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*(subject to editorial corrections)**

No 17/007540

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

BETWEEN:

CAROLINE CONNOLLY

Appellant

And

WESTERN HEALTH AND SOCIAL CARE TRUST

Respondent

_____

Before Gillen LJ, Deeny LJ and Sir Reginald Weir

_____

DEENY LJ (delivering the judgment of the court)

[1] The history of this matter has been set down in paragraphs [2] to [22] of the judgment of Gillen LJ and I gratefully adopt the account set out by him. I echo his appreciation of the assistance of counsel, Mr O' Brien and Mr Ferrity. Nevertheless I find that I take a different view of the matter from the learned Lord Justice for the reasons which I will now set out.

[2] The findings of fact by the Appeal Panel appointed by the Western Health and Social Care Trust and set out in the decision of the Industrial Tribunal ("the Tribunal") of 13 December 2016 are as follows.

- "You removed a Ventolin (Salbutamol) inhaler from ward stock for your own use.
- In discussion with Sister Palmer, you confirmed the same and advised her of you (sic) intention to replace the item from your own prescription.
- Your actions were wrong."

[3] It was not in dispute at the hearing before us or at the earlier hearings that what Nurse Connolly did constituted misconduct but the precise nature of the misconduct is crucial to a just outcome. She felt an acute asthmatic attack coming on. Her evidence was that her own inhaler was in her locked car elsewhere. She

used a Ventolin inhaler from a locked medicine cupboard to which she had keys. Her ward sister was not present to give permission, although another sister had given her non-prescription drugs on a previous occasion. Although not conclusively determined at the various hearings on the facts her case is that she left the inhaler there after taking 5 puffs. She did not report the matter that day. Her explanation was that her normal Sister was Sister Palmer who was not on duty that day. The appellant was not on duty on 8 October 2012 but on 9 October 2012 there was, as found by the Appeal Panel, a discussion in which she confirmed that she had used the inhaler and told the Sister of her intention to replace the item.

[4] The Tribunal concluded that the summary dismissal of Nurse Connolly with effect from 21 June 2013 for that misconduct was one that "fell within a band of reasonable responses for a reasonable employer in all the circumstances of the case": paragraph [97] of the Tribunal's decision of 13 December 2016. The court's attention was drawn to the leading authorities on this matter. The Tribunal also set out a review of relevant authorities. They are further addressed in the judgment of Gillen LJ.

The Law

[5] The legislation relating to unfair dismissal takes its present form in this jurisdiction at Article 130 of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order").

> "130. - (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
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> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this paragraph if it-
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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.

(3) In paragraph (2) (a)-

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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)-

(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.

(6) Paragraph (4) is subject to Articles 130A to 139, 144 and 144A."

[6] A person who considers that their right, pursuant to Article 126, not to be unfairly dismissed, has been breached may apply to an Industrial Tribunal, as this lady did by an application of 1 July 2013 following her dismissal on 13 June by a Disciplinary Panel. The hearing before the employer's Appeal Panel was after the claim was brought. As set out by Gillen LJ the first Industrial Tribunal upheld the decision of the Appeal Panel of the employer. That decision was quashed by this court but a second Tribunal came to the same conclusion.

[7] The question for that Tribunal, pursuant to Article 130(4) (a), was whether "in the circumstances … the employer acted reasonably or unreasonably in treating [the reason for dismissal] as a sufficient reason for dismissing the employee." But they must determine that "in accordance with equity and the substantial merits of the case" per Art.130(4)(b). They should have asked themselves, therefore, when

deciding whether the reason justified summary dismissal whether that was equitable and merited for that is what the statute requires.

[8] Ascertaining what the reason is, where that is in dispute, is likely to be principally or wholly an assessment of facts. 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.

[9] That was the view of the Employment Appeals Tribunal in Westwood UKEAT/0032/09. It was not disputed in these proceedings by counsel for the respondent.

[10] The wording of Article 130(4) which reflects earlier legislation in this jurisdiction and in England and Wales might appear to leave open to the Industrial Tribunal a very wide discretion. However this was narrowed by a decision of the Employment Appeals Tribunal, per Browne-Wilkinson J, as he then was, in Iceland Frozen Foods Ltd v Jones [1983] ICR 17 cited by the Tribunal in its judgment at paragraph 56. Having reviewed the authorities the Judge concluded as follows:

> "We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by Section 57(3) of the Act 1978 is as follows: (1) the starting point should always be the words of Section 57(3) themselves; (2) in applying the Section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; (5) the function of the Industrial Tribunal, as an Industrial Jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."

[11] Although not referred to by the Tribunal His Lordship went on at page 25 as follows:

> "Although the statement of principle in Vickers Ltd v Smyth [1977] IRLR 11 is entirely accurate in law, for the reasons given in NC Watling & Co Ltd v Richardson [1978] ICR 1049 we think Industrial Tribunals would do well not to direct themselves by reference to it. The statement in Vickers Ltd v Smyth is capable of being misunderstood so as to require 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 the Section. This is how the Industrial Tribunal in the present case seems to have read Vickers Ltd v Smyth. 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 and Industrial Tribunals would be well advised to follow the formulation of the principle in NC Watling & Co Ltd v Richardson [1978] I.C.R. 1049 or Rolls Royce Ltd v Walpole [1980] IRLR 343.

[12] Section 57 sub-section (3) of the Employment Protection (Consolidation) Act 1978 is equivalent to our Article 130 although not in exactly the same terms.

> 57.-(3) Where the employer has fulfilled the requirements of subsection (1), then, subject to sections 58 to 62, the determination of the question whether the dismissal was, fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee. (4) In this section, in relation to an employee,- (a) " capability " means capability assessed by reference to skill, aptitude, health or any other physical or mental quality ; (b) " qualifications " means any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee held." (Emphasis added)

The words in parenthesis then have been given additional emphasis in this jurisdiction by being set out in a separate paragraph at Art. 130(4)(b).

[13] As Mr O'Brien for the appellant pointed out there is a danger in paying attention to the third sub-paragraph of this decision in overlooking the commencing paragraph i.e. that the Tribunal should decide whether or not the employer acted reasonably or unreasonably. Just as a jury in the past would decide whether or not a

defendant motorist had taken reasonable care in the event of a claim for damages against him, so the "industrial jury" (per E.A.T. in Iceland) of the Tribunal is entitled to determine whether an employer acted reasonably or unreasonably in dismissing an employee, once the reason for that has been established. That consideration is not confined to the assessment of the good faith of the decision. See below. I observe that, of course, one has to be dismissed to go to the Tribunal under these statutory provisions.

