped that in most cases an employer will have complied with them. Often, particularly where a claimant is represented, a few moments of discussion at the beginning of a case will establish that it is conceded that the relevant procedure has been complied with by the employer. But in the absence of an informed concession on the question, the Tribunal should regard s98A(1) as an issue and deal with it in its reasons."**

30. When considering whether Steps 1 and 2 have been complied with it is not necessary for there to be a strict sequence, Step 2 following Step 1, for, as HHJ Peter Clark said for the EAT in **Homeserve Emergency Services Ltd v Dixon** [2007] UKEAT/0127/07:

> **"15. The hearing in this case preceded judgement being given on behalf of the EAT by Underhill J in *YMCA v Stewart* [2007] IRLR 185. At paragraph 11 of that judgment, Underhill J made clear that although the statutory procedure refers to step 1 and step 2, it is not a requirement that the step 2 events should follow the step 1 letter. It seems to us that the matters set out in step 1 may precede or come at the same time as, or post date, the step 1 letter. Thus when, in paragraph 10 of their reasons, the Tribunal note that the Claimant was provided with nothing beyond the letter of invitation until the case against him was presented at the disciplinary meeting, it seems to us that they fell into error in considering that something must take place between the step 1 letter and the disciplinary hearing."**

31. There has been a discussion about the depiction of mistakes as being procedural or substantive, and guidance as to this was provided by Elias J and members in **Software 2000 Ltd v Andrews and Ors** [2007] UKEAT/0533/06, when he said this:

> **"40. The distinction between procedural and substantive matters had not earlier found favour with the Court of Appeal. In *O'Dea v ISC Chemicals Ltd* [1996] ICR 222, 234-5 Gibson LJ had in terms stated that he found the distinction 'unhelpful', although the concept of 'procedure' is now one which will need to be defined since it occurs in s.98A(2).**
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> **41. In *Lambe v 186K Ltd* [2005] ICR 307, para 59, Wall LJ, with whose judgment Butler Sloss and Laws LJJ agreed, whilst sharing the view that it was not helpful to distinguish between substantial and procedural failings, nonetheless approved the passage from Lord Prosser's judgment which we have italicised, saying that it provided a 'straightforward and sensible yardstick' for Tribunals.**
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> **42. It is pertinent to note that in the *Lambe* case there were both defects in the process of selection and an absence of consultation, but the Court of Appeal held that the Tribunal was entitled to conclude that the dismissal would have taken place at the end of the consultation period in any event.**
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> **43. In *Gover v Property Care Limited* [2006] EWCA Civ 286; [2006] 4 All ER 69 the Employment Tribunal found that there were fundamental failings in the way in which the employers sought to bring about changes in employment contracts. This led to constructive dismissals and a finding of unfair dismissal by the Tribunal. But it was held that even if proper consultation had occurred, the employees would not have accepted the fundamental changes which the employers were seeking to introduce into their contracts, and that all they had lost was the period during which consultation would have occurred, which the Tribunal found to be four months.**
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> **44. In the course of giving judgment Buxton LJ in turn cited with approval the italicised passage in *King v Eaton (no.2)* [1998] IRLR 681, and added that the fact that the issue was a matter of impression and judgment for the Tribunal 'indicates very strongly that an appellate court should tread very warily when it is being asked to substitute its own impression and judgement for that of the Tribunal….' (para 22). He also observed that the *Polkey* approach - assessing what would have happened had the dismissal been fair - was wholly consistent with the principle of assessing loss flowing from the dismissal on a just and equitable basis, which is the principle underlying section 123. These should be approached as "a matter for the common sense, practical experience and sense of justice of the Employment Tribunal sitting as an industrial jury" (para 14). He also approved the way in which HHJ McMullen QC had**

described the process in the EAT in that case (para 26) where the judge had said that the Employment Tribunal's task was 'to construct, from evidence not speculation, a framework which is a working hypothesis about what would have occurred had the [employer] behaved differently and fairly.'"

Discussion and conclusions

32. Applying those authorities, we must first deal with delay. This is quite shocking and inexcusable. From what the Judge has written it is a combination of maladministration by the Employment Tribunal, of poor service by the Tribunal, and poor case management by the Judge. There is no reason why parties should wait so long. The Claimant was dismissed in January 2008 and did not learn his fate until June 2010. The standard practice throughout the country in courts is for three months to be vouchsafed for the presentation of reasoned Judgments following the closure of the oral hearing or, if later, submissions. It is extended by **Kwamin v Abbey National PLC** [2004] IRLR 516 in the Employment Tribunals and the Employment Appeal Tribunal to three-and-a-half months, taking account of the unique constitution of both of these jurisdictions, consisting as they do in each case of a lay, part-time majority judiciary. Using whatever yardstick is relevant the delay here is inexcusable.

33. The real question is whether it constitutes grounds for finding an error of law. The one identified to us is the absence of mention of Mr Buckley. With respect to the Judge, we do not consider he is right in suggesting this was a mere typographical error. The language of the passage we have cited indicates an unfamiliarity with the witness, describing him as "a Mr Buckley." But the Judge has assured us his evidence was fully considered by the Tribunal members when it met. It is regrettable that there is no mention of him. As the Judge says, he gave evidence of the appeal process, and, with the assistance of the notes which he has produced for us and references by Miss Smith to the notes taken by her pupil, it is clear

Mr Buckley did give evidence of the appeal process and of the decision-making on the merits, at least not in any way different from that which is recorded in the decision of the NAP.

