Case No: A2/2009/2700

Neutral Citation Number: [2011] EWCA Civ 62
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
UKEAT/0506/08/SM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 1st February 2011

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE AIKENS

- -

Between :

TREVOR ORR	**Appellant**
- and -	
MILTON KEYNES COUNCIL	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Richard O'Dair (instructed by Fisher Meredith Llp) for the **Appellant**
Mr Simon Cheetham (instructed by Milton Keynes Council, Legal Services) for the **Respondent**

Hearing date: Wednesday 24 November 2010

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Judgment
As Approved by the Court

Lord Justice Sedley:

1. The question at the heart of this appeal is whether an employer, when considering dismissal of an employee for misconduct, is to be taken to know exculpatory facts which are known to the employee's manager but are withheld from the decision-maker. This question in turn touches on some larger questions about the law of unfair dismissal.

2. Although the case has a complex history, the essential sequence is the following. Mr Orr, the appellant, who is black and of Jamaican origin, was employed by the respondent council as a part-time youth worker from 2002. On 17 October 2005, in breach of the express instructions of his manager, Peter Madden, the appellant had discussed with some young people at a community centre a sexual assault which had recently taken place. Three days later, in the course of a discussion about working hours, the appellant had become rude and truculent towards Mr Madden.

3. A disciplinary hearing was conducted on the respondent council's behalf by a group manager, John Cove, who found that both allegations were established and that each amounted to gross misconduct. Mr Orr was dismissed by reason of both incidents. I will return at the end of this judgment to the significance of this. For the present it is necessary to note that, while the evidence against Mr Orr came in significant part from Mr Madden, and while Mr Orr for various reasons took no part in the hearing, the propriety of Mr Cove's conclusions on the material before him is not challenged. The same is the case in relation to the internal appeal against this decision, at which Mr Orr was represented but which failed.

4. Mr Orr then brought unfair dismissal and discrimination proceedings against the council. An employment tribunal sitting at Bedford found that the dismissal was fair; but it also found that there had been unlawful discrimination because a female white comparator had been treated more leniently in analogous circumstances. Mr Orr's appeal to the EAT on the inconsistency of the unfair dismissal finding with the discrimination finding resulted in a remission of the entire case.

5. A second employment tribunal sat at Bedford for five days in March and April 2008, and finally on 29 August promulgated a determination (its text deplorably riddled with uncorrected typographical errors) which

    a) found that what had sparked the altercation on 20 October 2005 was an underhand attempt made by Mr Madden to reduce Mr Orr's working hours without his agreement;

    b) found that in the course of the altercation, when Mr Orr, being upset, had begun to use Jamaican patois, Mr Madden had said: "You lot are always mumbling … I can't understand a word you lot are saying";

    c) held without opposition that the latter amounted to direct race discrimination;

d) but held that the dismissal was nevertheless fair and non-discriminatory because

(i) it was a reasonable response to what was known to the dismissing officer at the time, and

(ii) there was insufficient similarity between Mr Orr's case and those of the two comparators on whose more lenient treatment he relied.

6. Mr Orr appealed once more to the EAT (Judge Hand QC, Mr G Lewis and Mr R Lyons), whose judgment - [2009] UKEAT/0506/08/SM – describes the procedural history in detail. For reasons which the judgment spells out, the EAT concluded that the tribunal's favourable finding of fact which led to its finding of discrimination could neither be imported back into the disciplinary proceedings so as to render them unfair nor relied on so as to render the dismissal which followed them unfair.

7. From this summary I turn directly to the issues before this court, which have been considerably narrowed. In relation to them we have had the assistance of informed and focused submissions from Richard O'Dair and Simon Cheetham, for which the court records its gratitude.

8. For the appellant, Mr O'Dair limits his case to the situation in which *at the time of the disciplinary hearing* facts are known to the employer, albeit not to the decision-maker, which exonerate the employee or mitigate his offence. He distinguishes this from the equally problematical but legally different situation in which exonerating or mitigating facts become known *after* the disciplinary process has been completed. Given the fact findings in this particular case, Mr O'Dair submits that the council as a matter of law knew, through Mr Madden himself, that Mr Orr's behaviour in the second incident had been provoked by Mr Madden's own underhand conduct. That the council's disciplinary officers did not in fact know this, thanks to Mr Madden's concealment of it, does not legally (or for that matter morally) matter.

9. Mr Cheetham submits that this is to let legal fiction supplant reality: the reality was that neither the respective decision-makers nor the council itself knew what a tribunal more than two years later found to be the truth. To impute knowledge of it to them, and thereby to stigmatise a conscientious and careful decision as unfair, is, he says, neither morally nor legally right.

10. It is necessary first to look at the governing legislation. For present purposes this lies in a very small compass. Section 98 of the Employment Rights Act 1996, as amended, provides by subsections (1) and (2) that in a case such as the present it is for the employer to show that the employee has been dismissed for a reason relating to his conduct. Once this is established, subsection (4) provides:

> "…. 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.

11. Although it is not at the centre of the argument put before us, it is right to observe that the meaning of these provisions is both problematical and contentious, notwithstanding that this or a very similar formula has been on the statute book since its first enactment in s.24(6) of the Industrial Relations Act 1972, which introduced the concept of unfair dismissal. In the first years of the legislation[1] it was generally supposed that the employment tribunal sat as what Phillips J in *Grundy v Wills* [1976] ICR 323 called a special jury, taking its own non-technical approach to the question whether in all the circumstances the dismissal had been fair: see in particular *Earl v Slater and Wheeler (Airlyne) Ltd* [1972] ICR 508. The shift from this approach to a *Wednesbury* rationality test has been controversial, not least because it seems to have originated in a note in the Industrial Cases Reports of an EAT decision, *British Home Stores v Burchell* [1980] ICR 303, in which the employer was represented by counsel of great distinction, the employee did not appear at all and was not represented, and the single authority cited by the court had to do with the standard of proof. *Burchell* has nevertheless acquired authoritative status, initially through its approval (as an unreported case) by this court in *Weddel and Co v Tepper* [1980] ICR 286, and more recently by its endorsement in the judgment of Mummery LJ in *Foley v Post Office* [2000] ICR 1283. Mummery LJ there gives a much fuller account than I have done of the course taken by the caselaw over time. In the course of it he notes the (to my mind) cogently reasoned decision of Morison J, sitting in the EAT, in *Hadden v Van Den Bergh Foods Ltd* [1999] ICR 1150, §25, but holds it to be unsustainable in the light of binding authority. We for our part are bound by the decision in *Foley.*

12. This being so, we cannot resolve the textbook problem of the fairness of a properly conducted dismissal for a theft of which the accuser has himself been subsequently convicted; nor therefore the question, which Mr O'Dair must reserve, of Mr Orr's having been dismissed for an altercation which it later turned out had been caused by the manager responsible for his dismissal. But it is relevant to the question we do have to resolve that both problems, like the present problem, take the court back to the words of s.98(4)(b).

13. Put concretely, what are the equity of the situation and the substantial merits of an unfair dismissal claim where it turns out that the employee's manager knew of exculpatory facts and withheld them from the decision-maker? These are not, it should be noted, things which s.98(4)(b) merely requires to be taken into account. They are the prescribed statutory test, in addition to the sufficiency of the reason, by which the fairness or unfairness of a dismissal is required to be tested.

14. Mr O'Dair postulates analogous instances where it would be a reproach to the law not to find a dismissal unfair. A female secretary admits that she has struck and abused the male senior executive for whom she works; she says that he was sexually harassing her; he says it was she who was trying to seduce him, and is believed. So long as the dismissal process was fair, the secretary has no unfair dismissal claim and

[1] See the appendix to the judgment of Lord Justice Aikens.

cannot create one by asserting that the executive was lying. But she still has a sex discrimination claim. If in establishing that claim she satisfies a tribunal that she has been telling the truth all along, it may be that in the present state of the law she still cannot assert that this by itself made the dismissal unfair; but why does it not lie within the four corners of *Foley* to assert that the employer, through the mendacious executive, knew *at the time of dismissal* that she was telling the truth? Bringing the question closer to the present case, could there have been any answer to the claim if Mr Madden himself had carried out the dismissal?

