Appeal No. **UKEAT/0202/06/ZT**

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On **7 August 2006**

Before
HIS HONOUR JUDGE McMULLEN QC
MR C EDWARDS
MRS J M MATTHIAS

MASTERFOODS (a division of Mars UK Ltd) APPELLANT

MR E J WILSON RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

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SUMMARY

Unfair dismissal - Reasonableness of dismissal; Procedural fairness/automatically unfair dismissal

Practice and Procedure - Amendment

Employment Tribunal's conclusion of unfairness could not be criticised and was correct, especially as unappealed findings would make the dismissal unfair in any event by reason of the manager's closed mind and failure to conduct proper investigations. Claimant wished to appeal internally but because he did not comply with Respondent's policy requiring grounds to be submitted, it was refused. This is a breach of Step 3 and makes the dismissal automatically unfair under s 98A of the Employment Rights Act 1996. The Employment Tribunal refused an application to amend and add a new disability claim and its discretion was correctly exercised.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about unfair dismissal and Employment Tribunal procedure in dealing with an amendment to a claim of unlawful disability discrimination. The Employment Tribunal in this case expressly applied its experience of dealing with mental illness cases. At the express invitation of the parties we have applied our industrial relations knowledge and our experience of workplace reality to at least two points of law, and we are particularly helped by Mr Edwards' professional experience of nursing and mental illness. The judgment represents the views of all three members. We will refer to the parties as Claimant and Respondent.

Introduction
2. This is an appeal by the Respondent and a cross−appeal by the Claimant in those proceedings against a reserved judgment of an Employment Tribunal sitting over four days, and a day in chambers, at Norwich, Chairman Mr D R Crome, given on 7 November and registered with reasons on 20 December 2005. The Claimant and Respondent were represented respectively, as here, by Mr Shaen Catherwood and Mr Ian Scott of Counsel. The Claimant claimed unfair dismissal and unlawful disability discrimination. The Respondent now accepts he was disabled, but contended that he was fairly dismissed for dishonesty. The Employment Tribunal decided in the Claimant's favour on unfair dismissal and that he was disabled by reason of mental impairment. His dismissal was not the result of disability discrimination, and he was not allowed to expand his claim by a late amendment to it. Both sides appeal against that judgment. Directions sending this appeal to a preliminary hearing were given in chambers by Mr Justice Elias (President). At that preliminary hearing (attended by both Counsel) I, with members, ordered a full hearing of the appeal and cross−appeal.

The legislation
3. The relevant provisions of the legislation are first, the Employment Act 2002 s29. This introduces statutory dispute resolution procedures. These take effect by schedule 2, which provides for the standard procedure:

"Step 1: statement of grounds for action and invitation to meeting
1.-(l) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.
(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.
Step 2: meeting
2.-(1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.
(2) The meeting must not take place unless-
(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and
(b) the employee has had a reasonable opportunity to consider his response to that information.
(3) The employee must take all reasonable steps to attend the meeting.
(4) After the meeting. the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal
3.-(1) If the employee does wish to appeal, he must inform the employer.
(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.
(3) The employee must take all reasonable steps to attend the meeting.
(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.
(5) After the appeal meeting, the employer must inform the employee of his final decision."

In addition to this there are two general requirements:
"Timetable
12. Each step and action under the procedure must be taken without unreasonable delay.
Meetings
13.-(1) Timing and location of meetings must be reasonable."

Regulations were made under the Act and these are the Employment Act 2002 (Dispute Resolution) Regulations 2004, which provide in relevant part as follow:

"3 Application of dismissal and disciplinary procedures
(1) Subject to paragraph (2) and regulation 4, the standard dismissal and disciplinary procedure applies when an employer contemplates dismissing or taking relevant disciplinary action against an employee."

A definition is provided:

"2 ×
(1) 'relevant disciplinary action' means actions, short of dismissal, which the employer asserts to be based wholly or mainly on the employee's conduct or capability, other than suspension on full pay or the issuing of warnings (whether oral or written);"

A failure to follow one of these procedures is dealt with by Regulation 12 which says this:
"Failure to comply with the statutory procedures
12
(1) If either party fails to comply with a requirement of an applicable statutory procedure, including a general requirement contained in Part 3 of Schedule 2, then, subject to paragraph (2), the non−completion of the procedure shall be attributable to that party and neither party shall be under any obligation to comply with any further requirement of the procedure.
(2) Except as mentioned in paragraph (4), where the parties are to be treated as complying with the applicable statutory procedure, or any requirement of it, there is no failure to comply with the procedure or requirement.
(3) Notwithstanding that if regulation 11(1) applies the procedure that would otherwise be the applicable statutory procedure does not apply, where that regulation applies because the circumstances in sub−paragraph (a) or (b) of regulation 11(3) apply and it was the behaviour of one of the parties that resulted in those circumstances applying, that party shall be treated as if-
(a) the procedure had applied, and
(b) there had been a failure to comply with a requirement of the procedure that was attributable to him.
(4) In a case where regulation 11(2) applies in relation to a requirement of the applicable statutory procedure because the circumstances in sub−paragraph (a) or (b) of regulation 11 (3) apply, and it was the behaviour of one of the parties that resulted in those circumstances applying, the fact that the requirement was not complied with shall be treated as being a failure, attributable to that party, to comply with a requirement of the procedure."

