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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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DAVID RICE

Appellant:

-and-

DIGNITY FUNERALS LIMITED

Respondent:

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Before: Stephens LJ and Sir Paul Girvan

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a decision of an Industrial Tribunal ("the Tribunal") issued to the parties on 28 December 2017. The Tribunal having heard evidence over four days between 18 and 21 September 2017 dismissed the claim of race discrimination against and unfair dismissal of David Rice ("the appellant") arising out of his dismissal on 9 September 2016 by Dignity Funerals Limited ("the respondent") by reason of gross misconduct. The appeal is against the finding of unfair dismissal only.

[2] Mr O'Donoghue QC and Ms McIlveen appeared on behalf of the appellant. Mr Mulqueen appeared on behalf of the respondent.

Factual background

[3] The respondent is a long established national company of Funeral Directors providing services throughout the United Kingdom employing approximately 3,000 personnel. The respondent and its staff care for the bodies of the deceased making appropriate arrangements for funerals and providing compassionate help to people faced with the most difficult of times coming to terms with bereavement. The reputation of the respondent as it strives to ensure the provision of the best possible care to clients with compassion, respect and openness is critically important. The Tribunal considered, as do we, that this is an important feature of this case.

[4] In November 1987 the appellant, then aged 28, commenced in the undertaking business employed by Co-operative Funerals. He remained in that employment until August 1995 when he commenced with Kirkwood's Funeral Directors. In March 2011 the respondent purchased that business so that the appellant's employment transferred to it. In 2013 the respondent appointed the appellant as its Northern Ireland area manager and he remained in that position until his dismissal, at the age of 57, on 9 September 2016.

[5] Prior to the circumstances surrounding his dismissal the appellant had a work record devoid of any disciplinary offences.

[6] The appellant's wife, Diane Rice, was also an employee of the respondent.

[7] In 2016 another employee, Michelle Grimmett, was the subject of company disciplinary proceedings leading to the appellant dismissing her from which decision she appealed. In the course of her appeal she made a series of allegations against the appellant of management failing and inappropriate behaviour of staff in Northern Ireland which became the subject of an investigation by the respondent commencing on 18 April 2016. On 20 April 2016 an investigation meeting with the appellant was conducted by Emily Skelton, an Area Manager of the respondent and Steven Williams of the respondent's Human Resources.

[8] On 22 April 2016 the appellant was suspended. He was escorted from the business premises and his keys taken from him. It has subsequently transpired that this was the last day that he performed work for the respondent.

[9] Subsequent to the appellant's suspension Mrs Skelton sent a letter to the appellant confirming that he was suspended from work pending investigations into a series of allegations that had been raised which if proven could demonstrate a failure to carry out managerial duties that could be deemed as gross misconduct.

[10] On 27 April 2016 Mrs Skelton provided her full investigation report to the respondent which contained a number of recommendations including a recommendation that the appellant face disciplinary charges. She stated that on two occasions in the last 12 months a deceased left the premises in the wrong coffin. In relation to the most recent incident the deceased was viewed by his widow in the wrong coffin. In relation to the earlier incident it was noticed that there was a coffin in the garage that should not have been there, the driver of the hearse was contacted and this led to the right coffin being provided so that the deceased did not arrive with the family in the wrong coffin. Ms Skelton stated that the appellant was aware of both incidents but that there was no record of any formal action being taken and that she considered that a formal investigation should have taken place identifying individuals involved, consequences and a learning process. That if this had occurred on the first occasion she considered that there would not have been a recurrence.

She also had a concern as to the attitude of some of the staff involved which was that "the family did not know as the deceased never got to home and there was no complaint." Ms Skelton also reported in relation to two occasions in which a deceased had been dressed in the wrong clothing and again she considered that a formal investigation ought to have been conducted. Another aspect of her report was the incident in which the cremated remains of a deceased were scattered when the family had requested burial. Mrs Skelton stated that she was concerned that staff did not realise the importance of the company's reputation or of the adverse impact on a family. She considered that a formal investigation ought to have been undertaken. In addition Mrs Skelton considered that it was her belief that by failing to act and investigate the appellant had placed Dignity Northern Ireland and the wider business at risk of potential disrepute. She recommended that the appellant face disciplinary charges in that he "failed to investigate 2 incidents of deceased leaving the premises in the wrong coffin; 2 incidents of the deceased being dressed in the wrong clothing, failing to investigate inappropriate conduct within the team which included a video recording on company premises, threatening and violent behaviour and an allegation that a member of the team was under the influence of alcohol whilst at work."