15. Mr Cheetham's case, which turns on simple factual knowledge without legal overlay, means that in the last example the claim would stand up. Why not then in the present case? Because, says Mr Cheetham, there is no basis beyond a legal fiction for imputing Mr Madden's knowledge to the council which employed him, much less to another officer exercising its powers. What is more, to allow this to be done would undermine the entire doctrine of *Foley*: a dismissed employee would only have to assert that the evidence given against him or her was known by the witnesses themselves to be false in order to reopen the entire disciplinary process and shift the decision from the employer to the tribunal. Thus Mr O'Dair's argument proves too much.

16. Mr O'Dair, recognising the force of this, limits his case to knowledge held at a sufficient level of seniority to make it the council's knowledge. Here, for example, he says that what Mr Orr's manager did, said and knew in the course of managing him was done, said and known on the council's behalf. In that deliberately restricted sense it is factually as well as legally right to attribute it to the council. It means, no doubt, that a bona fide decision can be undone through no fault of the decision-maker, but that is a price which both equity and the substantial merits of the case make it fair for an organisation to pay.

17. If the law was as it was thought to be in the early years of the legislation and the tribunal, albeit required to respect properly taken decisions, not constrained by a *Wednesbury* test, there would be little standing in the way of Mr O'Dair's argument. But even given the doctrinal *Burchell* / *Foley* restraint, the legislation throws up paradoxes. The classic one, illustrated both by this case and by the hypothetical example I have given, is that the very same factual issue as led to the dismissal may be independently justiciable in a discrimination claim arising in the same tribunal out of the same facts. How, one asks, can a system of justice be asked to ignore for one purpose what it has found to be the truth for another?

18. The paradoxes go further. If a pure unfair dismissal claim based on the assertion that the claimant's manager knew that the ground of dismissal was false has to be struck out as not maintainable, why ought not the same to be true of an unfair dismissal claim brought alongside a discrimination claim? In other words, if Mr Cheetham is right, Mr Orr's unfair dismissal claim could and should have been struck out or dismissed without regard to the facts. Mr Cheetham not only acknowledges this outcome; he convincingly defends it as a discipline demanded of tribunals by statute and caselaw. Thus dismissal is primarily a matter for the employer, while discrimination is primarily a matter for the tribunal.

19. In my judgment, the *Foley* doctrine does not affect the narrow question put before us, which relates not to the fairness of what the employer has done but to what the

employer knew when doing it. I would hold that a person to whom a corporate employer deputes a decision about dismissal not only decides but inquires on behalf of the employer. In so doing, he or she has to be taken to know not only those things which he or she ought to know but any other relevant facts the employer actually knows. Among such facts, it seems to me, are facts known to persons who in some realistic and identifiable way represent the employer in its relations with the employee concerned. If, as would seem inescapable, relevant things known to a chief executive must be taken to be known to both the corporation and its decision-maker, the same is likely to be the case as the chain of responsibility descends. It is equally likely not to be the case when one reaches the level of fellow employees or those in more senior but unrelated posts. The elements mentioned in s.98(4)(a) – the size and administrative resources of the employer's undertaking - may well have a bearing here. All of this appears to me to be doing no more than putting practical flesh on the doctrinal bones laid out by Lord Hoffmann in the *Meridian* case [1995] 2AC 500. The principle is that where neither express authority nor vicarious liability affords an answer, attribution of the personal to the corporate depends on what one can call institutional intent.

20. I do not understand there to be any contest that, if Mr O'Dair is right on this issue, it was not open to the tribunal to hold that it was fair to dismiss Mr Orr on the ground of the second incident. But before we can reach that outcome, Mr Cheetham points to two further problems.

21. One is that there are insufficient findings about Mr Madden's status within the council and his rôle in relation to Mr Orr to enable this court to reach a reliable conclusion as to whether what is now held to have been within his knowledge should be imputed to the council. I agree with this, and would accordingly – and subject to the next issue – remit the case to a fresh tribunal for decision on this question.

22. The second problem is that Mr Orr was dismissed for not one but two acts of misconduct. The letter of dismissal dated 26 May 2006 makes discrete adverse findings and goes on:

> "It is my view that your conduct on each occasion was such that it indicates that you no longer intend to be bound by your duties and destroys the confidence that Milton Keynes Council can have in you as an employee."

23. The second employment tribunal dealt with the two allegations as one. But the EAT at §54 said this:

> 54. Even if we are wrong as to that, we do not accept Mr Harding's submission that the second employment tribunal should have looked again at the 17 October incident. In our view Mr Cheetham is quite right to say that the employer regarded both incidents as gross misconduct and that each would be sufficient to justify dismissal. Nor do we accept Mr Harding's argument that if dismissal by reason of race discrimination can be sustained that provides a basis for unpicking the second employment tribunal's decision that there were two incidents of gross misconduct, both of which justified

> summary dismissal as a reasonable sanction. In our view it is a non sequitur to say that if events of 20 October can be regarded as "tainted" by race discrimination so that any dismissal based on them must also constitute race discrimination, that would mean that gross misconduct on 17 October, which had no component of race discrimination, could no longer be regarded as a reasonable basis for summary dismissal. The appeal cannot succeed in relation to unfair dismissal and must be dismissed.

24. I do not consider, however, that this is dispositive of the case in the form in which we are now dealing with it. The employer undoubtedly did consider that each incident by itself merited dismissal. But it was for the tribunal to say whether that was fair. Where there are two concurrent grounds of dismissal for misconduct, a tribunal is quite entitled to hold that, were it not for the second, the employer would not have been acting reasonably in treating the first as sufficient grounds for dismissal.

25. For my part I would accordingly allow this appeal and remit to an employment tribunal the questions

    (a) whether Mr Madden's knowledge that it was he who had provoked the altercation with Mr Orr on 20 October 2005 is to be imputed to the respondent; and

    (b) whether, if so, the dismissal of the appellant for the incident on 17 October 2005 alone was fair.

26. Since, however, the other two members of the court have reached a different conclusion, let me respectfully explain why I do not agree with their respective (and partly differing) reasons for doing so.

27. Both Lord Justice Moore-Bick and Lord Justice Aikens take the view that there is no way of imputing to the respondent corporation Mr Madden's knowledge that it was he himself who had provoked Mr Orr into the second episode of misconduct. It appears to me, with respect, that this depends upon the legal significance of facts which have so far not been established. The passages cited by my Lords from the judgment of the Privy Council delivered by Lord Hoffmann in the *Meridian* case do not afford the answer: they establish simply that in the case of an employee who is neither explicitly authorised to speak for the corporation nor one for whom the corporation is vicariously liable, the question is whether he or she is a person whose acts are intended to be those of the corporation.

28. The one thing we do know about Mr Madden is that he had the council's authority to manage Mr Orr. In that capacity, it is cogently arguable that anything he knew about Mr Orr's performance of his duties was in law known to the council. So, logically, was anything he knew about his own management of Mr Orr. While I have concluded that this is, even so, something which has to be properly investigated and decided, it seems to me entirely possible that it will be found that the relevant things which Mr Madden knew were known to him in his capacity as Mr Orr's manager and in that relevant sense were known to the council.

29. If this is so, the fact that these things were not known to Mr Cove is, with respect, irrelevant. Mr Cove, too, was a person acting in the name of the council. The appellant's case does not involve imputing Mr Madden's knowledge to him; it involves imputing it to the council, for it is what the council knew and did which determines whether the dismissal was fair or not. The relevant state of mind is not, with great respect to Lord Justice Aikens, the "real reason" for the dismissal. It is the totality of information which the employer holds when deciding whether or not to dismiss an employee. No corporation, and certainly not a public law body such as the respondent, can ordinarily plead that its left hand did not know what its right hand was doing. Nor, with respect, am I able to agree that the 19th-century doctrine of *In re Hampshire Land* [1896] Ch 743 which protects employees from the equivalent of a duty of self-incrimination has any bearing on the present branch of modern employment law.

30. It is here, if anywhere, that the elephant in the room – s.98(4)(b) – is capable of playing a positive role. If, as Lord Justice Aikens says, to dismiss a man for misconduct which his manager privately knows was of the manager's own making seems contrary to equity and merits, there are two possible ways in which s.98(4)(b) might come to the employee's aid. One is to treat the provision as a filter or fallback, a requirement for a final look. But Lord Justice Aikens conclusion on this limb of the case highlights the near-impossibility, at least in the present state of authority, of doing anything about it if a final look shows the result to be unjust. The other is to read the provision back into the antecedent provisions of s.98, so as to enquire, for example, whether the decision to dismiss was not only procedurally but substantively fair. But to do this is likewise to challenge the body of authority which now binds us at this level.