[14] The decision in Iceland was followed by this court in Dobbin v Citybus Ltd [2008] NICA 42 and Rogan v South Eastern Health & Social Care Trust [2009] NICA 47. Those courts also cited with approval passages from the judgment of Arnold J in British Homes Store v Berchill [1980] ICR 303. Since then there has been a decision of the Employment Appeals Tribunal in Sandwell & West Birmingham Hospitals NHS Trust v Mrs A Westwood [2009] UKEAT/0032/09/LA:

> "109 We do not accept that submission. It is not clear to us what the breach of Trust policy actually was. The conduct complained of was taking the patient outside. Assuming that is a breach of Trust policy, it still remains to be asked – how serious a breach is that? Is it so serious that it amounts to gross misconduct? In our judgment that is not a question always confined simply to the reasonableness of the employer's belief. We think two things need to be distinguished. Firstly the conduct alleged must be capable of amounting to gross misconduct. Secondly the employer must have a reasonable belief that the employee has committed such misconduct. In many cases the first will not arise. For example, many misconduct cases involve the theft of goods or money. That gives rise to no issue so far as the character of the misconduct is concerned. Stealing is gross misconduct. What is usually in issue in such cases is the reasonableness of the belief that the employee has committed the theft.
>
> 110 In this case it is the other way round. There is no dispute as to the commission of the act alleged to constitute misconduct. What is at issue is the character of the act. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract. What then is the

direction as to law that the employer should give itself and the employment tribunal apply when considering the employer's decision making?

111 Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee: see *Wilson v Racher [1974] ICR 428, CA per Edmund Davies LJ at page 432 (citing Harman LJ in Pepper v Webb [1969] 1 WLR 514 at 517):*

> `Now what will justify an instant dismissal? - something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract`

and at page 433 where he cites Russell LJ in *Pepper* (page 518) that the conduct

> `must be taken as 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:

> `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.'

So the conduct must be a deliberate and wilful contradiction of the contractual terms."

[15] That decision, with which I agree, is relevant in the case before us in several respects. It was expressly cited by the Tribunal which rightly acknowledged that this was a mixed question of fact and law.

[16] The decision in Laws v London Chronicle Ltd [1959] 2 All ER 285 is a decision of the Court of Appeal in England which is of strongly persuasive authority in this court. The plaintiff Jean Laws had been present when there was a dispute between her immediate superior and the managing director of her employer. Her immediate superior left the room calling on her to follow. The managing director told her to stay where she was. She left the room out of loyalty to her immediate superior and because the situation was embarrassing and unpleasant. She was dismissed summarily the next morning for misconduct. Lord Evershed M.R.

delivered the judgment of the court with which Lord Jenkins and Wilmer LJ agreed. He reviewed the older authorities and concluded as follows at page 288.

> "I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read 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."
> (Emphasis added).

The court went on to conclude that the judge at first instance was right to hold that she had been unfairly dismissed. The Tribunal were referred to the case in that a milder passage at 287 was quoted at para.60. For this court's purpose it is right to note that the Master of the Rolls found that "it cannot be said that her conduct amounted to such a wilful disobedience of an order, such a deliberate disregard of the conditions of service, as justified the employer" in summarily dismissing her. This authority is helpful to the applicant.

Role of the Court of Appeal

[17] Nurse Connolly exercised her right pursuant to Article 22 of the Industrial Tribunals (NI) Order 1996 to appeal therefrom to the Court of Appeal in Northern Ireland "being dissatisfied in point of law" with the decision of the Tribunal.

[18] When considering the role of this court in relation to an appeal on a question of law from the Tribunal I bear in mind the passages from the judgment of this court in Mihail v Lloyds Banking Group [2014] NICA 24 at [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 (McConnell v Police Authority for Northern Ireland [1997] NI 253; Carlson v Connor [2007] NICA 55."

[19] The court cited Carswell LCJ in Chief Constable of the Royal Ulster Constabulary and Assistant Chief Constable A H v Sergeant A [2000] NI 261 at 273,

delivering the judgment of this court. Carswell LCJ, as he then was, begins at 272.

> "Before we turn to the evidence we wish to make a number of observations about the way in which tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions.
> ……..
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> 4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.
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> 5. A tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless—
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> (a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the tribunal (Fire Brigades Union v Fraser [1998] IRLR 697 at 699, per Lord Sutherland); or
>
> (b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: Edwards (Inspector of Taxes) v Bairstow [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36."

I observe that that clear division between the approach on issues of fact and issues of law does not, perhaps because it did not need to, address an issue here, which is a mixed question of law and fact.

Consideration

[20] I was troubled by a number of aspects of the Tribunal's decision. I will address some of those while bearing in mind that the ultimate decision for this court is whether the decision of the Tribunal was wrong in law or the conclusions on the facts were "plainly wrong" (Mihail) or with "no or no sufficient evidence to found them" (Chief Constable v A).

[21] The Tribunal, having set out the history of the matter and the relevant law and some considerations, returns at paragraph 94 to a number of matters including this:

> "We accept the respondent's submissions that this case involved an admission of guilt and that although misconduct can take many forms there is no hierarchy in the range test."

This is a rewording of a passage in Harvey on Industrial Relations and Employment Law at [1535.02]. I think that has to be viewed with caution. It is clear that in one sense there is a hierarchy or graduation i.e. from minor misconduct which could not possibly justify dismissal ranging up to gross misconduct about which, again, if proved, there could be no argument.

[22] At paragraph 59 one finds this.

> "It is not for a tribunal in then determining whether or not dismissal was a fair sanction to ask whether a lesser sanction would have been reasonable, the question being whether or not dismissal was fair. "

I express a degree of caution with that statement. The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind 'equity and the substantial merits of the case'. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning.

[23] The authority for the Tribunal's statement given in Harvey, Industrial Relations at paragraph [975] is the decision of the Court of Appeal in England in British Leyland UK Limited v Swift [1981] IRLR 91. Lord Denning MR said the following at p. 93:

> "The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said:
>
> > '… A reasonable employer would in our opinion, have considered that a lesser penalty was appropriate'.

> I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."

Ackner LJ and Griffiths LJ, as they then were, gave concurring ex tempore judgments. None of those say that a lesser penalty was not a consideration that was relevant for the Tribunal to take into account. They were stating what the overall test was. I think it important to bear this in mind. Harvey also cites in support Gair v Bevan Harris Limited [1983] IRLR 368. The judgment of the Lord Justice Clerk does indeed cite and follow the decision in British Leyland but it does not exclude consideration of a lesser sanction as a relevant consideration.

