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Judgment: approved by the Court for handing down | *Delivered:* **22/9/08**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Between:

GERARD DOBBIN

Applicant/Respondent;

and

CITYBUS LIMITED

Respondent/Appellant.

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Before Kerr LCJ, Campbell LJ and Higgins LJ

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HIGGINS LJ

[1] This is an appeal by way of case stated from a decision of the Fair Employment Tribunal (the Tribunal) that the respondent employee was unfairly dismissed. In assessing compensation the Tribunal found that the respondent's approach to the disciplinary process and his conduct 'largely contributed to the manner in which his misconduct was viewed by the respondent'. Accordingly his compensation was reduced by 75%, although this reduction was not applied to the basic award. The Tribunal awarded Mr Dobbin the sum of £38,401.

[2] The respondent commenced employment with the appellant in or about 1976. From 1985 until 2002 he held the post of Bus Inspector. In February 2002 he was dismissed for 'serious and persistent harassment' of another employee called Best, also a Bus Inspector.

[3] In September 2001 Mr Best made a complaint to his line manager, a Chief Inspector, of harassment by the respondent. Later in September 2001 the respondent and Mr Best agreed to attempt informal resolution of this complaint. This was to be carried out with the assistance of an agreed

facilitator who was the union representative of the Trade Union to which they both belonged. On 22 September 2001 Peter Donnelly, the trade union facilitator, met Mr Best. Following this meeting Mr Best decided not to seek informal resolution of the complaint but instead to pursue a formal complaint against the respondent under the appellant's harassment policy.

[4] On 26 September 2001 Mr Best duly made a complaint of harassment against Mr Dobbin. The complaint was in writing and it averred that the harassment began on 28 August 2001. It was also alleged that Mr Best had been the victim of slanderous behaviour. The Tribunal found the complaint included (paragraph 15 of the case stated) –

> "… a phone call made to Mr Best's home, referred to the respondent's change of mind with regard to covering Mr Best's annual leave, the walk out by the respondent from the course on the 13 September 2001, the complaint about Mr Best's performance of duties on the 20 September 2001 and the discovery on the 22 September 2001 that the respondent had accused him of dishonesty in July 2001 to Chief Inspector Childs."

[5] The issue of dishonesty (sometimes referred to in the papers as 'slanderous behaviour') related to the purchase of a retirement gift for a fellow employee. It was suggested that Mr Best had not purchased the gift with the money raised by the employees but had presented a crystal bowl that he already possessed, thereby misusing the money raised. The respondent was accused of spreading this story amongst the workforce.

[6] The appellant investigated these complaints under its written Harassment and Policy Procedure (the harassment policy). Heather Grant (the designated Human Resources member) and Gerard Mullan, (a depot manager from another location), were appointed to investigate them. Following the investigation, a charge of serious and persistent misconduct was laid against Mr Dobbin. It was also alleged that during the investigation the respondent sought to put pressure on Mr Best using a trade union representative and a bus driver to have Mr Best advised that the respondent would be highlighting to the appellant certain misconduct by Mr Best relating to the bus driver. This event led to the respondent being disciplined for intimidation as part of the harassment complaint. A disciplinary hearing took place on 5 February 2002 and on 6 February 2002 he was found guilty of gross misconduct and dismissed from his employment.

[7] The respondent appealed this decision and Mr Philip O'Neill, an Area Manager, heard the appeal. The appeal was dismissed. In dismissing the appeal, Mr O'Neill wrote an eight page letter on 12 March 2002 to the

respondent's trade union representative, setting out his findings. The respondent appealed Mr O'Neill's decision to the Managing Director, Mr. E Hesketh. At a hearing before Mr Hesketh, in which the respondent was represented by his trade union's regional organiser, the contents of Mr O'Neill's letter of 12 March 2002 were accepted on behalf of the respondent as correct. The Managing Director dismissed the appeal and affirmed dismissal of the respondent as the appropriate course.

[8] By an application lodged with the Tribunal on 3 May 2002 the respondent complained of unfair dismissal, breach of contract and religious discrimination. On the second day of the hearing of the complaint he withdrew his complaint of religious discrimination and the Tribunal proceeded to hear the other complaints. On the last day of the hearing the Tribunal was informed that the only issue that the respondent wished to pursue was the complaint of unfair dismissal. By a decision dated 24 August 2006 the Tribunal found that he had been unfairly dismissed from his employment as a Bus Inspector in February 2002. At paragraph 74 of its decision the Tribunal concluded that the decision to dismiss the respondent fell outside the range of reasonable responses available to an employer. In arriving at that conclusion the Tribunal had particular regard to the following matters –

> "a) Certain acts of misconduct, such as not talking to another member of staff and refusing to attend a course because a member of staff was present, were acts that had happened with other employees and had not incurred disciplinary sanction. The employee Mr. Best who complained of harassment, on his own admission, had not been on talking terms with another Inspector for some years;
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> b) The repetition of the claimant's allegations concerning the crystal bowl occurred mainly within the confidential process of the investigation into the complaint of harassment;
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> c) The failure by the respondent to make any enquiry to establish when the rumour regarding the crystal bowl was circulated to the drivers at May Street;
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> d) The lack of impartiality by the disciplinary panel and Mr. O'Neill as the first line of appeal;

e) The lack of objective justification for the classification of the respondent's actions as 'serious and persistent acts of harassment' and

f) The failure to give regard to the claimant's length and record of service."

[9] The Tribunal was requested to state a case for the opinion of the Court of Appeal on four points of law –

"74. Did the Industrial Tribunal err in law in failing to accept that the dismissal of the respondent was within the range of reasonable responses open to the appellant in light of the facts found or admitted?

75. Did the Industrial Tribunal err in law in deciding that the extent of the procedural defects in the investigatory, disciplinary and appeal process held by the appellant were sufficient to make the dismissal unfair?

76. Did the Industrial Tribunal err in law when considering the 'equity and merits', as required by Article 130(4) of the Employment Rights (Northern Ireland) Order 1996, by including in their consideration of the 'circumstances of the case' the relevant policies of the appellant in particular the guidance to employees and management as to the likely classifications of certain acts of misconduct and the likely disciplinary penalty to be incurred included in the revised "Platform Agreement"?

77. If the dismissal was unfair did the Industrial Tribunal err in law in holding that, notwithstanding the misconduct of the respondent and his approach to the investigation and disciplinary process, the deduction from the compensatory award in respect of the respondent's contribution to his dismissal should be limited to 75%."

