

Appeal No. UKEAT/0254/06/RN
& 0327/06/RN

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 26 October 2006
Judgment delivered on 28 November 2006

Before

HIS HONOUR JUDGE RICHARDSON

MRS R CHAPMAN

MR P M SMITH

AVID TECHNOLOGY EUROPE LIMITED

APPELLANT

MRS K BREEDON

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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Summary

Unfair dismissal – Reason for dismissal including substantial other reason

The Tribunal erred in law in finding that the Appellant had not established a substantial reason for dismissal. The Tribunal erred in law, and reached conclusions for which there was no evidence, in its consideration of the question whether it was reasonable to dismiss. The Tribunal did not make essential findings of fact for the purpose of considering contributory fault.

HIS HONOUR JUDGE RICHARDSON

1. This is an appeal by Avid Technology Europe Ltd (“ATE”) against 2 judgments of the ET sitting in Reading. By its first judgment dated 24 January 2006 the Tribunal found that ATE had unfairly dismissed its former employee Mrs Karen Breedon. By its second judgment dated 23 March 2006 the Tribunal awarded her compensation for unfair dismissal in the sum of £30,241.

The Facts

2. ATE carries on business in media creation software. On 1 July 2003 Mrs Breedon was employed as an area sales manager with responsibility for an area known as EMEA - Europe, Middle East and Africa, together with India. Initially she reported to a sales director. Then she reported directly to ATE’s UK General Manager, Mr Ramsay.

3. In 2004 Mr Ramsay desired to set up an office in Dubai. A former work colleague of Mr Ramsay, Mr Aslett, was offered the post of manager at the Dubai office. Mrs Breedon learned that she would be reporting to him, which was the opposite of what was planned when the Dubai office was first considered. Early in February 2005 there was a meeting of staff in Barcelona. By the time of this meeting, when Mr Aslett was introduced to other members of staff, it was clear that his role would take a significant part of what Mrs Breedon had been doing. Mrs Breedon’s new role had not been finalised. Mrs Breedon found the Barcelona meeting humiliating - and ATE in due course upheld a grievance which she raised in this respect.

4. ATE's case before the Tribunal was that Mrs Breedon was a good employee, that ATE was an expanding company which needed more staff to cover smaller areas as it expanded, and that Mrs Breedon would have been retained and given worthwhile territory in which to work.

5. On her return from Barcelona Mrs Breedon was anxious and upset. She was due to go to Boston the following week. She felt she could not fulfil this commitment. So, at 10pm on 4 February 2005, she telephoned Mr Ramsay. She told him she would not be going, her flight should be cancelled, and someone else should cover her. She became extremely emotional. Her husband was with her in the kitchen. He picked up the phone.

6. According to Mr Ramsay, Mr Breedon uttered a threat. He said "You are fucking with my family. If this does not stop I am going to fuck with your family" and "You had better check out who I am". Mr Breedon is a private detective and ex police officer. Mr Ramsay reported the matter within ATE the same day, and reported it to the police 36 hours later. Mr and Mrs Breedon, however, deny that any threat was made. According to Mr Breedon he simply said "I hope you are satisfied now".

7. ATE consulted its solicitors and started disciplinary proceedings. A letter dated 9 February set out what were in effect four charges. The first three related to the making of the call at 10pm, the berating by her of Mr Ramsay, and inconsistency in complaining about an appointment to the Dubai office when she did not want to move to Dubai to open the office herself. The fourth charge was said to be:-

"(iv). the ability of Peter Ramsay to manage you given the threat issued by your husband to both him and his family"

It was then said:-

“I must make it clear that the final of these issues is by far the most serious....This could result in your dismissal as we cannot allow any employees to be in fear of harm whether physical or otherwise if he makes a decision that another employee does not like.”

8. On 15 March 2005 a disciplinary hearing took place. Mr Breedon was not interviewed at or prior to that hearing. A background note was produced by Mr Ramsay which the Tribunal found to be inaccurate, and found had not been shown to Mrs Breedon. Following the hearing she was dismissed on the basis of ground (iv). The dismissal letter includes the following:-

“From the evidence available to me, including talking to the various parties involved, I believe a threat was made by your husband against Peter Ramsay and his family on 4 February 2005. You have denied this allegation and, far from distancing yourself from your husband’s threat (although you claim to have been so distressed to have collapsed during the phone call), have supported his account of events – which I reject as inaccurate. Given my finding that the threat was indeed issued, an acknowledgement and apology would have been more appropriate.

It is completely unacceptable to expect Peter Ramsay to manage a member of staff in circumstances where a threat has been made against him and his family (Peter has a wife and children). It is clear that they are distressed and concerned by this threat – indeed they took it seriously enough to report it immediately to the police.

