Case No: EA-2020-000973-LA (Previously UKEATPA/1023/20/LA)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 November 2021

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

HOVIS LIMITED	**Appellant**
- and -	
MR W LOUTON	**Respondent**

- -
- -

Mr M White (instructed by Steeles Law) for the **Appellant**
Mr E Webb (instructed by Pattinson & Brewer) for the **Respondent**

Hearing date: 7 October 2021

- -

JUDGMENT

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SUMMARY

PRACTICE AND PROCEDURE

The claimant in the employment tribunal worked for the respondent as a delivery lorry driver. A manager, Mr Sittre, reported that, when driving his car on the motorway, accompanied by his wife, both of them had seen the claimant driving his van on the same stretch of motorway and smoking at the wheel.

Following an internal disciplinary investigation and process the claimant was found to have been smoking whilst driving, which was a serious breach of the respondent's procedures, and dismissed.

The tribunal found that the claimant was not unfairly dismissed. He did not appeal or cross-appeal from that decision. The tribunal upheld the claimant's claim of wrongful dismissal. The respondent appealed from that decision.

At the hearing in the employment tribunal the claimant gave evidence in person and denied that he had been smoking. Neither Mr Sittre nor Mrs Sittre gave evidence to the tribunal. The tribunal concluded that it therefore could not find as a fact that the claimant had been smoking. The tribunal erred by concluding that, in the absence of either Mr or Mrs Sittre giving evidence in person, it was precluded from making such a finding; and by failing to evaluate the hearsay evidence of the statements that had been gathered from the Sittres in the internal investigation.

The appeal was allowed.

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HIS HONOUR JUDGE AUERBACH:

Introduction

1. I shall refer to the parties as they were in the employment tribunal as claimant and respondent. This is the respondent's appeal. In brief summary the factual background is this.

2. The claimant was employed by the respondent as a lorry delivery driver. It was alleged that on 27 December 2019 he had been seen smoking at the wheel of his vehicle while driving on the motorway. It was common ground that such conduct would be a serious breach of the respondent's smoking policy, which identifies that it may attract the sanction of dismissal, and that the claimant knew that.

3. The allegation was made by the respondent's logistics manager, Mr Sittre, to another manager, Mr Jarvis. Mr Sittre's account, in summary, was that, on the day in question, he had been driving in his car with his wife as a passenger. They had passed the claimant's Hovis-branded lorry on the motorway and Mrs Sittre had seen the driver smoking at the wheel. Mr Sittre had then manoeuvred the position of his vehicle relative to that of the claimant so that he could also look, and he had then also himself seen the claimant smoking at the wheel.

4. Mr Jarvis conducted an investigation, including speaking to the claimant, who denied the allegation. However, Mr Jarvis concluded in his investigation report that there was a case to answer in disciplinary process. That led to disciplinary charges, and in due course a disciplinary hearing before another manager, Mr Hall. He concluded that the claimant was guilty of the conduct alleged and summarily dismissed him. The claimant appealed and that was considered by another manager, Mr Taylor. The appeal was unsuccessful.

5. The claimant complained of unfair dismissal and wrongful dismissal. The claims came to a full merits hearing before EJ Heap. The claimant was represented by Mr Webb of counsel, the respondent by Mr White of counsel. The live witnesses were the claimant and Messrs Jarvis, Hall and Taylor. In a reserved decision the tribunal dismissed the unfair dismissal complaint, but upheld the complaint of wrongful dismissal and awarded damages. I heard the respondent's appeal against

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the decision that the claimant was wrongfully dismissed. There was no appeal or cross-appeal in respect of the decision that he was not unfairly dismissed. The parties were represented in the EAT by the same counsel who appeared in the tribunal.

The Tribunal's Decision

6. After dealing with preliminary matters, the tribunal directed itself as to the law. As to wrongful dismissal, it identified that consideration of the wrongful dismissal claim "requires the tribunal itself to determine whether the employer has established that the employee acted in repudiatory breach of contract such as to entitle the employer to summarily dismiss him or her. This requires the tribunal to undertake an evaluation of the evidence before it and to reach its own conclusions as to what took place." No issue is taken with that self-direction.