Where the procedure is not complied with, s31 applies to increase or reduce as appropriate any compensation due, according to which party has failed to complete the procedure. Disciplinary action, in the form of dismissal, is dealt with by s98A of the Employment Rights Act 1996 which provides as follows:

"98A Procedural fairness
(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if-
(a) one of the procedures set out in Part I of Schedule 2 to the Employment Act 2002 (dismissal and disciplinary procedures) applies in relation to the dismissal,
(b) the procedure has not been completed, and
(c) the non−completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.
(2) Subject to subsection (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of section 98(4)(a) as by itself making the employer's action unreasonable it he shows that he would have decided to dismiss the employee if he had followed the procedure.
(3) For the purposes of this section, any question as to the application of a procedure set out in Part I of Schedule 2 to the Employment Act 2002, completion of such a procedure or failure to comply with the requirements of such a procedure shall be determined by reference to regulations under section 31 of that Act."

4. In addition, two provisions have not yet been brought into effect dealing with this new dispute resolution machinery, for s30 provides:

"30 Contracts of employment
(1) Every contract of employment shall have effect to require the employer and employee to comply, in relation to any matter to which a statutory procedure applies, with the requirements of the procedure.
(2) Subsection (1) shall have effect notwithstanding any agreement to the contrary, but does not affect so much of an agreement to follow a particular procedure as requires the employer or employee to comply with a requirement which is additional to, and not inconsistent with, the requirements of the statutory procedure."

5. Disability discrimination is now provided for by the amendments introduced into the Disability Discrimination Act 1995 and so far as is relevant to our proceedings include the following:
"3A Meaning of "discrimination"
(1) For the purposes of this Part, a person discriminates against a disabled person if-
(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply,
(b) he cannot show that the treatment in question is justified.
(2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled.
(5) A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person."

6. The relationship between these new provisions was described in a judgment I gave in High Quality Lifestyles Ltd v Watts [2006] IRLR 850 on behalf of the EAT where in paragraph 9 we said this:
"As can be seen, this consists of what can be conveniently be divided into disability−related discrimination, s3A(1), discrimination by not making reasonable adjustments for a disabled person, s3A(2) and direct discrimination s3A(5). Only the first is qualified by the justification defence."

7. Further illumination is given by the Disability Rights Commission's code which came into effect at the same time as these amendments on 1 October 2004, and provides as follows:

"4.29 In general, direct discrimination occurs when the reason for the less favourable treatment in question is the disability, while disability−related discrimination occurs when the reason relates to the disability but is not the disability itself. The expression ‘disability−related discrimination' therefore

distinguishes less favourable treatment which amounts to direct discrimination from a wider class of less favourable treatment which, although not amounting to direct discrimination, is nevertheless unlawful."

8. Procedural rules regulate amendments to Employment Tribunal claims: see the 2004 Rules: rule 10(1) and 10(2)(q). These give extensive powers of case management to a tribunal including the power to give permission for an amendment to a claim.

9. The Tribunal directed itself to the relevant provisions.

The facts
10. The Tribunal described the Respondent in the following terms:
"53 We remind ourselves that the respondent is a large multi−national company from whom the highest standards of good industrial practice can be expected. We were impressed by the respondent's dismissal and appeal procedures. There was the initial investigation, followed, albeit the next day, by a disciplinary hearing. That hearing resulted in a recommendation for dismissal which was referred to a consultation with the Human Resources Department which, when resulting in confirmation of the decision, was itself referred to a review meeting, following which there was an appeal. Whilst we do not find that this careful process does not in itself meet the statutory requirements, plainly appeal is a separate issue to a reconsideration and review. Nevertheless the procedure is to be admired."

11. There is an express requirement in the disciplinary regime applicable to its employees, who are termed Associates, and this too imposes a requirement that those high standards apply to the Associates. The Respondent operates a food plant at King's Lynn, Norfolk, from a head office at Melton Mowbray. It has sophisticated procedures. These include the right of the Respondent to impose suspension without pay when an investigation is under way and where there is an allegation of criminal activity.

12. The Claimant was employed as a technical operator at a salary of £29,000 per annum from 1991 until the relationship ended by his dismissal on 9 November 2005. The Tribunal said this:
"1 The claimant commenced employment with the respondent's predecessor on 3 June 1991 and that employment was transferred to the respondent on 13 July 1992. The terms and conditions of employment were regulated by a written contract, pages 28 to 34 of the bundle. In due course an attendance management policy was incorporated into the Company Handbook which was part of the claimant's terms and conditions of service including obligations on both sides, on the one hand the employer to monitor and conduct health enquiries from time to time and from the point of view of the employee to report changes in condition and particular at paragraph 7 the parties recognise that whilst limited social and recreational activities were permitted during absence,
'With regards to other employment whilst an associate is in receipt of company sick pay they are required to abstain from all other forms of employment, voluntary or paid, until such time as they are fit enough to return to work at Mars. Once an associate is fit for work, the company will endeavour to find suitable work to enable an associate to return as soon as possible'.

2 The procedure allows for reviews of sickness absences, at paragraph 10 at page 39 and following, and in particular provides at paragraphs 10.5 and 10.6, for the possibility of alternative employment termination, or the payment of a disability pension. There are also provisions giving the employer the right to require an occupational health physician to review of the situation."