While I have taken into account that you did not issue the threat, in the absence of a sincere retraction, the position remains untenable.”

The Tribunal recorded the evidence of ATE at the Tribunal hearing as being that if Mrs Breedon had apologised she would not have been dismissed.

9. On 8 April 2005 an appeal was heard by Mr O’Beirne, the Irish General Manager. As part of the appeal process Mr Breedon was interviewed. The appeal was dismissed. In his letter dated 19 April 2006 Mr O’Beirne gave reasons for preferring the evidence of Mr Ramsay to that of Mr and Mrs Breedon. He reviewed the conclusion that it was unreasonable to expect Mr Ramsay or anyone else to manage her under such circumstances. He agreed with that conclusion. The dismissal therefore stood.

10. It is important to note that at all material times Mrs Breedon positively supported her husband's version of events. On 9 February, at the outset, she said:-

"The contents of the conversation alleged to have taken place with my husband are utterly denied".

At the end of the process, in her appeal letter she vigorously denied the threatening call. In her statement to the Tribunal she said:-

"I became extremely upset and began crying. My husband took the phone from me and said "Are you satisfied now" and put the phone down. Although I was in an upset state I am quite satisfied that he did not utter the threats that Avid now allege that he did, in particular the threat to interfere with Mr Ramsay's family."

Statutory provisions

11. The relevant statutory provisions governing whether a dismissal is fair are the following:-

"98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and**
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

(2) a reason falls within this subsection if it-

- (a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
- (b) relates to the conduct of the employee,**
- (c) is that the employee was redundant, or**
- (d) is that he employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under enactment.**

(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 employers 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.”

12. The relevant statutory provisions governing the assessment of a compensatory award are the following:-

“123 Compensatory award

(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of compensatory award by such proportion as it considers just and equitable having regard to that finding.”

The Tribunal’s conclusions on the merits

13. It was ATE’s case at the Tribunal that it had dismissed Mrs Breedon for a substantial reason. The threat had led to a breakdown in relationship between the parties to which Mrs Breedon had contributed, denying the threat, and neither retracting nor apologising.

14. The Tribunal found that ATE had not dismissed Mrs Breedon for some other substantial reason, and went on to conclude that Mrs Breedon was “substantively and procedurally unfairly dismissed”.

15. The Tribunal’s process of reasoning, in section 6 of its reasons, must be set out at some length.

16. Firstly, the Tribunal held that the alleged threat was not the reason for dismissal; rather, it was failure to apologise which was the reason for dismissal, and this was a reason relating to conduct. The Tribunal's process of reasoning is set out in paragraphs 6.2 to 6.4:-

“6.2 Had the Respondent shown a potentially fair reason for the dismissal. The Respondent relied on some other substantial reason. An alleged threat by the Claimant's husband to her manager and his family. However, the Respondent did not consider the threat on its own justified the Claimant's dismissal. We arrived at that conclusion because the documentation showed and the Respondent confirmed in evidence that the reason for the dismissal was her stance in relation to the alleged threat by her husband. This was also confirmed in paragraph 14 of their submissions. It seemed to the Tribunal that the threat by her husband was either a sufficient reason for dismissal or it was not. Her apology could not have removed the threat. Therefore, if apologising was sufficient for her to retain her job then it must have been the lack of an apology that was the reason and not the threat itself. The threat could not have been a sufficient reason in itself; if it was, an apology would have made no difference. Further the Respondent's letter of dismissal confirms this by referring to her failure to acknowledge or apologise for the threat.

6.3 Moreover, it seemed to us that, when the employer relied on an action leading to a breakdown in relations, it must be the action of the employee herself that leads to the breakdown and not that of a third party. The Claimant did not issue any threats herself. Her only “offence” was in not acknowledging the alleged threat or apologising for her husband.

6.4 Thus it was her refusal to apologise that was the reason for her dismissal. This, however, would appear to be a dismissal on the grounds of conduct and not SOSR. This is emphasised by the fact the Respondent dealt with it as a conduct matter. There was a letter inviting her to a disciplinary meeting, her letter of dismissal stated that her position was untenable due to her failure to acknowledge or apologise for the threat. Thus, although the Respondent was adamant that the dismissal was on the ground of SOSR it appeared to the Tribunal that the ground relied on was the conduct. It is noteworthy also that in bringing the disciplinary proceedings the Respondent actively sought out complaints about the Claimant's conduct to add to the charge of her husband having allegedly made threats to Mr Ramsay. We therefore, find that the alleged threat was not the reason for the dismissal.”