[24] I was concerned that the Tribunal had misdirected itself on this point but taking into account their further reference to the subject at paragraph 96 I consider it would not be appropriate to find that they had done so.

Conclusions on Appeal Panel Process & Findings of Fact by Tribunal

[25] The employer here had delegated to a Disciplinary Panel the decision on what sanctions should be imposed on the appellant after her use of this Ventolin inhaler. The Disciplinary Panel decided in favour of summary dismissal. This case has already been to the Court of Appeal where the court, in its judgment, per Weir LJ, Connolly v WHSCT [2016] NICA 4, concluded that the Disciplinary Panel and the early investigation were indeed flawed and that the Tribunal's decision that the appeal process restored fairness was based on no or no sufficient evidence and to that extent could be described as perverse. That court quashed the first Tribunal decision.

[26] Counsel for the respondent then accepted by the time of the second Tribunal that the Trust could not stand over the Disciplinary Panel and the investigation but did argue that the Appeal Panel remedied any defects. The second Tribunal, whose decision is before us, accepted his submissions. Considering how they dealt with these matters and bearing in mind the written and oral submissions of Mr O'Brien I would not agree about the correctness of their conclusion in that regard.

[27] However, it is not necessary for me to go into this in every detail for it seems to be indisputable that the appeal process was fatally flawed in three particular and important respects.

[28] There had apparently been exchanges of complaints by and against Nurse Connolly. It was accepted by the time of this Tribunal that there were unredacted and irrelevant matters in the papers before the Appeal Panel arising from those exchanges which were prejudicial to Nurse Connolly. Mrs Shirley Young, one of the two members of the Panel gave evidence at the Industrial Tribunal.

[29] The Tribunal found at paragraph 90 that this inclusion of prejudicial material did not matter.

> "As set out above, we accept that unredacted material was not read, nor taken into consideration in the Appeal Panel's deliberations. Workplace conflict involving the claimant was an open secret and was referred to by the claimant in the appeal hearing. We do not consider that the unredacted material produced resulted in subconscious bias against the claimant."

However, this conclusion is based on having heard from one of the members of the Panel, Mrs Shirley Young, only. The Tribunal was entitled to find her a credible witness but even if they accepted her assurance she apparently gave no assurance about the thinking of the other member of the Panel. I say nothing adverse about the other member of the Panel. But given that the Panel had been given unredacted prejudicial material she should have been there also before the Tribunal so that the Tribunal could assess whether she had been coloured consciously or unconsciously by unfair and prejudicial material. This did not happen.

[30] The judgment of the Tribunal does not even say that Mrs Young gave hearsay evidence assuring them that the other member of the Panel had not read or was not influenced by the material. It seems to me this was indeed a conclusion with no sufficient evidence to support it. It also undermines a somewhat frail claim that the appeal process had remedied earlier defects.

[31] It is clear in the appeal process that Mrs Young had drawn the conclusion that Nurse Connolly was going to replace the inhaler she had used without telling anyone and that that would be a serious matter involving the chain of supply, something she was interested in. But as counsel pointed out, taking us to the exchanges, there is no evidence that that is what Nurse Connolly intended to do. There is no finding of fact to that effect. It should not therefore have been taken into account against her.

[32] Paragraph 81 of the decision sets out one of the appellant's grounds of appeal to the Tribunal. It reads as follows.

> '*The investigation, disciplinary and appeal processes, between them failed to investigate and establish if there was a culture of staff using Trust drugs for personal use.* '
>
> This point was not advanced at the appeal hearing save for the claimant's comment that Sister McGarrigle had offered her Linctus from ward stock. We note Mrs Young established that Linctus differed from Ventolin in that was not (sic) a prescribed drug and considered that it was a reasonable distinction for a reasonable employer to have drawn."

[33] What the Tribunal fails to do there is to consider whether an employer, through the Sister who gave medicine, albeit non-prescription medicine, from hospital stocks to the appellant without, apparently, thinking there was anything improper about that, would be acting wholly unreasonably in summarily dismissing the same employee who at a slightly later time uses an inhaler for her chest condition. Clearly there is a distinction between prescription and non-prescription drugs but it appears wholly disproportionate for one action to be lawful and permissible and the other action to be visited with summary dismissal, particularly in the case of a relatively inexperienced nurse with no previous disciplinary findings against her. I conclude that the Tribunal's findings in these three respects were based on "no or no sufficient evidence" (Chief Constable v A) and were "plainly wrong"(Mihail).

Further Conclusions

[34] For my part I think it valuable to go further than those matters. I acknowledge, as Gillen LJ reminds us, that this appellant has now been before two of the employer's panels and two Industrial Tribunals and failed to find favour with any of them. It may be that her previous employment as a soldier, and, indeed, the qualities necessary to become an Irish boxing champion, have not made her an ideal supplicant before panels and tribunals. But the determination, in accordance with equity and the substantial merits of the case as to whether her summary dismissal was one within the band available to a reasonable employer, must be decided on the facts and not on the subjective impression she engendered in those before whom she appeared.

[35] The facts as found are that she took five puffs of this inhaler when undergoing an asthmatic attack without permission. The Tribunal accepted the Appeal Panel's view that this was aggravated by her failure to report the matter until two days later.

[36] It appears to me that, even taking into account the delay, for which an explanation was given which was not rejected as a finding of fact, that could not constitute "deliberate and wilful conduct" justifying summary dismissal. Her Terms of Employment do not seem to have expressly prohibited such a use. The Code of Conduct is ambiguous at best on the topic. If she had asked the Ward Sister for permission before she used the inhaler and the Sister had refused her permission and she had nevertheless gone ahead and used it one might have had the sort of act of disobedience contemplated by the Court of Appeal in Laws v London Chronicle Limited, op cit. That would have been a deliberate flouting of essential contractual conditions i.e. following the instructions of her clinical superiors. But that is not what happened here. Furthermore, I agree with the statements in Harvey on Industrial Relations and Employment Laws [1550]-[1566] that dismissals for a single first offence must require the offence to be particularly serious. Given the whole list of matters which the employer included under the heading of Gross Misconduct it is impossible, in my view, to regard the nurse's actions as "particularly serious".

[37] The Tribunal cannot have been mindful of the statement of Edmund Davies LJ, as he then was, in Wilson v Racher [1974] ICR 428, CA at page 432, citing Harmon LJ in Pepper v Webb [1969] 1 WLR 514 at 517:

> "Now what will justify an instant dismissal? — something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract."

