JUDGMENT : THE HONOURABLE MR JUSTICE ELIAS : EAT : 31st July 2003.

1. The Appellant appeals against the finding of the Tribunal sitting at Exeter that she had not been unfairly dismissed. The Tribunal concluded, contrary to the submissions of the Council, that the Appellant had been dismissed but in the circumstances was not unfairly so. The Appellant's husband appeared for the Appellant, but he had the benefit of a Skeleton Argument prepared by Mr Thomas Linden. We are grateful to him and to Mr Abbott who appeared for the Council.

The Background

2. By way of general introduction to the facts, it is pertinent to note that the tribunal was not impressed by the Appellant. They said this*: "We have found in many respects the Applicant's evidence confusing, inconsistent and lacking credibility and she has been clearly unwilling to recognise the accuracy of events clearly recorded in correspondence and other documents."*

3. The facts found by the Tribunal were as follows. The Appellant was appointed as an Administrative Assistant within the Personnel and Administration Department of Somerset Fire Brigade in August 1999. She had two job-share line managers. One was a Mrs North and the other Mrs Hinchcliffe. Her job performance was unsatisfactory and her superiors raised issues with her on a number of occasions. On 19 June she was upbraided for her performance. She contended that she had been severely criticised and subjected to verbal abuse by Mrs North. The Tribunal wholly rejected that allegation and said that matters had been raised with the Appellant in an entirely proper manner. The relationship with Mrs North deteriorated. On 27 June the Appellant sought a meeting with Mrs Taylor, the Director of Corporate Services. She told Mrs Taylor that she felt she was not supported. Mrs Taylor agreed to arrange for mediation. That was arranged scheduled for 12 July. The intention was to identify the problems and find a way forward. In the event the Appellant was sick due to stress which, she alleged, came from harassment at work. The meeting had to be postponed. On the Appellant's return to work, Mrs Taylor gave her the option of either proceeding with the mediation or lodging a formal grievance against Mrs North. That would result in a formal investigation. This was indeed the first of numerous occasions when the Appellant was told that she if she wished she could pursue her allegations of bullying and harassment through this formal procedure. She chose not to do that. There was subsequently a mediation meeting on 9 August. The Appellant accepted that the past was now water under the bridge and agreement was reached about the need to clarify roles and responsibilities for the future. Unfortunately, the atmosphere, which was already difficult, worsened significantly.

4. Mr Kemp, the Deputy Chief Fire Officer, told the Tribunal that the Department had been "traumatised" and "had suffered grievously" as a result of the Appellant's conduct. The tribunal had no doubt where the responsibility lay; *"We are in no doubt having carefully considered all the evidence that the Applicant was wholly responsible for this situation as a result of her allegations of bullying and harassment for which not one shred of evidence has been produced and her critical and challenging attitude towards her colleagues compounded by her practice of openly recording in a notebook things said to her by them. Mrs Taylor sensed that the atmosphere was extremely bad whenever she visited the department and there was evident hostility between the Applicant and other members of staff."*

5. In order to resolve matters, Mrs Taylor sought assistant from Mrs McCririck, the Group Manager for Employer Relations at County Hall. They had a meeting with the Appellant on 15 September. The Appellant was given the option of pursuing a formal complaint or further mediation or redeployment. She considered these options and some two and a half weeks later said that she wished to proceed with further mediation. The Appellant complained, however, that insufficient steps were being taken to remedy the bullying, although this was a reference to matters prior to the meeting on 9 August, which she had said was "water under the bridge". There was a further mediation meeting on 10 November. Mrs Western, the Senior Training Consultant, who had been the mediator, concluded that the relations between the Appellant and Mrs North were probably irretrievable "because the Applicant was unwilling to accept any responsibility for the events within the team." The situation was causing deep distress to Mrs North who could not work with the applicant and by the 20 November she was working at home. Mrs McCririck met the appellant on 22 November and