[11] On 6 May 2016 Mr Ian Studd, the respondent's Regional Manager for the Midlands region, met with the appellant at Mr Studd's request at a hotel in Stranraer. The Tribunal refer to this meeting as the "Scottish meeting." The appellant tape recorded the meeting without Mr Studd's knowledge. Before the Tribunal there was a dispute as to the admissibility in evidence of the tape recording with the respondent contending that recording was inadmissible as the meeting was "without prejudice." The Tribunal ruled that the tape recording was admissible. That ruling was not challenged by the respondent on this appeal.

[12] At the date of this meeting Mr Studd had the adverse findings contained in Mrs Skelton's investigation report which led to the possibility of the destabilisation of the respondent's Northern Ireland business. In the course of the meeting Mr Studd offered the appellant and his wife, Mrs Diane Rice, also an employee of the respondent, the opportunity to relocate to employment with the respondent in Scotland on the understanding that disciplinary action would not proceed against him. The appellant and his wife had close family living in Scotland and had on previous occasions indicated that they might like to consider relocating to Scotland. The appellant rejected this proposal.

[13] Between 9 and 11 May 2016 Mr Bob Brown one of the respondent's area managers undertook an operations audit of the respondent's business in Northern Ireland. The respondent has a computer software system for organising funerals known as "Compass" which produces what are termed "garage orders." The audit report revealed that this software was introduced in Northern Ireland at the beginning of January 2016. However on Monday 25 January 2016 staff at Ravenhill Funeral Service received a call from a family asking when the hearse was

due to arrive for a funeral. Staff in the branch had no initial knowledge of this funeral and it did not appear on their garage orders for that day. The deceased had been removed, dressed, coffined and taken home by the weekend staff. The funeral had not been input to Compass and so did not appear on paperwork anywhere. A vehicle and staff were dispatched and arrived about 15 minutes late. The delay was blamed on traffic and this was apparently accepted by the family. The report stated that as a result of this Ravenhill stopped using Compass to produce garage orders and reverted to their earlier paper-based system.

[14] In relation to the identification of the deceased at Ravenhill the audit report revealed 11 deceased not signed out.

[15] In relation to the Jewellery and Personal Effects audit at Ravenhill the audit report revealed that the register recorded no jewellery items on any deceased brought into care between November 2015 and May 2016 which was stated as seeming to be "highly unlikely."

[16] In summary the audit report concluded that there was no sign of anything underhand going on, but that in Northern Ireland "Dignity systems and procedures are bypassed/ignored/partly used throughout the operational side of the business." The report recognised that many good things happen but "too many things don't fit together properly and so there have been several known mistakes and many more near misses which are only hinted at." The report referred to a "mishmash of home-grown paperwork: arrangers using their original non-Dignity arrangement sheets and then transferring the info on Dignity forms; Diary staff with no access to Compass; operations and admin being physically separated, which leads to delays in getting disbursement cheques signed and returned before the funeral; various cultural issues – 3 day funerals, an expectation that mistakes will happen, but that's ok as long as the family doesn't find out; and a complete disinterest in changing anything; all of these together with a willingness for managers to ignore Dignity procedures has led us to where we now are." The report added that "computers are now in all NI branches. A system needs to be devised which ensures the timely inputting and subsequent updating, of funerals to Compass."

[17] The Tribunal considered and we agree that the audit report raised further issues in relation to the appellant as to his overall management of the respondent's Northern Ireland operation than were contained in the report of Mrs Skelton.

[18] On 11 May 2016 the appellant lodged with the respondent a grievance concerning the allegations made by Ms Grimmett on the basis that he was the subject of an unwarranted attack by her. The grievance was also about the content of the meeting in Stranraer in that he felt unfairly treated by his employer in calling him to a meeting at Stranraer and effectively telling him that he could come to work in Scotland but that otherwise he would be the subject of disciplinary proceedings.

[19] On 19 and 26 May 2016 the appellant attended grievance investigation meetings.

[20] On 3 June 2016 the respondent dismissed the appellant's grievance.