17. Secondly, the Tribunal addressed the question “whether the Claimant's failure to acknowledge or apologise for the alleged threat justified dismissal on the grounds of some other substantial reason”. The Tribunal's process of reasoning is set out in paragraphs 6.5 and continues, we think, certainly as far as paragraph 6.9:-

“6.5 The Tribunal then went on to consider whether the Claimant's failure to acknowledge or apologise for the alleged threat justified dismissal on the ground of SOSR. The Tribunal found that it did not although the panel differed in their reasons for that finding.

6.6 The Chairman and Mr Jones considered that a person could not be expected to acknowledge or apologise for something that they did not do and did not believe had been done by another. Further, the Respondent indicated they were sceptical as to whether the Claimant had heard what was said by her husband because she was in a distressed state at the time. There appeared to be a belief by the Respondent that the Claimant had not heard what was said but stubbornly believed her husband over Mr Ramsay. However, had she acknowledged the alleged threat the Claimant would then have been in a position where she

could have been dismissed for the threat, it having been admitted. The Claimant was, therefore, in a situation where she was either dismissed for not acknowledging and apologising for her husband's threat or because she admitted her husband's threat.

6.7 Miss Hughes was of the view that the Claimant had heard her husband say something he should not have to Mr Ramsay. She based this on a comment at the end of Lauren McKenna's witness statement that the Claimant had left a message for her saying that things had got out of hand. Ms McKenna was not challenged on that in cross examination and she interpreted that as the Claimant recognising that her husband had said something inappropriate to Ramsay.

6.8 However, whether it was the case that the Claimant heard what her husband said, or did not but believed his version of the conversation, the Tribunal were at one in finding that the Claimant could not be criticised for the threat nor for not acknowledging it, at least until after the final finding that a threat had been made.

6.9 However, a Tribunal has not just to consider whether the Respondent has established the reason for the dismissal but, where more than one reason is shown, whether they have established the principal reason for the dismissal to be one falling in Section 98. The Tribunal does not consider that the Respondent has established the principal reason as one falling in Section 98."

18. Thirdly, there then follows a section of reasoning where the Tribunal considers again the question of apology. This section runs from paragraphs 6.10 to 6.12:-

"6.10 The principal reason relied upon certainly revolved around the alleged threat by the Claimant's husband. An employee can only apologise after the finding by the Respondent that what was alleged to have been said had been said. The Tribunal find that the Claimant could not be criticised for not apologising at least until after the final finding by the Respondent that her husband had made a threat.

6.11 The Claimant said that once it was found as a fact, rightly or wrongly, she would have apologised. Can the lack of an acknowledgment or apology on behalf of another amount to a breach of trust and confidence when she has not been given an opportunity to acknowledge or apologise on behalf of her husband? We find that it cannot. The Claimant was not dismissed for misconduct but due to an untenable situation as a result of her husband's alleged threat. The Respondent stated that the Claimant's and Mr Ramsay's continued working relationship would be untenable. At the same time they stated an apology would have cured the problem. The relationship, therefore, was not beyond repair nor did they consider Mr Ramsay's position untenable if an apology would cure the relationship.

6.12 There had been a finding at the disciplinary hearing that the Claimant's husband had threatened Mr Ramsay. The Claimant had specifically appealed that finding. It was not until the appeal that Mr Breedon was interviewed. After the finding was confirmed on appeal, having regard to the fact that Mr Breedon had not been interviewed earlier, the Claimant should have been given an opportunity to acknowledge or distance herself from the threat. There was no opportunity for her to do that. The Claimant, therefore, was given no opportunity to acknowledge or distance herself from the alleged threat."

19. Fourthly, the Tribunal deals with procedural issues in paragraphs 6.13 to 6.16:-

"6.13 Even if we are wrong on that, with regard to the procedure followed, the Tribunal find that the Respondent was not reasonable in its belief at the time of dismissal because at that time they had not

carried out a fair procedure. At the time of the dismissal they had not spoken to Mr Breedon. Upon the allegation being made they did not even speak to Mrs. Breedon but went straight into the disciplinary procedure on assumption on what was alleged to have been said was said. There appeared to be a pre-formed view that what was alleged was correct since the letter calling the Claimant to a disciplinary hearing referred to the “threat” rather than an alleged threat.

6.14 Before the disciplinary process was initiated the Respondent’s only procedure was to discuss the matter with Mr Ramsay and the company solicitor. As a result of the discussion with the solicitor they sought other matters with which to charge Mrs Breedon personally as well as the allegation against her husband.

6.15 Further, in considering the matter Mr O’Kelly received from Mr Ramsay a report on the background leading up to the conversation with Mr Breedon. The note was incorrect in a number of material respects. The Claimant was not been given a copy of that note and so was not able to correct any inaccurate impressions given by Mr Ramsay’s report on the background.