7. The tribunal then made very detailed findings of fact about every aspect of the conduct of the investigation, disciplinary and appeal processes. These included the following topics. Mr Jarvis established that the registration plate given to him by Mr Sittre was indeed that of the claimant's vehicle. The Sittres' vehicle was also seen in dashcam footage looking out from the claimant's cab. Mr Jarvis also asked two other employees, Mr Flinton and Mr Smith, to check the claimant's vehicle for signs of smoking. They found none. Mr Jarvis interviewed Mr Sittre, who gave a detailed account of what he said had happened and provided a sketch. Mr Jarvis obtained an email statement from Mrs Sittre. He conducted an interview with the claimant.

8. The judge also set out in some detail, the account of matters that the claimant gave to Mr Hall at the disciplinary hearing, in response to the Sittres' statements, and issues that were raised as to the credibility of aspects of his and their accounts. She also described how, at the appeal stage, Mr Taylor carried out what was called a static reconstruction, using Mr Sittre's car and a Hovis lorry. He sat in both the passenger's and driver's seats of the car, next to the lorry, and took photographs. From this exercise he concluded that it was possible, as the Sittres had claimed, to see from their car, the driver seated in the lorry's cab.

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9. The judge then set out her reasoned conclusion as to why the dismissal was fair, including working through what might be called the usual **Burchell** questions, and consideration of a number of further specific allegations of unfairness that were advanced on behalf of the claimant.

10. The tribunal then considered the wrongful dismissal complaint. I will set out the reasons concerning liability for wrongful dismissal in full.

> "136. I turn then to the wrongful dismissal complaint. I must firstly be satisfied in this regard that on the basis of the evidence before me the Claimant acted as the Respondent contends he did on 27th December 2019 – that is that he was smoking in his company vehicle.
>
> 137. This aspect of the claim is not parasitic on my findings and conclusions on the unfair dismissal claim because rather than the test of reasonableness and reasonable belief, the burden is on the Respondent to satisfy me on the balance of probabilities that the Claimant was guilty of the misconduct alleged. I am required to make my own findings in that regard as to what happened.
>
> 138. The problem here for the Respondent is that which I observed to Mr. White at the outset of the hearing – the Respondent has not called anyone who was an actual witness to the events of 27th December 2019. There were only three people present on 27th December 2019 – the Claimant; Mr. Sittre and Mrs. Sittre. The Claimant has given evidence and been cross examined. However, I have not heard on behalf of the Respondent from either Mr. or Mrs. Sittre who are the only individuals who would be able to provide a first hand account of what they saw on 27th December 2019. I was therefore unable to evaluate their credibility against that of the Claimant.
>
> 139. Whilst it is true to say that there was supporting evidence that the Claimant had been smoking such as the footage corroborating the manoeuvre that Mr. Sittre took in his own vehicle, that falls far short of my being able to find as a fact that the Claimant was, on the balance of probabilities, smoking on 27th December 2019. Particularly, there is evidence that mitigates against that position such as the statements of Messrs. Flinton and Smith and, without being able to evaluate the evidence of the only first hand witnesses to the matter for myself, I can make no finding of fact that the Claimant was smoking as alleged by the Respondent.
>
> 140. I should remark that had I been satisfied that the Claimant had been smoking on 27th December 2019 in a company vehicle then I would have concluded that that amounted to conduct which was so serious that it entitled the Respondent to summarily dismiss him. That is because what was alleged would have been a criminal offence; it could have resulted in the Respondent being prosecuted and fined and the Smoking Policy was clear on how the Respondent viewed such conduct and the seriousness of breach of that policy.
>
> 141. However, I have not and cannot find on the facts based on the evidence before me that the Claimant was guilty of smoking in a company vehicle on 27th December 2019 and it follows that the wrongful dismissal complaint is well founded and it succeeds."

11. The Tribunal went on to award the claimant damages of £5,964.84. There is no appeal in

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respect of that award, as such.