[10] Employment rights are governed by The Employment Rights (Northern Ireland) Order 1996, Part IX of which relates to unfair dismissal. Article 126(1) guarantees an employee's right not to be unfairly dismissed. Article 130 places the onus on the employer to demonstrate that the reason for dismissal is one permitted by the 1996 Order. Article 130 of the Order makes

provision for the determination of the question whether a dismissal was fair or unfair. The relevant parts of Article 130 provide -

> 130. - (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-
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> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within paragraph (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 paragraph if it-
>
> (a) relates 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,

[11] It was not in dispute that the respondent's dismissal related to his conduct and that therefore Article 130(1) and (2) (a) were satisfied. Consequently paragraph (4) applied. This provides -

> (4) In any other case where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
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> (b) shall be determined in accordance with equity and the substantial merits of the case.

Thus the issue in the case before the Tribunal was whether or not the dismissal for conduct was fair or unfair in accordance with paragraph (4).

[12] The disciplinary proceedings against the respondent were taken under the appellant's Harassment Policy. Each employee had received a copy of this Policy on its introduction in October 1997. The document commences with a statement from the Managing Director which includes the following: –

> "In order to bring the intentions of the General Harassment Policy and Procedures alive it is important that you read, understand and behave in accordance with the document. By doing so you will help create a better working environment for yourself, colleagues and customers."

[13] Harassment is defined in paragraph 2 of the Policy. This states: –

> "Harassment is defined as any verbal or physical abuse, derogatory statements, displays of emblems, or discriminating remarks made by one or more persons in the work environment or in the course of work which are any of the following –
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> unwanted and unreciprocated;
> causes humiliation, offence, alarm or distress;
> interferes with job performance or creates an unpleasant working environment;
> trivialises people as individuals or as a group and emphasises their sexuality, marital status, religious beliefs, political opinion, ethnic origins, disability or age over their role as workers."

[14] Paragraph 3 identified various forms of harassment. It is in these terms:

> "Harassment may take many forms. It can range from extreme forms such as violence and bullying to less obvious actions like ignoring someone at work. The following, though not an exhaustive list, are examples of harassment.
>
> - Physical contact ranging from touching to serious assault;

- Verbal harassment through jokes, offensive language, gossip and slander, sectarian songs etc;
- Written harassment through circulation of any sectarian notes, letters etc;
- Abusive phone calls which may be to someone's workplace or their home;
- Visual displays of posters, graffiti, obscene gestures, flags, bunting and emblems;
- Isolation or non co-operation at work; exclusion from social activities."

[15] Paragraph 4 gave warning of disciplinary action and the likely penalty should an employee be found guilty of harassment. It states –

> "Intimidation or harassment in any form is unacceptable behaviour. Sectarian, racial and sexual harassment constitute unlawful discrimination under Fair Employment, Racial Equality and Sex Discrimination Legislation respectively. Causing alarm or distress may constitute harassment under the Protection from Harassment (NI) Order 1997. Translink will treat such action as gross misconduct which may warrant dismissal.
>
> Employees whose general behaviour can lead to or cause distress in others will be treated equally seriously."

[16] The Harassment Policy applied to all staff. In addition there existed a Platform Agreement which was reached between the appellant and the Trade Union representing bus staff. This had been last amended in September 1997. It contained Codes of Discipline and set out specific disciplinary outcomes in the event of major or gross misconduct, which were defined. There was also a 'Memorandum of Agreement – Inspector' dated 1991. The Tribunal found that this was the relevant agreement for disciplinary measures against an Inspector, although it did not contain the type of details that were in the Platform Agreement (as amended in 1997).

[17] The Tribunal found that it was only during the investigation process that the respondent became aware that dismissal was an option for his alleged conduct - see paragraph 57 of the case stated. The Tribunal concluded that there had been a lack of training on the harassment policy, and that such training as took place emphasised sectarian and sexual discrimination as

opposed to other forms of harassment. The Tribunal found that the relevant disciplinary policy for the respondent was the 'Inspector's agreement', which, unlike the 'Platform Agreement', did not set out examples of misconduct which could lead to disciplinary action nor a detailed procedure relating to the relevant line of management. The Platform Agreement contained examples of harassment which were classified as either major misconduct or gross misconduct. According to this Agreement, 'Major misconduct' includes lesser cases of sexual harassment and lesser cases of sectarian harassment and threatening or offensive behaviour and offensive language. Gross misconduct includes serious or persistent cases of sexual or sectarian harassment or breaches of the equal opportunities policy. The Tribunal found that the respondent's conduct did not fall within one or more of the eight protected features set out in the harassment policy. All complaints of harassment were to be referred to the Human Resources Department, whereas not all other disciplinary matters were to be so referred.

[18] The Tribunal was critical of several aspects of the investigatory process. Errors in the prescribed forms and several failures to follow the harassment procedure were identified by the Tribunal. None was noted by either the investigatory team or the later appeal hearings. The Tribunal was critical of a caution issued to the respondent about talking about the subject of the complaint to other employees because the caution did not equate with the terms of the 'advice and warning' required by the harassment policy. Furthermore the Tribunal found that no attempt was made to identify a time frame for the harassment in question. The Tribunal criticised the terms of the initial charge which referred to harassment simpliciter rather than 'serious and persistent harassment'. While the appellant claimed that only one member of the investigatory team was included in the disciplinary panel, the Tribunal was satisfied that both members had played a role and that the main member had already made up his mind about the factual allegations. The Tribunal noted that the respondent was disciplined not just for his misconduct but also for the manner in which he conducted himself during the investigation, in particular his repetition of his beliefs about the origin of the retirement gift, the crystal bowl. The disciplinary panel was found to have failed to give consideration to other alternative penalties other than dismissal. In addition the Tribunal found that a major factor in the penalty decided upon, was the respondent's refusal to 'retreat from his belief that there was something wrong about the crystal bowl'.

[19] The Tribunal found that Mr O'Neill had failed to identify any of the procedural deficiencies in the investigatory or disciplinary processes and did not disclose to the respondent additional information obtained by him and which was taken into account, nor the fact that he had had contact with the complainant. Mr O'Neill was familiar with the Inspector's Agreement and the Platform Agreement and the Tribunal was critical of his failure to provide

reasons for rejecting the appeal based on the various definitions of misconduct set out in those agreements.

[20] The Tribunal concluded that the Managing Director went through the motions of conducting an appeal. He failed to ascertain any of the procedural deficiencies and was aware of the misconduct classifications in the Platform Agreement. He took the view the respondent's change of attitude was last minute and gave no cognisance to the respondent's lengthy record of employment or disciplinary record and was more concerned to ensure an effective harassment policy.

