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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

Between:

ROBERT MARTIN COLHOUN

Appellant

and

ROYAL MAIL GROUP LTD

Respondent

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The appellant appeared as a litigant in person
Ms Herdman of counsel (instructed by Carson McDowell Solicitors) for the respondent

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Before: Treacy LJ and O'Hara J

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O'HARA J (*delivering the judgment of the court*)

Introduction

[1] The appellant was employed by the respondent for 15 years until he was dismissed summarily for gross misconduct on 30 April 2021. His claim that he had been unfairly dismissed was unanimously rejected by an Industrial Tribunal in January 2023. The appellant appeals to this court from that decision. His case essentially is that in view of his relatively long service which was without any disciplinary blemish the sanction of dismissal was excessive and quite disproportionate to his very limited wrongdoing.

[2] For the respondent, Ms Herdman in her helpful and succinct submissions, identified three issues:

(i) Whether the notice of appeal lodged on 18 July 2023 (and not forwarded to the respondent until 1 August 2023) was out of time with the consequence that the appeal should not be considered.

(ii) Whether the appellant should be required to provide security for costs pursuant to Order 59 rule 10(5) of the Rules of the Court of Judicature.

(iii) Even if the first two issues did not appeal to the court, the decision of the Industrial Tribunal should stand because its decision that dismissal was within the range of reasonable responses for the employer was comfortably within its discretion and certainly not wrong in law.

[3] Ms Herdman acknowledged that the strength of the respondent's arguments on the first two issues would be affected by the court's consideration of the third issue, namely the merits of the appeal. That is also the view which the court took. While the appeal was listed for hearing on 5 October 2023 only on the two preliminary issues, the parties were notified in advance that the court may want to be addressed on the merits also. Both the appellant and Ms Herdman responded positively to that indication with the result that the whole appeal was heard on 5 October save that short supplementary submissions were received during the following two weeks. Against, that background the court can now give its findings in full.

Background

[4] There is comparatively little dispute about many of the critical facts in this case. It will be helpful therefore, to set out the "relevant findings of fact", as found by the Industrial Tribunal ("the Tribunal"). In its judgment the Tribunal states as follows from paras 18-31:

> "18. The claimant was employed as a OPG (Postman) on a 21-hour part-time contract providing annual leave reserve cover. In this role the claimant was required to cover delivery and collection duties whilst an OPG was on annual leave.
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> 19. It is common case that in the role of OPG a core duty of the claimant's was to safeguard and deliver mail in a timely fashion. That core duty is also a core function of the respondent business. It is also common case that the respondent must have trust and confidence in all its OPGs to fulfil this core duty to ensure this core function is performed. Moreover, the claimant as an employee of the respondent is contractually obliged to assist the respondent deliver this service.
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> 20. Each catchment area for delivery is called "a duty". On the week commencing 1 March 2021 the claimant was placed on the "Rosemount 4" duty as the main duty

holder, Mr M Dunne, was on annual leave. The claimant covered this duty on Monday, Tuesday, Thursday, Friday and Saturday of that week with Wednesday being his day off. Although the claimant was only contractually required to work 21 hours per week, he worked more than those hours that week to cover this duty. The extra hours he worked were over his normal 21 hours were treated as overtime. The claimant was not compelled to work these extra hours; he did so on a voluntary basis.

21. Part of the claimant's workload on the Rosemount 4 duty that week was the delivery of three Door-2-Door (hereinafter referred to as the "D2D") contracts by the end of that week, ie by Saturday 6 March 2021. D2D contracts are unaddressed mail. In terms of substance they are predominantly advertisements from businesses who are customers of the respondent. D2D mail is classed by the respondent as "live mail." In practical terms this means that this mail is just as important as first and second class addressed mail and should be treated as such. The status of D2D mail reflects the fact that D2D contracts are an important lucrative revenue stream for the respondent. D2D contracts are required to be completed during the working week that they are issued to an OPG to deliver. A reason for this is because the advertisements from the relevant businesses are often time sensitive, offering potential customers offers or promotions on their products and services over a specified time frame.

22. The respondent gives a commitment to its relevant customers that their D2D contracts will be fulfilled within a specified timeframe. The timeframe for delivery of the D2D mail given to the claimant to deliver on the Rosemount duty was between 1-6 March 2021. A failure to meet these undertakings has a negative effect on the respondent's brand and its quality of service targets. A failure to meet the undertakings on a repeated basis could ultimately lead to the respondent losing these contracts and the associated revenue which they generate.

