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Judgment: approved by the Court for handing down | *Delivered:* **17/04/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPEAL FROM THE INDUSTRIAL TRIBUNAL DATED 19 MAY 2014

BETWEEN:

X

Appellant/Claimant;

-and-

MINISTRY OF DEFENCE

Respondent/Respondent.

Before: GIRVAN LJ, COGHLIN LJ and GILLEN LJ

GILLEN LJ (delivering the judgment of the court)

[1] This is an appeal from a decision of an Industrial Tribunal on 19 May 2014 whereby the Tribunal dismissed the appellant's claim of unfair dismissal arising out of his dismissal by the respondent on 20 April 2012.

Background facts

[2] The Tribunal hearing this matter made an order pursuant to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 prohibiting the publication in Northern Ireland of identifying matter in a written publication available to the public in relation to the appellant's identity, or any of the witnesses in the case or of relevant locations. We shall invite counsel to address us on the issue as to whether such an order is still appropriate. In the interim this judgment has been anonymised.

[3] The respondent employed the appellant as a civilian guard for 9 years 5 months between November 2002 and April 2012.

[4] His terms and conditions of employment permitted the appellant to submit travel claims for payment for additional hours attendance (overtime at the normal place of work or elsewhere) and short term detached duty (where for example he attended courses at other locations).

[5] The appellant's line manager (Mr M) on three occasions – 15 April 2008, 20 May 2009 and finally 18 November 2010--had drawn the attention of employees to the fact that travel claims for additional hours attendance could only be claimed on PPPA Form 1904 and not on PPPA Form 305. PPPA Form 305 was only to be used for short term detached duty. The correspondence informed employees that this was because additional hours attendance was a taxable payment whereas payments for short term detached duty were not. If employees claimed travel for additional hours attendance on the wrong form it is in effect tax evasion which, the line manager informed employees, could result in dismissal. The letter of 18 November 2010 advised that all staff were to check that they had complied with the current policy rules and the guidance notes as to how to claim additional hours attendance and detached duty payments. It advised that this was a one-time opportunity to rectify any genuine mistakes made and that any further discrepancies found during audit checks would be forwarded to the Fraud Investigations Unit for action.

[6] On 10 May 2011 Mr M received confirmation from the PPPA by telephone that the appellant had contacted that body to rectify travel claims for overtime being claimed on PPPA Form 305 instead of PPPA Form 1904.

[7] On 18 May 2011, in the course of an interview at Palace Barracks, the appellant contended that he had contacted PPPA in December 2010 and was informed there were no problems with his claims.

[8] Following this meeting, by letter dated 23 May 2011, the appellant was suspended on the grounds that he was suspected of making fraudulent claims in accordance with the Policy Rules and Guidance for Dealing with Major Discipline Offences.

[9] Thereafter the line manager carried out an investigation into the appellant's travel claims. The appellant was further interviewed on 18 August 2011 and was questioned about a number of journeys he had made from his home to his place of work in relation to which he had submitted a travel claim. These journeys related to dates between 23 January 2008 and 13 June 2010. At that meeting the appellant contends that he explained that insofar as those journeys attracted additional hours attendance payment by way of overtime, no part of the journey was on or near his normal route from his home to his work. He argued that he had taken alternate routes from his normal route for the purposes of security. In addition he had made some journeys within the camp complexes and had charged for these. The appellant was represented by his Trade Union representative at this meeting.

[10] After this meeting, the appellant was invited to a further meeting with Mr M to give him "the opportunity to clarify what (his) alternate routes are and what is (his) normal route(s) to work at (his place of work)".

[11] On 29 August 2011 the appellant declined to attend for further interview on the advice of his Trade Union official.

[12] About the same time the appellant lodged a grievance application arising out of these matters. Colonel A, who was appointed to deal with the grievance, met with the appellant on 22 September 2011 in relation to his grievance which related to the delay in the conduct of the investigation.

[13] At this meeting it was clear that the focus of the complaint was the on-going disciplinary investigation in relation to the appellant's travel claims and the delay in relation to that investigation. Colonel A undertook to look into the stage at which the investigation had reached.