31. This is why, in the reasoning which has brought me to my conclusion at §25 above, I have not sought to domesticate the beast but have done what is proverbially done when there is an elephant in the room, namely ignore it. Only a higher court can say now whether there is more to s.98(4)(b) than Lord Simon of Glaisdale felt able to see in it in *Devis v Atkins* [1977] AC 931, which was a wide construction of "reasonably" (a formula which, with great respect, could be used to justify a band of possible decisions broad enough to encompass what a tribunal views as substantively inequitable and unmeritorious dismissals).

32. I recognise that the facts of this case may not be an ideal vehicle for such a decision (particularly in the light of Mr Orr's non-participation in the initial disciplinary hearing), and that the issue of principle is itself far from clear-cut, raising as it does the risk of tribunal hearings being turned into surrogate disciplinary hearings. But none of these issues has to be resolved in order to accept Mr O'Dair's carefully limited submission which, for the reasons I have given, seems to me to be sound in law and potentially viable on the facts.

Lord Justice Moore-Bick:

33. The background to this appeal has been described by Sedley L.J., whose account I gratefully adopt. It may be helpful, however, if I begin this judgment by identifying what I regard as the critical facts found by the employment tribunal whose decision was promulgated on 29th August 2009.

34. The appellant, Trevor Orr, is of Jamaican origin. He was employed by the respondent, Milton Keynes Council ("the Council"), as a part-time youth worker until he was summarily dismissed for gross misconduct on 26th May 2006. The events which led to Mr. Orr's dismissal occurred on 17th and 20th October 2005. On 17th October 2005 he discussed with some young people at one of the community centres where he worked allegations of a recent sexual assault, despite having been expressly instructed by his team leader, Peter Madden, not to do so. On 20th October 2005 Mr. Orr had a discussion with Mr. Madden about working hours, in the course of which he lost his temper and behaved in an offensive and insubordinate manner. However, Mr. Madden himself was not entirely blameless, first, because he had gone behind Mr. Orr's back in seeking to engineer by devious means a reduction in his working hours and, second, because in the course of their discussion he had said to Mr. Orr, who in the heat of the moment had lapsed into Jamaican patois, "You lot are always mumbling on and I cannot understand a word you lot are saying." The Council accepted that the use of those words constituted an act of direct unlawful discrimination.

35. The Council appointed a senior manager, Mr. John Cove, to oversee the disciplinary process. He appointed another member of staff, Mr. Rob Ward, to carry out an internal investigation into the allegations against Mr. Orr . He then conducted a hearing himself at which he heard evidence from various witnesses, including Mr. Madden. He did not hear from Mr. Orr because he declined to attend the hearing. Mr. Madden did not describe the circumstances which led to his discussion with Mr. Orr about working hours, nor did he mention the fact that he had made the discriminatory remark mentioned earlier.

36. Mr. Cove found that both allegations of misconduct had been established and that each of them was sufficient to constitute a sufficient ground of dismissal. He wrote to Mr. Orr on 26th May informing him of his findings and of the decision to dismiss him with immediate effect. Mr. Orr appealed against that decision, but his appeal failed. He subsequently made a claim for unfair dismissal and unlawful discrimination. The tribunal found that the level of investigation was reasonable in the circumstances and that the conduct of the disciplinary process had been reasonable and fair. It found that on the basis of the evidence before it the Council genuinely and reasonably believed that the allegations made against Mr. Orr were well-founded. Dismissal fell within the band of reasonable responses and accordingly was not unfair.

37. Section 98 of the Employment Rights Act 1996 ("the 1996 Act") provides, so far as is material, as follows:

> "(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 . . . 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—

(a) . . .

(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."

38. It will been seen that although subsection (4)(b) contains the approach to be adopted when determining whether the dismissal is fair or unfair, it is subsection (4)(a) that contains the essential criterion, namely, whether the employer acted reasonably or unreasonably in treating the reason he has shown for dismissing the employee as sufficient justification for it. (As Lord Simon of Glaisdale put it in *Devis & Sons Ltd v Atkins* [1977] A.C. 931 at 959B-C, "the reference to "equity and the substantial merits of the case" merely shows that the word "reasonably" is to be widely construed"). An employee who considers that he has been dismissed unfairly may complain to an employment tribunal which must determine whether the dismissal was or was not unfair.

39. The statutory provisions relating to unfair dismissal have undergone some alterations in wording since they were first introduced by the Industrial Relations Act 1971, but in my view the changes are of no significance and the authorities on the meaning and effect of the earlier forms of the legislation have been uniformly accepted as persuasive and, where appropriate, binding in relation to later forms. One of the early decisions which has assumed considerable importance is that of the Employment Appeal Tribunal in *British Home Stores v Burchell* [1980] I.C.R. 303. That was a decision on the effect of Schedule 1, paragraph 6(8) of the Trade Union and Labour Relations Act 1974 which provided, so far as material, as follows:

> " . . . the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee."

40. Arnold J. delivering the decision of the EAT explained the function of the industrial (now employment) tribunal to which a complaint of unfair dismissal has been made in the following way:

> "The case is one of an increasingly familiar sort in this tribunal, in which there has been a suspicion or belief of the employee's misconduct entertained by the employers; it is on that ground that dismissal has taken place; and the tribunal then goes over that to review the situation as it was at the date of dismissal. The central point of appeal is what is the nature and proper extent of that review. We have had cited to us, we believe, really all the cases which deal with this particular aspect in the recent history of this tribunal over the past three or four years; and the conclusions to be drawn from the cases we think are quite plain. What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

41. The decision in *Burchell's* case was considered by this court in *Weddel v Tepper* [1980] I.C.R. 286, another decision on the Trade Union and Labour Relations Act 1974, in which an employee had been dismissed for dishonesty. The industrial tribunal found that although the employer genuinely believed on reasonable grounds that the employee was guilty of dishonesty, it had not given him a sufficient opportunity of refuting the allegations against him and that his dismissal was therefore unfair. Having cited with approval the passage from the formulation of the principles set out by Arnold J. in *Burchell's* case, Stephenson L.J. said at page 297:

> "Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And, it seems to me, they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the industrial tribunal in this case, "gathered further evidence" or, in the words of Arnold J. in *Burchell's* case, post, p. 303 "carried out as much investigation into the matter as was reasonable in all

> the circumstances of the case." That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably."

42. Waller and Cumming Bruce L.JJ. both also approved the formulation in *Burchell's* case.

43. The principles identified in *Burchell's* case were considered again in *Monie v Coral Racing Ltd* [1981] I.C.R. 109 (another case on the Trade Union and Labour Relations Act 1974), in which the employer reasonably suspected two employees of dishonesty but did not have sufficient evidence to enable it to form a firm belief in the guilt of either. The appellant relied on *Burchell's* case for the proposition that nothing short of belief in the employee's dishonesty would do. This court rejected that submission, however, and Stephenson L.J. warned against treating *Burchell's* case as providing a universal test (see page 127B-C). However, that warning was not, in my view, intended to cast doubt on what had been said in *Burchell's* case concerning the essential nature of the employer's duty, in particular in relation to the importance of conducting an investigation into the facts that is as full and fair as is reasonable in the circumstances.

44. The approach taken in these cases to the determination of the fairness of the dismissal concentrates on the conduct and state of mind of the employer immediately before and at the time of the dismissal. In substance it requires one to ask whether, when he took the decision to dismiss the employee, the employer had taken all reasonable steps to inform himself of the facts, whether, having done so, he formed the view on reasonable grounds that the employee had behaved in a way that justified his dismissal and, finally, whether his conclusion that the conduct justified dismissal was itself reasonable. In *Iceland Frozen Foods Ltd. v. Jones* [1983] I.C.R. 17, 24F-25D Browne-Wilkinson J., giving the decision of the EAT which has subsequently been approved by this court, held that in deciding the last question it is necessary to determine whether in the particular circumstance of the case the decision to dismiss the employee fell within the band of reasonable responses which the employer might have adopted. All these elements are in my view encompassed in the question posed in section 98(4)(a) of the 1996 Act, namely, "whether the employer acted reasonably or unreasonably in treating it [sc. the reason shown by the employer] as a sufficient reason for dismissing the employee".