23. Several years previously in recognition that D2D mail is of equal importance to addressed mail, the respondent reached an agreement with the Communications Workers Union (hereinafter referred to as the ("CWU") of which it claimed it is a member, that all OPGs would receive a supplement in their pay as

payment for having to deliver D2D mail. This supplement is automatically paid to an OPG irrespective of whether they deliver the D2D mail assigned to them.

24. In terms of normal practice the D2D mail to be delivered by an OPG in any given week is given to them at the beginning of the week, in large bundles which are secured by strapex binding. The delivery office has an area comprised of large metal frames; one for each catchment area/duty. Each frame is divided up into smaller sectional frames for each address falling within that catchment area. When mail is received each day the OPG is required to place the mail for each address into each sectional frame. In this way the mail is divided and organised into bundles of mail for each address before the OPG commences his duty each morning. The rational for this is to streamline and ease delivery of mail. The D2D mail for each duty should be delivered daily on an incremental basis, for example, 20% one day and 30% another day etc. To meet this targets the OPG is required to take some time at the end of each duty to organise the D2D mail into each section of the frame for the purposes of delivery to each address the following day.

25. The claimant failed to deliver any of the D2D mail for all three of the D2D contracts that he was required to deliver while working the Rosemount 4 duty during the week in question, ie 1-6 March 2021. Furthermore, the claimant failed to prepare the D2D mail for delivery that week in the normal way as outlined at para 24. Instead, each bundle of D2D mail for each of the three contracts was left beside the frame for the Rosemount 4 duty with the strapex binding intact.

26. The claimant did not report his failure to deliver the D2D mail to anyone. Crucially, he did not report this failure to any of his managers in the delivery office despite having daily access to them. Although he spoke to Mr Dunne about other matters upon his return from annual leave, he did not inform Mr Dunne of his failure to deliver this D2D mail either. The claimant simply left the D2D mail for someone else to deal with.

27. The claimant maintained that his workload that week was extremely challenging due to a variety of factors which included: the requirement to deliver extra

letters (some of which was Census mail) and bulk parcels from nearby deliveries which necessitated him using a van. Associated difficulties in parking due to their being a national lockdown, he felt unwell due to having to wear a mask and having recently received a Covid-19 vaccine and extra personal pressures because he was the primary carer for his sister whose group activities had ceased due to the national lockdown. The claimant also pointed to the fact Mr Dunne's route is generally a walking route and, thus, Mr Dunne would not ordinarily have been subject to the challenges the claimant faced that week associated with the bulk deliveries and use of a van.

28. The claimant contended that he would have delivered the D2D mail if he had not experienced extra work pressures referred to above. There was a dispute between the parties as to whether the claimant's workload that week was achievable. However, it is not necessary for the Tribunal to make a finding of fact in relation to that matter to determine the issues before the Tribunal. This is because the claimant accepted that he had access to his managers each morning during that week. He also accepted that he could have indicated to one of his managers that he could not complete the full workload assigned to him on the Rosemount 4 duty and could have asked for help. The claimant's excuse for not doing so was because he felt he would not get help. However, the Tribunal does not regard this to be a convincing or credible excuse. This is because the claimant accepted that one day during the week in question, he received help to cover approximately 100 addresses without having to ask for that help. It is also common case that the claimant took a concession on the Census mail that week as he could not deliver it all. Consequently, he was only required to deliver Census mail on Monday and Tuesday of that week. Considering these undisputed facts the Tribunal found as a fact that the claimant could have raised any concerns with one of his managers about his workload and, in doing so, had every reason to believe that those concerns would be addressed.

29. The respondent sets standards of conduct for its employees. Those standards are set out in its Conduct Code (Disciplinary) Policy which was agreed with the CWU. The Conduct Code states that it is to be known as

the "Conduct Policy." In substance it is the respondent's disciplinary policy. All the respondent's employees are subject to the Conduct Policy. The claimant accepted that he was aware of the Conduct Policy and that it applied to him in his employment with the respondent.

30. The conduct policy states that wilful delay of mail is an example of gross misconduct which could result in dismissal without notice and sets out the test to determine whether his actions may be considered as wilful delay as follows:

> 'Deliberate action taken by an employee that causes mail to be delayed called wilful delay. Where proven, such breaches of conduct can lead to dismissal, even for a first offence; indeed, wilful delay is a criminal offence and can result in prosecution.'

31. On 12 March 2021, the respondent discovered that the three D2D contracts assigned to the Rosemount 4 duty over the week 1-6 March 2021 had not been delivered. This revelation was brought to the attention of the delivery office manager, Mr Sean Heekin. Mr Heekin spoke to the claimant about this on 14 March 2021. Having heard the claimant's explanation of events Mr Heekin decided to send the claimant home for a cooling off period whilst Mr Heekin determined the appropriate course of action."