[38] For this court to approbate the Tribunal's decision upholding as within a reasonable range of responses the summary dismissal of an employee from her chosen profession on these facts without any prior warning as a "repudiation of the fundamental terms of the contract" would be to turn language on its head. Employment law is a particular branch of the law of contract. With statutory interventions it has, of course, developed a character of its own. But any dismissed employee opting to go into a court of law and claim damages for breach of contract at common law against an employer who had summarily dismissed them for using a Ventolin inhaler while suffering from an asthmatic attack and delaying two days in reporting that, particularly when it was their 'first offence,' could be tolerably confident of success before a judge, in my view.

[39] It seems to me therefore that this is one of those cases where the conclusion reached by the Tribunal was "plainly wrong" (Mihail) and one that no reasonable Tribunal ought to have arrived at.

[40] The interpretation of what, in this jurisdiction, is Article 130(4)(a) of the 1996 Order has been fixed by a series of appellate courts over the years i.e. that whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer even if not the decision the Tribunal would have made. That test, expressed in various

ways, is too long established to be altered by this court, and in any event has persuasive arguments in favour of it. But it is necessary for tribunals to read it alongside the statutory provision of equal status in Article 130(4)(b) i.e. that that decision "shall be determined in accordance with equity and the substantial merits of the case". Those words provide a protection to both employees and employers. They are a protection to the employee where the employer, usually acting through other employees with delegated power, acts with a genuine belief in what they are doing but in a way that is inequitable and contrary to the substantial merits of the case.

[41] But Article 130(4)(b) is also a protection to the employer. It conveys that even if an employer is guilty of one or more errors in procedure nevertheless that should not be equated with unfair dismissal unless those errors have indeed led to unfairness to the dismissed employee which would render it inequitable or contrary to the substantial merits of the case to dismiss them.

[42] The Tribunal in its judgment acknowledged, at paragraph 67, that it must consider whether the decision to dismiss was proportionate in all the circumstances of the case. Proportionality has come to the fore in legal thinking since 1996, it might be said. But it is difficult to see how they did approach this in a proportionate way, particularly as, at paragraph 97, the Tribunal acknowledged that the penalty imposed was "at the extreme end".

[43] For all these reasons I conclude that the Tribunal erred in law and in its appreciation of the facts and would quash its decision that the appellant was fairly dismissed. As discussed at the hearing I would allow the parties to consider the issue of remedy before making our Order, as a mere remittal to another tribunal would be clearly inappropriate in the circumstances.

SIR REGINALD WEIR

I agree with the result proposed by Deeny LJ for the reasons which he gives.

[On hearing further submissions from counsel the Court quashed the finding of the Tribunal and substituted a finding of unfair dismissal and remitted the matter to a fresh tribunal to determine the remedy. The Appellant's costs in the Court of Appeal were to be borne by the Respondent.]

GILLEN LJ **GIL10385)**
Application

[1] This is an appeal from a decision of an Industrial Tribunal ("the Tribunal") issued on 13 December 2016. The Tribunal dismissed the appellant's claim of unfair

dismissal arising out of her dismissal by the respondent on 21 June 2013 by reason of gross misconduct.

Background facts

[2] This case has something of a chequered history. A previous decision by an Industrial Tribunal dated 10 October 2014, dismissing the appellant's claim for unfair dismissal, was set aside by the Northern Ireland Court of Appeal in a decision dated 1 February 2016 (Connolly v Western Health and Social Care Trust [2016] NICA 4). That court ordered that the decision of the Tribunal be set aside and the matter be remitted to a differently constituted Tribunal for rehearing. It is against the finding of the fresh Tribunal that this appeal lies.

[3] The background facts to this case have now been related on a number of occasions – for example in paragraphs [2]-[13] of the earlier decision in the Court of Appeal – and therefore require only a relatively brief recitation at this stage.

[4] The appellant qualified as a nurse in 2009 at the age of 27, was appointed in January 2011 under a permanent contract by the respondent Trust as a staff nurse and from 7 February 2011 served as such in the Acute Medical Unit of Altnagelvin Hospital.

[5] Her terms and conditions of employment signed when commencing her employment required her, inter alia, to adhere to and to maintain regulations regarding controlled drugs and the custody and proper maintenance of medicines. Under administrative responsibility she was familiar with Disciplinary and Grievance Policies of the Unit of Management.

[6] The Trust disciplinary rules included definitions of conduct under the headings of "Misconduct" and "Gross Misconduct".

[7] Misconduct listed examples of offences other than gross misconduct resulting in disciplinary action and/or counselling/informal warning in the light of the circumstances of each case. It listed 22 points the first of which stated:

> "Inappropriate or unacceptable conduct or behaviour towards employees, patients, residents, clients, relatives or members of the public."

[8] Those points included "alcohol/drugs misuse".

[9] The section dealing with "gross misconduct" declared:

> "The following are examples of gross misconduct offences which are serious breaches of contractual terms which effectively destroy the employment

> relationship, and/or the confidence which the Trust must have in an employee. Gross misconduct may warrant summary dismissal without previous warnings."

The rules then set out several points which include:

> "Misuse or unauthorised use of property – unauthorised use or removal of Trust property. Damage caused maliciously or recklessly to property, equipment or records belonging to the Trust, clients, patients, residents or employees." and
> "Misuse of drugs e.g. through misappropriation or being under the influence of drugs."

[10] Accordingly the Tribunal recorded at paragraph [12] of its determination:

> "Whilst the respondent did not have an express written policy, as acknowledged by the claimant, she was aware that the use or removal of medicines for personal use was not permitted."

[11] On the morning of 4 October 2012 the appellant reported to work and had with her a Ventolin inhaler, her own property, which Sister Palmer, the Ward Sister who was on duty on that morning, saw her using.

[12] On 7 October 2012, whilst at work the appellant asserted she felt the onset of an asthmatic attack but did not have an inhaler with her. Sister McGarrigle, the Ward Sister in charge that day, was not present at the time and the appellant had sole responsibility of the ward. Being under some stress she alleged she went to the medicine room in the ward and took a Ventolin inhaler, the property of the respondent, inhaled about five puffs from it and then left the inhaler on the desk in the medicine room. While she had an inhaler in her car parked nearby she was concerned about being unfit to continue with her work and took the decision to use the respondent's Ventolin inhaler.

[13] The appellant continued with her duties for the remainder of shift and did not inform the Ward Sister or any other person in appropriate authority on 7 October 2012 that she had used the respondent's inhaler.

[14] The appellant was next on duty on 9 October 2012 and had a conversation that afternoon with Sister Palmer, the Ward Sister, during which she told Sister Palmer that she had used a Ventolin inhaler belonging to the respondent whilst on duty on 7 October 2012.