[14] Following Colonel A's intervention a disciplinary charge letter, which appeared to suggest one charge with two separate elements, was issued to the appellant on 26 September 2011. It was signed by the appellant's manager with charges couched in the following terms:

> "Over the period 23 January 2008 to 13 June 2010 … you claimed on Form 305 for the additional attendances despite instructions issued by me – on three occasions – informing all staff that additional attendances must be made on Form 1904 and not Form 305. Over this period you also failed to ensure that all aspects of your travel were done in the most economical manner. I am required therefore to charge you with the alleged major disciplinary offence of the submission of false claims for travel."

The disciplinary hearing of January 2012

[15] On 19 January 2012 the appellant was required to attend a disciplinary hearing chaired by Colonel A assisted by an independent member and an HR consultant. The appellant was warned that, depending on the facts established at the hearing, the outcome could be possible dismissal. This notification confirmed that the appellant was entitled to be accompanied and assisted at the hearing by the Trade Union representative and that he was entitled to call witnesses.

[16] Before the disciplinary hearing, Colonel A was provided with an evidence pack which contained:

- Civil Service Code.

- Major Disciplinary Policy Statement.
- Guide to Major Disciplinary Offences including gross misconduct – this document stated that the most common disciplinary offences on the gross misconduct category included "submission of false claims for travel ..."
- Guide to Major Discipline Potential Mitigating Circumstances.
- Major Discipline Policy Statement – Conduct of Major Disciplinary Hearing.
- Policy, Rules and Guidance – Detached Duty Expenses.

[17] This pack, which was provided to the appellant in advance of the hearing, also included a copy of the notes of the investigatory interview on 18 August 2011 and maps and a routes planner calculation from the RAC which showed the shortest and fastest routes from the appellant's home to relevant bases. This was the first time these maps and planners had been made available to the appellant. Spread sheets showing details of the appellant's travel claims over the period January 2008-March 2010 were also included. A summary was provided of the locations in question, the miles claimed and the amount paid as compared with the shortest and fastest routes and the difference between the two together with a difference in money. The spread sheet showed the sum allegedly over claimed as being £365.95.

[18] The pack for the disciplinary hearing also contained an analysis of case precedents, namely 44 previous cases involving the submission of false claims for travel and subsistence. Of the 38 cases which proceeded to a hearing, 14 resulted in dismissal where the deciding officer considered the evidence established a breakdown in trust. In the remaining 24 cases which were found proven, a penalty short of dismissal was the outcome.

[19] The minute of this disciplinary hearing records:

> "The charge should be broken into two areas for resolution: firstly whether he had ignored guidance on use of the correct forms (PPPA Form 1904 not PPPA 305) where the individual may be knowingly committing tax evasion, and secondly where he rounded up claims to an excessive and fraudulent degree over a period of two years. Mr Magill was asked if he understood the first charge to which he replied that he did but when asked whether he admitted the charge he replied no."

[20] At this hearing the appellant alleged that other members of the Guards Service had behaved similarly with reference to the forms. He referred to an entry in his "police" notebook dated 10 December 2010 which was in the following terms (sic):

> "Spoke with (HR) Peter? Told him what line manager said about travel claims, they said I have not done anything wrong all correct."

[21] Colonel A asked the HR advisor present at the hearing to obtain a transcript of this telephone call as all calls to MOD HR should be recorded and a recording normally provided on request.

[22] The appellant is recorded as saying that, with reference to this aspect of the charge, "he held his hands up" but that other members of the NISGS "do likewise".

[23] We pause to observe that in fact no transcript of this call ever appears to have been obtained. However Mr McGleenan did put before us transcripts of a telephone call of 14 February 2011 between the PPPA and the appellant together with other calls of 15 February 2011 and 25 May 2011. In particular the transcript of the call of 25 May 2011 raised the question of him putting through the claims on the wrong form. Significantly this call occurred shortly after his eventual suspension and made no reference at all to any previous call in December 2010 as alleged by the appellant. Accordingly we are unable to conclude that any call made by the appellant in December 2010 is relevant.

[24] Returning to the disciplinary hearing on 19 January 2012, Colonel A raised the issue of the disputed second charge of excessive mileage claims. It is clear from the record of that hearing that the appellant accepted that he had claimed excess miles but asserted they were not excessive intentionally. His explanation was that he varied his route for security reasons. He also added that he had claimed for miles travelled within the camp once he had arrived there albeit he accepted he had not obtained permission from his line manager for such travel.

[25] After the disciplinary hearing, a copy of the notes of the hearing was sent to the appellant for agreement or amendment. By letter dated 13 February 2012 the appellant indicated that he was sending an amendment of additional points which had not been included in the record, outlining 18 additional points.