[21] At paragraph 28 of the case stated the Tribunal set out the misconduct which the respondent admitted. This may be summarised as –

> making a phone call to Mr Best's home during which he spoke to Mrs Best and described Mr Best 'as the lowest of the low';
> reneging on an earlier arrangement to provide holiday relief for Mr Best;
> refusing to remain at an Inspector's course when he discovered Mr Best was present;
> lodging a complaint to his line manager with regard to Mr Best's performance of his duties, and
> alleging to a fellow Inspector that monies collected by Mr Best for a retirement gift for another employee were not used to purchase the gift and that Mr Best had used a crystal bowl that he already possessed.

[22] The Tribunal noted at paragraph 28 of the case stated that the respondent did not admit that he had spread the allegation about the alleged misuse of money amongst other employees (other than to the Inspector). The opening sentence of paragraph 28 records that the respondent admitted speaking to the Chief Inspector and another employee about the authenticity of the retirement gift.

[23] The Tribunal found that the investigatory team was not impartial; that the misconduct of the respondent which had actually been established did not come within the definition of harassment as defined in the harassment policy; that the investigatory and disciplinary team did not consider the definition of harassment; that its conclusion that the respondent's conduct towards two drivers was intimidation was not a reasonable response that a reasonable employer, looking at the evidence impartially, could have reached; that the inclusion of the statements made by the respondent during the investigatory process as part of the alleged misconduct was not a decision which fell within the reasonable responses of a reasonable employer; and that the disciplinary

hearing was solely concerned with the penalty to be imposed. The Tribunal questioned the impartiality of Mr O'Neill on the basis that there had been some contact between Mr O'Neill and the complainant, which contact might explain Mr O'Neill's acceptance of the respondent's conduct as gross misconduct despite the examples given in the other company agreements referred to earlier.

[24] The case stated suggests that the Managing Director could have remedied the defects in the earlier procedures 'if it had been a genuine review of the previous decisions taken at the various levels of management'. The Tribunal concluded that the respondent's long service and disciplinary record were not considered nor was the misconduct compared with other examples of major and gross misconduct in the company's procedures. The test applied by the Tribunal was whether the appellant had a genuine belief on reasonable grounds after reasonable investigation that the respondent's conduct justified dismissal. The Tribunal concluded that there was a lack of fairness. It also concluded that it was not reasonable for the investigatory and disciplinary process to consider that the respondent's repetition during the investigation and disciplinary process of his belief about the retirement gift rendered his conduct in this regard as persistent. At paragraphs 70 and 71 of the case stated the Tribunal set out its conclusions.

> "70. The Tribunal essentially concluded in light of the evidence both oral and documentary that the reason that the respondent was dismissed was a desire by some of the appellant's employees to be seen to have an effective harassment policy. The layers of deficiencies in the appellant's dealing with the respondent led the Tribunal to conclude that the overall process was so unfair that the Tribunal was not satisfied on the balance of probabilities that there was a genuine belief on reasonable grounds after a reasonable investigation on the part of the appellant that the respondent had been guilty of "serious and persistent harassment" which warranted his dismissal.
>
> 71. This was not a case where the Tribunal considered that dismissal would have occurred had fair and proper procedures been followed."

[25] In its decision the Tribunal expressed the view that the conduct of the respondent could not be described as 'systematic' and that his actions, which occurred over a short period of time, were 'of a low-grade nature'. At paragraph 51 of the decision the Tribunal stated –

> "51. Mr O'Neill does not state his own view, as the appellate authority, on the conclusion of the investigation team that the harassment of Mr Best was both serious and persistent. Mr Mullan (part of the investigation team) had classified the harassment as "systematic". "Systematic" in the ordinary sense of the word is defined as "methodical, done according to a plan, regular or deliberate". The available evidence could not reasonably support a finding that the actions of Mr Dobbin were "deliberate, calculated and sustained". There were without doubt acts of harassment by Mr Dobbin to Mr Best but they occurred over a short period of time and were generally of a low-grade nature. The Tribunal concluded that no reasonable employer viewing these actions, against the totality of the company's procedures could conclude that they amounted to "serious and persistent harassment".
>
> 52. The Tribunal found it difficult to understand how a reasonable employer against the background of these policies could classify the actions of the claimant, as described to this Tribunal, as a more serious type of misconduct than "lesser cases of sexual harassment or sectarian harassment". The failure to address this issue undermines Mr O'Neill's conclusion that "Mr Mullan's determination that the matter was one of gross misconduct appears appropriate for this form of unacceptable behaviour".

[26] Mr O'Neill set out the allegations against the respondent in his letter under the heading 'Background'. This stated –

> The case against Mr Dobbin is that he harassed Mr Best by, amongst other things, acting in a spiteful and intimidating manner and eventually making derogatory and slanderous comments in the course of his work. These were both unwanted and unreciprocated. The malicious statements caused offence, distress and intrusion to Mr Best and his wife to such an extent that Mr Best was unable to continue at work for a period of time as a result of stress. It would appear that the root cause for this behaviour

> towards Mr Best originated as a result of a dispute over overtime between Mr Dobbin and his immediate Line Manager, Mr. Childs, after which Mr Dobbin set about the systematic harassment of Mr Best because he would not co-operate with Mr Dobbin's desire to "get back" at Mr Childs. The investigation team concluded that there was sufficient substance in the complaint against Mr Dobbin on the grounds of serious and persistent harassment which took the form of intimidation and slander and they subsequently decided to enact disciplinary proceedings. It is my understanding that Mr Dobbin has never disputed his involvement in these acts and has shown no regret."

[27] During the appeal hearing before Mr O'Neill the respondent was represented by the Regional Organiser of his Trade Union. He made nine points on the respondent's behalf, each of which was dealt with in Mr O'Neill's eight page letter. Mr O'Neill was critical of one aspect of the investigation team's work relating to the source of the receipts for the crystal bowl. However, at page six he stated: –

> "My enquiries have found the investigation into the complaint of harassment to be thorough, fair and reasonable and I have found that the Company stated procedures have been followed in a diligent manner.