[5] We note from the Tribunal's finding at para 28 above that the Tribunal decided that it was not necessary to make a finding on the disputed issue of the extent of the appellant's workload that week. We will return to this issue but, in our judgment, the Tribunal's approach on that was wrong.

[6] The next stage of the procedure was a so-called fact finding meeting on 18 March 2021 at which the appellant was accompanied by a representative from his union. During that meeting the manager conducting it, Mr Heekin, had the following exchange with the appellant and his union representative:

> "Appellant: I was always meaning to do the door to doors, I just ran out of time.
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> Mr Heekin: That is hard to believe when you haven't even gone as far as opening the strapex of any of the bundles.

Would you have done door to doors in the past in other duties you have done?

Appellant: Yes, I think so.

Union Rep: I think it should be considered as unintentional delay as Robert was trying to prioritise his mail by focusing on the parcels and mail. Then he ran out of time to do door to door.

Mr Heekin: I disagree, hard to believe that he had ever any intention of doing the door to door as he never even got as far as opening the bundles.

Union Rep: Robert also offered to go out and do the door to doors on the Friday (12 March) after the initial conversation, but you refused, why?

Mr Heekin: As far as I am concerned the door to doors are evidence in the fact finding."

[7] We find these exchanges surprising. Mr Heekin was supposed to be conducting a fact finding meeting. If he was true to his role, he would have restricted himself to facts rather than forming a view as to the appellant's intention, a critical matter because intentional delay is quite different from unintentional delay in terms of the Code of Conduct.

[8] This stage of the process ended with Mr Heekin stating that the appellant would remain on precautionary suspension until further notice. That led in turn to a formal conduct meeting on 8 April 2021 which the appellant was invited to attend for the following matter to be considered:

> "Gross misconduct and breach of business standards in that on week commencing 1 March 2021 you intentionally delayed D2D contracts by failing to deliver them to specification and did not make your manager aware that you were unable to deliver this workload."

[9] During the course of this meeting, the appellant largely maintained his position but also made the following points as summarised in para 41 of the Tribunal decision:

> "41. Despite accepting that his conduct could cause the respondent to lose customers, the claimant did not accept that his failure to deliver that mail would reflect negatively on the respondent. It was argued by the claimant and his union representative that the blame for the failure to deliver the D2D contracts on the Rosemount 4 duty on the week in question should be at least partially attributed to the OPG who covered this duty on the claimant's day off and to **the management team** within the delivery office as they should have identified that the D2D contracts had not been fulfilled through their requisite checks." [Emphasis added]

[10] The manager who conducted this disciplinary hearing, Mr Montgomery, decided to uphold the complaint and further decided that the appropriate sanction for this employee with an unblemished record over 15 years was summary dismissal with immediate effect. Mr Montgomery stated that he had considered lesser sanctions open to him including suspended dismissal or compulsory transfer. However, having read all of the mitigating factors against the gravity of the appellant's conduct, Mr Montgomery "determined the claimant's attitude to his conduct, notably his lack of remorse and lack of insight into his own culpability indicated that a lesser sanction would not be correct."

[11] The appellant appealed against this dismissal, but that appeal was dismissed by a Mr Walker on essentially the same basis as Mr Montgomery had acted.

[12] The Tribunal held, relatively uncontroversially, that the disciplinary process had been followed so that in procedural terms the dismissal was fair. On the substantive issue the Tribunal entirely endorsed the employer's reasoning and concluded that the dismissal was fair. In very summary terms, the Tribunal's reasoning at para 64 of its judgment was that:

(i) The appellant was an experienced OPG. A core part of his role and, indeed, a central element of the respondent's business was the delivery of mail in a timely fashion.

(ii) The appellant failed to deliver any of the D2D mail for three contracts for the week in question. He also failed to take any steps to prepare this mail for delivery.

(iii) The appellant wrongly prioritised addressed mail over the D2D mail and, in doing so, acted outside the scope of his role.

(iv) The consequences of this conduct were potentially very serious; had it gone unchecked it could have had serious consequences for the respondent in terms of its reputation.

[13] In terms of sanction the Tribunal found that each of the two decision makers had considered the possibility of a lesser sanction for this "gross misconduct", on account of length of service and his clear disciplinary record but had reasonably decided that nothing short of dismissal was appropriate because of the nature and gravity of the conduct and his failure to accept responsibility or show remorse for it.