6.16 While the appeal did remedy the defect of not interviewing Mr Breedon it did not remedy the Claimant not having a copy of documentation taken into account by Mr O’Kelly. Nor did it deal with the lack of opportunity for her to acknowledge or apologise after the final finding of fact at the appeal, that her husband had issued a threat. There had been a finding at the disciplinary hearing that the Claimant’s husband had threatened Mr Ramsay. The Claimant had appealed that finding. After the finding was confirmed on appeal after Mr Breedon being interviewed, the Respondent should have warned the Claimant that if she did not acknowledge or distance herself from the threat her dismissal would, follow. There was no opportunity for her to do that.”

20. In paragraph 6.17, which is lengthy and which we do not need to quote in full, the Tribunal by a majority expressed the conclusion that the matter was prejudged. The Tribunal’s reasoning appears to apply to the dismissal hearing. There is no express finding that the appeal hearing was prejudged, and it does not necessarily follow from any of the findings of the majority.

21. Finally, the Tribunal concludes with paragraphs 6.18 to 6.19:-

“6.18 The Tribunal unanimously find that dismissal was not within the range of reasonable responses because the action leading to the dismissal was not that of the Claimant’s but a third party. The Claimant would have been prepared to distance herself from her husband’s alleged threat after the final finding of fact had she been given the opportunity. There was no action by the Claimant that could justify dismissal. It clearly was not the case that the Claimant’s position in the company was untenable. There was no suggestion that Mr Ramsay could not work with the Claimant again. Even if Mr Ramsay had felt he could not work with the Claimant again, the organisation was large and fast growing.

6.19 The Tribunal do not find the Respondent has established the principle [sic] reason for the dismissal was one falling in Section 98. Further, the procedure was unfair since there was an inaccurate document taken into account by Mr O’Kelly and Mr O’Beirne on the background that the Claimant did not have the opportunity to correct. Further, there was no

opportunity for the Claimant to acknowledge or distance herself from her husband's alleged threat after the finding was confirmed.”

The Tribunal's conclusions on compensation

22. On the question of compensation the Tribunal had two main issues to decide: whether she took reasonable steps to mitigate her loss, and whether she contributed to her own dismissal.

23. On the question of mitigation, the Tribunal made detailed findings as to the steps she took to obtain alternative employment between March, when she was dismissed, and when she obtained alternative employment (which commenced on 4 November). It considered four specific areas of criticism and made findings (see paragraphs 3.18 to 3.21 of its reasons). It concluded, in paragraph 6.2, that she had mitigated her loss by exploring all avenues which were traditional for her type of job, being prepared to accept temporary work until something permanent came along, and being interviewed by a job seeker's panel who were satisfied she was actively seeking work.

24. On the question of contributory fault, the Tribunal concluded:-

“6.1 With regard to whether the Claimant contributed towards her own dismissal, we find that she did not for the following reasons:

- 6.1.1 Before the matter got out of hand the Claimant did what she could to resolve the matter. She called Ms McKenna a number of times but Ms McKenna failed to call her back.**
- 6.1.2 The matter may have been resolved sooner had the Respondent carried out an investigation and the lack of an investigatory meeting is not something that can be placed at the Claimant's door.**
- 6.1.3 The alleged threat was not one said to have been made by the Claimant.**
- 6.1.4 The Claimant was not given an opportunity after the final finding of fact to state her position on the alleged threat. Had she not done so at that point then she may have contributed, but until that point had passed without her stating her position she cannot be said to have done so.**

Submissions

25. We will summarise the submission of Mr Panesar on behalf of ATE as follows. He submitted that the Tribunal erred in its finding on some other substantial reason. A dismissal can be for some other substantial reason even where there are elements of conduct or capability: **Huggins v Micrel Semiconductor** (EAT 009/04) and **Wilson v Post Office** [2000] IRLR 834. He submits that it was perverse, or a misdirection in law, to reject the reason for dismissal given by the employer.

26. He submitted that the Tribunal in effect substituted its own view for that of the employer, contrary to section 98(4). He pointed out that there had been no question of an apology during the dismissal process; Mrs Breedon was stoutly denying any wrongdoing. The Tribunal took evidence which it received about an apology, and assessed the employers' actions in the light of that evidence, instead of concentrating on the material the employer had, and assessing whether it acted reasonably. He refers in particular to paragraph 6.6 to 6.8 of the reasons, where he submits there is no sign of the reasonableness test being applied. The only reference to the band of reasonableness test is much later, at paragraph 6.18 of the reasons, and is vitiated by the finding that the dismissal could not be fair because it arose from the actions of a third party.