45. However, such an approach necessarily involves accepting that the judgment made by the employer at the time of dismissal might with hindsight be open to criticism by reference to information that was not reasonably available to him at the time. In *W. Devis & Sons Ltd v Atkins* [1977] A.C. 931 the manager of an abattoir was dismissed because he refused to comply with the employers' policy in relation to the purchase of animals for slaughter. The employers offered him a severance payment but subsequently withdrew the offer and purported to treat his dismissal as a summary dismissal on the grounds of gross misconduct. However, at the time of the dismissal they had been unaware of any misconduct on his part. On a complaint of unfair dismissal by the employee the industrial tribunal refused to allow the employers to

give evidence of the misconduct on which they wished to rely. Their subsequent appeals were dismissed. In the House of Lords Viscount Dilhorne, with whom the other members of the Appellate Committee agreed, pointed out that Schedule 1 to the Trade Union and Labour Relations Act 1974 required the determination of the question whether the dismissal was unfair having regard to the reason shown by the employer for it. He said at page 952G:

> "Paragraph 6(8) appears to me to direct the tribunal to focus its attention on the conduct of the employer and not on whether the employee in fact suffered any injustice. If in the tribunal's view the employer has failed to satisfy it that he acted reasonably in treating the reason shown to be the reason for the dismissal as a sufficient reason for that dismissal, the conclusion will be that the dismissal was unfair."

46. Lord Simon said much the same at page 959A-C:

> "Under paragraph 6(8) the employer must satisfy the tribunal that he acted reasonably in treating "it" (i.e., the reason shown by the employer as the reason for the dismissal of the employee) as a sufficient reason for the dismissal. This leaves no room for the adduction of evidence of matters which would have constituted such a reason if they had been but were not known to the employer at the time of the dismissal. The reference to "equity and the substantial merits of the case" merely shows that the word "reasonably" is to be widely construed; but they in no way affect the proposition that what must be shown to be reasonable and sufficient is the employer's action in treating the reason shown by him (the employer) as the reason for dismissing the employee. The words have a plain, primary and natural meaning."

47. Since section 98(4) of the 1996 Act is drafted in almost identical terms, it must, in my view, be given the same interpretation and that has certainly been the view taken in subsequent cases. It follows that when it is determining the fairness of a dismissal the tribunal is concerned only with the conduct of the employer and must exclude consideration of information that was not reasonably available to him at the time of the dismissal. However, where the employer's disciplinary procedures include a right of appeal, information that becomes available in the course of the appeal is to be taken into account: see *West Midlands Co-operative Society Ltd v Tipton* [1986] 1 A.C. 536.

48. In *Foley v Post Office* [2000] I.C.R. 1284 this court considered the proper approach to the application of section 98. Mummery L.J., with whom Nourse and Rix L.JJ. agreed, stated the position as follows at pages 1287C-1288 C:

> "In my judgment, the employment tribunals should continue to apply the law enacted in section 98(1), (2) and (4) of the Employment Rights Act 1996 giving to those subsections the same interpretation as was placed for many years by this court and the Employment Appeal Tribunal on the equivalent provisions in section 57(1), (2) and (3) of the Employment

> Protection (Consolidation) Act 1978. This means that for all practical purposes:
>
> (1) "The band or range of reasonable responses" approach to the issue of the reasonableness or unreasonableness of a dismissal, as expounded by Browne-Wilkinson J. in *Iceland Frozen Foods Ltd. v. Jones* [1983] I.C.R. 17 , 24F-25D and as approved and applied by this court (see *Gilham v Kent County Council (No. 2)* [1985] I.C.R. 233; *Neale v Hereford and Worcester County Council* [1986] I.C.R. 471; *Campion v Hamworthy Engineering Ltd* [1987] I.C.R. 966 and *Morgan v Electrolux Ltd* [1991] I.C.R. 369, remains binding on this court, as well as on the employment tribunals and the Employment Appeal Tribunal. The disapproval of that approach in *Haddon v Van den Bergh Foods Ltd* [1999] I.C.R. 1150, 1160E-F, on the basis that (a) the expression was a "mantra" which led employment tribunals into applying what amounts to a perversity test of reasonableness, instead of the statutory test of reasonableness as it stands, and that (b) it prevented members of employment tribunals from approaching the issue of reasonableness by reference to their own judgment of what they would have done had they been the employers, is an unwarranted departure from binding authority.
>
> (2) The tripartite approach to (a) the reason for, and (b) the reasonableness or unreasonableness of, a dismissal for a reason relating to the conduct of the employee, as expounded by Arnold J. *in British Home Stores Ltd v Burchell* (Note) [1980] I.C.R. 303, 304 and 308G-H, and as approved and applied by this court in *W. Weddel & Co. Ltd v Tepper* [1980] I.C.R. 286, remains binding on this court, as well as on employment tribunals and the Employment Appeal Tribunal. Any departure from that approach indicated in *Madden* (for example, by suggesting that reasonable grounds for belief in the employee's misconduct and the carrying out of a reasonable investigation into the matter relate to establishing the reason for dismissal rather than to the reasonableness of the dismissal) is inconsistent with binding authority.
>
> Unless and until the statutory provisions are differently interpreted by the House of Lords or are amended by an Act of Parliament, that is the law which should continue to be applied to claims for unfair dismissal."

49. This statement of the law is binding on us, but even if it were not, I should be loath to depart from it. As Mummery L.J. observed (at page 1287D), employment tribunals throughout the country decide thousands of unfair dismissal cases every month. It is essential that there should be no uncertainty about the principles which they are to apply. The decision in *Foley's* case provides that certainty, so far as it lies within the power of this court to do so, and it would be quite wrong, in my view, to cast any doubt upon it.

50. Finally, it is necessary to mention *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563, in which this court stated once again that it is not the function of the employment tribunal to place itself in the position of the employer. Mummery L.J., with whom Lawrence Collins and Hughes L.JJ. agreed, said 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."

51. The question that has to be decided in the present case is somewhat different, namely, who is to be regarded as the employer for the purposes of section 98 of the 1996 Act. Nonetheless, the authorities on the interpretation of that section are of importance because they elucidate its nature and object. As such they provide the essential background against which the question falls to be decided. At one level the answer is obvious: it is the person or organisation by whom the employee was employed; but the position is not so straightforward when, as will often be the case, the employer is a large organisation or (as is almost invariably the case) a legal rather than a natural person who can act only through the agency of others. The application of the principles set out in *Foley's* case then becomes more difficult.

52. Mr. O'Dair submitted that the employment tribunal found that Mr. Orr's offensive and insubordinate behaviour was provoked by the racially abusive remark made by Mr. Madden. He also submitted that the tribunal held the Council vicariously liable for Mr. Madden's racial abuse and that in those circumstances it was anomalous that it should at the same time have held the dismissal of Mr. Orr to have been fair.

53. A number of points need to be made at this stage. The first is that, although the tribunal found that Mr. Madden did make the abusive remark attributed to him, it did not make an express finding that that remark had provoked the outburst which constituted gross misconduct. (Nor, for that matter, did it find that the outburst had been provoked by his discovery of Mr. Madden's duplicitous attempt to reduce his working hours.) The second is that the tribunal felt obliged to uphold Mr. Orr's claim for discrimination because the Council conceded that, if Mr. Madden had spoken the words alleged, they constituted unlawful discrimination on the grounds of race. The tribunal was asked to make a bare finding of fact, which it did, and having done so held that the claim succeeded. The third point that needs to be made is that the tribunal found that Mr. Orr had committed two acts of gross misconduct, each of which justified his dismissal. The first, and arguably more serious, was discussing the allegations of sexual assault with various young people with whom he worked contrary to express instructions. No challenge has been made to that aspect of the tribunal's decision.

54. The main thrust of Mr. O'Dair's argument was that Mr. Madden's knowledge of what led to the meeting and of the exchanges between him and Mr. Orr on 20th October is to be imputed to the Council as his employer. Mr. Cove failed to take it into account when he formed his view of Mr. Orr's behaviour on that occasion and therefore the Council failed to act reasonably when reaching the decision to dismiss him.