[28] During the appeal hearing Mr O'Neill asked the respondent how he thought the complaint of harassment had been dealt with and noted his comments in his letter in these terms –

> "During the appeal hearing I asked Mr Dobbin how he thought the matter could have been dealt with. Mr Dobbin's only comments were to admit his role and attempted to further justify his behaviour by stating that he was "annoyed and felt his suspicion over the alleged misappropriation of cash collected in respect of the purchase of crystal were justified." I am not impressed by Mr Dobbin's argument that Mr Childs was 'solely to blame for not resolving the matter and allowing it to fester'. I noted that whilst Mr Dobbin says he was amenable to help resolve the matter, the facts of the investigation show that he instigated and sustained the harassment of Mr

> Best. He could not claim to be fully co-operating with the investigation team's efforts when it was clear that he was continuing to further aggravate the situation by making unsubstantiated allegations against Mr Best."

[29] Mr O'Neill expressed his conclusions in the following passage: -

> Regrettably, I am in agreement with the investigation team that Mr Dobbin's actions and, more importantly, his failure to accept the error of his ways, gives no confidence that he could be trusted to continue in a supervisory role.

[30] Having rejected the appeal, Mr O'Neill then advised the respondent of his right to appeal further to the Managing Director, which the respondent did. At this final appeal Mr Hesketh was informed by the respondent's trade union representative, that no issue was taken with the contents of Mr O'Neill's letter. Before the Tribunal the respondent agreed that the records of the first instance investigatory meetings were an accurate reflection of what he had said at that time. The Tribunal concluded at paragraph 21 of its decision that –

> "the claimant had conceded to the investigation team that he had committed some of the acts complained of by Mr Best. However he did not admit that he spread the allegation with regard to the non-purchase of the crystal bowl amongst other employees. The claimant displayed a lack of candour at times with the investigation team."

[31] During the final appeal to Mr Hesketh the respondent indicated that his original comment in relation to the money for the retirement gift was not intended to be taken seriously. Mr Hesketh noted that this was inconsistent with what had been discovered during the investigation, namely that the respondent had repeated this allegation on a number of occasions and had indicated that he was considering a report of the matter to the Police Fraud Squad.

[32] Notes of the substance of the appeal hearing were prepared by Mr Hesketh. These included the following observations –

> "Mr Carson [the Regional Organiser of the respondent's Trade Union] opened by drawing attention to Mr Dobbin's long service within the Company, 27 years in total including a significant

> period as an Inspector. Mr Dobbin had come through the ranks and through the hard times of the troubles. Mr Carson set the context of Mr. Dobbin's behaviour within a pressured working environment in May Street. It had been Mr Best's initiative to recognize someone else's contribution to public transport by way of a presentation. A joke had been made that the bowl presented was one of Mr Best's old golfing trophies. It was now acknowledged that Mr Dobbin's raising the issue of receipt was an over-reaction on his part."
> ……
>
> "Mr Hesketh referred to Mr O'Neill's letter dated 12 March. Mr Dobbin confirmed that he had examined a copy of this letter and took no issue with the contents. Mr Dobbin went on to say that his behaviour had been totally out of character."
> …….
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> "Mr Hesketh referred to the difficulty faced by an employer in these circumstances. Mr Dobbin accepted that all the relevant matters had been thoroughly investigated and the steps taken by the Company were appropriate."
> ……..
> "Mr Carson made a final plea for Mr Dobbin to be given another chance."
> ……
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> "Mr Hesketh indicated that he wanted to take some time to further review and consider all aspects of this case. He had known Mr Dobbin personally for some years, and very much regretted meeting him in these circumstances. However he had to weigh carefully the fact that Mr Dobbin's change of attitude was very much at the last minute and the responsibility of an employer was to deal properly with cases of harassment."

[33] Having considered the matter Mr Hesketh wrote to the Regional Organiser setting out his decision. In the letter he stated that he had considered various documents included in the notes of the Disciplinary Hearing, the notes of the appeal to Mr O'Neill and the notes taken by himself at the final appeal. He went on to say –

"The only matters advanced to me as grounds of appeal were that his behaviour was out of character and that his length of service should be taken into account. I shall now deal with each of these points:

(i) In view of the prolonged sequence of events, I cannot accept the submission that Mr Dobbin acted out of character. This was very different from an isolated incident which could perhaps occur in such a way, and could be viewed differently. Initially it would appear that Mr Dobbin was annoyed with Mr Childs in relation to the allocation of overtime. Mr O'Neill has clearly demonstrated there were no grounds for this view. In any event, Mr Dobbin's response was to attempt to direct others not to co-operate with Mr Childs when he should, if he felt aggrieved, have pursued the matter through proper channels. Mr Best quite rightly refused to participate in this activity and, as a result, Mr Dobbin subjected him to persistent harassment. Mr Best then made an informal complaint against Mr Dobbin, as he was entitled to do, and made this formal when he learned from a colleague that Mr Dobbin had been damaging his reputation by making a serious allegation that he had misappropriated cash collected for a retirement present for another employee. Subsequently Mr Dobbin impugned the objectivity of the Managers appoint to carry out the investigation without giving any explanation of why the Investigation Team might be biased against him.

(ii) I have also given consideration to Mr Dobbin's relatively long service I and his record in the Company. I have found nothing in his record which is of benefit to him in determining the penalty. I have therefore concluded that, due to the gravity and persistence of Mr Dobbin's harassment, his introduction of the malicious allegation that Mr Best had misappropriated cash and his attitude towards this whole matter, which he only modified when he appeared before me,

> dismissal is an appropriate penalty in all the circumstances.
>
> I have very carefully considered the representations made on Mr Dobbin's behalf and the substantial volume of relevant information in this case. It is my conclusion that Mr Dobbin was correctly found guilty as charged and that dismissal is the appropriate penalty."

[34] Mr O'Hara QC who, with Mr Ferrity, appeared on behalf of the appellant, submitted that the approach of the Tribunal was erroneous in a number of respects. Firstly, the Tribunal was incorrect to find that the respondent only became aware that dismissal was an option during the investigation of the complaint against him. Secondly, the Tribunal (unlike his employers) found that the respondent had committed some of the acts alleged against him, but minimised their effect. In assessing the nature of the misconduct the Tribunal erred in taking into account the wording of the Platform Agreement which did not apply to Inspectors or to alleged cases of harassment and erred in their finding that no reasonable tribunal could have concluded that his conduct amount to serious and persistent harassment. Thirdly that the Tribunal, in finding that the appeal hearing before Mr Hesketh was inadequate to deal with the procedural defects that it had identified, failed to appreciate the manner in which the appeal before Mr Hesketh was pursued. Fourthly, it was submitted that the procedural defects found by the Tribunal (which were minimal) were not such as to render the dismissal unfair. Fifthly, that the Tribunal should not have concluded that the decision to dismiss was not within the range of decisions that might be made by a reasonable employer in the circumstances. Sixthly, if the Tribunal was justified in finding the dismissal was unfair, the finding that the respondent contributed so substantially to his dismissal to justify a reduction in his award of seventy five per cent was inappropriate and that such a contribution to his dismissal should have resulted in a reduction of one hundred per cent.