[14] In conclusion, the Tribunal summarised its findings as being that the appellant had failed to complete a fundamental part of his role which was contractually required of him and which he was paid a supplement to carry out. It held that there was no reasonable excuse for these failings on his part. Due to his lack of acceptance of responsibility and his failure to show adequate remorse the Tribunal was satisfied that the dismissal was a sanction permissible because it fell within the band of reasonable responses of a reasonable employer. In all the circumstances, the Tribunal concluded that it was reasonable for the respondent to decide that the appellant did not deserve a second chance.

Discussion

[15] In her helpful and concise submission, Ms Herdman reminded this court of its limited role and the respect which is properly afforded to decisions of industrial tribunals which are sometimes described as industrial juries.

[16] We were also referred to the judgment of this court in *Connolly v Western Health and Social Care Trust* [2017] NICA 61. In that case the majority of the Court of Appeal upheld an appeal against a decision of an industrial tribunal that the nurse appellant had been fairly dismissed. The relevant legislation then as now, is Article 130 of the Employment Rights (NI) Order 1996, which provides as follows:

> "(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 … for the dismissal, and
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> (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.
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> (2) A reason falls within this paragraph if it—
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> (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,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under a statutory provision."

Article 130(4) then continues:

> "(4) 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)—
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> (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."

[17] Inevitably, there has been considerable discussion about the proper interpretation of this provision and its predecessor statutory provisions over a number of years. From these various authorities we draw the following lessons:

(a) That 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.

(b) 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.

(c) The function of the 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.

[18] Turning then to the role of the Court of Appeal, that role is clearly defined in *Mihail v Lloyds Banking Group* [2014] NICA 24, at para [27] where the court stated:

> "[27] This is an appeal from an Industrial Tribunal with a statutory jurisdiction. On appeal, this court does not conduct a re-hearing and, unless the factual findings made by the Tribunal are plainly wrong or could not have been reached by any reasonable Tribunal, they must be accepted by this court."

[19] It is also evident that this court is confined to considering questions of law arising from the case. However profoundly the appellate court may disagree with the Tribunal's view of the facts, it is not to upset the Tribunal's conclusions unless there is no or no sufficient evidence to found them or the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion – see *Chief Constable of the RUC and Assistant Chief Constable AH v Sergeant A* [2000] NI 261 at 273.

[20] We have considered the legislative context and the judicial precedents extremely carefully and have reached the conclusion that the appellant's appeal against the Tribunal decision must succeed for the following reasons:

(i) One of the fundamental aspects of fairness in employment law is that there should be some equivalence between the treatment of employees whose misconduct or failings overlap. In our judgment, that aspect of fairness is entirely absent from this present case, remarkably so.

(ii) In his finding dated 4 June 2021 dismissing the appeal against dismissal Mr Walker concluded:

> "I believe that any award less than dismissal would be ignoring Royal Mail's commitment to its customers and also to the trust and integrity between Royal Mail and its employees. **All employees** have an important part to play in living up to the commitments we make to our customers, and if we fail our customers, they are likely to take their business elsewhere. That then damages the business and also threatens the job security of **all employees**. It would also not go unnoticed by our external regulator, Ofcom, who can impose penalties if we fail to deliver on our obligations." [Emphasis added]

What Mr Walker conspicuously ignores, as did Mr Montgomery before him, was that to the extent that the appellant failed to live up to his duties, so also did the line managers who were responsible for overseeing him every day from 1-6 March. If Mr Walker needed any reminder of this, he got it from, of all people, Mr Heekin who he was in contact with during his investigation of various matters raised during the appeal hearing before he reached his appeal

decision. In response to an enquiry from Mr Walker, Mr Heekin sent an email on 25 May 2021 which included the following at para 3:

> "There had been a Census posting that week where mail had been spread over a number of days to get it clear which meant that there were frames with trays underneath. This possibly muddied the water when managers were doing their walk around. **Either way it is definitely a learning point for managers going forward to be more thorough with frame checks …" [Emphasis added]**

(iii) The Tribunal decided at para 28 cited above, that it did not need to decide whether the applicant's workload during the week in question was achievable. In our judgment, that was a fundamental error. This is not a case where there is any suggestion that the appellant was not working diligently. To put it colloquially, there is no suggestion that he was skiving whether by sitting at home or taking prolonged breaks or anything of that nature. That fact immediately brings into question the issue of how blameworthy his conduct actually was. Should he have told his employer that he was under pressure and just could not add the D2D mail to his existing workload? Yes, he should. Should the managers who oversaw his work every day have noticed day after day that this mail was going undelivered? Yes, they should have (as Mr Heekin acknowledges) but they did not. It was only when the regular OPG returned to work the following week that he alerted management to the issue. One way of interpreting this is that while the appellant was busy on the job (if not on the full job) his line managers were asleep on (part of) their job. Yet it was the appellant who was sacked summarily while the line managers went entirely unpunished. For them, according to Mr Heekin, there is just a lesson to be learned. As para 41 of the Tribunal decision shows this point was raised before Mr Montgomery during the disciplinary hearing but ignored. Regrettably the Tribunal also overlooked the point despite finding at para 19 of its decision that delivering mail in a timely fashion is a core duty of the appellant but also a core function of the business.