55. Part X of the 1996 Act must be interpreted in a manner that makes it capable of practical application in the workplace, whether the employer is an individual or a large organisation. If the employer is a large organisation with many employees, it will inevitably be necessary to delegate responsibility for dealing with routine employment problems to suitably qualified managers who have authority to take decisions on behalf of the organisation. In my view Parliament must be taken to have recognised that, although the organisation remains the employer, some decisions, including in some circumstances the decision to dismiss an individual employee, will be taken on its behalf by someone who is not at the most senior level.

56. The problem of identifying the person or body that is to be regarded as representing a corporation or organisation of a similar kind arises in many different contexts. In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 A.C. 500 it arose in the context of trading in securities requiring notification to the regulator. Employees of the company, acting within the scope of their authority but without the knowledge of the board or managing director, used funds managed by the company to acquire a large number of shares, thereby giving rise to an obligation to notify the regulator. The company failed to give the required notification and as a result the regulator instituted proceedings against it. A question arose whether the traders' knowledge was to be attributed to the company. Lord Hoffmann, giving the judgment of the Privy Council explained the position in relation to companies as follows:

> "The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself," as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company?
>
> One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised

> by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

57. A similar question arises in relation to section 98. Parliament clearly intended that Part X of the 1996 Act should apply to corporate employers as well as public bodies such as the Council. The authorities to which I have referred establish that section 98 requires the tribunal when determining whether the dismissal is fair to consider whether the employer believed that the employee was guilty of conduct justifying dismissal and whether he had reasonable grounds for holding that belief. Since belief involves a state of mind, it is necessary, as Lord Hoffmann said, to determine whose state of mind was *for this purpose* intended to count as the state of mind of the employing company or organisation.

58. For reasons given earlier Parliament cannot have assumed that in a large organisation every allegation of misconduct or other grounds of dismissal against any employee would be investigated by the person or body that represents it at the highest level, who would himself then decide whether to exercise the power of dismissal. The very fact that in order to be reasonable a belief in the guilt of the employee must proceed on the basis of a reasonable investigation supports the conclusion that the employer may delegate that investigation and the subsequent decision on dismissal to a person within the organisation who has sufficient skill and experience to carry it out effectively, having regard to the nature of the allegations and the position of the employee against whom they are made. The answer to the question "Whose knowledge or state of mind was *for this purpose* intended to count as the knowledge or state of mind of the employer?" will be "The person who was deputed to carry out the employer's functions under section 98."

59. In the present case that person was Mr. Cove. The submission that the knowledge of Mr. Madden is to be treated as the knowledge of the Council and as such is to be imputed to Mr. Cove is in my view unsound. In the first place, it is doubtful whether in circumstances of this kind an employee's knowledge of his own wrongdoing is to be imputed to his employer: see *In re Hampshire Land Co.* [1896] 2 Ch. 743 in which an officer's knowledge of his own wrongdoing was not attributable to the company. More importantly, however, to impute to Mr. Cove knowledge of Mr. Madden's behaviour that he could not reasonably have acquired through the appropriate disciplinary procedure in order to enable Mr. Orr to treat as unreasonable and therefore unfair a decision that was in all respects reasonable would be to impose on

the Council as the employer a more onerous duty than that for which section 98 provides.

60. Sedley L.J. suggests that the person deputed to carry out the investigation on behalf of the employer must be taken to know any relevant facts which the employer actually knows, which include not only matters known to the chief executive but also any relevant facts known to any person within the organisation who in some way represents the employer in its relations with the employee. However, in my view it would be contrary to the language of the statute to hold that the employer had acted unreasonably and unfairly if in fact he had done all that could reasonably be expected of him and had made a decision that was reasonable in all the circumstances. That is why it is important to identify whose state of mind is intended to count as that of the employer for this purpose. To impute to that person knowledge held by others is to reverse the principles of attribution formulated in the *Meridian* case and to place the whole exercise on an artificial footing. The obligation to carry out a reasonable investigation as the basis of providing satisfactory grounds for thinking that there has been conduct justifying dismissal necessarily directs attention to the quality of the investigation and the resulting state of mind of the person who represents the employer for that purpose. If the investigation was as thorough as could reasonably have been expected, it will support a reasonable belief in the findings, whether or not some piece of information has fallen through the net. There is no justification for imputing to that person knowledge that he did not have and which (ex hypothesi) he could not reasonably have obtained. Moreover, the principle cannot logically be restricted to a person in the position of Mr. Madden; if sound, it must apply to all employees above a certain level of seniority, though in principle it should apply to any employee who is in possession of information that relates to the organisation's affairs and which it is material for his superiors to know. To impute Mr. Madden's knowledge to Mr. Cove, therefore, is tantamount to treating Mr. Cove as having acquired all the relevant information in the organisation's possession. That is not what section 98(4) or the authorities require.

61. The apparent anomaly on which Mr. O'Dair relied arises from the fact that the statutory provisions concerning unfair dismissal are directed to the employer's conduct and state of mind at the time of the dismissal, whereas the provisions relating to discrimination are directed to the fact of discrimination. The distinction was pointed out by Viscount Dilhorne in *Devis v Atkins* at page 952C-F. The tribunal's task in the two cases is fundamentally different. When considering a claim for unfair dismissal the tribunal cannot substitute its own findings in relation to misconduct because it is concerned only with the question whether the employer acted reasonably or unreasonably in investigating the allegations, forming a belief in the employee's guilt and deciding to dismiss him. This principle has recently been confirmed by this court in *London Ambulance Service NHS Trust v Small*, to which I referred earlier.

62. In the course of argument a question arose whether section 98(4) might give the employment tribunal some scope for applying its own judgment to the facts as it finds them when deciding whether the dismissal was unfair. In his judgment Aikens L.J. has most helpfully traced the legislative history of section 98, which shows that a change in language occurred with the passing of the Employment Act 1980, when the words "(having regard to equity and the substantial merits of the case)" were replaced by the expression "and that question shall be determined in accordance with equity

and the substantial merits of the case." However, I can find nothing in the authorities to suggest that it brought about a change of substance. On the contrary, they proceed on the assumption that the effect of the various formulations from that to be found in paragraph 6(8) of Schedule 1 to the Trade Union and Labour Relations Act 1974 (*Burchell's* case) through to the current version of section 98(4) itself (*Foley's* case) is the same. If the section could be interpreted as giving greater role to the tribunal's own judgment, one would have expected the point to have received some attention long before now.

63. In my view, however, two serious difficulties of principle stand in the way of it. The first is that it does not properly reflect the language of section 98(4). As I observed in paragraph 38 above, paragraph (a) contains the essential test for determining whether the dismissal is to be judged fair or unfair, namely, whether the employer acted reasonably or unreasonably in treating the reason for it as a sufficient reason for dismissing the employee. Paragraph (b) provides the yardstick (equity and the substantial merits of the case) that is to be used when judging the employer's conduct. Its purpose is simply to make it clear that the tribunal is not to take a technical or legalistic approach when making the determination for which paragraph (a) provides, but the task for the tribunal remains that of determining whether the employer acted reasonably in the sense in which that has been interpreted in the decided cases.

64. That brings me to the second difficulty, namely, that a broader interpretation of section 98(4)(b) cannot be reconciled with the decided cases. In *Foley's* case the court set out to reaffirm the principles to be derived from the earlier authorities in order to clarify the task that employment tribunals are required to undertake in cases of this kind. The judgment in that case contains no hint that subsection (4)(b) is to be understood as giving a greater role to the tribunal's view; much less does it suggest that it is any part of the tribunal's function to decide whether it would itself have thought it fair to dismiss the employee. On the contrary, the decisions in both *Foley's* case and *Small's* case make it clear that the tribunal's task is confined to deciding whether in the light of the information available to him at the time the employer's decision was reasonable in the sense of being one that a reasonable employer could have made. There is an important distinction between the question whether, in hindsight, the dismissal was unfair and whether the employer acted unfairly in the circumstances obtaining at the time. The authorities show that the tribunal's task is to answer the latter question, not the former.

65. Finally, Mr. O'Dair submitted that Mr. Madden's discriminatory remark was a contributory cause of Mr. Orr's dismissal and that in those circumstances the dismissal must be regarded as unfair in order to enable him to obtain an adequate remedy for that unlawful discrimination. He also sought to argue that the loss flowing from that act of discrimination included the loss of Mr. Orr's employment, for which he was entitled to receive compensation in the ordinary way.