[26] Colonel A then arranged to meet the appellant on 20 April 2012 to confirm that he had found the appellant guilty on both the disciplinary charges against him and that the appellant was to be dismissed. The note of this meeting records:

> "There were two charges to be answered:
>
> (a) Charge of not obeying a reasonable instruction to use the correct form – there is evidence that on three occasions Mr X had signed an instruction detailing the form to be used. (Colonel A) said he therefore found him guilty of the charge.

(b) To the far more serious charge of not claiming in the most economical manner and that of submitting false claims, (Colonel A) looked in detail at the length of time, the detail of the claims, the amount of the claims with rounding up and whilst accepting there must be a degree of variance, he did not accept the pattern of claiming behaviour was justified, it is outside the policy and he found Mr X guilty of the charge."

[27] Colonel A then looked at the potential mitigation including the fact that claims are made up over a considerable amount of time, Mr X had been aware of the regulations, there was no evidence Mr X had cleared exceptional claims with his line manager and that any allegation that this was a widespread practice would be investigated.

[28] Colonel A concluded:

> "The Department demands the highest standards of behaviour. There is a degree of personal responsibility. (Colonel A) told Mr X that in view of the serious breach of trust he was dismissed from 20 April 2012."

[29] The appellant then lodged an appeal by way of letter dated 24 April 2012. His points of appeal included that the penalty was severe and unfair, that the investigation was flawed, that there had been inconsistent treatment and he had no intent to commit fraud.

The appeal hearing on 10 January 2013

[30] The appeal hearing was conducted by Brigadier B. He was assisted by the same HR advisor who had attended the disciplinary hearing and a note taker was also present. The appellant attended the hearing accompanied by his Trade Union representative.

[31] The minute of the appeal records the following points:

- The appellant had always claimed the exact same figure for travel between home and base even though he claimed to be varying his routes. The appellant asserted that he only claimed this fixed figure "despite on various occasions doing more". The first claim he had made was for that figure of 28 miles and he had stayed with this figure ever since.

- When asked about claiming for travel within the camp the appellant indicated that he used his car to travel around various camps. The HR advisor at the hearing outlined that there was no policy which covered travel within the camp.

[32] When the hearing resumed on 14 February 2013 Brigadier B confirmed that the purpose was to consider whether the process and consideration of the original hearing was fair and reasonable and in accordance with departmental policy and process.

[33] In the course of the hearing the appellant asserted that he felt there was a grudge held against him due to an incident at a firing range involving the wife of a training officer and that this had been the reason for the disciplinary proceedings against him.

[34] By letter dated 19 March 2013 the Brigadier wrote to the appellant confirming the finding of Colonel A. He indicated:

- There was a lack of consistency in the appellant's case.

- His claims from home to base were always for the same amount and this was hard to believe when he also said he varied his routes.

- The appellant's explanations of including mileage within camps when there was no policy for this had undermined his case.

- He considered that the deciding officer's decision was entirely reasonable.

- Whilst he accepted that the appellant faced a difficult welfare family situation and that this was the first significant disciplinary offence in his service, he supported the decision of Colonel A on penalty. The offences had occurred over a period of 14 months and he determined that the appellant was guilty of gross misconduct and that for this Department such behaviour was intolerable. The penalty of dismissal therefore stood.

[35] Thereafter the appellant sought redress before the Industrial Tribunal for wrongful dismissal pursuant to the terms of the Employment Rights (NI) Order 1996 ("the 1996 Order").

The hearing before the Tribunal

[36] The Tribunal concluded that the dismissal of the appellant had been fair in all the circumstances and fell within the band of reasonable responses of a reasonable employer in the circumstances of the case.

[37] At paragraph 59 of its decision the Tribunal noted:

> "It was clear from the evidence of both (Colonel A and Brigadier B) that they considered the second disciplinary charge (relating to not claiming for travel in the most economical manner) to be the most serious and the one which most influenced their respective decisions. Accordingly, it was this disciplinary charge on which the Tribunal focused. The Tribunal was satisfied that both decision-makers had formed a genuine belief that the claimant was guilty of the misconduct alleged against him."

[38] The Tribunal concluded that the decision-makers had not accepted the explanations put forward by the appellant in the course of the disciplinary and appeal hearings. The appellant's explanation regarding route variation was unconvincing since the appellant had always claimed exactly the same mileage from his home to base whilst at the same time arguing that he had varied his routes.