The Grounds of Appeal

12. There are two grounds of appeal, expressed in the notice of appeal as follows;

(1) The Tribunal fell back improperly on the burden of proof
The Tribunal erred in law by relying on the burden of proof in circumstances where to do so was unlawful because:

(a) the Tribunal did not, before falling back on the burden of proof to decide the issue, attempt (or alternatively, attempt meaningfully) to determine on the available evidence whether the Allegation [of smoking] was true; and/or
(b) the Tribunal fell back on the burden of proof to decide whether the Allegation was true in circumstances where it could, on the evidence before it, reasonably, have made a proper finding on the issue.

(2) The Tribunal discounted, improperly, documentary and hearsay evidence
The Tribunal held that it could make no positive finding as to the Allegation without having heard from witnesses who claimed to have seen the Claimant smoking, and being able to evaluate their credibility as against the Claimant's.

There was ample documentary and hearsay evidence before the Tribunal – [summarised earlier in the notice of appeal] – to weigh up against the Claimant's account. The Tribunal should have weighed up said evidence in coming to a decision in respect of the Allegation, but instead discounted it completely on the basis that it was not first-hand evidence as to the Allegation. To do so was an error of law."

13. DHCJ Clive Sheldon QC permitted both grounds to proceed to this full hearing.

The Law

14. In a civil claim, including in the employment tribunal, the burden of proving a factual allegation generally lies on the party making it. The standard of proof is balance of probabilities.

15. Where, in a given case, the alleged fact asserted by one party is not agreed or admitted by the other, and the judge, having assessed the relevant evidence, considers that the evidence pointing in either direction is evenly matched, and there is no way to choose or decide, then the burden of proof is, as it were, the tie breaker. The party asserting the factual proposition in question will not have shown it probably to be the case, and so the party who bore the burden in respect of the matter will lose. This scenario is discussed in a number of authorities to which I was referred.

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16. In **Morris v London Iron and Steel Co. Ltd** [1987] 1 QB 493 (CA) the claim was of unfair dismissal but there was a dispute as to whether the claimant had been dismissed. The tribunal stated that, after considering all the evidence, it found the probabilities either way equally balanced. As the burden of proof to show dismissal was on the employee, the claim failed. The Court of Appeal upheld that decision. May LJ said, at 504C-G:

> "A judge or a tribunal of fact should make findings of fact in relation to a matter before it if they can. In most cases, although in some it may be difficult, they can do just that. Having made them, the tribunal is entitled to draw inferences from the findings of primary fact where appropriate. In the exceptional case, however, a judge conscientiously seeking to decide the matter before him may be forced to say "I just do not know": indeed to say anything else might be in breach of his judicial duty. In this connection, however, I would say this. Speaking from my own experience some people find it easier to make up their minds than others and it should not be thought that a swift reliance upon where the burden of proof lies and a failure to decide issues of fact in the case, ought in any way to be considered an easy or convenient refuge for anybody who does find it difficult to make up his mind in a particular case. Judges should, so far as is practicable and so far as it is in accordance with their conscientious duty, make findings of fact. But it is in the exceptional case that they may be forced to reach the conclusion that they do not know which side of the line the decision ought to be. In any event, where the ultimate decision can only be between two alternatives, for instance negligence or not, or, as in the instant appeal, dismissal or resignation, then when all the evidence in the case has been called the judge or the tribunal should ask himself or itself whether, on that totality of the evidence, on the balance of probabilities, drawing whatever inferences may be thought to be appropriate, the alternative which it is necessary for the plaintiff to succeed is made out. If it is not, then the operation of the principle of the burden of proof comes into play and the plaintiff fails."

17. Croom-Johnson LJ and Sir Denys Buckley gave concurring judgments.

18. In **Stephens v Cannon** [2005] EWCA Civ 222, after reviewing a number of authorities, Wilson J, for the Court, said this:

> "46. From these authorities I derive the following propositions:
>
> (a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.
>
> (b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.
>
> (c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.
>
> (d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to

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> perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.
> (e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in judgment will be necessary."