concluded after a discussion that the only option was either redeployment or an agreed package under a compromise agreement. The Council's preference was found by the Tribunal to be for redeployment. There was a contractual power to do this as the Tribunal found. The Appellant agreed that she would confirm her chosen option by 1 December. She failed to do that. By an email dated 30 November she said she was not willing to consider the options before she knew what options had been offered to Mrs North. She would not meet with Mrs McCririck on 4 December. She continued to allege that there had been no proper consideration of her concerns of bullying and harassment. Mr McCririck arranged another meeting in the afternoon of 4 December; the appellant refused to attend that and claimed that she was under too much stress. In the circumstances, Mrs McCririck understandably thought that the Applicant should be sent on 'garden leave'. Then she sent a letter by recorded delivery confirming that and requesting that the Applicant attend a meeting on 12 December to discuss the options.

6. She advised the Appellant that failure to attend the meeting might lead to disciplinary action being taken against her. The Tribunal found in terms hardly surprisingly, in the circumstances, this was not unreasonable. The Appellant ignored this letter and turned up for work on 6 December. She said that she had not received the letter, although told a different story to Mr Kemp. He told her to go home and to attend the meeting on 12 December. On 8 December she signed off sick due to stress, she said. She remained on certified sick leave until her employment terminated finally on 24 May 2001. She continued to allege that there had been no consideration of her bullying problems notwithstanding that she had refused on numerous occasions to make a formal complaint. She did not attend the meeting on 12 December, that was rearranged for 18 December and she was told again that disciplinary action might result if she failed to attend. She again refused to attend citing this time a doctor's appointment. On 21 December she was told again by Mr Kemp that she could make a formal complaint and she was requested to contact Mrs McCririck to arrange a meeting date. On 11 January, Miss Stokes referred the Appellant's case to a consultant occupational physician to advise on various questions, such as whether the Appellant was fit to attend a meeting with Mrs McCririck, whether it was reasonable to contact her and whether she was fit to return to work and if so, in what capacity.

7. As the Tribunal found this was manifestly a proper thing for the employers to do. They were showing commendable patience in the light of the continuing uncooperative and difficult attitude displayed by the Appellant. An appointment was made for her to see the physician on 16 January. Predictably, she said she was unable to attend due to another appointment. Subsequently she sought to challenge the purpose of the appointment. Following what the tribunal described as further procrastination she saw the consultant on 5 March. He reported that the Appellant felt unable to meet Mrs McCririck at that time and he wished to see a doctor's report before deciding if and when she might be able to do so. By 28 March, and with the agreement of the appellant's GP, the consultant physician advised the Council that the Appellant would be able to attend a meeting subject to specified conditions, such as time to prepare and a supporter present, and that she should know in advance who was attending the meeting. In the light of this, the Council sent her a letter inviting her to attend a meeting on 5 April with Mrs Sherlock, the Senior Personnel Officer, rather than Mrs McCririck. The meeting was fixed for 12 April or, if that was too short notice, on 30 April. Predictably, she said she was unable to attend on 12 April, again due to a prior engagement, and she raised questions about Mrs Sherlock's credentials. Mrs Sherlock replied that the meeting would take place on 30 April, that this was the final opportunity to resolve the matter, and that if she did not attend then the Council would have to decide a way forward based on the information it had at that time.

8. The Council was only too understandably running out of patience. Somewhat bizarrely, the Appellant, through her husband, described this as a confrontational attitude, which "makes it impossible for Carol to attend on 30 April". On 9 May the Council made a formal offer of redeployment in the Environment and Property Department of Social Services on a temporary basis, for 4 to 6 months. The intention was to find a permanent post during that period. That offer was rejected and was criticised by the Appellant for its "temporary nature". The Tribunal noted that "there was little doubt" that in due course a permanent position would have been found. It was made clear that this was the final offer from the respondent facilitating the Appellant's return to work. She did

not even reply to that letter. Her husband contacted Mrs Sherlock and said she was not well and unable to attend the meeting. On 24 May the Council wrote to her saying that she had repudiated her employment relationship by her continuing refusal to work toward a resolution of the issues.