13. In May 1993 he began a long period of sickness absence on account of an elbow injury, said to be industrially related. On 15 October 2003 he was given a first warning, operative for 24 months, for undertaking activities inconsistent with the reasons for his absence and these reasons were that he was found to be taking part in a fly−drive holiday in Florida, USA.

14. On 5 December 2004 Dr Deacon, who was at the time the Respondent's occupational health physician, provided a report to Lawrence Vingoe, who was the relevant personnel manager in these proceedings. The report included that the Claimant remained distressed, unable to concentrate and cope with many everyday

activities. That report was never disclosed to the Claimant. On 7 May 2004 he was interviewed by Heather Wood of the occupational health team at King's Lynn and described his symptoms.

15. On 14 October 2004 he was observed by private investigators engaged by the Respondent driving at high speed with his mother to France across the Dartford river crossing and over to Calais, although the investigators gave up because they could not keep up with his speed.

16. On 18 October 2004 the Claimant attended a meeting ostensibly to consider a review of his health condition. This was conducted by Heather Wood. Lawrence Vingoe was also there. He gave an account of his symptoms and then was informed that he had been observed driving to France. As a result of this, the meeting was terminated and he was told to turn up at a disciplinary hearing, the allegation being that he obtained company sick pay fraudulently and he had been dishonest about the reasons for his absence. He was suspended without pay at that time.

17. The next day at 10.00 am he attended a disciplinary meeting with Mr Vingoe, as a result of which a number of checks was made by Mr Vingoe. Prior to his making those checks, Mr Vingoe filed a ‘decision document' which we find represents his decision in respect of the Claimant's future. He decided that the Claimant was an experienced and dramatic deceiver and had deliberately, repeatedly, lied about his true ability and that he was dishonest. Mr Vingoe did not believe the symptoms that he described had been suffered. The further enquiries involved the method of payment at the Dartford crossing and also a further approach to Heather Wood at King's Lynn and Tracy Arnold, the head of the Respondent's occupational health department, seeking their view concerning driving to Calais.

18. On 22 October 2004 Mr Vingoe wrote to the Claimant telling him that he was being recommended for dismissal. He was invited to the next stage of the disciplinary procedure which this time involved a hearing with Gillian Caroe, the personnel manager, on 1 November 2004. He attended and Ms Caroe decided to support the recommendation for dismissal.

19. There was further consideration on 4 November 2004, this time by a panel consisting of Mr Vingoe, Ms Caroe and two others. According to the procedure a unanimous decision is required if dismissal is to be supported. This panel had before it Mr Vingoe's decision document and oral presentations from him. The panel decided that the Claimant's dishonesty was of fundamental concern to it, and Mr Vingoe went on to explain how he came to the view that the Claimant was lying and had acted inconsistently. The panel carefully considered Mr Vingoe's recommendation and agreed unanimously with it. That means that they supported the decision to dismiss, and so on 9 November 2004 Mr Vingoe wrote saying "×I am writing to confirm my decision." In other words, resolving an issue in this case, it is clear that the decision was Mr Vingoe's and it was supported throughout, following his recommendations. He was the dismissing officer.

20. The grounds for the dismissal were as follow:
"In my letter dated 18 October 2004 I set out the allegations against you. Briefly, these were that that you have dishonestly reported your reasons for absence and your fitness to work and that you have fraudulently obtained Company Sickness benefit. At the disciplinary hearing on 19 October 2004, which was reconvened on 1 November 2004 you were given the opportunity to put your case to both Gillian Caroe and me and to provide any explanations."

21. The Claimant was offered the right to appeal and was told this:
"In accordance with the Company's disciplinary procedure you have the right to appeal against my decision. You must set out the grounds of your appeal in writing to Marc Turcan, Plant Manager within 5 working days of the date of this letter."

A reminder was sent on 13 November 2004. The Claimant wrote back (the text is important):
"I want to appeal the decision of my dismissal.
I am consulting with my solicitor about the grounds of the appeal and these will be sent separately as soon as possible."

22. Mr Vingoe agreed that it was reasonable for him to have time to take advice and that he must then set out his grounds of appeal by 22 November 2004. By a fax on 24 November 2004, solicitors instructed by the Claimant informed Mr Vingoe that the grounds of appeal would reach him by close of business on the next Friday. On 6 December a letter dated 26 November from the solicitors, with a note saying that it had not been faxed in the interests of privacy, was sent and received and it enclosed the grounds of appeal. On 6 December 2004 the Claimant was informed that his appeal would not be heard due to the delay in presenting the grounds of appeal. On 4 February 2005 the Claimant lodged his claim form. There was a case management discussion about this attended by legal representatives and the case started before the Tribunal in August 2005.