[21] On 4 June 2016 the appellant appealed against the dismissal of his grievance. In relation to that appeal the appellant was invited to a further meeting on 22 June 2016 which he declined to attend. The grievance appeal was dismissed on 24 June 2016. In the course of the grievance hearings he was not permitted to refer to the "Scottish meeting" on the basis that the respondent considered it was a "without prejudice" meeting.

[22] In July 2016 Mike McCollum, the respondent's Chief Executive Officer, wrote a letter to one of the respondent's clients in which he stated that a new area manager had been appointed for Northern Ireland. The appellant believed this to be clear evidence of a pre-determination by the respondent prior to the outcome of disciplinary proceedings that he would not be returning to his employment.

[23] On 1 August 2016 a decision was taken by the respondent to commence disciplinary proceedings against the appellant and on 10 August 2016 the specific allegations were set out in correspondence to him.

[24] In August 2016, Mrs Skelton informed Kate Davidson, a Regional Manager, that she was temporarily looking after the Northern Ireland area until a replacement area manager could be found. Again the appellant considered this to be evidence demonstrating the company's decided intention to remove the appellant from his employment.

[25] On 31 August 2016 the appellant attended a disciplinary hearing conducted by Mr John Laker (Regional Manager). Detailed notes of that hearing were prepared by the respondent. Following consideration Mr Laker wrote to the appellant on 9 September 2016 stating his decision to dismiss the appellant for gross misconduct. In the letter of dismissal a number of reasons were given. In summary, the reasons that justified, in the opinion of the respondent, a finding of gross misconduct were as follows:

> "(a) In relation to the funeral arrangements for a particular deceased there were a number of findings. The appellant acknowledged serious procedural errors had occurred in relation to this funeral which could have resulted in Dignity missing the funeral arrangements for the family. The appellant stated that he had no faith in the Compass system and that he was aware that a second manual process was in place to ensure that

a funeral could not be missed but recognised that the funeral would have been missed had the client not called the office to establish where the cars were. The appellant acknowledged that he was aware of this issue and that no investigation was carried out and no recommendations or improvement suggested. The appellant acknowledged that he knew that the Diary Controller subsequently stopped using Compass Garage Orders and there was a finding that this was a decision that the appellant effectively endorsed so that the appellant had permitted staff to use a manual system rather than the computerised system. The appellant also acknowledged that he did not escalate any concerns to his regional manager. Mr Laker concluded that this was an act of Gross Misconduct in line with the Company disciplinary policy which had the potential to bring the Company into disrepute.

(b) The appellant did not investigate or make recommendations for improvement when he discovered that the ashes of a deceased had been scattered and not buried as per the client's wishes. There was also a finding that the appellant did not inform his line manager of this fact. Mr Laker concluded that this was an act of Gross Misconduct in line with the Company disciplinary policy which had the potential to bring the Company into disrepute.

(c) That significant breaches of the Identification and Jewellery and Personal Effects procedures were known to the appellant and that the systemic failure by the team under the appellant's control amounted to a blatant disregard for the procedures. That this was a significant dereliction of his responsibility as an area manager. It was found that commensurate with the appellant's role it was a key requirement to ensure that the Jewellery and Personal Effects procedure was adhered to at all times and that knowing of these breaches he ought to have escalated to his regional manager. Mr Laker considered that the failure to

> notify anyone outside of Northern Ireland "was a deliberate attempt to cover up any short comings in (the appellant's) managerial ability and a serious abdication of (his) responsibilities."

Mr Laker took into consideration the factors that the appellant cited as having contributed to the significant breaches of the identification procedure which were staff turnover, inability to use Compass due to lack of training and lack of support from a regional manager. Mr Laker found that it was the responsibility of the area manager to arrange and manage suitable training to ensure that there was compliance with company procedures. In relation to support from his regional manager it was established that the appellant attended regular meetings in England and in attendance would be his area manager community, all of whom would be available. In addition his regional manager also visited Northern Ireland on a regular basis. Mr Laker concluded that the appellant had not offered any exceptional mitigating circumstances to explain his actions concluding that his employment with the respondent should now be terminated.

[26] On 4 October 2016 the appellant appealed setting out the grounds of his appeal in a detailed letter.