[15] It was the appellant's account that she reported for duty and endeavoured to approach Sister Palmer to discuss matters but Sister Palmer was busy and asked the appellant to speak to her later. Sister Palmer saw the appellant using her own Ventolin inhaler on 9 October 2012. That afternoon she spoke with Sister Palmer and discussed what had occurred on 7 October 2012. She asserted she was instrumental in approaching Sister Palmer and in bringing her use of the respondent's Ventolin inhaler to Sister Palmer's attention in a relatively unprompted manner.

[16] Sister Palmer then reported the matter to Mr Raymond Jackson the respondent's Unscheduled Care Co-ordinator, Emergency Care and Medicine.

[17] Mr Jackson, after an initial meeting with the appellant, formally wrote to her on 10 October 2012 confirming that she was suspended from work with immediate effect pending further investigation of a number of concerns in the workplace. However, only the issue relating to the inhaler was relied on at a disciplinary hearing on 21 June 2013.

[18] The appellant then appealed the decision to dismiss her. That hearing was heard on 2 December 2013. It resulted in the decision to dismiss the appellant being confirmed.

[19] A claim by the appellant to the Industrial Tribunal was determined on 18/19 June 2013, with a decision on 10 October 2014 dismissing the appellant's claim. That Tribunal concluded that there had been procedural problems and substantive unfairness in the investigation and in the disciplinary hearing but concluded that these issues had been cured by the subsequent appeal hearing.

[20] The appellant sought a review of the Tribunal's decision on 20 October 2014 but this was rejected by the Tribunal on 23 December 2014. As indicated above, an appeal to the Court of Appeal against that decision resulted in the court upholding the appellant's appeal, setting aside the decision of the Tribunal and remitting the matter to a differently constituted Tribunal for hearing.

[21] That case came before the fresh Tribunal between 13-15 September 2016 with a decision being handed down on 13 December 2016. Once more the appellant's claim for unfair dismissal was dismissed and this is the subject of the current appeal before this court.

[22] At the Tribunal hearing in September 2016, the respondent did not rely on the investigation or the disciplinary hearing and acknowledged that there had been procedural and substantive unfairness in both stages of these aspects of the disciplinary process. The respondent relied only upon the appeal hearing and argued that this appeal had cured all of the previous deficiencies. Evidence was presented before the Tribunal from the Chair of the Appeal Panel ("the Panel"), Mrs Shirley Young and the appellant herself.

Legislation

[23] Article 130A(1) of the Employment Rights (Northern Ireland) Order 1996 Order ("the 1996 Order") provides that where the statutory dismissal procedure is applicable in any case (as set out in Schedule 1 of the Order) and the employers are responsible for non-completion of that procedure, the dismissal is automatically unfair.

[24] Article 130(1) of the 1996 Order provides that it is for the employer to show the reason for dismissal. The employer must show that the reason falls within paragraph (2) and paragraph (2) includes a reason relating to the conduct of the employee.

[25] Article 130(4) of the 1996 Order provides:

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

Principles and leading authorities governing the interpretation of the 1996 Order

[26] Counsel cited a wealth of familiar but important authorities on the issues in this case.

[27] These authorities included *Rogan v South Eastern Health and Social Care Trust [2009] NICA 47, British Home Stores Limited v Burchell* [1980] ICR 303, *Iceland Frozen Foods Limited v Jones* [1983] ICR 17, *Salford Royal NHS Foundation Trust v Roddan* [2010] IRLR 721, *Sandwell and West Birmingham Hospitals NHS Trust v Westwood* [2009] UKEAT/0032/09/LA, *Mihail v Lloyd's Banking Group* [2014] NICA 24, *Taylor v OCS Group Limited* [2006] EWCA Civ. 702, *Monji v Boots Management Services Limited* UKEAT/00292/13 and *Compass Group UK and Ireland Limited T/A Eurest v Okoro* [2009] 153 (22) S.J.L.B. 32.

[28] For our purposes it is not necessary to do other than outline some of the general principles stated therein and which are relevant to this case:

(i) The starting point is the words of Article 130(4) of the 1996 Order.

(ii) The Tribunal has to decide whether the employer who discharged the employee on grounds of misconduct entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct.

(iii) Therefore there must in the first place be established a belief on the part of the employer.

(iv) The employer must show that he or she had reasonable grounds for so believing.

(v) The employer, at the stage he/she formed the belief, must have carried out as much investigation into the matter as was reasonable. It is important that an employer takes seriously the responsibility to conduct a fair investigation.

(vi) The Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider that the dismissal to be fair.

(vii) 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.

(viii) 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 and another, quite reasonably, take another.

(ix) 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.

(x) A Tribunal however must ensure that it does not require 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 the relevant legislation.

(xi) Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee. The disobedience must

at least have the quality that it is wilful. It connotes a deliberate flouting of the essential contractual conditions.

(xii) More will be expected of a reasonable employer where the allegations of misconduct and the consequences to the employee if they are proven are particularly serious.

(xiii) In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the employer's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The fact that other employers might reasonably have been more lenient is irrelevant (see the decision of the Court of Appeal in *British Leyland (UK) Ltd v Swift* [1981] IRLR 91, *Gair v Bevan Harris Limited* [1983] IRLR 368 and Harvey on Industrial Relations and Employment Law at [975].

(xiv) The conduct must be capable of amounting to gross misconduct.

(xv) The employer must have a reasonable belief that the employee has committed such misconduct.

(xvi) The character of the misconduct should not be determined solely by the employer's own analysis subject only to reasonableness. What is gross misconduct is a mixed question of law and fact. That will be so when the question falls to be considered in the context of the reasonableness of the sanction.

[29] Finally, we remind ourselves of the role of the Court of Appeal in such appeals. The comments of Carswell LCJ in *Chief Constable of the Royal Ulster Constabulary and Assistant Chief Constable AH v Sergeant A* [2000] NI 261 at 273 are illuminating where he said:

> "(4) The Court of Appeal which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.
> (5) A Tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless –
>
> (a) there is no or insufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the Tribunal … or

(b) the primary facts do not justify the inference or conclusions drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse …"

[30] Similarly we find helpful the judgment of this court in *Curley v The Chief Constable of the PSNI and Superintendent Middlemiss* [2009] NICA where the court said at [14]:

> "It is clear from the relevant authorities that the function of this court is limited when reviewing conclusions of facts reached by the Tribunal and that, provided there was some foundation in fact for any inference drawn by a Tribunal, the appellate court should not interfere with the decision even though they themselves might have preferred a different inference."