23. Although it will be clear from what follows that it was not necessary for its Judgment, the Tribunal decided that the Claimant was disabled by reason of mental illness. This is not the subject of a dispute before us, nor is the correctness of the Employment Tribunal in making such a finding, absent a live claim before it. The Tribunal also decided the following:

"12 Various rumours had come to the knowledge of Mr Vingoe that the claimant was the source of cheap cigarettes and alcohol, probably imported from the continent. Mr Vingoe gave credibility to these rumours, though it is right to say that the source of the rumours was never disclosed to the claimant, though the fact of the rumours was made known to him in the disability process which we are about to describe.
13 As a result of the rumours and upon the suspicion held by Mr Vingoe that the claimant was not being entirely frank about his condition or its consequences, a firm of investigators called Xl 4 Investigations were commissioned to observe the claimant who, by all the medical reports, was virtually unable to leave his home. The investigators reported by letter of 16 October 2004, that on 14 October they had observed the claimant in his Volkswagen Passat motorcar drive from his home address to the address of his mother and then travelled on the A47 and subsequent roads as far as junction 11 of the M20, apparently going to Calais. The claimant was said to be driving at very fast speeds from time to time and indeed it was because of the speed of his motorcar that the surveillance team did not pursue him any further along the M20. He was observed crossing the Dartford Bridge and using the Dart Tag vehicle toll booth. The investigator indicated to the respondent that the booth required the driver to hold prepaid tickets for multiple crossings for regular users, and Mr Vingoe himself caused an enquiry to be made on the internet which tended to support the view that the Tart [Dart] Tag channel was only available to persons holding a Dart card. The investigator also reported that the claimant had driven at speeds in excess of 100 mph so that the investigator had to give up the chase at some point on the M2.
55 The conduct relied upon, we have already referred to in our findings of fact, the alleged trading in illegal goods imported from Calais and the driving activity observed on 14 October. The respondent was saying that it believed the claimant was "swinging the lead" and was perfectly fit to work as was demonstrated by his activity on 14 October and that therefore he was wrongly claiming benefit within the sick pay provisions.
56 In order to satisfy a Tribunal that a dismissal relating to conduct was fair, an employer must first of all show that at the time it took the decision to dismiss, it had conducted a sufficient investigation, disclosing credible facts in which, it did in fact believe and that in dismissing it adopted a fair procedure. The supporting evidence was that obtained by the private investigators and was certainly enough to cause any reasonable employer to blink, and to make further enquiry. As Dr Rix said in his report he found it unusual for a patient affected by the mental illness affecting the claimant, to drive a car in that manner. The respondent relied upon several pieces of supporting evidence other than the driving."

24. It will be seen that the beginning of paragraph 56 cited above contains an unusual formulation, but no point was made to us that the Tribunal had misunderstood where the burden of proof lies. So, notwithstanding that unusual way of expressing the issue before it, we are in no doubt the Tribunal knew where the burden of proof lay.

25. The Tribunal found three aspects were the subject of criticism over what is described as the substantive unfair dismissal claim. These related first to Mr Vingoe's investigation of the material on the payment for the Dartford crossing, known as the Dart Tag. This is because a short−cut is made available for season ticket holders who can go through an expedited gateway. Secondly, there were criticisms of the reliance by Mr

Vingoe on rumours that the Claimant had been engaged in illicit trading including frequent trips across the Channel. Thirdly, the involvement of Mr Vingoe himself was the subject of very substantial criticism. The Tribunal said this:

"62 We also consider the question of procedure. It seems clear to us that the investigative meeting preceding the disciplinary meeting by a day, started out as a medical interview with Mrs Wood present for that purpose and during the course of that meeting it developed into an investigation. In this sense the claimant was duped into a false understanding of why he was present, although by the end of the meeting it was clear to him that he was being investigated because of course he was suspended. We believe the claimant when he told us that before the commencement of the disciplinary hearing on 19 October, whilst the chairs were being assembled in the room, that Mr Vingoe said to the claimant in an aside, 'The game is up". We also bear in mind that Mr Vingoe had Dr Deacon's letter of 5 February 2004, in his pocket. We have referred to that letter in the findings of fact and find it odd that the letter does not seem to have been referred to by anybody else in this case until the hearing. Dr Deacon was the company's Occupational Health physician and had made a diagnosis of disability and in particular given a positive opinion that the claimant was disabled within the meaning of the Disability Discrimination Act 1995 and on course to qualify for a company retired sick pension."

26. As can be seen, "The game is up" is a reference to what was said to the Claimant at the beginning of his interview with Mr Vingoe at the disciplinary hearing on 19 October. On behalf of the Respondent it is suggested that that indicates that the Respondent treated the matter seriously. However, from the account of this by the Tribunal, it was regarded by the Tribunal as showing a closed mind by Mr Vingoe. There were specific criticisms of Mr Vingoe's relationship to the other levels of procedure, for the Tribunal went on to say this:
"66 We are troubled by the fact that Mr Vingoe conducted the investigation, presided at the disciplinary meeting and in fact personally took the decision and then instructed the other echelons of the company in the various stages of the dismissal process. He was too closely involved and in his evidence to us came across as being too firmly committed to the view the claimant had committed misconduct and was intransigent in his attitude.
67 For those reasons we find that the investigation was incomplete and the procedure flawed in that Mr Vingoe was driven to dismiss the claimant from his opening remarks "It's all over" to the decision to dismiss and the refusal of .the appeal on the very technical ground that has been referred to."