19. The claimants in that case sold the defendants a plot of land. It was part of the agreement that the defendants would build at least one property on the land and sell it, the proceeds of which over a certain figure were to have been paid to the buyers. In breach of contract they failed to do that. When assessing damages, the master was unable to decide between rival experts' opinions as to what the property would have sold for, and concluded that, as the burden was on the claimants, he would default to the figure given by the defendants' expert. I pause to observe that the judge was therefore not engaged in finding as a fact what had actually happened in the past. The property never was built or sold. The judge's task there was to consider a counterfactual. Arguably, in a case of that type, the approach is not quite the same. Wilson J in fact touches on this point at [49]. But in all events, most, if not all, of the authorities from which he drew his propositions, concerned actual disputed past events (including **Morris**). Further, those propositions have been adopted in the next case to which I was referred, **Verlander v Devon Waste Management** [2007] EWCA Civ 835, where the decision of the Court was given by Auld LJ, who had also been a member of the panel in **Stephens**.

20. **Verlander** concerned a personal injury claim by an employee who claimed to have injured his back when lifting and stacking an industrial freezer at work in a particular way. The recorder found the evidence on both sides, about what had or had not happened, unsatisfactory in various ways, and concluded, as the Court of Appeal put it, that he could not rationally decide one way or the other. As the burden of proof to show that the accident happened in the particular manner claimed lay with the claimant, his claim was properly dismissed. Auld LJ observed:

> "24. When this court in Stephens v Cannon used the word "exceptional" as a seeming qualification for resort by a tribunal to the burden of proof, it meant no more than that such resort is only necessary where on the available evidence, conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the claimant has not proved his

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case. The burden of proof remains part of our law and practice -- and a respectable and useful part at that -- where a tribunal cannot on the state of the evidence before it rationally decide one way or the other. In this case the Recorder has shown, in my view, in his general observations on the unsatisfactory nature of the important parts of the evidence on each side going to the central issue, particularly that of Mr Verlander, that he had considered carefully whether there was evidence on which he could rationally decide one way or the other. It is more than plain from what he has said and why, that he concluded he could not. Further, more detailed analysis by him of the evidence and rehearsal of his views on it would, in my view, have been otiose."

21. Where a trial judge *has* made a finding of fact, which a party wishes to challenge, the appellate court can only interfere if the judge has made some error of law. Numerous authorities make this point. I was referred to Lord Reed's formulation in **Henderson v Foxworth Investments Ltd** [2014] 1 WLR 2600, at [67]:

"It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

22. I was also referred to the recent formulation of Coulson LJ (Rose LJ as she then was concurring) in **Farrar v Rylatt** [2019] EWCA Civ 1864, at [25]:

"Accordingly, for all practical purposes, in order to appeal successfully against the findings of fact made by a judge at first instance, an appellant has to show that there was no evidence to support the findings made, or there was a demonstrable misunderstanding of, or failure to consider, relevant evidence. If all the relevant evidence was considered by the judge then, even if the appellate court might have come to a different conclusion, an appeal against the trial judge's findings of fact will fail. That is why an appeal against a trial judge's findings of fact is such a high hurdle for an appellant to overcome."

23. A distinct legal proposition, however, is that it is an error of law for the trial judge to fail to consider at all, evidence of a particular type, such as documentary or hearsay evidence, simply because it is of that type, unless it falls properly to be excluded from consideration because of the application of some rule of evidence or other established exclusionary legal principle.

24. As to that, rule 41 **Employment Tribunals Rules of Procedure 2013** provides that employment tribunals are not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. So, hearsay or documentary evidence, or other types of evidence, of

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whatever nature, are not, *as such*, inadmissible, and if such evidence is sufficiently relevant to what the tribunal has to decide, then it should be considered. But the assessment of the evidence, and what weight to attach to it, is, of course, a matter for the tribunal.

25. There is, specifically, no rule that hearsay evidence cannot be considered or given weight by a tribunal. The judge is, of course, entitled to give consideration to how the fact that the evidence is hearsay may have a bearing on the assessment of its reliability and what weight to attach to it. In particular, witnesses who give oral evidence to the tribunal in person are required by rule 43 to do so on oath or affirmation. Their evidence can also be tested by cross-examination in front of the tribunal in a way that hearsay evidence cannot.