Grounds of appeal

The appellant's case

[31] Mr O'Brien, who presented the case on behalf of the appellant with commendable skill, raised three matters by way of appeal:

(i) The Tribunal had erred in its findings in relation to the gravity of the misconduct in that the misconduct alleged could not be characterised as gross misconduct or, in the alternative, that it could not be characterised as sufficiently grave to warrant dismissal.

(ii) The failings in the investigation. In particular it was submitted that where there is a question regarding the seriousness of the conduct in question, an employer will have to investigate the circumstances surrounding a misconduct to establish the seriousness of that misconduct. In light of the far-reaching consequences for someone in a profession like the appellant, it was submitted that there was a substantial need for a careful and conscientious investigation into the misconduct in this matter. The Tribunal had misdirected itself on the law in concluding that in cases of an admission of misconduct there is generally no need for an investigation.

(iii) The findings of the Tribunal made relating to the appellant's intention to replace the inhaler with one of her own prescription and the inferences drawn therefrom were perverse. There was procedural

unfairness in failing to afford the appellant an opportunity to address this issue.

The respondent's case

[32] The respondent's case, equally well presented by Mr Ferrity, made the following points:

(i) The Tribunal did consider the reasonableness of the respondent's decision that the misconduct of the appellant was capable of being gross misconduct and that it represented a breach of the fundamental implied term of trust and confidence. Moreover the Tribunal examined whether a sanction other than dismissal was appropriate.

(ii) Whilst there will be cases of admitted misconduct where no further investigation will be required and others where the reasonable employer will investigate to form a view about the seriousness of the conduct in question, generally speaking it is for a Tribunal to evaluate such matters as part of its consideration of the reasonableness of the dismissal. The Tribunal did carry out such an evaluation.

(iii) This was not a case of perversity on the part of the Tribunal. There was no sufficient case made out that the Employment Tribunal had reached a decision which no reasonable Tribunal on a proper appreciation of the evidence and law could have reached. In particular with relation to the appellant's intention to replace the used inhaler with one of her own prescription, the Tribunal crystallised and determined the appropriate issue arising from this matter.

Discussion

Gross misconduct

[33] I commence my assessment of this ground of appeal with the prefatory observation that judges in this court must remain free of the reproach that their decision has been influenced by their preference for a different outcome. That is not the test that this court must invoke.

[34] The concept of gross misconduct is not precisely calculable and its measurement can never be exact in every case. However the disciplinary procedure set out a number of definitions in its rules including definitions of the term "misconduct" and "gross misconduct".

[35] The hearing of her appeal against dismissal took place on 2 December 2013 before Fiona Beattie (Assistant Director of Diagnostics and Clinical Support) and Mrs Young a manager from the Human Resources Department, both of whom were self–evidently more versed in the ethos and spirit of the respondent's employment

requirements than the Industrial Tribunal or indeed this court. The hearing provided for witnesses to be called by either party and recalled if necessary.

[36] After the conclusion of the hearing the Panel was to review all of the evidence presented before determining on a balance of probability whether the actions were or were not proven and to consider any mitigating circumstances put forward at the hearing, taking account of the employee's record before deciding on the appropriate disciplinary action to take.

[37] It was common case in this matter that the employer was obliged to show gross misconduct to justify the summary dismissal.

[38] Ventolin was a prescribed drug. No one disputed that it was unacceptable to take medication from the ward for personal use or with the intention of replacing it when her own medication should be prescribed. It is to be recalled that the appellant's terms and conditions of employment signed when commencing her employment required her, inter alia, to adhere to and to maintain regulations regarding controlled drugs and the custody and proper maintenance of medicines. Hence the seriousness of her actions should not be readily underestimated.

[39] There was evidence from Sister McGarrigle before the Disciplinary Panel that if the appellant had an asthma attack she would have been expected to enter A and E or be seen by the doctor on the ward. The appellant took neither of these obvious courses.

[40] It is also significant that it was common case that the representative on behalf of the appellant, in the course of her presentation on behalf of the appellant before the Panel, had referred to the appellant's acceptance that:

- she had breached Trust policy,
- she was keen to demonstrate she had reflected on the incident,
- she had undertaken a root and branch review of her professional responsibilities as a registered nurse as an employee,
- she had reflected on her actions, attitude and behaviour relating to the inappropriate removal of the Ventolin inhaler,
- she considered her judgment had been fatally flawed and deeply regretted her actions.

[41] However before the Panel the appellant had made her presentation by reading out a written statement in the course of which she said as follows:

> "Do please consider that the inhaler was a non-control drug. No one was hurt and I had fully intended to replace it. I did not have to admit to taking it but I readily did because I thought it was okay to do so."

[42] Paragraph [48] of the Industrial Tribunal's finding recorded as follows:

> "Mrs Young found it 'shocking' that a qualified nurse would think it all right to replace medication without consideration of the serious potential consequences in respect of pharmacy supply chain, governance and safety issues. Mrs Young in response put further questions to the claimant, in particular asking her what she had meant when she said 'borrowed' the inhaler and she intended to replace it. The claimant replied that she wanted to replace the inhaler, she had intended to replace it with one prescribed by the GP and return it to the Ward Manager. Mrs Young asked would the claimant have considered it acceptable to take antibiotics from ward stock, she replied she did not. When asked about labels and barcodes on medication products the claimant advised that she was not thinking about that at the time, she just thought she could replace the inhaler."

[43] The Panel concluded that these actions constituted gross misconduct. In particular the Panel considered of significance that the claimant:

> "Continued to attempt to justify why [you] removed and used the inhaler. This leaves the panel with the belief that she continued to hold the view that these actions are justifiable in certain conditions. This is not the case. The removal of medicines is never appropriate and the intention to replace them is dangerous. We are not reassured that you will make an appropriate judgment in this or any similar matter in the future. … There is then no explanation for your failure to report both your medical situation and the removal of the inhaler as a matter of priority, if as you, stated you understood that the latter to be wrong. Only these latter actions could be possibly construed as any form of mitigation. We do not find your explanation plausible."

[44] The findings of the Tribunal rehearsed the appropriate legal principles under which it was acting at paragraph [67] of its decision.

[45] I consider that this paragraph properly outlined the legal principles governing the approach of the Industrial Tribunal including that:

> "It may not rehear and re-determine the disciplinary decision originally made by the employer; it cannot substitute its own decision for the decision reached by that employer. In the case of a misconduct dismissal, such as the present case, the Tribunal must first determine the reason for the dismissal: that is, whether in this case the dismissal was on the basis of conduct and must determine whether the employer believed that the claimant had been guilty of that misconduct. That Tribunal must then consider whether the employer had conducted a reasonable investigation into the alleged misconduct and whether the employer had then acquired reasonable grounds for its belief and guilt. The question is not whether the Tribunal will have reached the same decision on the same evidence or even on different evidence. The Tribunal must then consider finally whether the decision to dismiss was proportionate in all the circumstances of the case."