66. There are in my view at least two significant difficulties in the way of that argument. In the first place, as the EAT pointed out, Mr. Orr's racial origin played no part in the employer's decision to dismiss him. Indeed, it does not appear that the contrary was argued before the tribunal, since the only complaint (which in any event failed) was that the dismissal itself constituted an act of direct discrimination because Mr. Orr was treated less favourably than the two comparators he put forward. At most all that can be said, therefore, is that an act of racial discrimination committed by another

employee caused Mr. Orr to behave in a manner that amounted to gross misconduct. However, he was dismissed for misconduct, not because he was Jamaican. I find it impossible to see how that can render his dismissal unfair within the meaning of the legislation.

67. Moreover, the Council's decision to dismiss Mr. Orr was also based on his gross misconduct on 17th October 2005. In paragraph 5 of its determination the tribunal made its finding as to the outcome of the disciplinary hearing by summarising Mr. Cove's letter to Mr. Orr of 26th May 2006. It recorded that Mr. Cove had found both charges proved, considered them to be gross misconduct and dismissed him. The letter itself, to which we are entitled to have regard since it has been incorporated into the tribunal's determination, makes it clear that Mr. Cove considered that Mr. Orr's conduct *on each occasion* was such as to indicate that he no longer intended to be bound by his duties and destroyed the confidence the Council could have in him as an employee. The tribunal does not appear to have been asked to consider whether the Council's decision to dismiss Mr. Orr would have fallen within the band of reasonable responses if the only reason for it had been his misconduct on 17th October. In view of the nature of that misconduct I find it difficult to see how it could be argued to the contrary, but in any event I do not think that it would be appropriate to remit the matter to the tribunal for a finding to be made on that point when the argument was not raised at the original hearing. It follows that the discriminatory act on which Mr. Orr seeks to rely had no effect on the outcome of the whole affair.

68. For these reasons I would dismiss the appeal.

Lord Justice Aikens:

69. The simple facts of this case, which has now been going on for five years, have raised some novel arguments before this court on the application of ***section 98(4)(a)*** and ***(b)*** of the ***Employment Rights Act 1996*** ("ERA"). Unfortunately, I cannot agree with the conclusions reached by Sedley LJ.

70. Sedley LJ has set out the facts at [2] to [5] above. Moore-Bick LJ has also stated what he regards as the important facts. I do not quarrel with those statements. It is unfortunate, as Sedley LJ has pointed out, that the Reasons of the second ET, dated 29 August 2008, are not clearly expressed and are very poorly proof-read. The second ET's fact findings, decision and reasons were made after a seven day hearing. They were made for two distinct purposes: (i) in relation to Mr Orr's claim for unfair dismissal, and (ii) in respect of his claim that he had been the object of direct racial discrimination.

71. Four important points are tolerably clear from the findings of the second ET. First, the second ET found that Milton Keynes Council ("the council") carried out an investigation about the allegations of gross misconduct by Mr Orr on the two different occasions, ie. on 17 October and 20 October 2005. In the course of that investigation two witness statements were taken from Mr Orr and one from Mr Madden. Other statements were also taken. The investigating officer appointed by the council, Mr Rob Ward, produced a written report.

72. Secondly, Mr Orr did not take part in the subsequent disciplinary hearing held on 19 May 2006. However, the second ET also found, at paragraph 5, that this hearing

lasted 1 ½ hours and that Mr John Cove, the "group director" who had been appointed by the council to conduct it, gave careful consideration to the evidence available. Mr Cove found the two allegations of gross misconduct against Mr Orr were proved.

73. Thirdly, Mr Orr took only a limited part in the subsequent internal appeal procedure, although he did attend. The decision to dismiss Mr Orr was upheld.

74. The fourth and most significant point concerns the second ET's own findings on the verbal altercation between Mr Orr and Mr Madden in the incident on 20 October 2005. The findings appear at paragraph 4 of the second ET's Reasons. They concluded: (i) Mr Madden had gone behind Mr Orr's back and taken steps to initiate a process of reducing his working hours; (ii) Mr Orr did not know that at the time of the meeting on 20 October; (iii) Mr Orr did lapse into a form of patois during the meeting; (iv) that provided the context for the remark of Mr Madden. The final three sentences of the paragraph state:

"*We have heard evidence from the claimant on the [alleged discriminatory remark by Mr Madden] and evidence from Mr Madden [and] we have noted that the context within which the remark could have been made existed and have found Mr Madden's account to be evasive and at times contradictory. On a balance of probabilities we prefer the evidence of the claimant and thus find that Mr Madden did indeed give voice to the phrase: "…you lot are always mumbling on and I cannot understand a word you lot are saying…". The episode concluded when the claimant left the premises and went home".*

75. I emphasise that it was therefore the *second ET's* evaluation of all the evidence before it, including Mr Madden's oral evidence, that led to the findings that are now central to the present appeal. These are points (i) and (iii) set out in the previous paragraph and the second ET's conclusion that, "*on a balance of probabilities*" Mr Madden made the statement quoted above, which gave rise to the allegation of direct racial discrimination.

76. Given the argument advanced before us, it is important to note two findings that were not made by the second ET. First, it did not find that Mr Madden had admitted, at any stage, that he had done either of the two things set out in (i) and (iii) in the previous paragraph. Secondly, it made no finding on where Mr Orr's manager, Mr Peter Madden, fitted in the hierarchy of the management structure of the council's social service department.

77. Now it might be thought, in a general sense, that it would be unfair for an employer to dismiss summarily an employee in circumstances in which an ET had concluded, after a seven day hearing, at which counsel represented both parties, that the line manager of the employee had used underhand methods to change a work rota of the employee (even if for well – intentioned reasons) and the same line manager had made a racially discriminatory remark to the employee in the course of a heated argument on the issue of working hours that had resulted from the action taken by the line manager. But the EAT concluded that the second ET were correct in determining that the decision of the council to dismiss Mr Orr was fair, the ET having found that the investigation and disciplinary process of the council could not be impugned: see [53] of the EAT's decision. In reaching this view, the second ET and the EAT followed case law

stretching back over 40 years on the interpretation of what is now ***section 98(4)(a)*** of the ERA and which is binding on this court.

78. The case law on the interpretation and application of what is now ***section 98*** and its predecessors is vast; indeed, it could be said that the section has become encrusted with case law. For the purposes of the present appeal, I think that the relevant principles established by the cases are as follows: (1) the reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.[2] (2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason"[3] for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.[4] (3) Once the employer has established before an ET that the "real reason" for dismissing the employee is one within what is now ***section 98(1)(b),*** ie. that it was a "valid reason", the ET has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in ***section 98(4)(a).*** [5] (5) In applying that sub-section, the ET must decide on the reasonableness of the employer's decision to dismiss for the "real reason". That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.[6] If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response of the employer. (6) In doing the exercise set out at (5), the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.[7] (7) The ET must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted".[8] (8) A particular application of (6) and (7) is that an ET may not substitute its own evaluation of a witness for that of the employer at the time of its

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[2] ***Abernethy v Mott, Hay & Anderson [1974] ICR 323 at 330,*** approved by the HL in ***Devis & Sons v Atkins [1977] AC 931 at 954*** per Viscount Dilhorne, with whom the other law lords agreed.

[3] ***West Midlands Co-operative Society Ltd v Tipton [1986] 1 AC 536 at 545*** per Lord Bridge of Harwich with whom the other law lords agreed.

[4] ***Devis & Sons v Atkins [1977] AC 931 at 952C-954G*** per Viscount Dilhorne and ***at 959B-E*** per Lord Simon of Glaisdale.

[5] ***Morgan v Electrolux Ltd [1991] ICR 369 at 572H*** per Balcombe LJ giving the judgment of the court.

[6] ***British Home Stores v Burchell (Note) [1980] ICR 303 at 304,*** per Sir John Arnold. That was a case of alleged dishonest conduct. The principle has been applied to misconduct cases generally since then. See in particular: ***Foley v Post Office [2000] ICR I263; London Ambulance Service NHS Trust v Small [2009] IRLR 563.***

[7] ***Iceland Frozen Foods Ltd v Jones [1983] ICR 17 at 24-25; Foley v Post Office [2000] ICR 1283 at 1292D – 1293C,*** per Mummery LJ, with whom Nourse and Rix LJJ agreed.