[27] On 24 November 2016 the disciplinary appeal hearing was conducted on behalf of the respondent by Mr Stephen Rymer (Regional Manager, North East). Again detailed notes were made of that hearing by the respondent. The appeal presented by the appellant, who by this stage had engaged legal assistance, centred on mitigating factors relating to a lack of training, lack of support and a purported discriminatory comment made to the appellant at the 6 May 2016 Scottish meeting that Northern Ireland was operating in a bubble. Mr Rymer decided to dismiss the appeal and reasons were communicated to the appellant by letter dated 8 December 2016. Mr Rymer was satisfied that the appellant had been appropriately trained and that managers in Dignity had been made aware of how they book training for themselves and their staff. He could find no evidence to support this ground of appeal. He reviewed the evidence as to support and could find no evidence to support the ground of appeal of a lack of support. The third ground of appeal of an alleged racist comment no longer arises in these proceedings.

[28] Throughout the disciplinary and appeal processes the appellant was not permitted to refer to the meeting of 6 May 2016.

[29] It was the appellant's case before the Tribunal that his conduct did not amount either individually or cumulatively to gross misconduct; that the motivation behind the decision either to invoke disciplinary proceedings or to find the appellant's conduct to be gross misconduct warranting summary dismissal was a refusal by the appellant to relocate to Scotland or a pre-determined decision that the appellant was not to return as Area Manager in Northern Ireland.

[30] It was the respondent's case before the Tribunal that the meeting in Scotland was a "without prejudice meeting" with the appellant to see if a difficult situation could be nipped in the bud; thereafter the decision to invoke disciplinary proceedings and to make findings of gross misconduct was entirely warranted as a result of their investigation. Further, that the decision was procedurally and substantively fair.

The proceedings before and the decision of the Tribunal

[31] The Tribunal heard evidence from (a) Mr Ian Studd (Regional Manager for the Midlands Regions), (b) Mrs Emily Skelton (Investigating Officer), (c) Mr John Laker (Disciplinary/Dismissing Officer), (d) Mr Stephen Rymer (Appeals Officer), (e) Mr Anthony Driver (appellant's Line Manager/Regional Manager) and (f) the appellant.

[32] The Tribunal set out 3 issues relevant to its decision in relation to the claim of unfair dismissal as follows:

(a) Was the meeting of 6 May 2016 between the appellant and Mr Studd privileged?

(b) Was the appellant dismissed for gross misconduct following a reasonable investigation and on reasonable grounds?

(c) Were the actions of the respondent in relation to process and penalty within the band of reasonable responses for a reasonable employer?

The Tribunal answered no to the first question and yes to the second and third.

[33] The Tribunal set out the applicable legal principles in relation to unfair dismissal referring to a number of authorities including *Connolly v Western Health and Social Care Trust* [2017] NICA 61. The Tribunal then stated that "the *Connolly* decision confirms that the task of the Tribunal is not to substitute its view for the employer's. The Tribunal must decide in a gross misconduct case whether there was wilful and deliberate disregard for rules or policies and whether dismissal was an appropriate sanction particularly where an employee is summarily dismissed for a first offence. The Tribunal must look at whether the actions of the employer with regard to process and penalty were within the band of reasonable responses for a reasonable employer in the circumstances. The Tribunal must then determine whether the dismissal was fair or unfair in accordance with equity and the substantial merits of the case. As part of this assessment the Tribunal must look at whether a lesser sanction was appropriate in the circumstances."

[34] The Tribunal ruled that the recording of the Scottish meeting was admissible but decided that Mr Studd was seeking to find a way out of a difficult position for the company as he could see the ramification for the Northern Ireland business of the serious matters uncovered by Mrs Skelton. The Tribunal found that there was no bullying, harassment or threat from Mr Studd and rejected the contention that the appellant was told that if he did not go to Scotland he would be sacked. The Tribunal concluded that Mr Studd's approach involved a realistic assessment of the situation at that time in view of the *emerging* information about serious organisational breaches and before the audit process began in earnest. The Tribunal stated that Mr Studd was reacting to commercial imperatives.

[35] An issue that arose before the Tribunal and indeed before this court was if on 6 May 2016 the appellant was suitable to work for the respondent in Scotland without having been disciplined then why was it that in September 2016 he was summarily dismissed for gross misconduct. The Tribunal addressed this issue by holding that the full extent of the serious matters in relation to the appellant were uncovered by the audit undertaken by Mr Brown which occurred after the Scottish meeting. The Tribunal stated that the Brown audit had uncovered the extent of the very serious failings which had happened on the appellant's watch and that these were in some important respects additional to the matters uncovered by Mrs Skelton's investigation. The Tribunal found that it was the fact that those more serious matters disclosed by the Brown audit had not been properly investigated by the appellant nor reported to his senior managers in Great Britain which led to the disciplinary action against the claimant and to his ultimate dismissal.