(iv) If the employer had argued and the Tribunal had found that the appellant was not working diligently during March 2021 it may have been arguable that a dismissal was fair. But the Tribunal expressly shied away from that question. It focused instead on whether the delay to the delivery of the D2D mail was intentional or unintentional. With respect that focus is wrong. The failure to deliver was intentional in the sense that the appellant knew that it was not being delivered but only because he was working long hours, including overtime, on other deliveries. To find him culpable of intentional delay in a blameworthy sense is, in the judgment of this court, unsustainable.

(v) The repeated references in the reasoning of the respondent to "lack of remorse" are misplaced and inappropriate in the context of this case. We repeat again, this is not a case in which the appellant was alleged to be work shy. In truth the height of the allegation against him is that he should have alerted his managers to the pressure he was under which led to him being unable to deliver the D2D mail. By the same token that is something they should have been alert to.

[21] In these circumstances, and for these reasons, the finding of this court is that the Tribunal's decision to uphold the dismissal of the appellant as fair was perverse. It appears to us that the decision to dismiss was a gross over reaction to the appellant's very limited wrongdoing. On the respondent's case D2D mail is integral to its business and Royal Mail runs the risk of losing public trust and integrity if it is not delivered. Worse than that, it faces the risk of having penalties imposed on it by Ofcom if it does not deliver on its obligations, according to Mr Walker. If we assume that to be the case and not an exaggeration used in order to damn the appellant, how can it possibly happen that no line manager noticed for over a week that this particular part of the mail was not being delivered by the appellant, and how can it be that according to Mr Heekin, whose position is endorsed implicitly by Mr Walker, all of this is no more than a learning point for managers?

[22] In light of that conclusion on the merits we turn briefly to the initial two questions which were acknowledged by Ms Herdman to largely depend on the outcome of our view of the merits. It will be obvious that the question of security for costs has fallen by the wayside in light of our finding on the merits. So far as the appeal being out of time is concerned, we are satisfied that the appeal was late, but we are equally satisfied that in part, at least, that was because the appellant had to raise approximately £650 to pay the fees for an appeal to be accepted by the court office. For an unemployed man who had failed in his application to an industrial tribunal that is quite a sum of money. The argument in favour of extending time becomes stronger again when it is clear that he did not have the support of his union to fund or represent him on this appeal.

[23] In her helpful supplementary note dated 13 October, after the oral hearing, Ms Herdman drew to the court's attention the decision of Girvan LJ in *Magill v Ulster Independent Clinic* [2010] NICA 33 in which the principles governing an application for extension of time to appeal were reviewed and restated. We agree with Ms Herdman that there are some factors which do not support the extension of time, such as the point at issue being one of specific significance to the appellant rather than being one of general importance, and the fact that the appellant had already received a hearing on the merits of his claim before the Tribunal. However, in the circumstances of this case it is our judgment that time should be extended for this appeal, partly because of the financial burden which lodging an appeal unassisted imposed on the appellant but mainly because of the merits of the appeal which, as we have already indicated, we believe to be compelling.

[24] It is, therefore, the order of this court that the appeal from the decision of the Tribunal succeeds and that the decision of the Tribunal be quashed. We further order that the case be remitted to a freshly constituted tribunal. We believe that it is appropriate to make clear the view of this court as to the scope of that hearing. For the reasons set out at para 20 it is the view of this court that no tribunal could reasonably reach the conclusion that this dismissal was fair. Furthermore, it is the view of this court that the question of contributory fault should not arise on any analysis of remedies, whether reinstatement, reengagement or damages. If the appeal had been allowed only on a procedural point of some sort, we accept that it would be open to a tribunal to consider the extent of any contributory fault on the part of the appellant. This is not such a case. In our judgment, the focus by the respondent and then by the Tribunal on the conduct of the appellant to the total exclusion of clear failings at supervisory level elsewhere in the organisation was a fundamental error which renders the dismissal unfair. That being so, we do not consider that it would be appropriate for the Tribunal to which the case is remitted to consider any matter other than remedy, with no deduction for contributory fault. We strongly encourage discussions to resolve the outcome without further hearings, hopefully with the appellant enjoying the support of his union or legal representatives for that purpose.