[8] Ibid.

investigation and dismissal, save in exceptional circumstances. [9] (9) An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process[10]) and not on whether in fact the employee has suffered an injustice.[11]

79. The decision of this court in ***Morgan v Electrolux Ltd [1991] ICR 369,*** which confirmed the principle set out in (8) above, is especially important in the context of the present case. In stating the general principle, Balcombe LJ relied on an extract of a judgment of Wood J in the EAT in ***Lindford Cash & Carry Ltd v Thompson [1989] ICR 518*** at ***523-4.*** Wood J said at the start of that extract:

> "*If a tribunal is to say that this employer could not reasonably have accepted a witness as truthful, it seems to us that the decision must be based on logical and substantial grounds – good reasons. Instances might be – that the witness was a bare-faced liar, who must have given that impression to the employer at the relevant time…"*

80. In other words, as I read ***Morgan v Electrolux Ltd,*** this court endorsed the view that if a witness lied to an employer on a subject relevant to dismissal but it was reasonable at the time for the employer to have accepted what the witness actually said (because he was not a "*bare-faced liar who must have given that impression to the employer at the relevant time…"),* then an ET cannot, for the purposes of deciding whether the dismissal of the employee was fair or not, substitute its own finding on the truth or not of the evidence of the witness. This is so even if the witness confessed to the ET that he had lied to the employer at the relevant time.

81. In ***The London Ambulance Service NHS Trust v Small [2009] IRLR 563,*** this court affirmed the correctness of the principle propounded in the ***Electrolux case.*** Thus it held in that case (at [41]) that the ET had substituted its own finding of facts (albeit about the conduct of the employee rather than another witness) based upon the evidence that emerged before the ET, instead of confining itself to facts relating to the employer's handling of the employee's dismissal, the genuineness of the employer's belief in what the employee had or had not done and the reasonableness of the grounds of the employer's belief about the conduct of the employee at the time of dismissal.

82. These principles governing the interpretation and application of what is now ***section 98*** of the ERA considerably limit the scope of manoeuvre of Mr O'Dair in attempting to attack the conclusions of the second ET and the EAT. He concentrated his fire on the second of the two incidents which led to the dismissal of Mr Orr. Mr O'Dair accepted that he could not argue that either the council's officer conducting the disciplinary procedures or the officer responsible for dismissing Mr Orr should have realised that Mr Madden was a "bare-faced liar". On the face of things, both the procedure and the conclusion to dismiss for gross misconduct on 20 October 2005 were fair.

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[9] ***Morgan v Electrolux Ltd [1991] ICR 369 at 373F,*** quoting from the judgment of Wood J in the appeal tribunal decision of ***Linfood Cash and Carry Ltd v Thomson [1989] ICR 518 at 523-4.***

[10] ***West Midlands Co-operative Society Ltd v Tipton [1986] 1 AC 536.***

[11] ***W Devis & Sons Ltd v Atkins [1977] AC 931*** at ***952G*** per Viscount Dilhorne, with whom the other law lords agreed.

83. Therefore, Mr O'Dair has argued a novel point, which was not raised at any stage below. (Mr O'Dair did not appear for Mr Orr before the ET). He submitted that Milton Keynes Council, as employer, "knew", *at the time of the investigation and dismissal of Mr Orr,* the true facts about Mr Madden's underhand attempt to alter Mr Orr's working hours and also "knew" of his racially discriminatory statement to Mr Orr - *".you lot are always mumbling…I can't understand a word you lot are saying…"*. In other words, knowledge of those facts was to be attributed to the council, which is some kind of legal person, viz. a corporate body.

84. As I understood it, Mr O'Dair had two arguments. First, he submitted that if the facts known to Mr Madden are to be attributed to the council, as employer, then its "real reason" for dismissing Mr Orr for his conduct on 20 October 2005 cannot be characterised as "dismissal for gross misconduct". That is because, in the light of that knowledge, the "set of facts" or "set of beliefs" that were *known to the [corporate] employer at the time* could not amount to "gross misconduct". Secondly, if that knowledge is attributed to the council, he submits it must follow that the decision to dismiss Mr Orr for "gross misconduct" in relation to his behaviour on 20 October 2005 was not reasonable within ***section 98(4)(a)*** and so was unfair.

85. We did not receive any submissions on the precise legal status or nature of Milton Keynes Council. For the purposes of this appeal I can assume that it is a body corporate created by statute, which statute will define the council's powers, rights and duties. On that basis, I think that Mr O'Dair's submissions gives rise to at least three issues. The first is: by what rules does a tribunal or court decide which natural person's acts or knowledge or state of mind are to be attributed to a corporate employer for the purposes of ***section 98*** of the ***ERA?*** The second question only becomes of practical importance if, in answer to the first, it is concluded that the acts and knowledge of Mr Madden are, for the purposes of ***section 98*** of ERA, capable of being attributed to the council at the time that it dismissed Mr Orr. The second question is: for the purposes of its determination under ***section 98(4)(a) and (b),*** can an ET, upon the basis of evidence before it, investigate and make decisions on the issue of whether the knowledge of a natural person is to be attributed to the corporate employer which issue was not raised at the time of the employer's investigation and dismissal? The third question assumes that Mr O'Dair's principal argument does not succeed. Does that mean that Mr Orr is left in the position that the second ET has found that Mr Madden had previously lied about the attempt to change the work pattern and about the racially discriminatory remark, but it is of no consequence: Mr Orr was, in the eyes of the law, "fairly" dismissed for misconduct on 20 October 2005?

86. On the first issue, ie. that of whether Mr Madden could be a person whose knowledge would be capable of being attributed to the council for the purposes of ***section 98*** of the ERA I had written a draft judgment of my own before reading Moore-Bick LJ's judgment in draft. Moore-Bick LJ reaches the same conclusion as I had and for the same reasons. Although Mr O'Dair has raised a novel and interesting argument, I hope he will forgive me for not setting out, in my words, the same reasons as Moore-Bick LJ gives for rejecting the argument. Therefore, I respectfully cannot agree with Sedley LJ that the case should be remitted to an ET for a finding on the issue he identifies as (a) at [25] above.

87. Given my conclusion, the second issue I have identified above, ie. can an ET investigate and make findings on whose knowledge is attributable to a corporate employer and act on those findings, does not arise. However, in my view a quick consideration of the possible issues that would arise only underlines the difficulty of attempting to create any rule of attribution for the purposes of ***section 98*** of the ERA other than that proposed by Moore-Bick LJ. If the knowledge of persons other than those appointed directly to deal with the process of investigation and dismissal of employees is to be attributed to the corporate employer then, logically, the issues of who knew what and whether that knowledge is to be attributed to the corporate employer at the time of the investigation/dismissal would have to be considered at two stages. First, at the investigation stage before dismissal or at the time of any appeal following dismissal. Secondly, by an ET if a dismissal was challenged as being unfair. The first would make the task of an investigating or appeal officer very much more elaborate and difficult. The second begs the questions of whether findings of fact by an investigating officer of the corporate employer on that topic could be challenged in the ET and the circumstances in which an ET might substitute its own findings for those made on behalf of the employer. If it could there is the further question of when, if at all, an ET could then substitute its view of whether the dismissal was fair on the basis of its own findings on knowledge and attribution, if those findings differed from any made on behalf of the employer at the investigation stage.

88. All the case law concerning ***section 98(4)(a)*** to which I have referred above is against the notion of that kind of investigation at either stage. To my mind this demonstrates that the rule of attribution for the purposes of ***section 98*** must be narrow, as Moore-Bick LJ has concluded.

89. That leaves the third issue: is there any other route by which it can be concluded that the dismissal of Mr Orr in respect of his conduct on 20 October 2005 was "unfair"? The fact remains that there is a determination by the second ET, apparently endorsed by the EAT, that Mr Madden was guilty of duplicity in relation to trying to change Mr Orr's working hours and was also guilty of making a racially discriminatory remark to Mr Orr on 20 October 2005 in the course of the heated discussion between the two men. Does that make Mr Orr's dismissal for "gross misconduct" on that occasion "fair" for the purposes of ***section 98*** of the ERA?