27. He submitted that the Tribunal failed to make any findings about a central issue in the case - namely, whether the threat was made, and whether ATE reasonably believed that it was made. These findings were essential for the purpose of assessing the reasonableness of the dismissal, the credibility of the parties and the question of contribution.

28. He further submitted that in various respects the Tribunal reached conclusions which were perverse. In particular he criticised the approach of the Tribunal to the question of apology, and a number of individual findings of the Tribunal.

29. On the question of mitigation, Mr Panesar in his skeleton argument made a number of submissions to the effect that the Tribunal's findings were perverse. On the question of contribution, his principal submission was that the Tribunal did not make essential findings of fact as to the alleged uttering of the threat in Mrs Breedon's presence.

30. On behalf of Mrs Breedon Mr Walker's submissions may be summarised as follows. Firstly, he submitted that the approach of the Tribunal to the question of some other substantial reason was correct in law. He submitted that it accorded with **Wadley v Eager Electrical** [1986] IRLR 93, in which the Appeal Tribunal held that to amount to a substantial reason for dismissal there must be some act on the part of one side to the contract or the other to the contract of employment in breach of the duty of mutual trust and confidence. The Tribunal, in identifying the key reason for dismissal as the failure to acknowledge or apologise, was applying that principle.

31. Secondly, he submitted that the Tribunal did consider and apply section 98(4) in its reasoning. He submitted that in paragraphs 6.6 to 6.9 of its first set of reasons the Tribunal was addressing the question posed by section 98(4). He pointed to the express reference, in paragraphs 6.18 and 6.19, to the range of reasonable responses test.

32. Thirdly, he defended the Tribunal's conclusion that Mrs Breedon could not be criticised for not acknowledging the threat or apologising until after the final finding that a threat had

UKEAT/0254/06/RN & 0327/06/RN

been made. In this conclusion, he submits, the Tribunal was not substituting its judgment for that of the employer, nor was its conclusion unreasonable. He likened the position to that which would apply in the criminal courts: first establish guilt, and then offer the opportunity, in mitigation, for an apology. He submitted that the Tribunal was fully entitled to criticise ATE for failing to offer any opportunity for Mrs Breedon to apologise once the facts had been established.

33. Fourthly, he addressed us on the various grounds of perversity relied on by Mr Panesar. In two respects he correctly, and fairly, made concessions. The Tribunal was wrong to hold that Mrs Breedon was not given a copy of Mr Ramsay's note. The Tribunal was in error in finding or relying on that allegation in paragraphs 3.15, 6.15, 6.16 and 6.19; but, he submitted, the Tribunal's reasons were sufficient in any event to justify its decision. The Tribunal also expressed itself incorrectly in holding, in paragraph 6.18, that there was "no suggestion" that Mr Ramsay could not work with Mrs Breedon again. Mr Walker accepted that there was such evidence, but submitted that the Tribunal was fully entitled to find that Mrs Breedon's relationship with him was not untenable.

34. On the question of mitigation, Mr Walker submitted that no error of law or perversity was made out. On the question of contribution, Mr Walker accepted that the Tribunal did not determine whether the threat was in fact uttered, but submitted that no such finding was necessary. He submitted that the manner in which ATE dealt with the matter procedurally denied Mrs Breedon any opportunity to apologise.

Our conclusions

35. There is an appeal to the Employment Appeal Tribunal only on a question of law. The fundamental task of the Appeal Tribunal is to see whether a Tribunal has decided a case
UKEAT/0254/06/RN & 0327/06/RN

according to law. We think it may be helpful if we set out the manner in which we would expect this Tribunal to have taken its decision.

36. Section 98 lays out for a Tribunal a structure within which to determine whether a dismissal was unfair.

37. The starting point is to establish what the employer's principal reason for dismissal was. A reason for dismissal is, in the well known words of Cairns LJ, a set of facts known to the employer or it may be a set of beliefs held by him which cause him to dismiss the employee: **Abernethy v Mott Hay and Anderson** [1974] IRLR 213 at para 13. At this stage, the Tribunal is not concerned with whether the decision to dismiss is reasonable. It is concerned only with whether it is a reason of the kind falling within section 98(2) or otherwise a reason of substance, as opposed to a trivial or whimsical reason, for dismissal. It is not concerned with the label the employer put on the reason, but rather with the reason itself.

38. In this case ATE's reason for dismissal was set out in the letter of dismissal, which we have quoted already. Put shortly, ATE dismissed because (1) a threat had been made by Mr Breedon against Mr Ramsay and his family; (2) Mrs Breedon had denied that allegation and supported her husband's version of events, whereas an acknowledgement and apology would have been appropriate; and (3) it was unacceptable to expect Mr Ramsay to manage Mrs Breedon in those circumstances.