[39] The Tribunal was satisfied that the amount of investigation carried out by the respondent in relation to these matters was reasonable.

[40] Finally the Tribunal expressed the view that this was a case where reasonable employers could have imposed a range of different sanctions. However this amounted to a breach of trust and MOD staff had been warned when submitting any travel claim that a false statement in such a claim could lead to disciplinary action including dismissal. "In short the Tribunal was satisfied that the issue of trust in this area was of crucial importance."

Statutory Framework

[41] Article 130A(1) of 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.

[42] Article 130(1) of the 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.

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

> "(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 reasons 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

(b) shall be determined in accordance with equity and the substantial merits of the case."

Principles governing the interpretation of the 1996 Order

[44] It is unnecessary that I should burden this judgment by setting out in extenso authorities that have been cited on this subject in many cases both in this jurisdiction and beyond. Suffice to say that the leading authorities include Rogan v South Eastern Health and Social Care Trust [2009] NICA at 47, British Homes Stores Limited v Burchell [1980] ICR 303, Iceland Frozen Foods Limited v Jones [1983] ICR 17, Bowater v North West London Hospitals NHS Trust [2011]EWCA Civ. 63, HSBC Bank Plc (formerly Midland Bank Plc) v Madden [2000] IRLR 827, Salford Royal NHS Foundation Trust v Roddan [2010] IRLR 721 and R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ. 1605.

[45] From this array of authorities the following principles relevant to the instant case can be discerned.

(1) The starting point is the words of Article 130(4) of the 1996 legislation.

(2) 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.

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

(4) Secondly the employer must show that he or she had reasonable grounds for so believing.

(5) 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.

(6) It is not relevant for the Tribunal to examine the quality of the material which the employer had before them. The test is reasonableness and a

conclusion on the balance of probabilities is a reasonable conclusion. The judgment as to the weight to be given to evidence was for the Disciplinary Tribunal and not for the Industrial Tribunal.

(7) The onus is therefore on the employer, on the balance of probabilities, to establish the case. Whilst there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular the more serious the allegation or the more serious the consequence of the allegation if proved, the stronger must be the evidence before a court will find the allegations proved on the balance of probabilities.

(8) 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……"

(9) 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

[46] In the amended grounds of appeal the appellant set out four grounds namely that the Tribunal had erred in law:

(1) by failing to examine the issue of the belief of the respondent on charges 1 and 2.

(2) in failing to consider the reasonableness of the belief that the appellant was guilty of charge 1.

(3) in concluding that the belief of the respondent that the appellant was guilty of charge 2 was reasonable or was the product of a sufficiently rigorous investigation.

(4) in concluding that the dismissal was within the band of reasonable responses of a reasonable employer.

The submissions of the appellant

[47] Mr O'Donoghue QC, who appeared on behalf of the appellant with Ms Campbell, in the course of well-structured skeleton arguments augmented by clear oral submissions made the following points.

[48] First, that the Tribunal had adopted a flawed approach in focusing solely on the second charge whereas in the event it was both charges that had formed the basis of the decision to dismiss by both Colonel A and Brigadier B.

[49] Secondly, that the Tribunal fell into error in substituting its own views for those of the decision-makers. By concluding that the respondent was entitled to dismiss the appellant fairly on the second charge only, it had formed a view that was not consistent with the view formed by Colonel A and Brigadier B.

[50] On the basis of 1 and 2 above, the Tribunal could not have concluded that the belief of the respondent that the appellant was guilty of charge 2 was reasonable. In any event since the allegation was one of deliberate falsehood, the Tribunal had failed to conduct a rigorous investigation of the evidence. It failed to obtain any evidence as to the average distance that someone living at the appellant's address would drive in order to get to Palace Barracks responsibly varying his route for

security reasons over a period of time. Without such evidence it was impossible to assess whether the travel claim could be considered on a reasonable basis to be deliberately excessive. In any event there was no requirement on him to calculate precisely each individual journey if the substance of his claims over a period of time reflected his actual travel and thus the average of 28 miles had not been proved to be excessive. Moreover in the absence of conclusive evidence establishing that the appellant knew he was not permitted to claim for travel within the camps it was difficult to see how the employer could hold a reasonable belief that such claims were excessive.