[35] Mr Potter who appeared on behalf of the respondent submitted that the scope for appeal from a decision of the Employment Tribunal was limited and that this Court could only intervene where the Tribunal –

(a) misdirected itself in law, misunderstood the law or misapplied the law;

(b) reached a particular conclusion or finding of fact for which there was no evidential basis; or

(c) reached a perverse decision which no reasonable tribunal directing itself properly on the law could have reached.

[36] Mr Potter submitted that the first two points made by Mr O'Hara were findings of fact that the Tribunal was entitled to reach on the evidence. The procedural defects identified by the Tribunal were serious and could not be legitimised by the appeal hearing before Mr Hesketh (who had, in any event, added to the procedural unfairness by failing to consider whether the dismissal was proportionate with the respondent's conduct). It was submitted by Mr Potter that the issues in the appeal to this court were confined to two statements made by the respondent during the hearing before Mr Hesketh. The first was that the respondent took no issue with the contents of the letter written by Mr O'Neill and that he accepted that all relevant matters had been thoroughly investigated and the second was that the steps taken by the appellant to investigate the complaint were appropriate. Mr Potter described these two statements as 'apparent or alleged concessions or acceptances' and suggested that they had been made because the respondent chose to base his appeal to Mr Hesketh on his length of service and previous good character in an effort to save his job. He contended that the appellant's argument that such apparent or alleged concessions made it impossible for a Tribunal to conclude that the disciplinary process up to that point was either unlawful or outside the band of reasonable responses was not supported by legal authority. What the appellant was contending, he submitted, was, in effect, that the respondent was waiving his rights under employment law, which was not a course of action to be undertaken lightly.

[37] Mr Potter did not accept that the respondent had made any concessions or waived any of his rights in the appeal before Mr Hesketh. He submitted that whatever had taken place at the appeal before Mr Hesketh did not prevent the respondent from re-opening such issues before the Tribunal nor did it preclude the Tribunal from finding that the disciplinary procedures up to that point were substantively or procedurally unfair nor did it render the disciplinary procedures up to that point substantively and procedurally fair and not subject to legal challenge. Furthermore the appellant did not make the case before the Tribunal that the nature of the appeal to Mr Hesketh had legitimised what had occurred earlier. He submitted that the serious deficiencies identified by the Tribunal rendered the procedure unfair and that unfairness encompassed the failure of Mr Hesketh to adopt a proportionate response to the respondent's misconduct He suggested that the Tribunal appears to have taken the view that whatever occurred at the appeal, Mr Hesketh was absolved from reaching a determination on the misconduct issue, but not from determining whether dismissal was the only appropriate penalty. He argued that if the only issue before Mr Hesketh was the nature of the appropriate penalty, Mr Hesketh should not have adjudicated upon the misconduct issue by endorsing the findings of the disciplinary panel and Mr O'Neill.

[38] Mr Potter claimed that Mr Hesketh had taken advantage of the 'attempted plea in mitigation' to corroborate and confirm the earlier findings, dismissed the show of remorse and 'took the opportunity to copper-fasten the substantive basis for the dismissal'. In relation to the proportionality of the penalty he submitted that the Tribunal had concluded correctly that Mr Hesketh, in seeking to ensure an effective harassment policy, had failed to take account of the respondent's length of service and good record. A reasonable employer would not have concluded in these circumstances that the respondent's long service was outweighed by his misconduct. Furthermore, the concessions made by the respondent at the hearing before Mr Hesketh acquired no legal status nor did they clothe the process with legitimacy. They could not exempt Mr Hesketh from the obligation to conduct a proper appeal against the dismissal finding which included a consideration of the proportionality of the penalty. The Tribunal finding that the process was unfair was justified. In those circumstances it was open to the Tribunal to conclude that the decision to dismiss fell outside the range of reasonable responses by a reasonable employer. The contribution finding was harsh and any greater amount would be perverse.

[39] The Tribunal was critical of the appellant for a lack of training on its harassment policy. In addition it found that it was only during the investigation process that the respondent became aware that dismissal was an option for his misconduct (see paragraph 57 of the Case Stated). The policy document had been sent to the home of each employee and the respondent attended a meeting of managers at which the policy was discussed The policy was, as counsel submitted, largely self-explanatory. It was neither complex nor obscure.

[40] At paragraph 6 of its Decision the Tribunal stated – "However the Policy issued in October 1997 made clear to those who chose to read it that harassment did not need to be either sectarian or sexual for it to be considered a disciplinary matter". (My emphasis) The words "to those who chose to read it" are in the context, unusual. Counsel for the appellant submitted that this was a further example of the Tribunal's willingness to downplay or minimise several aspects of the case. However the harassment policy was clear – any harassment could be considered a disciplinary matter. Mr O'Neill commented in his findings that all employees were trained in the appellant's policy and dignity at work policy and were familiar with it. He also stated that, as an Inspector of many years, the respondent would be well acquainted with the policy and noted that he had attended a day-long course on dignity at work which specifically covered the issue of harassment. He also drew attention to paragraph 6 of the Harassment Policy which requires those in positions of managerial or supervisory responsibility to ensure that harassment did not take place. These circumstances suggest there was no reason to suppose that the respondent was unaware of the Harassment Policy

and the potential consequences of a finding of harassment against any employee. Certainly, he never suggested that he did not know of it.

[41] It was not suggested that the Tribunal drew any distinction between the respondent being aware that his particular conduct might lead to dismissal as opposed to a finding of harassment or a finding of serious and persistent harassment. Such a distinction would be illusory. Therefore we consider Mr O'Hara's submission that the Tribunal's finding at paragraph 57 of its decision (that it was only during the investigatory process that the respondent became aware that his conduct which was charged as serious and persistent harassment might lead to dismissal) was inconsistent with the findings of the investigatory process and that no evidence was available to the Tribunal to support that finding.

[42] The second issue related to the Platform Agreement. Mr O'Hara submitted that this was irrelevant to the issue of the fairness of the respondent's dismissal. Mr Potter contended that it was entirely proper and appropriate for the Tribunal to consider this document in the context of the appellant's disciplinary practices. It was a more comprehensive document than the Inspectors' Agreement. While this agreement was one of a number of documents dealing with disciplinary issue it did not apply to Inspectors or to the Harassment Policy and, accordingly, we consider that it was not a relevant factor in a complaint under the Harassment Policy. Consequently it was unnecessary and unhelpful for the Tribunal to refer to it for comparison purposes. It offered no assistance in view of the clear words of the Harassment Policy and the only issue for the appellant was whether the conduct proved fell within the terms of the Harassment Policy. Clearly it did. The Tribunal's treatment of this issue will be considered again later in this judgment.