27. Related to this is criticism of Mr Vingoe's approach to the medical material before him:
"65 In the view of the Tribunal and having regard to what was in the letter, it was incumbent upon Mr Vingoe to approach the disciplinary meeting in a rather different manner. The information the Company had by 19 October, was that the claimant was disabled by reason of mental illness and had been behaving, particularly in regard to the driving, in a way inconsistent with his stated condition. Since the medical people were already involved, it seems to the Tribunal that a reasonable employer would have referred the facts from the investigators back to Dr Deacon so that he could have had an opportunity of considering those facts and reviewing the decision he had taken in February. That may well have resulted in the claimant still being dismissed for misconduct. On the other hand we are not to know what Dr Deacon would have said. We know what Dr Rix has said, but Dr Deacon had known the claimant over a longer period of time at an earlier stage of the illness. In our view the company's investigation was defective in failing to involve the health advisers in the dismissal process when the claimant's health was plainly at the centre of the claimant's defence to the allegations."

Thus, the conclusion of the Tribunal (para 67) is:
"×that the investigation was incomplete and the procedure flawed and we also hold that Mr Vingoe, being driven by his first statement to the Claimant at his disciplinary hearing had a closed mind."

28. The Tribunal then considered whether the statutory disputes procedures had been complied with and held that this was an automatically unfair dismissal because the Claimant had been precluded from an appeal for he had failed to enclose grounds. The Tribunal held that enclosure of grounds is an additional requirement not vouchsafed by the regulations and that the dismissal therefore was automatically unfair for

the purposes of s98A. Stating of grounds is a requirement in the contract of the Respondent with its employees but the Tribunal held it was not so required for the purpose of meeting the statutory conditions.

29. The Tribunal went on to decide an application to amend the claim by including a claim under s3A(1) of the Disability Discrimination Act. It decided to refuse the application considering a number of factors to which we will turn in due course, including the prospect of a delay, the cost to the Respondent of any such adjournment and there being no reason for this late amendment.

The Respondent's case

30. The Respondent was invited to deal first with what are described in the Claimant's skeleton argument as two unappealed points, for it was contended that whatever may be the outcome of the appeal they could not survive the findings which had not been appealed. These are paragraphs 62, which is cited above, together with the fact that the Claimant was "duped" about his first attendance which was for a sickness review. Mr Scott contended that these findings did not destroy the basis of his appeal. He accepted as a matter of law that involvement by a manager at all stages of a disciplinary procedure might or might not - depending on the fact−sensitive nature of the case - lead to a finding of unfair dismissal.

31. The substantive case against unfair dismissal was built upon a challenge to the Tribunal for substituting its judgment for that of the employer. The Tribunal was aware of the law, he contended. We take that as being no challenge to the self−directions as to the law, but as a challenge to its application. It was contended that the Tribunal's findings in relation to Mr Vingoe's shortcomings had contaminated its findings.

32. As to perversity, Mr Scott engagingly told us that he would not spend long on this, nor did he, for the simple contention was the same viz the Tribunal had failed to apply the range of reasonable responses test to the facts before it. Dismissal here was within the range of a reasonable Respondent and therefore the decision was both wrong in law and perverse. There had been a proper investigation and the Tribunal had wrongly, on the evidence before it, come to the conclusion that the Respondent had slipped below the standards of a reasonable employer in the conduct of its investigation.

33. On automatic unfair dismissal, it was suggested that the contract of employment pre−dated the statutory procedures. The requirement to provide grounds of appeal is not a burden as the Tribunal found, particularly if there is an existing contract to this effect. The provisions of s30 had not been brought into effect but they shed light on the way in which parliament intended there should be a relationship between the more sophisticated procedures which commonly exist in industry, and the rudimentary statutory procedures; the former are designed to supplement, and are not inconsistent with, the latter. It was contended that there was ambiguity in the provisions relating to the lodging of an appeal and that to construe this provision as indicating that there would be automatic unfair dismissal would lead to absurdity.

34. As to the Claimant's suspension without pay, the provision was introduced in his case for it was in contemplation of an investigation, but it was not action short of dismissal constituting disciplinary action. In any event it was a non sequitur to say that any breach of the suspension provisions was automatically unfair dismissal.

35. As to the time point, when this had been clarified by Mr Catherwood's intervention, it appears that the central contention is that the Claimant had suffered by his being brought to a disciplinary hearing within one day. Mr Scott contended that these were matters which were not answered by the Employment Tribunal and we should not do so.

36. In response to the cross−appeal against the rejection of the amendment, Mr Scott contended that the Tribunal had considered all aspects relevant to the exercise of its discretion and had reached a permissible decision. Although prejudice is an important matter, the Tribunal had noted that there was prejudice but this was not the only matter to be considered.

The Claimant's case

37. At the outset of the Claimant's case we raised a point about s203 of the Employment Rights Act which contains an embargo against contracting out. Mr Catherwood very fairly said that neither side had seen this point nor prepared for it. Both sides agreed that this was not a case of an exceptional nature which would allow the point to be taken by a party seeking to raise it at the EAT, and reminded us of the sequence of authorities which I set out on behalf of the EAT in Leicester County Council v Unison [2005] IRLR 920 recently approved by the House of Lords in North Wales Training and Enterprise Council t/a Seltec v Ashley [2006] ICR 992. Mr Catherwood observed that insofar as the contract of employment had the effect of limiting the effect of the statutory disciplinary procedures, it would infringe s203(1) of the 1996 Act, since it would avoid a finding of automatic unfair dismissal. In any event he, together with Mr Scott, urged us not to deal with this point as it was not an exceptional case. As to the two points relating to automatic unfair dismissal which were not covered by the Tribunal, suspension is a question of law and can be dealt with by us, but the provision about reasonable time to prepare for a meeting was one which would require examination by the Employment Tribunal.