39. At the section 98(1) stage, we would have expected the Tribunal to find whether this was a set of facts or beliefs genuinely held by ATE. If it was, we would expect the Tribunal to have asked whether it fell into any of the categories set out in section 98(2) and if not whether it was some other substantial reason for dismissal.

40. If the reason did not satisfy the test under section 98(1), that would be the end of the matter.

41. If the Tribunal found that it satisfied the test under section 98(1), then we would expect the Tribunal to go straight on to section 98(4), and consider whether, in all the circumstances, the employer acted reasonably in treating the reason as sufficient to dismiss. It is now well established that the Tribunal applies a “range of reasonable responses” test to every aspect of its consideration of the section 98(4) question.

42. Among the questions which we would expect the Tribunal to have addressed for the purpose of section 98(4) would be the following. Did ATE act reasonably in concluding that a threat had been made? Did ATE act reasonably in concluding that Mrs Breedon had supported her husband’s version of events, whereas she should have apologised? Did ATE act reasonably in the procedure it followed, including any appeal? Did ATE act reasonably in imposing the sanction of dismissal? These are the kinds of question we would expect the Tribunal to have addressed. The list is not exhaustive, and it is not intended to be a substitute for the overall statutory test, which is set out in section 98(4).

43. If the Tribunal found the dismissal to be unfair, the Tribunal would then in this case have had to consider the question of contributory fault. For this purpose it would have asked, and answered, the question whether there was conduct on the part of Mrs Breedon which was culpable or blameworthy, and which contributed to her dismissal: see **Nelson v BBC** (No 2) [1979] IRLR 346 at paras 40-45.

44. In this case the conduct said to have been blameworthy on Mrs Breedon’s part was denying the allegation and supporting her husband’s account instead of apologising. This was
UKEAT/0254/06/RN & 0327/06/RN

what the Tribunal had to evaluate. In this case there was no dispute that she denied the allegation and supported her husband's account. The question is whether it was blameworthy to do so. This depends crucially on whether (a) a threat was made, and (b) she heard the threat being made. If a threat was made and she heard it being made, then to deny the allegation and support her husband's account was at least arguably blameworthy. So we would expect to see clear findings of fact on those issues, followed by an evaluation of whether Mrs Breedon's conduct contributed to her dismissal and if so to what extent.

45. This, then, is the broad structure the law required the Tribunal to follow. A Tribunal which clearly follows this structure is unlikely to commit an error of law. Our difficulty in this case is to see whether and to what extent the Tribunal asked the correct questions and made sustainable findings.

46. We start with the section 98(1) question. The Tribunal found that ATE did not establish that the principal reason for dismissal fell within section 98(1). Yet there is no suggestion of any ulterior motive for dismissal, or that ATE was dishonest in the reason it gave.

47. In our judgment, the opening paragraphs of the Tribunal's reasoning demonstrate a wrong legal approach.

48. The Tribunal erred in law in dissecting ATE's reason, so as to restrict it to a failure to acknowledge or apologise. It is important to appreciate that a principal reason for dismissal can be a composite set of facts or beliefs. Here ATE's reason was not restricted to a failure to acknowledge or apologise. It comprised the features we have set out earlier in this judgment: the threat, the positive support given to her husband by Mrs Breedon when she should have apologised or retracted, and the breakdown of trust and confidence caused by these matters.

49. If we understand the reasoning correctly, the Tribunal made this error for at least two reasons. Firstly, it applied a “but for” test to the reason which ATE gave: see paragraphs 6.2 and 6.4. This was not necessary or appropriate. The Tribunal said ATE would not have dismissed her if she had apologised - but it could have said, with equal truth, that ATE would not have dismissed Mrs Breedon but for Mr Breedon’s threat. In truth ATE’s reason was composite. The search for a reason or principal reason does not require a composite reason of this kind to be dissected. There are of course occasions where an employer has two quite different reasons in mind for a dismissal. Then it may be necessary to decide which is the principal reason. But where the employer has what is in reality a single composite reason for dismissal, it is not necessary to dissect it. Moreover in the process of dissection the Tribunal has left out part of ATE’s reason - Mrs Breedon’s positive support for her husband’s denial of a threat.

50. Secondly, the Tribunal considered that in the context of a breakdown of relationships, it must be the action of the employee which led to the breakdown and not that of a third party.