[46] I consider that this is a flawless assessment of the duty cast on the Industrial Tribunal.

[47] At paragraph [71] of the decision the Tribunal rehearsed the concerns of Mrs Young as set out in paragraphs [41] and [42] above.

[48] At paragraph [94] et seq the decision of the Industrial Tribunal was as follows:

> "We find that the matter of concern to the Appeal Panel was the claimant's failure to make the report for a significant period of time, rather than the undermined matter of whether it was made unprompted. We accept that the respondent considered the claimant's taking of a prescription drug from under lock and key for her use is aggravated by her failure to report the matter until two days later, compounded by her contemplating replacing it with one of her own and in particular her on-going failure to see that there was much wrong

> with this, together with concern over the claimant's integrity and credibility arising from her inconsistency in her evidence and challenge before them. We note that the claimant was aware that the removal of medication without authorisation for personal use was wrong, that she admitted the charge put and acknowledged before the Appeal Panel that her actions were wrong and in breach of the respondent's procedures and that at the appeal hearing the claimant sought the next least severe sanction to dismissal, of a final written warning.
>
> [95] We consider that at the end of the appeal stage when the decision to dismiss was made the Appeal Panel held a genuine belief of misconduct by the claimant based upon reasonable grounds, following a reasonable investigation, being that the claimant took and used the respondent's inhaler without authorisation and that she did not immediately alert anyone in her line management.
>
> [96] Whilst it is not for the Tribunal to substitute its opinion for that of the employer, as a mixed question of fact and law in these circumstances we do not consider unreasonable the respondent's analysis of the nature and gravity of the offence, or a conclusion that the conduct in question was a wilful contradiction of the fundamental implied term of trust and confidence and capable of amounting to gross misconduct sufficient to repudiate the contract of employment. We consider that the respondent considered a lesser sanction of a final written warning and took account of the claimant's points in mitigation."

[49] I consider that there is no basis upon which this court could consider that this conclusion was plainly wrong or that it could not have been reached by any other reasonable Tribunal. Taking a prescription drug from under lock and key for the appellant's own use is clearly an extremely serious matter which no hospital can or should tolerate. Not only was the appellant well aware that this was prohibited behaviour but it could easily have been avoided by seeking assistance from A and E or the duty doctor.

[50] It was not unreasonable to conclude that this was aggravated by her failure to report the matter until two days later. Moreover it was perfectly reasonable for the Panel, made up of employees of the Trust well versed in Trust procedures and

policies, to take the view that intent to personally replace it infringed the pharmacy supply chain. Frankly it scarcely requires an expert to inform the court that decisions to replace prescribed medications in principle should not be taken at this level irrespective of how simple an exercise in replacement in individual instances may appear to be.

[51] It was also reasonable for the Tribunal to accept that it was appropriate for the Panel to have assessed, having heard the appellant which of course we did not, that she still failed to think that there was much wrong with this and thus the danger that lay perhaps in her future conduct.

[52] I see no reason why this conduct could not have amounted to a repudiation of the contract of employment by the employee and to have constituted wilful conduct and deliberate flouting of what she knew was an essential contractual condition especially in light of the terms of employment she had signed at the outset of her employment (see paragraph 5 of this judgment). It is not unreasonable to conclude that this fell squarely within the definition of gross misconduct set out in the policy documents mentioned above. Whilst it did constitute a single act of misconduct, it was not unreasonable to conclude that it was sufficiently egregious to justify summary dismissal by the employer.

[53] One further attack upon the judgment by the appellant arose out of paragraph [59] of the Tribunal's decision which read:

> "It is not for a Tribunal in then determining whether or not dismissal was a fair sanction to ask whether a lesser sanction would have been reasonable, the question being whether or not dismissal was fair."

[54] The argument was that equity and fairness requires a consideration of whether a lesser sanction would have been one that all right thinking employers would have applied to a particular act of misconduct. Counsel submitted that the reasonableness of the decision by the employer to dismiss cannot be made without comparing the possibility of an alternative decision.

[55] I do not agree. I consider that the Tribunal was correct in its approach. As Langstaff J pointed out in *Harris v Academies Enterprise Trust* [2015] IRLR 208 EAT at [2]:

> "There is a wide ambit within which generous disagreement is possible."

[56] Hence it may be that there are two correct answers/sanctions or at least two answers/sanctions neither of which are so incorrect that they can be impugned on appeal. Another Tribunal might well have reasonably determined a lesser sanction in this case. That does not help determine whether the answer/sanction at which

the Panel arrived in this instance was incorrect or unreasonable. So long as the Panel/Tribunal has not taken into account some matter which it was improper to take into account, or has failed to take into account some matter which it was necessary to take into account in order that the discretion might be properly exercised or so long as the determination, in the exercise of discretion, was not so beyond that which any reasonable tribunal or judge could have decided, the determination cannot be impugned. Hence I find no basis for challenging the sanction actually arrived at in this instance.

[57] Whilst this may not necessarily have been the conclusion that this court would have reached had it been hearing the matter at first instance, I find no basis for substituting our view for that of the Panel and the Industrial Tribunal hearing this matter. I therefore dismiss this ground of appeal.

Failings in the investigation

[58] The essence of the appellant's case on this ground was that the investigation suffered from a signal failure to address a number of matters including for example:

- Establishing the time lining of the events which formed the basis of the charge against the appellant.

- The absence of an attempt to establish what was the full extent of the appellant's explanation for the use of the inhaler.

- Whether there was a culture of permitting at least the use of non-prescription medications in this ward.

- What became of the inhaler after the event?

- Did the appellant admit this to the sister on the ward subsequently or was the matter drawn to her attention by the sister on the ward.

- When did the appellant intend to replace the inhaler?

[59] In short the appellant's case is that the Tribunal misdirected itself in law in failing to follow the principles set out in *Compass* and investigate these matters in order to form a view about the seriousness of the conduct in question or the mitigating circumstances surrounding the misconduct.

[60] I find no substance in the ground of appeal. My reasons are as follows.

[61] First, it was common case that the investigation carried out by Mr Raymond Jackson had been inadequate. The Tribunal adopted the findings of the first Tribunal's decision in that regard relating to the investigation. The Tribunal was

therefore well aware of the inadequacies of the investigation. It is not a question of the Tribunal being unaware of the measures that might have been taken.