38. Moving on to the substance of the appeal made by the respondent, Mr Catherwood dealt with the criticisms made by the Tribunal, sought to be undermined by Mr Scott's analysis. We were reminded that the premise for the judgment of the Tribunal was that the Respondent regarded the Claimant as regularly trading in illicit alcohol and tobacco across the Channel, for this suggested that regular trips must be made. Mr Vingoe relied upon rumours, not simply as a trigger, but also to support his decision about the Claimant's honesty. He had not properly investigated the circumstances in which, as the Claimant asserted in his interviews, you could take the Dartford crossing through the restricted channel by simply putting money in the bucket, as through the unrestricted channel. The simple question Mr Vingoe should have asked in his enquiries was whether that was possible and he did not do so.

39. Criticisms by the Tribunal of Mr Vingoe's treatment of the medical evidence indicated that a reasonable employer would have taken more specialist advice rather than simply have gone to the occupational health nurses and should have gone back to Dr Deacon or to whoever was filling his shoes in order to see if the Claimant was, as Mr Vingoe found, faking it and as the Tribunal described it "swinging the lead". The medical documentation was not made available to the Claimant, for as the Tribunal again found, Mr Vingoe had the letter in his pocket as he was attending the disciplinary hearings.

40. As to the procedural points, these are fatal to the Respondent's appeal since the Claimant was duped, Mr Vingoe was found to have had a closed mind and was engaged at all stages of the procedure. As Mr Catherwood put it, wherever the Claimant turned there was Mr Vingoe and his mind was made up.

41. In respect of the perversity appeal, this was described as a difficult case to run, for our Tribunal had not been shown notes of evidence or of cross−examination and that the perversity appeal would in any event run up against the buffers of the unappealed findings. It could not survive.

42. As to the automatic unfair dismissal, it was contended that the provision relating to an appeal is clear and unambiguous and there is no warrant for investigating via parliamentary debates under the rules in Pepper v Hart [1993] AC 593 whether or not an alternative meaning could be provided.

43. On suspension without pay which is said to buttress the finding of automatic unfair dismissal, it was contended that this too is disciplinary action. The timing of disciplinary meetings, in this case one day after the review on health grounds, was a matter for the Employment Tribunal, but that in any event it need not be remitted to it since such a marked deficiency need not go back.

44. Finally, on his cross−appeal Mr Catherwood contended that the essential issue was the reason for the Respondent's dismissal of the Claimant which was that the Respondent, through Mr Vingoe believed that the Claimant was fabricating the symptoms of disability. This must relate to the disability. There was a good claim to be made under s3A(1). The claim form, not expressly but implicitly, contained an allegation under s3A(1) and this was recognised by the Respondent in its reply which, in a blanket denial, used the words:

"The Respondent further denies that it directly or otherwise discriminated against the Claimant on the grounds of his alleged disability by dismissing him."

Mr Catherwood contended that this was simply a re−labelling exercise which should have been allowed by the Tribunal. If this were a new claim and he, by the end of his argument, accepted that it was, then the matter should have been allowed by the Tribunal's exercise of discretion to extend time. There was no prejudice to the Respondent.

The legal principles
45. The legal principles to be applied to the issues on appeal are as follow in paras 45−55.

46. For a party to seek to overturn a decision of an Employment Tribunal on the grounds of perversity, a very high hurdle must be crossed, see Yeboah v Crofton [2002] IRLR 634.

47. A slight imperfection in expression in a judgment of an Employment Tribunal does not fatally undermine its judgment if it has elsewhere provided the correct test, see Jones v Mid−Glamorgan County Council [1997] ICR 815 CA.

48. In the conduct of disciplinary proceedings in respect of misconduct, the law set out in BHS v Burchall [1978] IRLR 379 as amplified by the Court of Appeal in Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 must be met. These include the application of the standard of the reasonable employer, or alternatively the range of reasonable responses test, to all stages, for Mummery LJ said this:

"The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

49. An Employment Tribunal must not substitute its view for that of the reasonable employer.

50. Medical and other material, when relevant to disciplinary hearings, must be made available, see London Underground Ltd v Laher UKEAT/0592/04 at paragraphs 42 and 52, HHJ Serota QC and members expressly relying on the experience of the lay members in that constitution.

51. Where reliance is placed on informants, the guidance given by the EAT, Wood P and members, in Linfood Cash & Carry Ltd v Thomson [1989] IRLR 235 should be followed while recognising that every case must depend upon its own facts. Guidance was given at paragraph 20, which includes the provision of written statements of informants rather than reliance on rumours.

52. The test for breach of the statutory procedures is set out in Alexander v Bridgen Enterprises Ltd [2006] IRLR 422 at paragraphs 35 and 36 :

"35
They are not intended to impose all the requirements breach of which might, depending on the circumstances, render a dismissal unfair. This suggests that the bar for compliance with these procedures should not be set too high.
36
Third, we think that it is relevant to bear in mind that once the statutory procedures have been complied with, employers are thereafter provided with a defence for failing to comply with fuller procedural safeguards if they can show that the dismissal would have occurred anyway even had such procedures been properly followed. This factor, in our view, militates against allowing the bar for the statutory procedures being set too low."