[51] In concluding that the appellant had been found guilty of submitting false claims for travel expenses, it is unclear whether or not the Tribunal was focusing solely on the second charge or paraphrasing the two charges. If the latter, then the Tribunal should have considered the issue of the respondent's belief and the reasonableness of that belief in relation to the first charge. No such consideration took place. Counsel contended that it was not axiomatic that the dismissal would occur even if both charges were proven. Other reasonable employers could have issued the appellant with a final written warning.

[52] Finally, Mr O'Donoghue argued that there was no evidence as to how much the excessive mileage might have amounted to. The extent of the financial loss to the respondent was unknown and thus there is no basis upon which the Tribunal had assessed whether the dismissal was within the band of a reasonable response of a reasonable employer.

Submissions of the respondent

[53] Mr McGleenan QC, who appeared on behalf of the respondent with Ms Best, in the course of equally impressive skeleton arguments and oral submissions, made the following points:

(1) Ground 1 of the appeal should be rejected because it was clear from the outset before Colonel A that the appellant "had held his hands up" in relation to charge 1. Colonel A specifically found the appellant guilty of charges 1 and 2. However it was recognised by Colonel A, Brigadier B, the Tribunal and indeed in the original skeleton arguments proffered by the appellant before the Tribunal, that charge 2 was by far the more serious matter and that the focus of the decision to dismiss was squarely on that second charge. It was the false claim for mileage in the absence of a satisfactory explanation for such excessive claims that became the kernel of the decision throughout.

(2) Similarly, ground 2 should be rejected for the same reason in that it was crystal clear that the whole focus of the finding was on charge 2 in

circumstances where charge 1 had in substance been admitted and that the reason for dismissal was in reality the second charge.

(3) Mr McGleenan challenged ground 3 of the appeal on the basis that it was not only clear that the respondent believed that the appellant had been guilty of charge 2 but that it was reasonable to do so. Moreover there was ample evidence of the respondent having carried out "as much investigation into the matter as was reasonable in all the circumstances of the case" including:

- The lengthy investigatory meeting between the appellant and his line manager.
- The provision of RAC route maps and a schedule of costs made by the respondents relevant to the journeys of the appellant.
- The appellant had been expressly invited to discuss the matter further in order to clarify the precise nature of his alternate routes but he had chosen not to attend at such a meeting thus effectively frustrating further investigation at that stage.
- Colonel A had been provided with maps, a route planner and calculations from the RAC illustrating the shortest and fastest routes from the appellant's home to relevant basis.
- Both Colonel A and Brigadier B had conducted further investigations into the points raised by the appellant e.g. the telephone calls and the policy concerning travel within the camp.
- There was available the "Civil Detached Duty Expenses" Policy which required travel in the most "economic way" and required the persons using a private vehicle on duty to travel by aiming to take the shortest and most direct route.

(4) The appellant's admission that he had submitted his own travel claims on the basis of *an average* of 28 miles when the shortest route was 20 without further information was an implausible explanation which was misleading and ill-founded.

(5) The fourth ground of appeal was rejected by Mr McGleenan on the basis that the dismissal was within a band of reasonable responses of a reasonable employer. He emphasised that the role of the Tribunal was not to substitute its own view for that of other reasonable employers or the decision-making body in this instance provided it was within the band of reasonable responses of a reasonable employer.

[54] The Tribunal had before it a summary of the locations in question, the miles claimed and the amount paid. A comparison was made between the shortest and fastest routes. The difference between the two together with the difference in money was illustrated on a spread sheet showing the sum allegedly over claimed as amounting to £365.95. These travel claims had been made over a period of 14 months involving the use of public money and constituted a serious breach of trust. All of this illustrated that the decision to dismiss was within the band of reasonable responses.

Discussion

[55] At the outset we pause to remind ourselves of the role of this court in conducting an appeal from a Tribunal as set out at paragraphs [45](8) and [45](9) of this judgment. This court must therefore be careful not to over analyse the decision of this Tribunal and should recognise the wide margin of appreciation that must be accorded to its decision.

[56] The essence of a proper approach by a Tribunal is to recognise the three stage test set out by Arnold J in Burchell's case, namely:

- The employer must establish that he or she believed that the employee was guilty of misconduct.

- The employer must show that he or she had reasonable grounds for so believing.

- The employer must show that at the time he or she held that belief, he or she had carried out as much investigation as was reasonable.