[36] The Tribunal was satisfied that there was a reasonable investigation. It considered both Mrs Skelton's investigation and the audit carried out by Mr Brown holding that the issues uncovered appeared to be related to systemic failures and that the focus was on the appellant as he was the area manager with responsibility for the running of the operation in Northern Ireland. The Tribunal rejected the contention that there was some sort of vendetta against him which was driven by Ms Grimmett and her associates.

[37] The Tribunal referred to two key polices of the respondent, the Identification of the Deceased policy and the Jewellery and Personal Effects policy, which the respondent regarded as fundamental to its business as serious errors could result from non-compliance. The Tribunal was satisfied that Mr Laker carefully considered all of the disciplinary charges and the evidence which was before him and that he also considered the points made by the appellant in explanation and mitigation. The Tribunal held that Mr Laker considered lesser sanctions and considered that dismissal was the appropriate sanction due to the serious and repeated nature of the shortcomings and due to the appellant's admission that he had repeatedly failed to address the serious breaches of procedure which were likely to bring the company into disrepute. The Tribunal found that Mr Laker reasonably formed the view that the appellant failed to inform his manager because he wanted to conceal the true

situation in Northern Ireland. The Tribunal also found that Mr Laker reasonably concluded that any one of the serious shortcomings amounted to gross misconduct.

[38] The Tribunal found no material fault with the appeal process.

[39] The Tribunal held that the appellant's explanation in the proceedings before it for failure to advise his manager was firstly that his manager trusted him so he did not need to do so and secondly that he was in the process of informing his manager when he was suspended and therefore could not do so. The Tribunal considered that this was a contradictory position to adopt and it tainted the appellant's evidence.

[40] In relation to training the Tribunal held that the appellant was familiar with arranging training for his staff and he could have sought training for himself if he had been minded to do so.

[41] The Tribunal found that the appellant whilst acknowledging serious failings did not feel he had any responsibility for the failure to investigate and the failure to notify and that it was reasonable for managers to find this attitude evident in the disciplinary and appeal process to be of serious concern to them.

[42] The Tribunal found that the actions of the respondent were within the band of reasonable responses for a reasonable employer as regards both process and penalty.

[43] In relation to the Scottish meeting the Tribunal identified the issue as being whether or not the appellant's dismissal was predetermined. That contention was rejected *on all the evidence before the Tribunal* on the basis that the matters for which the claimant was ultimately dismissed emerged in full following the Scottish meeting and they were so serious that dismissal was a fair sanction in the circumstances. In particular given that the appellant did not accept responsibility for the failures under his command and he blamed others for his deficiencies a lesser sanction would not have been appropriate. The fact that the Scottish meeting could not be alluded to in the disciplinary process did not inject unfairness into the process given the content of that meeting and the fact that it occurred before the full extent of the more serious issues and the appellant's role with regard to them were uncovered. The Tribunal held that it was in relation to those more extensive serious issues uncovered by the audit that the appellant was ultimately dismissed.

[44] The Tribunal concluded that the disciplinary process and penalty were within the band of reasonable responses for a reasonable employer and that the dismissal was not unfair in accordance with equity and the substantial merits of the case. Specifically the Tribunal considered that it was not unreasonable for managers to dismiss the appellant for gross misconduct despite his clear record given:

(a) The seriousness of the failings in procedure which were uncovered;

(b) The deliberateness of the appellant's disregard of fundamental policies;

(c) The fact that the policies which, to the appellant's knowledge, were repeatedly breached, were important policies that went to the heart of the business and its reputation;

(d) The deficient response of the appellant to those failings; and

(e) His evident lack of acceptance of any responsibility.

The grounds of appeal

[45] The grounds of appeal set out in the appellant's Notice of Appeal dated 8 February 2018 are as follows:

(1) The Tribunal erroneously held that the appellant was dismissed following a reasonable investigation and on reasonable grounds.

(2) The Tribunal erroneously held that the actions of the respondent in relation to process and penalty were within the band of reasonable responses for a reasonable employer.