9. The Appellant sought to appeal that decision 6 June but was told that since there was no dismissal there was no right to appeal. The Respondents had contended that there was no dismissal in these circumstances and that by her conduct the Appellant had dismissed herself. The Tribunal rightly rejected that and held that the action by the employers in accepting what they took to be a repudiatory breach by the employee did constitute a termination in law. They went on to find however, that there was a reason relating to conduct and that the dismissal was fair. They first considered what they described the substantive issues before considering procedural questions. As to the former, they were in no doubt that the Respondents had justifiably reached the end of the road, as they put it. They took into account the following matters: *"We take into account the following points in determining that issue. Firstly, it is quite clear that the personnel and Administration Department within the fire brigade, in Mr Kemp's terms, was traumatised and suffering grievously and the problem had to be resolved. In November 2000 Mrs McCririck referred to the need to resolve the situation which had become impossible for the team. In terms of organisation, efficiency and taking care of the health and safety of all the staff concerned she stated that the then current situation could not be continued and yet 6 months later it was still unresolved. In our view, based on all the evidence, that was entirely due to the Applicant's totally uncooperative attitude and notwithstanding the Respondent's willingness to address her concerns at every turn. Secondly, in our judgment and based on all the evidence available to it, the respondent was entitled to conclude by 24 May that the Applicant was not prepared to attend any meeting with the management the purpose of which was discuss redeployment rather than reinstatement in her old job. During this hearing, the Applicant's unguarded response to a question as to her reason for not attending meetings, as requested by the respondent, was that "I wanted my old job back. I had done nothing wrong so as to warrant losing it.""*

They also considered the procedural aspects. They noted that there had been no warning and no opportunity to state a case and no right to appeal. However, they then directed themselves in accordance with **Polkey v A E Dayton Services** [1988] ICR 1, a decision of the House of Lords and noted that Lord Mackay had recognised that the failure to comply with relevant procedural safeguards would not necessarily make a decision unfair. They quoted the passage from Lord Mackay's judgment: "*The failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the Industrial Tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee".*

10. They concluded that it was an exceptional case where, notwithstanding the procedural defect, the dismissal was fair. They summarised their reasons for so concluding at paragraphs 22 and 23 as follows: *"Accordingly, we have addressed each of those questions in turn. As to the nature and gravity of the Applicant's alleged misconduct, it is quite clear that there was on her part a persistent refusal to attend meetings and obey her employer's lawful instructions; and that she had persisted in that course of conduct, in spite of two clear warnings of possible disciplinary action, over a period of nearly six months. We felt that it was important to remind ourselves that this was a reason for the Respondent's decision to dismiss the Applicant rather than her conduct within her department and any consequential damage which she had caused to it. The evidence of that persistent refusal and the Applicant's explanation for it was all too clearly set out in her letters to the Respondent. Indeed, as we have earlier noted, on the basis of that evidence the Respondent was fully entitled to conclude that the Applicant was not prepared to attend any meeting with management other than for the purpose of discussing her reinstatement.*

As to the information available to the respondent at the time, it had available all the letters to which we have just referred together with the various notes of its earlier discussions with the Applicant recording its attempts to address her concerns including offers made on numerous occasions to pursue any formal complaint made by her (and none were made) through its grievance procedure. In our judgment, it could reasonably conclude that there was noting more that could be said by the Applicant in defence of her conduct. The information available to the Respondent was comprehensive and there was no further information to be obtained; and there were not further

steps which it could be reasonably be expected to take given the pressing need to resolve the matter. The Applicant's misconduct was beyond dispute and there was no explanation that she could have given over and above that evidence by her letters."

11. For good measure however, they went on to find that even if the dismissal was unfair, the Appellant had suffered no injustice, that she had contributed 100% to her dismissal and that in the circumstances it was not just and equitable to award any compensation.