90. As already noted, Mr O'Dair accepted that he could not attack the reasonableness of the investigation on behalf of the council, nor its decision, assuming knowledge of what actually had occurred was not attributed to it. On that basis, Mr O'Dair could not say that the decision of the council to dismiss was "unreasonable" within ***section 98(4)(a),*** as interpreted in the cases.

91. In the course of argument, I asked counsel if they had any submissions on the effect of ***section 98(4)(b)*** and whether it added anything to the debate? I also asked if there was any authority as to its scope and interpretation. Both Mr O'Dair and Mr Cheetham admitted frankly that they had not concentrated particularly on that paragraph. They kindly agreed to research the issue and to provide us with any relevant further material.

92. I have looked at the legislative history of the equivalent of what is now ***section 98(4)*** of the ERA. It starts with the ***Industrial Relations Act 1971, section 26(4).*** That provided:

> "*Subject to sections (4) or (5) of this section, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on* ***whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee ; and that question shall be determined in accordance with equity and the substantial merits of the case***." [My emphasis].

93. There was similar wording in the various statutes which have replaced the 1971 Act.[12] I have set out the different wording in an Appendix to this judgment. The difference between the earlier wording and the present provision is as follows: previously, the determination of the question of whether the dismissal was fair or unfair was said to depend on whether, in the circumstances the employer acted reasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee and *that question*, ie. the reasonableness of the employer's actions, was to be determined in accordance with "*equity and the substantial merits of the case*".

94. However, it occurred to me that the purpose of the legislature in dividing up the section into two separate paragraphs as in the latest version of this provision was to create a different emphasis. First, the determination of the question of whether the dismissal of an employee was fair or unfair depended on whether, in the circumstances, the employer acted reasonably or not in treating the "real reason" for dismissing the employer as a sufficient reason for doing so. But, secondly, "*the question"*, ie. that of whether the dismissal is fair or unfair, "*shall be determined in accordance with equity and the substantial merits of the case"*. To my mind, that suggested that the statute required the ET to do something separate and in addition to the exercise encompassed by paragraph (a) of ***section 98(4).***

95. The only specific comment on the interpretation of the "old" format that I have found is that of Lord Simon of Glaisdale in ***W Devis & Sons Ltd v Atkins,***[13] referred to at [38] and [46] of Moore-Bick LJ's judgment. That makes it clear that the words "*equity and the substantial merits of the case*" in paragraph 6(8) of Sch 1 of the 1974 Act "*…merely shows that the word "reasonably" is to be widely construed"*. They do not import any notion of a second consideration by an ET.

96. It appears, from the researches of counsel, that ***section 98(4)(b)*** itself has been considered directly only in one very recent decision of the EAT in ***Enable Care and Home Support Ltd [2010] UKEAT/0366/09/SM.*** There was argument in that case on whether ***section 98(4)(b)*** added any further test that an ET had to consider before determining whether a dismissal was fair or not. The EAT was split on this issue. As I read the somewhat obscure reasoning, the minority accepted a submission that

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[12] ***Para 6(8)*** of ***Sch 1*** to the ***Trade Union and Labour Relations Act 1974;*** then the ***Employment Protection (Consolidation) Act 1978 section 57(3),*** which was amended various times by different Acts until the present Act came into force. The original version of ERA was amended with effect from 1 October 2006, but the change was only to give effect to the introduction of a new ***section 98(3A),*** which deals specifically with dismissal upon retirement. The full history is set out in the Appendix to this judgment.

[13] ***[1977] AC 931*** at ***952B-C.***

paragraph (b) did add a further test that had to be considered before the final determination of whether a dismissal was fair or not: see [22]. The majority rejected that argument: see [21].

97. I have read the judgment of Moore-Bick LJ on this issue. I have to accept that no case in this court since the 1996 Act came into force has suggested that the change of wording or format brought with it a change of substance. No case (other than the minority view in the EAT decision referred to above) suggests that the effect of ***section 98(4)(b)*** is to direct an ET to engage in some kind of exercise beyond the determination of the question posed in ***section 98(4)(a),*** which is itself to be determined "*in accordance with equity and the substantial merits of the case"*.

98. Therefore I have to conclude that, subject to the view of the Supreme Court, the correct construction of ***section 98(4)(b)*** remains to the effect described by Lord Simon in ***W Devis & Sons v Atkins.*** If so, it cannot assist Mr Orr.

99. But even if it had greater effect than that, I could not say that the new wording in the 1996 Act was intended to overrule the long-established principle of "non-substitution" confirmed by ***Morgan v Electrolux Ltd.*** There is no basis on which an ET would be entitled to substitute its view of the relative merits of the evidence of Mr Madden and Mr Orr on what happened and why on 20 October 2005, for the purposes of carrying out the ***section 98(4)(a)*** exercise. I cannot see that it could do so under the guise of ***section 98(4)(b).***

100. My conclusions, therefore, are: (1) I am unable to accept the novel arguments of Mr O'Dair on "attribution of knowledge" to the council, despite the attractive way they were presented; and (2) ***section 98(4)(b)*** cannot assist Mr Orr's case in relation to the incident of 20 October 2005. That means I do not need to consider the relationship between the incidents of 17 October and 20 October 2005.

101. Neither the second ET's decision nor that of the EAT on the fairness of the council's decision to dismiss Mr Orr can therefore be challenged on a point of law. Accordingly, I would dismiss the appeal.

Appendix to judgment of Aikens LJ

The legislative history of the wording now found in ***section 98(4)*** of the ***Employment Rights Act 1996***, dates from the ***Industrial Relations Act 1971***. For each provision, I have highlighted the operative part of the text.

1. **Industrial Relations Act 1971 section 24(6)**

> "*Subject to sections (4) or (5) of this section, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on* ***whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee ; and that question shall be determined in accordance with equity and the substantial merits of the case***."

2. **Trade Union and Labour Relations Act 1974 Schedule 1, paragraph 6(8)**

> "*Subject to paragraphs (4) to (7) above, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on* ***whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee***."

Employment Protection (Consolidation) Act 1978 section 57(3)

First incarnation:

3. This provision originally read as follows:

> "*Where the employer has fulfilled the requirements of subsection (1), then, subject to sections 58 to 62, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on* ***whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee***."

Second incarnation

4. The provision was amended by ***section 6*** of the ***Employment Act 1980*** and ***SI 1980/1170, Article 4***. As amended, the provision read as follows:

> "*Where the employer has fulfilled the requirements of subsection (1), then, subject to sections 58 to 62, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 that question shall be determined in accordance with equity and the substantial merits of the case***."

Third and fourth incarnations

5. On 16 October 1992, the provision was amended, making it subject to certain provisions of the ***Trade Union and Labour Relations (Consolidation) Act 1992***. This

amendment does not appear to be relevant for present purposes. For completeness, however, I set out the provision which reads as follows:

> "*Where the employer has fulfilled the requirements of subsection (1), then, subject to sections 59 to 61, and to sections 152, 153 and 238 of the Trade Union and Labour Relations (Consolidation) Act 1992 (provisions as to dismissal on ground of trade union membership or activities or in connection with industrial action), the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 that question shall be determined in accordance with equity and the substantial merits of the case***."

6. On 30 August 1993, the provision was again amended, but only so as to make it subject to further provisions of the ***Trade Union and Labour Relations (Consolidation) Act 1992***. The re-amended provision read as follows:

> "*Where the employer has fulfilled the requirements of subsection (1), then, subject to sections 57A to 61, and to sections 152, 153 and 238 of the Trade Union and Labour Relations (Consolidation) Act 1992 (provisions as to dismissal on ground of trade union membership or activities or in connection with industrial action)]*[1]*, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 that question shall be determined in accordance with equity and the substantial merits of the case***."

Employment Rights Act 1996 section 98(4)

First Incarnation

7. As initially enacted, this provision (which came into force on 22 August 1996) read:

> *"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***."

Second incarnation

8. The present version of ***section 98(4)***, which came into force on 1 October 2006, is not, for present purposes, materially different from the original incarnation of ***section 98(4)***. The addition of the words "*in any other case*" at the start of the sub-section merely takes account of the introduction of ***section 98(3A)***, which deals with dismissal upon retirement. The provision presently reads:

"In any other case 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."