34. It was an error not to have mentioned the primary vehicle used by the Respondent for the presentation of its case against unfair dismissal, which was Mr Buckley attesting to the NAP report; but it is not such an error as would cause this decision to be set aside. We can see what Mr Buckley said, and we can see that the central finding by the Tribunal was not dependent upon a decision being made by the Tribunal about what Mr Buckley said at the hearing. In any Judgment of an Employment Tribunal there is bound to be a reference to the principal decision-maker of the Respondent, who is usually called before it to explain; here, there was the report of the NAP and a live witness who in fairness should have been mentioned. We have great sympathy with the Respondent in that there was no mention of him, but it is not an error of law; it is unfortunate and regrettable.

35. Turning to the statutory procedure, Miss Smith is right to draw our attention to **Venniri** and what HHJ Richardson said, but it will be recalled that in our case there was representation. It is good practice for the parties with the Tribunal at the start of a case to outline the issues if that has not already been done. This was a very simple case; Tribunals have been dealing with this kind of problem (misconduct) for 40 years. It should have flagged up if there was a point taken on the statutory procedure that it was to decide. No point was raised by the Claimant as to a breach of the procedure. Consequently, Mr Naughton confidently put forward his submission in relation to section 98A(2). If he knew that he was going to have to fight a contention under section 98A(1) he would have dealt with it. It is common ground that he made submissions in relation to 98A(2) and neither counsel made submissions in relation to section 98A(1).

36. Why did the Tribunal decide it? We agree with HHJ Richardson that in the days during the existence of this regime Tribunals should have been alert to it, particularly where there are criticisms of the procedure. When he said that it is an issue to be decided he did not mean the Tribunal goes off and decides it itself; it is itself to raise it as an issue and to make sure the parties understand that it is to be decided by it. The Tribunal did not do that in this case, and this was a breach of procedure; a material irregularity. A finding has been made that there was a breach of Step 2 without the opportunity being given to the Respondent to challenge it. It is arguable that there was a finding about Step 1, but Miss Smith on careful reflection cannot assert that there was a breach; it is neutral. On the other hand, there is a clear finding of a breach of Step 2.

37. As to that the Tribunal is wrong. The material to be advanced can come before the meeting, and logically there is a Step 1 letter, there is production of the grounds, and then there is a Step 2 meeting. We have looked with care at the material which was forthcoming to the Claimant by the time of the second fact-finding meeting. It came partly in the disclosure letter of 13 November 2007 and, as we have been taken through the notes of the interview on 22 November 2007 before Mr Bedi, it is clear that the Claimant had an extensive insight into what was being put against him. It cannot in our judgement be said that this failed to meet the requirements of Step 2, which are elementary. There is extensive examination by the Claimant and his representative of the material provided by the complainants, and this in our judgement satisfies the requirements of Step 2. We consider this is a matter of construction, which it is open to us to take. We look at the material that was available and we see whether it fits the contours of Step 2 under the Schedule, and in our judgement it plainly does, applying as we do the guidance in **Alexander**. This finding of automatic unfair dismissal is therefore set aside.

38. We turn then to section 98A(2). Mr Naughton complains with no sense of theatre that his clients have been short-changed as a result of the findings by this Tribunal. This was a straightforward submission to make. It was an easy answer for the Tribunal to give; that is, having decided a breach occurred of Step 2, section 98A(2) is not available to the Respondent to rescue it. Now that we have found the error in the Step 2 finding, section 98A(2) arises. This arises, we hold as a matter of construction, only in relation to procedural fairness. That is the subtitle in the chapter of the statute and it is also a reflection of the words "by itself" in section 98A(2). So the starting point, and indeed the finishing point, is that there must be a procedural error. In this case the Tribunal identified procedural errors in the Bedi procedure and in the NAP procedure, but it went further than that; it depicted the error at the NAP as manifestly unfair. We consider that there is a useful distinction to be drawn between procedural and substantive errors. In a case where it cannot be said what the outcome would be had the employer got it right this issue arises and it becomes substantively unfair. This is not a technical mistake by the employer but something that goes to the heart of the decision-making.

39. All of us consider the procedure adopted by the National Appeals Panel is extraordinary. However, notwithstanding our unique constitution here, that is not our role; it is the role of the Employment Tribunal. The Employment Tribunal, constituted by statute of people experienced in employment relations, are the national experts on employment procedures. What we think about them is entirely secondary to the expertise that they bring, and when a Tribunal says this is a procedure that is manifestly unfair it is to be given very substantial credit for the investment of its expertise in that decision. But as we say, secondarily we take the view that if 15 witnesses are interviewed not by the investigating body but the decision-making body without any input or any indication from the Claimant about what they are saying that is capable of

being manifestly unfair; not simply a technical breach of a procedure, but something going to the heart of the case. We cannot reconstruct what would occur had Mr Kelly listened to the evidence of these people. True it is, as Mr Naughton says, that Mr Kelly accepted that some of his conduct was inappropriate, but there is at least in one case, the Cottingham matter, a very substantial dispute of fact. As we visualise it, Mr Kelly gave his account, the panel went and interviewed Mr Cottingham and those associated with him (we do not know what they said to the panel, but, more importantly, Mr Kelly had no opportunity to challenge it), and then Mr Kelly was asked some further questions.

40. In our judgment there is no error of law in the Tribunal's approach; it was within the wide range of decision-making open to it to criticise the NAP as falling below the standards of a reasonable employer, and it is unusual in our experience for the investigation and the decision-making to be done by the same body. If this was an appeal, it was an extraordinary process; it does not look like an appeal, and if it was a rehearing then it did not take place in front of the Claimant. In our judgment there was no error in the Tribunal depicting this as substantively unfair; in which case the rightful complaint of the Respondent that there is no finding in relation to section 98A(2) falls away, because, as we have said, that applies only to a defect in procedure by itself. The appeal is dismissed, although the part of it relating to automatic unfair dismissal is allowed.