26. Although in his skeleton Mr Webb cited a dictum of Baroness Hale in **Polanski v Conde Nast Publications Limited** [2005] 1 WLR 637, about the possible implications of a party refusing to submit to cross-examination, he confirmed in oral submissions that he did not suggest that a hearsay account which has not been tested in that way must be given no weight at all. He was right not to do so. The fact that a hearsay statement has not been given under oath, or tested in that way at trial, are considerations that may of course inform the judge's assessment of its reliability or credibility, or otherwise of what weight to attach to it, but that is a different matter. They are also not necessarily the only considerations that may affect the evaluation of hearsay evidence. The tribunal needs to consider all the relevant circumstances in the given case, such as the particular circumstances in which the statement was made, the nature of the record of that statement, and so forth.

27. Nor, Mr Webb also accepted, is there any rule that oral evidence given, and tested, at trial, must or will always, as it were "trump" opposing documentary or hearsay evidence. The credibility and reliability of the oral evidence must itself still be subject to some evaluation; and it may also, in a given case, be outweighed by a determinative document, or a hearsay account, which, in all the circumstances, the judge finds more reliable or compelling.

Arguments

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28. In summary, Mr White's principal contentions for the respondent were as follows.

29. The judge had not made a finding of fact that the claimant was smoking, nor a finding of fact that he was not. She had effectively fallen back on the burden of proof. However, she had failed to demonstrate that she had first striven to arrive at a finding, by engaging with all the relevant evidence and evaluating and weighing it up. Referring to **Stephens** at [46] this was not a category (e) case where there was no need to explain in any detail.

30. The judge referred to the claimant having given evidence and been cross-examined but said nothing at all about his reliability or credibility. She referred to the photographs relating to Mr Sittre's manoeuvre and the reports of Messrs Flinton and Smith, but without any substantive discussion of any of this evidence. The evidence which was before her which she did not discuss at all included:

(a) The record of Mr Jarvis' interview with Mr Sittre, which formed part of Mr Jarvis' investigation report; and Mr Jarvis' own undisputed evidence to the tribunal that it was a fair and accurate record;

(b) The email in which Mrs Sittre gave Mr Jarvis her account of the incident.

31. There were significant probative features of this evidence, such as Mr Sittre saying that the claimant was smoking a roll-up, to be set alongside the claimant himself agreeing that he did smoke roll-ups, and stating he did not have anything in his hand that might have been mistaken for a cigarette. The judge also had evidence of the claimant's own account at the disciplinary hearing, which had a number of features that called into question his credibility. In all events, the judge's brief remarks at [138] and [139] were not sufficient to meet the standard described at **Stephens** [46](e) so as to permit her to fall back on the burden of proof.

32. Had the judge engaged with all the relevant evidence, there was more than enough evidence to support the conclusion that the claimant probably had been smoking. Mr White did not go so far as to contend that it would have been perverse, in the legal sense, to conclude otherwise; but he did submit that there should have been no need in this case to resort to the burden of proof to decide the matter. The judge had therefore erred by wrongly resorting to the burden of proof, which meant that

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ground 1 should succeed, which was sufficient for the appeal to succeed.

33. But in any event (per ground 2) the judge had erred by simply discounting the hearsay evidence on the basis that, without hearing from them as live witnesses, she could not evaluate the credibility of the Sittres' accounts at all, and could not make a finding that the claimant had been smoking. The weight to attach to evidence that had been considered by the judge was, of course, a matter for her, and could not be challenged on appeal. But the error here was to rule out evidence from consideration and/or to conclude that in the absence of evidence in person from one of the Sittres a finding in favour of the respondent was simply not possible.

34. Mr Webb's principal contentions for the claimant were, in summary, as follows.

35. He acknowledged that it would be difficult to argue that the decision could be read as embodying a finding of fact that the claimant was smoking, or one that he was not. However, this did not mean that the judge had impermissibly fallen back on the burden of proof. She was properly saying that the evidence was not sufficient to persuade her that the alleged fact had been shown.