Grounds of appeal

12. The only ground of appeal identified in the Notice of Appeal is against the finding of unfair dismissal. There is a lengthy Notice of Appeal prepared by the Appellant herself. Nowhere in that Notice of Appeal does she seek to challenge the Tribunal's findings of 100% contributory fault. We return to that point below. We first deal with the question of whether the Tribunal was entitled to find the dismissal as fair.

Challenge to fair dismissal

13. The Appellant submits that the Tribunal could properly conclude the dismissal was fair given the flagrant and significant breaches of its own contractual disciplinary procedure. Because the Council took the view that the Appellant had terminated her own employment, it gave no warning that she was to be dismissed and nor did it provide a right to a hearing or right of appeal. It is true that it had on two occasions made reference to the possibility of disciplinary action but such action had not been implemented and it had never been made clear to the Appellant that she was on the point of dismissal.

14. The Appellant submits that the Employment Tribunal appeared to treat this case simply as one of a procedural defect. She submits that it is far more significant than that and should have been seen so as a significant contractual error: see **Kajab v Westminster City Council** [1996] IRLR 399 (CA). Moreover, the Appellant contends that whilst there are very exceptional cases where a dismissal may be fair notwithstanding the failure to follow the appropriate disciplinary procedure these are very unusual. The Appellant referred to the decision in **Polkey v Dayton Services Ltd** [1988] ICR 142 where Lord Mackie (at p.153) indicated that an employer may reasonably conclude that relevant procedures need not be complied with if would be "utterly useless". And to a similar effect Lord Bridge said (p.163) that a Tribunal would in an appropriate case conclude that the employer was entitled to dispense with the procedural safeguards if they "would have been futile".

15. The Appellant submits that it is not possible in this case to say that the procedure would have been utterly futile. The effect of a clear warning may be salutary. As Sir Hugh Griffiths said in a well-known passage in **Winterhalter Gastranom Ltd v Webb** (1973) IRLR 120: *"Many do not know they are capable of jumping a five bar gate until the bull is close behind them."*

16. Mr X for the Council contends that the Tribunal here properly directed itself as to the appropriate test, considered very carefully in paragraphs 22 – 23 which we have set out above the factors which justify it in reaching the conclusion that a reasonable employer could have dismissed notwithstanding the breach of procedure, and argued that in all the circumstances this Tribunal could not go behind that determination. The Employment Tribunal had taken the view that misconduct was beyond dispute and there was no more that could be said and in those circumstances there was no purpose in the procedures being complied with.

17. We do have sympathy for the Tribunal in this case. It clearly took the view with much justification, that the Appellant was a difficult, uncooperative and truculent employee who was not willing to cooperate in seeking to resolve difficulties that had arisen at work. They concluded in terms that she would not be prepared to attend any meeting save for the purpose of her reinstatement. Nonetheless, we unanimously take the view that in this case it was not open to the Tribunal to say that a reasonable employer could have dispensed with the relevant procedure. We recognise that the employer does not actually had to have addressed the issue but whether or not to dispense with the procedure; it is enough that a reasonable employer in the circumstances could have done so; see **Duffy v Yeoman and Partners** [1995] ICR 1. But there are a number of factors which lead us to the conclusion that a

reasonable employer could not have taken the view that the procedures would have been a waste of time in this case. First, the employee had not been given a warning. It had been indicated that disciplinary proceedings would be taken, but she was not aware that dismissal would take place. Giving her a final warning may well have caused her to adopt a more realistic attitude to her situation; the threat of imminent dismissal certainly focuses the mind. In addition, this is not a case of somebody caught stealing red-handed or anything of that kind. It was her attitude above all that was causing difficulties, and that is something which was potentially capable of change, however unlikely it may have appeared to be. Finally, we think it is relevant that the procedures were impinged in such a fundamental way. It is a significant matter to deprive somebody of their employment without even the opportunity to state a case; there must be very strong evidence to justify the inference that the basic principles of natural justice could be reasonably dispensed with.

18. For these reasons therefore, we consider that the tribunal was not entitled to find that a reasonable employer could ignore the procedures in this way, and accordingly we substitute a finding of unfair dismissal for the Tribunal's conclusion that the dismissal was fair.