51. The Tribunal may here have had in mind **Wadley v Eager Electrical** [1986] IRLR 93, a case to which it made express reference earlier in the reasons, and upon which Mr Walker relied before us. In that case the employee was dismissed after his wife was charged with theft. The employer said that trust and confidence between employer and employee was thereby broken, and dismissed him. The Employment Appeal Tribunal said, in effect, that to amount to a substantial reason for dismissal in the context of a breakdown of relationships there must be some act on the part of one side or the other in breach of the duty of trust and confidence. That is no doubt true. Here, however, ATE’s case was that Mrs Breedon supported her husband when she should have apologised, so within ATE’s reasoning there was the element required by **Wadley v Eager Electrical**.

52. We have so far dealt with two elements of the Tribunal's reasoning. The Tribunal then went on to ask the question "whether the Claimant's failure to acknowledge or apologise for the alleged threat justified dismissal on the ground of SOSR": see paragraph 6.5.

53. It is not altogether easy to discern why the Tribunal asked this question, but we think the reason is as follows. We think the Tribunal considered that if a failure to acknowledge or apologise for the threat did not justify dismissal, then there would be no substantial reason. It answered that question for itself, holding that failure to acknowledge or apologise for the threat did not justify dismissal. See paragraphs 6.6 to 6.8. On the basis of its conclusion it then concluded that ATE had not established the principal reason: see paragraph 6.9. This is not the right approach. At this stage the employer does not have to establish that his reason did justify dismissal. He only has to establish that it was of a kind which could justify dismissal.

54. The alternative view, pressed upon us by Mr Walker, is that in these paragraphs the Tribunal had already moved on to the question whether it was reasonable to dismiss. We, however, do not think that can be right. The Tribunal do not apply the "reasonable responses" test in these paragraphs. These paragraphs form part of the Tribunal's conclusions on the question whether ATE had established a reason within the meaning of section 98(1).

55. In any event, even within that part of these paragraphs which are unanimous, there are in our judgment two flaws. Firstly, the Tribunal excluded from consideration an important part of ATE's reason - namely that Mrs Breedon positively supported her husband's account.

56. Secondly, the Tribunal held that even if Mrs Breedon heard what Mr Breedon said, she still could not be criticised for failing to acknowledge the threat. In our judgment the Tribunal there cannot possibly be applying a "reasonable responses" test. The Tribunal must be applying UKEAT/0254/06/RN & 0327/06/RN

its own judgment. We for our part consider that to be a perverse conclusion. Mrs Breedon was a highly paid member of management. If she heard her husband utter a threat to another member of management and his family, and did not acknowledge that something improper had been done, then it is in our judgment impossible to say that she could not be criticised.

57. For these reasons we think the Tribunal's conclusion that ATE had not established a principal reason falling within section 98(1) is fatally flawed. In the absence of an attack on the honesty of the reason, ATE in our judgment did establish such a reason.

58. Although strictly speaking the Tribunal did not need to do so, it also went on to consider the question of section 98(4) reasonableness in its reasons. It is, however, not altogether easy to see where this consideration starts in the reasons it gave. On the whole we think that the Tribunal started its consideration of section 98(4) issues at paragraph 6.10, dealt with the question of apology at paragraphs 6.10 to 6.12, and dealt with procedural questions at paragraphs 6.13 to 6.17.

59. We are critical of the Tribunal's reasoning in a number of respects. Firstly we note the Tribunal's fundamental approach to the question of apology. The Tribunal say that an employee can only apologise after the finding by the Respondent that what was alleged to have been said had been said. This is stated as the Tribunal's view; it was plainly not the view of ATE, as the dismissal letter makes clear. Again the formulation leaves out of account the fact that Mrs Breedon positively supported Mr Breedon's account, saying that she had heard his words. The question for the Tribunal on this aspect of the case was whether it was reasonable for ATE to believe that Mrs Breedon should not have supported her husband, but rather apologised.

60. Secondly, linked to the last point, we do not understand the comment of the Tribunal that it was not until after the appeal that Mrs Breedon had an opportunity to acknowledge or distance herself from the threat. On any possible view, at the very latest, the dismissal letter told her of the potential significance of an apology. Also, it must be remembered that it was her case she heard the telephone conversation. If she did, and if in reality that telephone conversation contained a threat, she had an opportunity to acknowledge or distance herself from it at a very early stage.

61. Thirdly, there is an acknowledged error of fact in the reasoning of the Tribunal as regards procedure. The Tribunal said that Mrs Breedon did not have an opportunity to correct factual inaccuracies in a note prepared by Mr Ramsay. This is an error (although, Mr Walker submitted to us, an understandable one). It is common ground that she did have the note. The error is compounded by its repetition dealing with the appeal (paragraph 6.16) and in the concluding paragraph of the reasons, paragraph 6.19.