(3) The Tribunal attributed improper weight to the impact that the respondent's failure to let the appellant discuss the content of the Scottish meeting had upon the reasonableness of the investigation and/or fairness of the dismissal.

(4) The Tribunal failed to have regard or proper regard to the evidence that was adduced before it.

Legal principles

[46] The legal principles applicable to Article 130 of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") have been set out by this court in *Connolly v Western Health and Social Care Trust* in particular by Gillen LJ at paragraph [28] (i) to (xvi).

[47] In this case pursuant to Article 130(1) & (2) of the 1996 Order it was for the respondent to establish "the reason (or, if more than one, the principal reason) for the dismissal," and that it "relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do" or "relates to the conduct of the employee" or is "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." Thereafter, if the respondent fulfilled those requirements then

pursuant to Article 130(4)(a) & (b) "the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case." It can be seen that once the reason for dismissal has been established the Tribunal in addressing Article 130(4)(b) so as to decide whether the reason justified summary dismissal should ask themselves whether summary dismissal was in accordance with equity and the substantial merits of the case.

[48] As was explained in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 "… 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."

[49] However, whilst the Tribunal must not substitute its decision as to the right course to adopt for that of the employer this does not mean that there is a requirement of such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within Article 130(4). That is not the law. The question in each case is whether the Industrial Tribunal considers the employer's conduct to fall within the band of reasonable responses, see *Iceland Frozen Foods Ltd v Jones* at page 25.

[50] As stated in *Connolly* application of the overall test does "not exclude consideration of a lesser sanction as a relevant consideration." Ordinarily the determination of the question whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee "in accordance with equity and the substantial merits of the case" involves *consideration* as to "whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct."

[51] The character of gross misconduct was considered in *Sandwell & West Birmingham Hospitals NHS Trust v Mrs A Westwood* [2009] UKEAT/0032/09/LA. It was stated that "the question as to what is gross misconduct must be a mixed question of law and fact …." The legal test is that "gross misconduct justifying

dismissal must amount to a repudiation of the contract of employment by the employee." That is "something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract" or "conduct repudiatory of the contract justifying summary dismissal." In the disobedience case of *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 at page 710 Evershed MR said that "the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions."

[52] At paragraph [36] of *Connolly* Deeny LJ delivering the majority judgment of this court agreed with the statements in Harvey on Industrial Relations and Employment Law [1550]-[1566] that dismissals for a single first offence must require the offence to be "particularly serious."

[53] In *Connolly* Deeny LJ stated that ascertaining what the reason for dismissal is, where that is in dispute, "is likely to be principally or wholly an assessment of facts." Deeny LJ went on to state that "reaching a conclusion as to whether the dismissal is fair or unfair, 'in accordance with equity and the substantial merits of the case' as required by Article 130(4)(b) would appear to involve a mixed question of law and fact."

[54] The role of this court in relation to factual determinations made by the Tribunal is limited. The relevant principles have been set out by Lord Kerr at paragraphs [78] – [80] when giving the judgment of the Supreme Court in *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7. Lord Wilson stated in *In re B (A Child)* [2013] 1 WLR 1911, paragraph [53] that "… where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it." This court does not conduct a re-hearing and it is only in very limited circumstances that the factual findings made by the Tribunal will not be accepted by this court, see *Mihail v Lloyds Banking Group* [2014] NICA 24 at [27]; *McConnell v Police Authority for Northern Ireland* [1997] NI 253; *Carlson v Connor* [2007] NICA 55; *Chief Constable of the Royal Ulster Constabulary and Assistant Chief Constable A H v Sergeant A* [2000] NI 261 at 273.

Discussion

[55] Mr O'Donoghue who presented the case on behalf of the appellant with clarity and skill, whilst accepting that there had been significant breaches of the Jewellery and Personal Effects policy which demonstrated a failure of managerial responsibility on behalf of the appellant amounting to gross misconduct, laid emphasis on the following points:

(a) The findings of gross misconduct as opposed to misconduct in relation to other aspects of the appellant's conduct were inappropriate given the mitigating factors that existed such as lack of training for the appellant, staff turnover and lack of support and also given the lack of complaints from clients about any of the funeral arrangements. It was suggested that there ought only to have been one as opposed to three, findings of gross misconduct.

(b) The appellant's exemplary work record was a factor both individually and cumulatively with other factors that ought to have weighed heavily in determining whether dismissal was outside the range of reasonable responses.