100% Contributory Fault

19. As we have said, this is not a mater which specifically been the subject of an appeal. In the circumstances the Council submit that we are not now entitled to interfere with the finding at all. We were referred to a decision of this Tribunal (Mr Justice Wall presiding) in the case of **JS Coxon v Rank Zeros UK Ltd** (EAT/1116/99). That was a case where notwithstanding very considerable procedural shortcomings identified by the EAT, it did not interfere with a Tribunal's conclusion that the employee had contributed 100% to the dismissal. We think that case can be distinguished from this one in away which indicate below.

20. Mr X for the Respondent contends that findings of contributory fault are pare-excellence matters which should be left to the discretion of the Tribunal. It is only if there is a plain error of law or adversity that this Tribunal should interfere: see Stevenson LJ, **Hollier v Plysu Ltd** [1983] IRLR 260 at 263.

21. Tribunals can of course in exceptional cases reduce compensation by as much as a 100%. In **Devis v Atkins** [1977] ICR 662 Viscount Dilhorn, who delivered the major speech, commented that: *"[section 123] requires a Tribunal to consider whether a dismissal was "to any extent" caused by the action of the employee. It does not preclude the tribunal from coming to the conclusion that the dismissal was wholly caused by its conduct and in the light of that conclusion thinking just and equitable to reduce compensation it would otherwise awarded to a nominal or nil amount."*

It seems clear that his Lordship is envisaging the full reduction only where the employee's conduct has wholly caused his dismissal. For reasons we have given, we do not think that is the case here. Accordingly, in order to be consistent with our finding that had procedures been complied with, there is a possibility albeit we accept very slight that the employee might have taken steps which could have avoided dismissal we do not think that a finding of 100% contributory fault can be properly identified here. That of course is not to say that here will not be cases where such a reduction is justifiable where the Tribunal finds procedural defects. In some case the nature of the misconduct will be so striking that even if the Tribunal concludes that the procedural defects render the dismissal unfair, it may properly reduce compensation by 100%. However, we have concluded that the dismissal is unfair precisely because an employer could not reasonably take the view that the compliance with procedures could be futile, since it was a possibility that they could have led to some other step being taken.

22. The question is what order we now make in the light of this finding. The Appellant submits that the matter should be remitted to a new tribunal for a complete new hearing. We wholly reject that; it is plain that this Tribunal has carefully considered all the evidence over a hearing lasting four days. Whilst we think that the finding of fair dismissal not justified, nor in the circumstances the finding of 100% contributory fault, nonetheless it is plain that the contribution was on any view given the Tribunal's findings be extremely high. In the circumstances and partly in order to help promote a settlement of this matter without any further hearing on remedies, we will fix the amount ourselves.

We stipulate there should a reduction of contributory fault of 90%. That applies to both to the contributory and the basic awards, although strictly the latter is reduced by such amount that is just equitable, rather than by reference to the contribution to the conduct of the dismissal: see section 73 (7) (b) of the **Employment Rights Act 1996**. In the **Coxon** case, to which we have made reference, this Tribunal made no finding that the dismissal might have been avoided had the proper procedures been applied with. We recognise that it may be said to be unfair to a respondent to allow grounds to be argued that were not specifically raised. But we must also bear in mind that in order for our decision to be consistent there out to be some reduction in the level of the contributory fault, and moreover there would be an injustice to the employee if we did not make that amendment to the contribution fault finding, which is really consequential on the conclusion we have reached in relation to the unfair dismissal.

Conclusions

23. We therefore substitute a finding of unfair dismissal for the Tribunal's conclusion that the dismissal was fair; and we substitute a finding of 90% contributory fault for the Tribunal's 100% assessment. If the parties cannot reach agreement, on compensation, then the matter will have to remitted to the same Tribunal in order for it to determine the appropriate level of compensation pursuant to the statute.

For the Appellant MR GRAHAM FOSTER (Representative)
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