[57] We have no doubt that the whole focus for the decision to dismiss this appellant was his misconduct in falsely claiming excessive mileage. At each stage of this process, the main focus has been on that element of the charge.

[58] The need for a penetrating analysis of the first aspect of the charge, namely the wrongful filling in of the appropriate forms, never arose because the appellant had not challenged that aspect. As Colonel A recorded, "He had put his hands up" to that element of the charge. The focus was firmly on the second aspect which carried with it the hallmark of dishonesty and fraud involving public money and a breach of trust.

[59] Colonel A had clearly found the appellant guilty of both parts of the charge but he made clear that the more serious aspect was the fraudulent claim for excess mileage. Brigadier B in his decision letter said:

"I find nothing wrong with the presiding officer's decision."

This is clearly a reference to both charges but again, understandably, the focus of his review was on the more serious second element. There was in fact no need for him to cross check the first aspect given the admission and the fact that it was seen as a technical breach.

[60] It is pertinent to observe that a review of the skeleton arguments put before the Tribunal by the appellant, reveals that counsel's submissions encouraged this approach. These arguments focused on that second element and indeed had made the case that the decision of the employer had been reached on the basis of an ulterior motive, an allegation which was dismissed by the Tribunal.

[61] We found it therefore somewhat incongruous that the emphasis before this court was on the apparent failure of the Tribunal to analyse the effects of the first aspect of the charge, namely the incorrect form filling, when the Tribunal had clearly been led in the direction of focusing on the second more serious aspect. In the circumstances posited the first strand of the charge was a dead issue about which there was little to say given its technical nature and the early admission by the appellant. It was inevitable that focus would effectively shift to the second and more serious aspect of the charges. We consider this to be a reasonable and logical approach and does not constitute an instance of a Tribunal substituting its own view for that of the disciplinary hearing.

[62] Accordingly, we find no basis for the first two grounds of appeal and we reject the argument that the Tribunal erred in law by failing to examine the issue of belief of both charges or that the Tribunal erred in law in failing to consider the reasonableness of the belief that the appellant was guilty of the first charge.

[63] We are satisfied that the belief of the respondent that the appellant was guilty of charge 2 was reasonable. It was implausible for the appellant to claim exactly the same average mileage for each of the occasions that he claimed excess miles. That afforded no opportunity to the employer to ascertain or verify what his actual mileage had been on any occasion. The appellant has never revealed what mileage he did on any particular occasion and, of crucial importance, he deliberately eschewed the opportunity to attend to do so on 25 August 2011 and to explain on that occasion the actual mileage involved in the alternative routes. He was therefore given ample opportunity to deal with the core issue in the whole affair but refused to do so. Hence it was perfectly reasonable for Colonel A to regard the difference of 8 miles i.e. 20 miles being the shortest route and 28 miles being the alleged average as too excessive without explanation.

[64] Moreover, the appellant had made a claim for mileage for driving within the camp notwithstanding he had neither sought nor obtained authority for claiming such mileage. Under the "Civilian Detached Duty Expenses" policy at paragraph 4 of "Task 3" staff had been specifically reminded that if they were "in any doubts as to the merits of travel arrangements" they should discuss their plans with their line

manager before committing any expenditure. The appellant made not the slightest attempt to enquire as to the propriety of this claim and gave no plausible explanation as to why he had failed to so do.

[65] The appellant was well aware of the possible consequences and seriousness of false claims. In the policy "Civilian Detached Duty Expenses" under "Task 5: claim detached duty expenses" at paragraph 2 headed "False Claims" staff are informed that "the deliberate and knowing submission of a false claim by a claimant is a serious offence as is the retention of a payment to which you know you have no entitlement. Such actions could lead to dismissal and/or prosecution." Indeed, MOD staff had been warned when submitting any travel claim that a false statement in such a claim could lead to disciplinary action including dismissal. Specifically when submitting travel expenses a warning to this effect appeared:

> "I understand that it is a serious offence to make or conspire in making a false statement on this claim and acknowledge that any false statement may lead to criminal prosecution or disciplinary action, either of which could result in dismissal.

[66] This behaviour had stretched over 14 months, involved the outlay of public money and therefore constituted a serious breach of trust. In these circumstances we consider it virtually inevitable that the respondent formed the belief that the appellant had been guilty of charge 2 and that this was a reasonable belief in the circumstances.