62. Fourthly, there is an important mistake in paragraph 6.18, where the Tribunal applies the “reasonable responses” test. The Tribunal said that “there was no suggestion that Mr Ramsay could not work with the Claimant again”. This is incorrect. Mr Ramsay said in his witness statement:-

“27. On Monday 7 January, I e-mailed Lauren McKenna with details of the call. Emer O’Kelly subsequently questioned me as to the events of that night. During the course of our meetings, I recounted the events as they are recounted above and confirmed that, in the absence of a prompt retraction and apology from Peter or Karen Breedon, there was no way I felt I could continue managing her.”

Whether it was reasonable for ATE to conclude that it was unacceptable to expect Mr Ramsay to manage Mrs Breedon when she did not make a prompt apology, but rather supported her

husband, was a matter for the Tribunal to assess. It was not conceded that Mr Ramsay could work with Mrs Breedon again.

63. In all these respects the Tribunal in our judgment went wrong in law, either basing its conclusions on findings for which there was no evidence, or asking and answering questions in a way incompatible with a “reasonable responses” test.

64. There are, however, aspects of the Tribunal’s reasoning which are on more solid ground. There is no error of law in the Tribunal’s conclusions that the Tribunal was not reasonable in its belief at the time of dismissal because it had not carried out a fair procedure. There was no investigation prior to the dismissal hearing. Neither Mr nor Mrs Breedon were interviewed. There is force in an argument that it would have been desirable to speak to a valued employee prior to instituting formal proceedings. There were supporting allegations which had no substance (although it is fair to say they were dismissed at the dismissal hearing, and played no part in dismissal). The majority’s reasoning that the result was pre-judged at the disciplinary stage is not, contrary to Mr Panesar’s submission, perverse; the Tribunal’s reasons are sustainable.

65. There was, however, a full appeal from the dismissal. The Tribunal do not find that the appeal was pre-judged. As the Tribunal noted, Mr Breedon was interviewed for the purposes of the appeal.

66. The Tribunal gave two reasons for saying that the appeal did not cure the defects in the hearing below. In so doing, they repeated two errors which we have already identified. First, the Tribunal relied on the failure to give Mrs Breedon Mr Ramsay’s document; this, we have seen, is simply erroneous. Secondly, the Tribunal refers to the lack of an opportunity to

UKEAT/0254/06/RN & 0327/06/RN

acknowledge or apologise after the final finding of fact at the appeal. We have already criticised this approach.

67. In our judgment, therefore, the Tribunal's consideration of the unfair dismissal claim was wrong in law.

68. We turn to the appeal concerning compensation. We propose to deal shortly with Mr Panesar's criticisms of the Tribunal's findings on mitigation. We see no error of law in the Tribunal's approach. It made the necessary findings of fact, and dealt with the issues between the parties. We are not persuaded that the Tribunal was perverse in its conclusions.

69. We do, however, agree with Mr Panesar's submissions that the Tribunal has considered the question of contribution without making essential findings of fact. As we have said already, the key criticism of Mrs Breedon was that she denied the threat, supporting her husband when she should have apologised. Whether this criticism is valid depends on whether the threat was made and whether she heard it. If the threat was made and she heard it, she did not need to await any finding of her employer before she apologised. So it was essential to find the facts on this question.

70. Although Mr Walker conceded that the Tribunal did not make any finding as to whether a threat was made, we have in considering this appeal looked again at paragraph 6.6, and asked ourselves whether there is here a finding by the majority by implication either that the threat was not made or that she did not hear it. If we had considered paragraph 6.6 to amount to such a finding, we would have given Mr Panesar an opportunity to make additional submissions to us on the point. In the end, however, we consider that Mr Walker's concession was correctly made. If the Tribunal had found as a fact that the threat was not made or Mrs Breedon did not

UKEAT/0254/06/RN & 0327/06/RN

hear it, we would expect to have found that fact clearly set out in the reasons - either in the findings of fact, or in the conclusions, or most of all in the remedies decision where the Tribunal dealt with contribution. Whatever the process of reasoning may be in paragraph 6.6, it is not the clear finding of fact which was required on the matter.

71. In these circumstances, the appeal must be allowed. It would not be satisfactory to remit the matter to the same Tribunal. It requires a fresh start before a different Tribunal, which will be free to make its own findings, untrammelled by the earlier decision.

72. We emphasise that the role of the Employment Appeal Tribunal is to ensure that a decision is taken on correct legal principles. It is not our role to express any view, one way or the other, as to whether the dismissal should be found fair or unfair, or as to whether there should be a finding of contributory fault. These matters are entirely the province of the fresh Tribunal.