53. When a party seeks to rely upon passages from parliamentary debates, the three rules set out by the House of Lords in Pepper v Hart [1993] 1 All ER 42 must be met, which is that (a) the legislation was

ambiguous or obscure or the literal meaning led to an absurdity; (b) the material relied upon consisted of statements by a Minister or other promoter of the Bill which led to the enactment of the legislation; (c) the statements relied on were clear.

54. When it is sought make an amendment to a case statement, the rules set out by the EAT Mummery P and members in Selkent Bus Co Ltd v Moore [1996] IRLR 661 are relevant where this is said:
"21
(4) Whenever the discretion to grant an amendment is invoked, the tribunal should take into account a//the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

22
(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:
The nature of the amendment
Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action."

55. It will be recalled that the exercise of discretion to allow a late claim is to be regarded as exceptional, see Robertson v Bexley Community Centre [2003] IRLR 434 CA at paragraph 25 per Auld LJ. When considering what to take into account in such an exercise it will often be relevant to consider a list of factors, set out for the purposes of the Limitation Act but approved for application in the EAT, in British Coal Corporation v Keeble [1997] IRLR 336, Mrs Justice Smith and members. .

56. Finally, remission to an Employment Tribunal is usually appropriate where an undecided point has not been dealt with and should be.

Conclusions
57. We reject the arguments of the Respondent on the appeal and uphold them on the cross−appeal.

Unfair dismissal.
58. We hold that the unappealed findings constitute findings of unfair dismissal against the Respondent from which this appeal cannot recover. It is plain throughout that the Tribunal applied the Burchell and Sainsbury's tests to the adequacy of the investigation. There is no question of it substituting its judgment for that of the employer although it is true to say that the Tribunal does use the first person pronoun on a number of occasions. This is a natural phenomenon of any judicial officer. The Tribunal twice gives itself a correct direction for it says:

"61 ×there were defects in the investigation and a reasonable employer would have widened the basis of the investigation and structured its case against the claimant in a more precise and open way, in the manner we have described."
"65 ×it seems to the Tribunal that a reasonable employer would have referred the facts [that is, of the medical matter] back to somewhere else [i.e. to Dr Deacon? as per quote?]."

Thus, in two places this Tribunal applies the correct test. The fact that it occasionally uses language in the first person does not in any way contaminate that finding, but if it did it would be rescued, see Jones. The Tribunal is to be acquitted of the charge that it went about the examination of the matters before Mr Vingoe in a way which showed itself to have been taking that role. The Tribunal made clear where it saw investigations falling short of what was required to be done to meet the standard of a reasonable employer. We have illustrated this by Mr Vingoe's failing to ask the correct question in relation to the Dartford crossing, but it is also clear in respect of the reliance on rumours which did not go through the elementary guidance

set out in Linfood. Similarly the way in which Mr Vingoe dealt with the medical material and his failure to get further material on this is a criticism made by the Tribunal and we consider it valid.

59. The Tribunal finally said that the procedure in this case would also render this dismissal unfair and this is an unappealed finding. We hold that when Mr Vingoe carried out four roles in this case his involvement would make the dismissal unfair. Those are the findings of the Employment Tribunal. On the material which we have seen we consider they were correct. Of course, not every case where a manager is involved at four stages makes the dismissal unfair but in this organisation, with very substantial human resources and management personnel available, there is no reason why Mr Vingoe should be involved at every stage including, we must say, at the stage of attending a medical review.

60. The second characteristic of this is that Mr Vingoe himself had a closed mind as we have pointed out and that when his decision is the one which is recommended to the other panel members it is understandable that it will have a very substantial effect on them. His mind was closed at the outset, from his statement to the Claimant that "The game is up" or "It's all over". From that stage he should not in our judgment reasonably have been involved in these disciplinary proceedings. Thus both on the unappealed findings, and on the findings of the Tribunal which we uphold, this dismissal was correctly found to be unfair.

61. The same applies to the contention that this judgment was perverse. No steady platform was built from which to launch the perversity appeal. The notes of evidence or an agreement about them was not provided. Mr Scott did not spend time on this and we will not either. Mr Scott did not rely on Strouthos v London Underground Ltd [2004] IRLR 636 CA but Mr Catherwood did. He submitted, correctly, that on much starker facts and findings than this the judgment of an Employment Tribunal of unfair dismissal in favour of a man who had taken a company vehicle illegitimately across the Channel was restored by the Court of Appeal.

Automatic unfair dismissal.
62. In fairness to both the advocates, the point relating to s203 of the Employment Rights Act is taken no further. We accept that this case is not exceptional and so we should not ourselves introduce this subject. It is a matter which might be reserved for another occasion to decide whether or not any departure from the standard disciplinary procedures would fall foul of s203.

63. As to the construction point, we hold that there is no ambiguity in regulation 3(1), that is, if the employee does wish to appeal he must inform the employer. If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting. What is clear is that there is no prescription about the form in which the wish to appeal should be registered. No writing is required, nor are grounds; all that is required is that information be passed to the employer. There is no ambiguity about that phrase. No other construction of it was offered by Mr Scott. .