(c) The fact that the respondent was prepared to employ the appellant in Scotland without any further investigation or any disciplinary proceedings when some of the appellant's inadequacies had been exposed in the Skelton report was another factor both individually and cumulatively with other factors that ought to have weighed heavily in determining whether dismissal was outside the range of reasonable responses.

(d) A consideration of lesser sanctions such as a final written warning, demotion, retraining or retraining allied with relocation was another factor both individually and cumulatively with other factors that ought to have weighed heavily in determining whether dismissal was outside the range of reasonable responses.

(e) That the appellant's inability to refer to the Scottish meeting during the course of the respondent's disciplinary process meant that the respondent had not conducted a fair investigation.

[56] The nature of the respondent's business is the central context of this case. The respondent in organising funerals deals with a fundamental aspect of human dignity. As we have indicated the reputation of the respondent, which must be based on *real* concern and *real* support for bereaved families, is critically important. That reputation must not only be for compassion but also for high ethical and organisational standards so that families can have confidence to entrust a deceased family member's funeral to the respondent. This central context finds expression in the respondent's core policies and is fundamental to the respondent's business. To suggest as the appellant suggested that because no one complained or because a family accepted a false explanation for failing to attend on time, is to fundamentally misunderstand the nature of the business. Bereaved families should not be put in the position of having to complain. False explanations should not be given. The culture should not be that mistakes do not require action if the family do not find out.

[57] The first issue raised on this appeal is in relation to the findings of gross misconduct. That involves a mixed question of fact and law so the questions are: What are the facts? Do those facts in law amount to gross misconduct? Subject to very limited exceptions factual determinations are for the Tribunal.

[58] We have set out the three factual findings of the respondent's disciplinary procedure at paragraph [25] above. The task for the Tribunal was to decide whether the respondent entertained a reasonable suspicion amounting to a belief in the guilt of the appellant of that misconduct. It is clear that the Tribunal was so satisfied in relation to each of the three grounds. The Tribunal also held that all three grounds amounted to gross misconduct. In the context of the respondent's business we consider that the Tribunal was entitled to form the view that each of the grounds amounted to a repudiation of the fundamental terms of the appellant's contract.

[59] More central to this appeal are the issues which arise under Article 130(4). In addressing those issues again the context is of central importance. The nature of the respondent's business is that it demands the highest levels of care and the appellant as the Northern Ireland Area Manager was responsible for leadership setting and achieving appropriate standards.

[60] The appellant's work record was taken into account by the Tribunal both individually and cumulatively with the other matters raised in this appeal. In another context that work record may have led to a different result but in the context of the respondent's business the decision of the Tribunal that to dismiss was within the range of reasonable responses was justified particularly given the factual findings that the appellant's disregard of fundamental policies was deliberate, that the policies were to the knowledge of the appellant repeatedly breached, the appellant's lack of acceptance of any responsibility and his deficient response to the failings.

[61] In relation to the offer of a job in Scotland the Tribunal held that Mr Studd was reacting to commercial imperatives and this offer occurred prior to the Brown Audit which uncovered important additional matters not contained in the earlier Skelton Report. The factual finding in relation to Mr Studd's motivation was one which could not be classified as plainly wrong. The factual finding that there were important additional matters is not only one which was not plainly wrong but is also one with which we agree. Again, the decision of the Tribunal that to dismiss was within the range of reasonable responses was justified particularly given the other factual matters set out in paragraph [60].

[62] In relation to lesser sanctions we note that at no stage prior to this appeal did the appellant suggest that he was prepared to relocate. That suggestion during this appeal was inconsistent with his earlier refusal to relocate to Scotland. There was evidence that he had been trained and that there was further training available to him if he had but requested it. Again, the decision of the Tribunal that to dismiss

was within the range of reasonable responses was justified particularly given the other factual matters set out in paragraph [60].

[63] The approach taken by the respondent to the recording of the Scottish meeting was that it was subject to privilege. In the event the Tribunal held that this approach was mistaken but that did not mean that it was unfair or that it had any impact on the final decision to dismiss. As we have indicated the Tribunal found that matters had moved on after the offer of employment by virtue of the findings in the Brown audit.

[64] We consider that the Tribunal was justified in finding that the respondent was not acting outside the range of reasonable responses.

Conclusion

[65] We dismiss the appeal.