[43] The Tribunal was critical of some aspects of the Investigatory and Disciplinary Process. In relation to the criticisms of Mr O'Neill it was submitted that the Tribunal appear not to have taken into account that the respondent did not contest the contents of Mr O'Neill's eight page letter. These criticisms levelled at Mr O'Neill were not made to Mr Hesketh and consequently the case presented to the Tribunal about the appeal to Mr O'Neill, represented a different one from that made during the appeal to Mr Hesketh. Mr Potter argued that the respondent was not precluded from making those points before the Tribunal. The Tribunal was critical of the appeal to Mr Hesketh. It was not convinced that he had read all the papers and concluded that he merely "went through the motions of the appeal". In particular the Tribunal stated that there appeared to be no attempt by Mr Hesketh to identify the earlier procedural deficiencies which the Tribunal had identified nor was there anything in the documentation to indicate how, or if, Mr Hesketh had weighed the respondent's last minute change of attitude relating to his misconduct with an employer's responsibility to deal properly

with cases of harassment. The Tribunal acknowledged that procedural deficiencies could be remedied on appeal but only if the appeal was sufficiently comprehensive and was a genuine appeal and not a review. It was submitted, in effect, that whatever deficiencies there may have been in the earlier procedures, the respondent's 'change of plea' before Mr Hesketh rendered them otiose. In any event they were not such as to cause the process or the dismissal to be unfair.

[44] The Tribunal noted some defects in the disciplinary process conducted by the appellant. While there were some deficiencies, it was not suggested or found that these impeded or prejudiced the respondent in any way in his defence of the charge against him or in the presentation of his case. Moreover, such deficiencies as existed prior to the appeal to Mr O'Neill do not appear to have overly concerned the respondent in the appeal before Mr O'Neill. Furthermore, in the appeal before Mr Hesketh the respondent accepted the contents of Mr O'Neill's eight page letter which contained and explained his findings. While the appeal to Mr Hesketh may have been in effect a 'plea in mitigation' by the respondent to save his job, its significance in relation to the conduct of the respondent cannot be ignored. The reality was that before Mr Hesketh the respondent admitted the substance of the complaint against him. In consequence, the hearing before Mr Hesketh was limited, in effect, to the nature of the appropriate penalty. The Tribunal do not seem to have appreciated the significance of the manner in which that appeal was pursued. In our judgment, therefore, the Tribunal's criticism of Mr Hesketh for not investigating the procedural deficiencies was misconceived. By the time that appeal took place, those deficiencies were no longer directly relevant and were, in any event, minimal. Whatever significance may have attached to them previously, this was overtaken and nullified by the respondent's acceptance of the charge against him in the appeal to Mr Hesketh. This change of attitude altered the situation to a very great degree.

[45] The Tribunal concluded that Mr Hesketh did not consider any penalty other than dismissal and that a desire to demonstrate an effective harassment policy was the determinative factor in the dismissal decision. It therefore determined that the appeal to Mr Hesketh was not a genuine 'review' and that no consideration was given to the respondent's long service and disciplinary record or the nature of his misconduct by comparison with other misconduct decisions. Not all of these criticisms were challenged but it was submitted that the Tribunal's reasoning was correct only in a limited respect as the Tribunal did not appreciate the fact that Mr Hesketh was hearing an appeal in which the respondent did not challenge the substantive case against him. As the substantive facts were not disputed and the conduct of the earlier procedures not challenged there was no need for Mr Hesketh to conduct a more comprehensive or detailed review. The Tribunal do not appear to have appreciated the impact of this change in the context of the minimal

procedural deficiencies and the consequent change it made in any necessity for a more comprehensive review at that stage. Mr O'Hara's description of it as one in which the respondent entered a last minute plea of guilty knowing that dismissal was an option and hoping that he would be treated sympathetically due to his long service, was not inaccurate. In those circumstances a complete rehearing was neither necessary nor justified.

[46] The notes of the hearing before Mr Hesketh and his letter of decision do not support the contention that he did not consider any penalty other than dismissal or that he just 'went through the motions'. The documents indicate that he was concerned about the respondent's position. The Tribunal concluded that the decision to dismiss was taken solely in order to ensure an effective harassment policy but the contemporaneous documentation lends no support to that view. The appellant had introduced a harassment policy and was entitled to attach significance to it and to ensure that it was effective. It would have been wrong to dismiss the respondent solely to ensure that the harassment policy was effective, but the documentation does not suggest that was the reason for the dismissal. Significantly no case was made to Mr Hesketh that the respondent was guilty of some lesser conduct which did not amount to gross misconduct. Mr Hesketh's notes record that the respondent accepted that his conduct was inappropriate. There is considerable justification for the appellant's criticism of the Tribunal's conclusions on the appeal to Mr Hesketh which will be considered again later in this judgment. Either the significance of the nature of the appeal before Mr Hesketh was not appreciated or was downplayed in the Tribunal's decision making process.

[47] The substantive issue before the Tribunal was whether the decision to dismiss the respondent for the conduct which he eventually admitted lay within the range of reasonable responses of a reasonable employer. Mr O'Hara submitted that it was self-evident that dismissal lay within the range of reasonable responses by a reasonable employer and for the Tribunal to conclude otherwise was irrational however, it was submitted by Mr Potter that the Tribunal's decision that the dismissal of the respondent was not within the range of reasonable responses of an employer on the particular facts of the case was one which was open to the Tribunal applying the appropriate test as set out in a number of authorities in unfair dismissal cases. These competing submissions prompt the question, 'what should be the approach of an Employment Tribunal to a complaint of unfair dismissal?'.

[48] It was not disputed that the reason for the dismissal of the respondent was his conduct and therefore the requirements of Article 130(1) were fulfilled. The Tribunal then had to consider whether the dismissal was fair or unfair by reference to paragraph 4 of Article 130. Paragraph 4 provides that the determination of the question whether the dismissal is fair or unfair depends on whether in the circumstances the employer acted reasonably or unreasonably in treating the conduct of the employee as a sufficient reason for

dismissal and the Tribunal shall determine that question in accordance with the equity and substantial merits of the case. The equivalent provision in England and Wales to Article 130 is Section 98 of the Employment Rights Act 1996 which followed equivalent provisions contained in Section 57 of the Employment Protection (Consolidation) Act 1978.