36. It was not correct that the judge had *automatically* discounted the hearsay or documentary evidence. From her reference to the claimant's evidence, in the context of [138], it could be inferred that she considered it to be credible, having heard it given in person and tested under oath. She referred at [139] to the footage corroborating Mr Sittre's manoeuvre, and that she did not regard it as showing that the claimant had been smoking. She referred also to the Flinton and Smith statements, which she considered supported the claimant's case. She had properly referred to the fact that she did not have the benefit of hearing evidence from either of the Sittres in person and tested under oath. Though it could perhaps have been better worded, it could also be inferred from [138] that she had *not* automatically discounted or ignored the Sittres' hearsay statements. Rather, having considered them, she had decided not to attach any weight to them, as she was entitled to do.

37. These aspects had to be set against the backdrop of the judge's earlier discussion of this evidence. For example, at [37] she had noted that Mr Smith reported finding dust in the vehicle, suggesting that the claimant had not cleaned it, but yet there were no signs of smoking.

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38. The judge had done enough to show that she had engaged with the relevant evidence, and to explain what she had made of it. The judge had therefore not erred by ruling evidence out of consideration; and she had done enough to explain to the parties why the wrongful dismissal claim had succeeded. This was an impermissible perversity challenge. Ground 2 should therefore also fail.

Discussion and Conclusions

39. The judge did not make a finding of fact that the claimant was smoking, nor indeed a finding of fact that he was not smoking. But I do not think that that was because she considered that the evidence pointing in either direction was evenly balanced, and therefore resorted to the burden of proof to reach her decision. The factual proposition that the respondent asserted and relied upon, was that the claimant *was* smoking. Absent a positive finding of fact from the judge to that effect, its defence would fail. If the judge, having approached the matter in the right way, failed to make such a finding, she would not need also to make a positive finding that he was not smoking, even if it might have been open to her to do so. The failure to do so does not therefore point to the conclusion that the judge considered the evidence pointing either way to be in perfect balance.

40. Nor is there anything else in paragraphs [136]-[141], or the overall sense of those paragraphs read as a whole, to suggest that the judge was of the view that this was a case where the evidence pointing either way was equally compelling, or equally problematic, leaving her simply unable to make a decision either way on the factual issue. She does not say that, and the tenor of the discussion is not to that effect. Rather, it is to the effect that the evidence does not enable her to make a finding that the claimant was smoking.

41. I conclude, therefore, that ground 1 does not succeed.

42. I turn to ground 2.

43. As I have noted, Mr White accepted, as he must, that what weight to attach to different features of the evidence was a matter for the judge. Whilst his case is that the totality of the evidence before her provided compelling support for the proposition that the claimant was smoking, and was certainly

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enough to support such a finding, he also accepted, as he must, that it cannot be said that that was the only proper finding that could have been made.

44. However, as I have described, the basis of ground 2 is that the judge erred in principle in the approach that she took to the available relevant evidence. As to that, Mr Webb correctly submitted that, in paragraphs [138] and [139] the judge did make some references to the evidence other than that of the claimant, that was before her, including some observations about what she made of some of it. He also submits that, brief though those remarks are, that evidence was given detailed consideration by the judge in earlier parts of her decision, for the purposes of deciding the unfair dmisssal claim. Her observation that the Flinton and Smith statements mitigate against a finding that the claimant was smoking, suggests, for example, that she attached some weight to the fact that they had not found positive evidence of smoking, and had found dust, in the cab, as described at [37].

45. A tribunal's decision must always be read fairly as a whole. But the judge necessarily and properly had to deal with the wrongful dismissal claim in a discrete section, because, as she rightly identified, it involved a discrete and different reasoning process from the consideration of the unfair dismissal claim. While, of course, that section drew on findings and other material set out earlier in the decision, it is, nevertheless, the *reasoning* in these paragraphs dealing specifically with that claim which must be considered.

46. I have concluded that the judge did fall into error as asserted by ground 2. My reasons follow.

47. The judge did not draw any adverse inference from the failure of the respondent to call either of the Sittres to give evidence in person. I was told at the hearing of this appeal that the question of why neither of them had been called was not the subject of any discussion or submissions at all. Nor do I think that the fact that, as the judge notes at the start of [138], she raised with Mr White at the start of the hearing that neither of them was to be a witness, points in itself to an error. Where there are claims of both unfair and wrongful dismissal, it is not unusual for parties sometimes to give less attention than perhaps they ought, in their arguments, and preparation, to the wrongful dismissal claim. It is not, as such, surprising that it caught the judge's attention at the outset that neither of the

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Sittres were being called, and that she remarked upon it.