[62] Secondly, I am satisfied that the Tribunal correctly directed itself in law. At paragraph [63] the Tribunal recognised the principles in *Salford's* case that the severity of the consequences to the employee of the finding of guilt may be a factor in determining whether the fairness of the investigation justified dismissal. At paragraph [64], the Tribunal cited *Monji's* case that where there is an acute conflict of fact it makes sense to expect a higher level of investigation and adjudication on the part of the employer. At paragraph [66] it invoked *Taylor's* case to the effect that it is for the Tribunal to consider whether the overall process was fair notwithstanding deficiencies at an early stage, in particular giving consideration to the fairness and open-mindedness of the decision-maker. Procedural defects in the initial disciplinary hearing may be remedied on appeal.

[63] At paragraph [74] the Tribunal recorded that it was mindful that reasonable investigation is important as a procedural safeguard in particular to enable the employers to discover relevant facts upon which to decide whether an offence has been committed, to provide the employee with an opportunity to respond to allegations and raise substantive defences and the opportunity to put forward factors in mitigation of the conduct. Stating that "where an employee admits the misconduct generally there will be little purpose in carrying on any investigation and the employer will be acting reasonably believing that the misconduct has been committed" is an accurate statement of the law as far as it goes . The earlier sentences clearly embrace the spirit of the *Compass* even though the case itself was not specifically cited. Indeed that paragraph goes on to record:

> "It is not reasonable though for an employer to simply ignore matters which they ought reasonably to have known, which would have shown that the reason was insufficient."

[64] It is crucial to appreciate that, as stated at paragraph [85] of the Tribunal decision, this matter was not considered on the basis of theft albeit it was admitted by the appellant that the inhaler was taken from stock and used for personal use. The Panel had accepted the appellant's explanation/account that the inhaler was used only once for her personal use.

[65] A key component to determination of this case was the conclusion of the Tribunal that:

> "We accept the respondent's contention that whatever then subsequently happened to the inhaler thereafter, whether it was left on a table or removed, the upshot of the admitted actions was that it could not be reused and the employer was effectively permanently

> deprived of the inhaler. We do not find in these circumstances for the Appeal Panel not to seek to investigate further or to make findings relating to the 'removal' was outside a band of reasonable responses and are satisfied their considerations of the 'removal' of the inhaler in the context of the charges formulated at the appeal stage was reasonable."

[66] Moreover it is important to appreciate that, as paragraph [84] of the determination points out, mitigation points in favour of the appellant e.g. that she did suffer from asthma, that this was the reason for her taking the inhaler in the absence of having her own to hand, points made in Mrs Gault's presentation on her behalf and on the written statement of the claimant, had been sufficient to bring about a situation where Mrs Young was of the view initially that a final written warning would be an appropriate sanction. The investigation that had been carried out therefore did not prejudice the appellant in any way and the points made in mitigation on her behalf had served to secure an open-minded and favourable initial approach.

[67] What changed matters fundamentally were not any inadequacies in the investigation but rather the appellant's performance on questioning by the Panel. The appellant' assertions that no one was harmed and that the inhaler taken was not a controlled drug gave the Panel the impression that the appellant had a continuing belief contrary to the reassurances given that the unauthorised removal of drugs could be justified .She appeared to miss the point that it was unauthorised removal of a prescription drug from a locked drugs cabinet in breach of trust which was of concern to them going into the future. Hence any investigation of a lax approach to non-prescription drug use was arguably irrelevant.

[68] Paragraph [94] of the Tribunal's determination is also important in this context. Therein the Tribunal made the following findings:

- That whilst the respondent did not have an express medicines use policy, the appellant's evidence was that she knew not to take medication without authorisation and that "certain acts of misconduct are so well known that there is hardly any need for them to be spelt out".

- The Panel accepted the appellant's account as to the time line and number of uses of the inhaler which was the most favourable approach to her.

- The matter of concern to the Panel was the appellant's failure to make the report for a significant period of time rather than the undetermined matter of whether it was made unprompted.

- The appellant was aware that the removal of medication without authorisation for personal use was wrong.

- At the appeal hearing the appellant sought the next least severe sanction to dismissal, namely a final written warning.

[69] Consequently I am satisfied that the Industrial Tribunal was entitled to conclude, as it did at paragraph [95], that a reasonable investigation had been carried out in the context of this case and that the appropriate legal authorities/principles had been complied with. I therefore find this ground of appeal to be without foundation.

Perversity

[70] The third ground of appeal by the appellant embraced the following assertions:

- The appellant had made clear in the investigation and at the appeal hearing/disciplinary hearing that a mitigating factor was that she intended to replace the inhaler with a new one of her own prescription.

- Mrs Young had regarded as important the effect this would have of breaking the strict supply chain of pharmacy items and comprising the safety of patients. She found the assertion of the appellant to be irresponsible and was critical of the appellant for having inadequately reflected on this aspect of the case.

- There was no evidence that the appellant had intended to covertly substitute her own inhaler for the one she had taken and there was no evidence before the Panel of any concerns relating to the pharmacy supply chain or to any risk to patients.

- The inferences drawn by the Panel from these matters should have been put to the appellant at the hearing to give her a chance to respond.

- There was no investigation into the potential consequences for the pharmacy supply chain, governance or safety issues of the appellant having an intention to replace the inhaler. These omissions constituted procedural unfairness.

[71] I consider that paragraph [71] of the Tribunal's decision makes it clear that the issue was not an attempt to conceal by the appellant but rather her conviction that it would be appropriate to replace the inhaler with one of her own. It was this that pointed the Panel towards a conclusion that she did not appreciate sufficiently that what she had done was wrong.

[72] The Panel chaired by Mrs Young who was employed at a senior level in the respondent's Trust and her fellow member were in a sufficiently senior and experienced position in the Trust to make a determination about the importance of

pharmacy supply chains, governance and safety issues. It is trite law that Industrial Tribunals and courts afford some measure of deference to the expertise of Panel members on such internal issues.

[73] Moreover Mrs Young did investigate this concern with the appellant. She asked her whether she would consider replacing antibiotics and then quizzed her about labels, barcodes and medication products to which the appellant had replied that she was not thinking about that at the time and she thought she could replace the inhaler (see paragraph [71] of the determination).

[74] I consider that this was not an unreasonable approach to adopt by the Panel and afforded the appellant a sufficient opportunity to make her response in as detailed a manner as she wished concerning the concept of a supply chain. It did not amount to procedural unfairness or perversity.

[75] Accordingly I reject the third ground of appeal.

[76] I would therefore have affirmed the decision of the Tribunal.