[49] The correct approach to section 57 (and the later provisions) was settled in two principal cases - *British Homes Stores v Burchell* [1980] ICR 303 and *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 – and explained and refined principally in the judgments of Mummery LJ in two further cases - *Foley v Post Office* and *HSBC Bank Plc (formerly Midland Bank Plc) v Madden* reported at [2000] ICR 1283 (two appeals heard together) and *J Sainsbury v Hitt* [2003] ICR 111.

[50] In *Iceland Frozen Foods* Browne-Wilkinson J offered the following guidance –

> "Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57(3) of the [Employment Protection (Consolidation) Act 1978] is as follows:
> (1) the starting point should always be the words of section 57(3) themselves;
> (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;
> (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
> (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
> (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer

might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

[51] To that may be added the remarks of Arnold J in *British Homes Stores* where in the context of a misconduct case he stated -

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the

balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

[52] A degree of uncertainty arose relating to the elements of the 'band of reasonable responses' test. This issue and the proper approach to unfair dismissal cases was clarified by the leading judgment of Mummery LJ in *Foley's* case, supra. At page 1287 he stated –

> "In my judgment, the employment tribunals should continue to apply the law enacted in section 98(1), (2) and (4) of the Employment Rights Act 1996 giving to those subsections the same interpretation as was placed for many years by this court and the Employment Appeal Tribunal on the equivalent provisions in section 57(1), (2) and (3) of the Employment Protection (Consolidation) Act 1978. This means that for all practical purposes:
>
> - (1) "The band or range of reasonable responses" approach to the issue of the reasonableness or unreasonableness of a dismissal, as expounded by Browne-Wilkinson J. in Iceland Frozen Foods Ltd. v. Jones [1983] I.C.R. 17, 24F-25D and as approved and applied by this court (see Gilham v. Kent County Council (No. 2) [1985] I.C.R. 233; Neale v. Hereford and Worcester County Council [1986] I.C.R. 471; Campion v. Hamworthy Engineering Ltd. [1987] I.C.R. 966 and Morgan v. Electrolux Ltd. [1991] I.C.R. 369), remains binding on this court, as well as on the employment tribunals and the Employment Appeal Tribunal. The disapproval of that approach in Haddon v. Van den Bergh Foods Ltd. [1999] I.C.R. 1150, 1160E-F, on the basis that (a) the expression was a "mantra" which led employment tribunals into applying what amounts to a perversity test of reasonableness, instead of the statutory test of reasonableness as it stands, and that (b) it prevented members of employment tribunals from approaching the issue of reasonableness by reference to their own judgment of what they would have done

had they been the employers, is an unwarranted departure from binding authority.

- (2) The tripartite approach to (a) the reason for, and (b) the reasonableness or unreasonableness of, a dismissal for a reason relating to the conduct of the employee, as expounded by Arnold J. in British Home Stores Ltd. v. Burchell (Note) [1980] I.C.R. 303, 304 and 308G-H, and as *1288 approved and applied by this court in W. Weddel & Co. Ltd. v. Tepper [1980] I.C.R. 286, remains binding on this court, as well as on employment tribunals and the Employment Appeal Tribunal. Any departure from that approach indicated in Madden (for example, by suggesting that reasonable grounds for belief in the employee's misconduct and the carrying out of a reasonable investigation into the matter relate to establishing the reason for dismissal rather than to the reasonableness of the dismissal) is inconsistent with binding authority."

[53] Mummery LJ then went on to consider the circumstances of the appeal in *Foley's* case in the course of which he identified the questions which a Tribunal was obliged to ask in a complaint of unfair dismissal. I paraphrase them rather than set them out in extenso. The first question is – Why did the employer dismiss the employee? (in other words did the reason for his dismissal relate to his conduct within the meaning of Article 130 and was that reason based on a set of facts known to the employer or a set of beliefs held by the employer which caused him to dismiss the employee?). The second question is – Did the employer act reasonably or unreasonably in treating that reason as a sufficient reason to dismiss the employee? In this regard the Tribunal has to consider whether the employer has established reasonable grounds for its belief that the employee was guilty of misconduct and whether it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

[54] When satisfied as to the employer's beliefs and investigation, the Tribunal must ask itself whether objectively the dismissal was "within the range of reasonable responses for this employer to have dismissed the employee". In some cases no range is necessary, for example, those in which the case for dismissal is obvious or those in which dismissal is clearly unreasonable. In the majority of cases there will be a range of reasonable

responses and as Mummery LJ said at page 1292, "In those cases it is helpful for the tribunal to consider 'the range of reasonable responses'". In the course of considering *Foley's* case he emphasised that, in accordance with the guidance offered in *Iceland Frozen Foods*, the Tribunal must not substitute itself for the employer and consider whether they personally think dismissal was fair and "substitute their decision as to what was the right course to adopt for that of the employer". At pages 1292 and 1293 he went on to say –

> "Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses "which a reasonable employer might have adopted.
> In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to "reasonably or unreasonably" and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their *decision* for that of the employer, that decision must not be reached by a process of substituting *themselves* for the employer and forming an opinion of what they would have done had they been the employer, which they were not."

[55] In *Foley's* case the Tribunal, having asked itself the correct question, found that the dismissal was within the range of reasonable responses for the employer to have dismissed the employee. The Court of Appeal held that this finding was not erroneous in law and not one which no reasonable tribunal could have reached. The appeal was dismissed. The Court then went on to consider the case of *Madden* and identified the reason for his dismissal. The Tribunal had held that the decision to dismiss Madden for that reason was unreasonable. In doing so the Court of Appeal found that the Tribunal had erred by not applying the law as laid down in the authorities. The error was to substitute itself as employer in place of the Bank in assessing the quality and weight of the evidence before the disciplinary hearing conducted by the Bank's area manager. The evidence was in the form of the investigating officer's report. As Mummery LJ stated at page 1294 –

> "Instead, it should have asked whether, by the standards of the reasonable employer, the Bank had established reasonable grounds for its belief that Mr Madden was guilty of misconduct and whether the bank's investigation into the matter was reasonable in the circumstances."