48. However, what is of concern, is what the judge says about this in the decision itself. At the end of [138] the judge refers – correctly – to the fact that she is required to make her own findings about the allegation of smoking. She then begins [138] by saying that the problem for the respondent is that it has not called any actual witness to the event, and then goes on to explain why she says that is a problem. Her conclusion in [138] is that, without either of the Sittres as witnesses in person, she is "unable" to evaluate their credibility against that of the claimant.

49. That is problematic for two reasons. First, while the judge refers to the claimant having given evidence and been cross examined, and whether she can weigh the credibility of the Sittres' evidence *against* his, she says nothing about what she makes of his evidence *as such*. Even uncontroverted evidence needs to be weighed and assessed by the judge as to its content and the weight to be attached to it. The concern is that the judge appears to be proceeding on the basis that, absent in-person evidence from one of the Sittres, she is unable critically to evaluate the *claimant's* evidence at all.

50. Secondly, the judge says that, without hearing from the Sittres in person, she was "unable" to evaluate *their* credibility. That suggests that she considers that she is unable to evaluate the credibility of their internal statements, or attach any weight to them at all, *because* they are hearsay that has not been tested by cross-examination under oath; and that she has therefore failed to consider and weigh those statements, *taking account* of the fact that they are hearsay, and all the relevant circumstances relating to them, as part of the totality of the evidence available to her.

51. I am mindful of the need for an appellate court not to be hypercritical, or to put more weight on the use of a single word by the judge than it might bear. But this is the sense of [137] as a whole, in the context of which the use of the word "unable" appears to me to have been conscious and deliberate. That impression is in turn reinforced by the statement at [139] that without being "able" to evaluate the evidence of the Sittres the judge "can make no finding of fact" that the claimant was smoking. Again, the sense is that the judge *cannot* evaluate the hearsay statements, and *cannot* make the positive finding sought by the respondent, in the absence of in-person testimony from a first hand

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witness other than the claimant.

52. That this language is not accidental or incidental is once again confirmed by what the judge says at [141]: "I have not and cannot find" as a fact "on the evidence before me" that the claimant was smoking. This is a clear statement by the judge not merely that, having considered and weighed the evidence, she has concluded that it does not support such a finding, but rather that it was simply not open to her so to conclude.

53. Standing back, I therefore conclude that the judge has fallen into an error of principle in her approach to the evidence. She has proceeded on the basis that, having heard evidence from the claimant in person, and in the absence of evidence in person from at least one of the Sittres, and notwithstanding that she had their hearsay statements and other evidence said to support the respondent's case, she *could not* make a finding of fact the claimant was smoking. That error of principle means that ground 2 succeeds.

Outcome

54. As ground 2 has succeeded, the appeal succeeds and the tribunal's decision that the claimant was wrongfully dismissed is quashed. The matter must return to the tribunal for that claim to be decided afresh.

55. At the hearing of this appeal, I heard submissions from both counsel as to what course I should take, with regard to remission, in the event that, as I have done, I allowed the appeal. They disagreed as to whether, in that event, remission should be to the same or a different judge. Plainly, there would be savings of time and resource for the tribunal and the parties for the matter to return to the same judge. I also have no doubt at all that she would approach the task of evaluating the totality of the evidence that she had entirely conscientiously. But nevertheless it would still be a big ask of her to come back to the same evidence in a fundamentally different way; and it is important that, whatever the outcome next time, the parties should feel confident that it has been reached with a completely fresh eye having been brought to bear on the body of evidence before the tribunal. It seems to me

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also that, given that the sole claim for consideration next time will be of wrongful dismissal, the hearing should not need to be that long.

56. I will therefore quash the decision allowing the claim of wrongful dismissal, and remit that claim for rehearing before a different judge.

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