64. What he did say however was that it led to absurd consequences. This is a way of expressing the first criterion for an application under Pepper v Hart. He did this by reference to s30 of the 2002 Act. We reject that contention. Parliament plainly had in mind the introduction in stages of this legislation. We have been referred to the response of the Government to the consultation prior to the bringing into effect of the regulations issued under that statute. From this it is clear that the Government was taking the deliberate step to stage the introduction of procedures, including those which would make it a breach of contract for there to be non−compliance with the procedures and indicating that a further two years' trial of the existing procedures would be necessary. Parliament has deliberately turned its attention to the gap which might appear between the appeal step in the regulations and the other provisions and this is not absurd. Thus we will not allow consideration of the parliamentary material. This argument does not pass the first criterion.

65. The consequences of a breach of any of the procedures arise when proceedings are brought before an Employment Tribunal. The proceedings which are regulated by these disciplinary procedures are those set out in Schedule 3 to the Act. The definition of relevant disciplinary action, as we have cited (para 3) above, includes disciplinary action short of dismissal. Since suspension on full pay is excluded from relevant

disciplinary action it follows that suspension without pay is not. Step 2 expressly envisages suspension as a form of relevant disciplinary action and makes an exception of it. We hold that action which takes the form of suspension without pay constitutes relevant disciplinary action and is therefore subject to the statutory disputes procedure. Failure to follow the regime when an unfair dismissal claim is mounted in the Employment Tribunal carries the consequences in s98A and is an automatic unfair dismissal. Any failure to follow a procedure also attracts the consequences of there being an increase or reduction as appropriate in compensation pursuant to ss31 and 38 in respect of Employment Tribunal proceedings for the employment rights set out in Schedule 3 to the 2002 Act. A one−off suspension without pay, not in accordance with the regime and not preceding dismissal, would attract the ss31 and 38 adjustments if proceedings were brought, typically for unlawful deductions. If it is the prelude to dismissal, arising out of the same conduct, and proceedings for unfair dismissal are then brought, there is no reason why the failure to take an appropriate statutory step before suspension without pay (bearing in mind the special Step 2 provision for suspension) should not result in a finding of automatic unfair dismissal.

66. We have given this view about suspension without pay at the instance of the Claimant, not seriously resisted by the Respondent, on the basis that although the Tribunal has not made a decision, there is a question of law and we can decide it. Strictly speaking, it is not necessary for us to decide the suspension point and the point about the short timescale leading to the first meeting since we have decided in favour of the Claimant on the principal point of automatic unfair dismissal. If it were necessary for us to decide, we would not need to remit the suspension without pay point since we can decide that question of law ourselves in the way we have shown above. We would have to remit the time point to an Employment Tribunal since it involves an appreciation of the facts which we cannot give. As we say, since we find in favour of the Claimant, it is not necessary for the disposal of this appeal under s35(1) of the Employment Tribunals Act for us to decide the time point or to remit it.
The amendment.
67. We will assume in Mr Catherwood's favour that there is an arguable case to be made under s3A(1) of the Disability Discrimination Act, so, if it comes to looking at the merits this part cannot be said to have none. The question really is whether discretion was correctly exercised by the Employment Tribunal. Applying the judgment of the Court of Appeal in Housing Corporation v Bryant [1999] ICR 123, we would hold that the Tribunal was correct on both limbs of that judgment. First, if this were a matter simply of construction, and therefore susceptible to appeal to the EAT as a matter of law, we would hold that the claim form does not include a claim under s3A(1). There is a paraphrase of s3A(2) in paragraph 11(c) of the particulars of claim and there is a straightforward allegation of breach of s3A(5) in paragraph 10 and its express repetition in paragraph 12 but there is no indication of any claim under 3A(1) for reasons given above by reference to the DRC code. These are separate causes of complaint and Mr Catherwood accepted when he opened this case before the Employment Tribunal he needed to make the complaint. As it happened, all the other claims under the Disability Discrimination Act which we have mentioned were withdrawn and/or dismissed.

68. The second question is whether the Tribunal exercised its discretion in a way which could be considered to be perverse if this were not truly a matter of construction. As is plain from the Bryant case, this matter also involved more than simply a construction of the black letter of the claim form and the response form, and incidentally, the response form contains no indication of any defence based upon justification and realistically could not be said to have met a claim under s3A(1).

69. If we are wrong about the first point, we have decided that the Tribunal was engaged on more than simply a matter of construction, and thus the test is whether its judgment was perverse or whether it exercised its discretion wholly wrongly in principle or failed to consider any relevant factor. On that footing, the sole basis upon which the claim is made here is that the Tribunal failed to consider prejudice. We reject that contention. The Tribunal, as we have said, considered several matters of prejudice to the parties and conducted the balancing exercise. It was actually in a very firm position to make this judgment, since it had adjourned the application by agreement from the beginning to the end of the evidence and so it was in a position to decide that issue with more information than it had at the outset. In our judgment the Tribunal has correctly applied the factors set out in Selkent considering also delay and costs and cannot therefore be criticised.

70. This case therefore will be remitted to the Employment Tribunal for it to continue its work in accordance with the order it has made which was to descend upon a remedies hearing. We would very much like to thank both Counsel for the considerable help they have given us during the course of this hearing, both orally and in writing.