[67] We are also satisfied that this belief and conclusion had been made in the wake of a proper investigation. The required desideratum for an adequate investigation is that the respondent has carried out as much investigation into the matter as was reasonable in all the circumstances (see Arnold J in Burchell). The investigation in the instant case had included:

- The initial meetings with his line manager when over 130 questions had been put to the appellant.

- The respondents had obtained RAC route maps, created a spread sheet with a schedule of costs to the respondent together with the amounts claimed and had analysed the shortest and fastest routes from the appellant's home to the relevant bases.

- Colonel A and Brigadier B had broken off their respective inquiries to investigate matters raised by the appellant during the hearings. Thus for example the alleged telephone call that appellant had made in December 2010 was investigated as far as was possible. Brigadier B obtained information touching on the policy of the respondent regarding claims for travel within the camp as alleged by the appellant and in the event discovered that there

were MOD vehicles available for staff to use for travel within the camp which served to discredit the appellant's argument.

- The appellant was specifically asked to attend with his line manager on 29 August 2011 to clarify the alternate routes he had taken together with his normal route to his place of work but, disquietingly, refused to do so.

- The minutes of the investigations and the disciplinary appeal hearings together with details of case precedents were all made available to the respondent.

[68] The refusal of the appellant to assist in August 2011 with an investigation into the precise routes he had taken on each occasion rendered it impossible to assess what the actual loss may have been had he acted honestly.

[69] All of this information which was obtained in the course of the investigations ill accords with the submission that there was inadequate investigation. We are satisfied that the issues were probed and investigated with objective thoroughness and we reject this ground of appeal.

[70] We also find no merit in the fourth ground of appeal that the Tribunal erred in law in concluding that the dismissal was within the band of reasonable responses of a reasoned employer.

[71] In coming to this conclusion we are conscious that it is not the role of the Tribunal to substitute its own view for that of the employer. There is much authority for the proposition that an employer has not dismissed an employee unfairly merely because there may well be cases where reasonable managements might take a different view. An element of discretion must be vested in any management when it is confronted with a decision on a range of penalties, all of which might be considered reasonable. The question for the Tribunal was whether or not the dismissal was reasonable. As the Tribunal itself acknowledged, dismissal in this instance may well have been regarded "at the harsh end of that band of reasonable responses" but breach of trust and the theft of public money demand condign punishment.

[72] There is no doubt that the pack for the disciplinary hearing contained an analysis of case precedents, namely 44 previous cases involving the submission of false claims for travel and subsistence. Of the 38 cases which proceeded to a hearing, 14 resulted in dismissal where the presiding officer considered the evidence established a breakdown in trust but in the remaining 24 cases a penalty short of dismissal was the outcome.

[73] In this context Wincanton Plc v Atkinson and Another UKEAT/0040/11/DM is instructive. In that case the respondents were employed as drivers by the appellant in a haulage business and they had been dismissed because they had

allowed themselves to drive without a licence for a period of months. The respondents advanced an argument that another employee, who had six years earlier allowed his licence to lapse in similar circumstances, had suffered no disciplinary action.

[74] Citing Hadjioannou v Coral Casino [1981] IRLR 352 and Paul v East Surrey District Health Authority [1995] IRLR 305, the court approved the following propositions concerning arguments that treatment received was not on a par with that meted out in other cases:

(i) It may be relevant if there is evidence that employees had been led by an employer to believe that certain categories of conduct will be either overlooked or at least will not be dealt with by the sanction of dismissal. That patently did not occur in the instant case.

(ii) There may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reasons stated by the employers is not the real or genuine reason for dismissal. The Tribunal investigated and dismissed the appellant's alternative explanation for his dismissal. That issue was not ventilated before this court.

(iii) Evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to visit the particular employee's conduct with a penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances. No such factual evidence was produced before the Tribunal or this court.

[75] Ultimately, however the question for the employer is whether in a particular case dismissal is a reasonable response to the misconduct proved. In this case there was no established policy applied for similar misconduct as evidenced by the differing approaches adopted in the above mentioned cases. This is not an instance of a policy towards such misconduct being changed without warning. We are satisfied that the approach adopted in this instance was within the band of reasonable responses which had hitherto been adopted and was appropriate in this case.

Conclusion

[76] In all the circumstances we therefore dismiss the appeal. We will hear the parties on costs.