[56] The *Madden* case is instructive as to the circumstances in which a Tribunal may exceed its responsibility and substitute itself as employer, instead of acting in the role of a Tribunal hearing a complaint under Article 130. Mr Madden worked for Midland Bank (now HSBC Bank Plc). Debit cards destined for three customers were used to obtain property by deception. An investigation by a security officer of the Bank revealed evidence that indicated Mr Madden may have been involved in the misuse of the debit cards. He was arrested by police but released without charge. After a disciplinary hearing conducted by an Area Manager he was summarily dismissed on the ground that the Bank had a reasonable belief he had been involved in the misuse of the debit cards and that trust in him had irretrievably broken down. At page 1295 Mummery LJ commented on the manner in which the Tribunal substituted itself for the Bank and stated: -

> "The extent of the tribunal's substitution of itself as employer in place of the bank, rather than taking a view of the matter from the standpoint of the reasonable employer, is evident from the tenor of the views expressed by the tribunal on the quality and weight of the available evidence against Mr. Madden. I refer to the tribunal's cumulative critical comments on the bank's internal investigation by Mr. Murphy, on the disciplinary hearing by Mr. Fielder and on the probative value of the material on which Mr. Fielder based the summary dismissal: that "there was no clear culprit for the misappropriation of the cards;" that there was "no firm evidence of the precise dates on which the cards were taken;" that there was "no direct evidence that Mr. Madden had accessed the Nixdorf system;" that there was no investigation of the "personal or financial affairs" of other members of the staff; that no account was taken of the nature of the goods bought with the stolen cards; that Mr. Fielder failed to take account of the fact that a man in Mr. Madden's financial and career position would not have jeopardised all for such a "relatively paltry theft;" that "the facts of the case should have produced more than reasonable

doubt in Mr. Fielder's mind;" that the investigators had closed their minds to any possibility other than the guilt of Mr. Madden; that Mr. Fielder "came to a hasty conclusion that Mr. Madden was probably guilty" and was content to accept the report of the investigators too readily and uncritically; and that Mr. Fielder's decision to dismiss Mr. Madden, who had a stainless record of 11 years' service, would effectively ruin his career and was not taken on reasonable grounds.

In my judgment no reasonable tribunal, properly applying the approach in *British Home Stores Ltd. v. Burchell* (Note) [1980] I.C.R. 303 and *Iceland Frozen Foods Ltd. v. Jones* [1983] I.C.R. 17 to the facts, could have concluded either (a) that the bank had failed to conduct such investigation into the matter as was reasonable in all the circumstances or (b) that dismissal for that reason was outside the range of reasonable responses. Instead of determining whether the bank had made reasonable investigations into the matter and whether it had acted within the range of responses of a reasonable employer, the tribunal in effect decided that, had it been the employer, it would not have been satisfied by the evidence that Mr. Madden was involved in the misappropriation of the debit cards or their fraudulent use and would not have dismissed him. The tribunal focused on the insufficiency of the evidence to prove to its satisfaction that Mr. Madden was guilty of misconduct rather than on whether the bank's investigation into his alleged misconduct was a reasonable investigation.

This case illustrates the dangers of encouraging an approach to unfair dismissal cases which leads an employment tribunal to substitute itself for the employer or to act as if it were conducting a rehearing of, or an appeal against, the merits of the employer’s decision to dismiss. The employer, not the tribunal, is the proper person to conduct the investigation into the alleged misconduct. The function of the tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of

> the results of that investigation, is a reasonable response."

[57] Further elucidation was provided by the judgment of Mummery LJ in J *Sainsbury Ltd v Hitt* in which he stated at paragraph 34 that the "range of reasonable responses approach applied to the conduct of investigations, in order to determine whether they are reasonable in all the circumstances, as much as it applies to other procedural and substantive aspects of the decisions to dismiss a person from employment for a conduct reason". In other words, it is not for the Tribunal to determine whether the conduct of the investigation was reasonable but whether in the particular circumstances of the case the investigation was one which a reasonable employer would consider fell within the range of reasonable investigations to enable the particular allegations against the employee to be investigated and determined. Thus the nature and depth of any investigation will vary with the circumstances and conduct under consideration.

[58] In the light of those observations relating to the law I turn to consider the Tribunal's decision in the instant appeal. As the respondent had admitted the conduct, the only question for the Tribunal was whether the investigative processes and the disciplinary hearings and appeals were, viewed objectively, within the band of responses by a reasonable employer and whether the decision to dismiss was, similarly viewed, within the band of reasonable responses of a reasonable employer. It is clear that the Tribunal on occasions substituted its own view for that of the reasonable employer – see the many issues mentioned earlier in paragraphs 11 to 16. I mention several of them now. In considering the nature of the conduct which the respondent admitted the Tribunal concluded that undoubtedly there were acts of harassment but they occurred over a short duration and that apart from the comment relating to the retirement gift it was generally of a low grade nature. In addition the Tribunal introduced a comparison with the Platform Agreement, which was irrelevant. Similarly in its treatment of the procedures and appeals the Tribunal expressed its own views as to the correctness of the procedures and the nature of the appeals. The Tribunal concluded that there was a lack of fairness about the process but did not identify how, if at all, the respondent was prejudiced. The appeal to Mr Hesketh was deemed inadequate without reference to and appreciation of, the nature of that appeal. Nowhere in the decision was the conduct relating to the retirement acknowledged for what it was – a serious allegation of theft against a fellow employee.

[59] This was a fairly simple case. The conduct was admitted. The only issues were whether the procedures adopted and the decision to dismiss lay within the band of reasonable responses of a reasonable employer. Clearly both were and the Tribunal should have so found.

[60] The questions posed for the Court of Appeal were –

1. Did the Industrial Tribunal err in law in failing to accept that the dismissal of the respondent was within the range of reasonable responses open to the appellant in light of the facts found or admitted?

2. Did the Industrial Tribunal err in law in deciding that the extent of the procedural defects in the investigatory, disciplinary and appeal process held by the appellant were sufficient to make the dismissal unfair?

3. Did the Industrial Tribunal err in law when considering the "equity and merits", as required by Article 130(4) of the Employment Rights (Northern Ireland) Order 1996, by including in their consideration of the "circumstances of the case" the relevant policies of the appellant in particular the guidance to employees and management as to the likely classifications of certain acts of misconduct and the likely disciplinary penalty to be incurred included in the revised "Platform Agreement"?

4. If the dismissal was unfair did the Industrial Tribunal err in law in holding that notwithstanding the misconduct of the respondent and his approach to the investigation and disciplinary process, the deduction from the compensatory award in respect of the respondent's contribution to his dismissal should be limited to 75%.

[61] We answer the questions posed in the case stated in the following manner –

Question 1 – Yes;
Question 2 – Yes;
Question 3 – Yes; and
Question 4 – does not arise.

Thus, the appeal is allowed.