

Appeal No. UKEAT/0264/08/RN  
UKEAT/0265/08/RN

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 2–3 April 2009  
Judgment handed down on 17 July 2009

**Before**

**THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)**

**MRS M McARTHUR BA FCIPD**

**MR D NORMAN**

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MR K SEHMI

APPELLANT

GATE GOURMET LONDON LTD

RESPONDENT

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1) MR S SANDHU 2) MR H SINGH 3) MR B MATHEW  
4) MRS I BEGUM 5) MRS A DHILLON

APPELLANT

GATE GOURMET LONDON LTD

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

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## **SUMMARY**

### **UNFAIR DISMISSAL**

**Exclusions including worker/jurisdiction**

**Procedural fairness/automatically unfair dismissal**

**Reasonableness of dismissal**

Six conjoined appeals by employees dismissed during the Gate Gourmet dispute and in respect of whom the Tribunal had found either that they were dismissed while taking part in unofficial industrial action, so that it had no jurisdiction pursuant to s.237 (1) of the **Trade Union and Labour Relations (Consolidation) Act 1992**, or that the dismissals were fair.

### **Sandhu**

- (1) Decision that Claimant, a union official, was dismissed while taking part in industrial action not inconsistent with the previous decision of the Tribunal that the action was unofficial
- (2) Employment Judge entitled to decline a review where she was able to correct an error in the Reasons by reference to findings already made
- (3) Although Claimant had initially attended the site as a trade union official to assist in resolving the dispute and would not be regarded as taking part in industrial action if that had remained his role, Tribunal entitled to find that he was no longer acting in that capacity at time of dismissal.

### **Singh**

Same point as *Sandhu* (3) (above).

### **Mathew**

Tribunal entitled to find that procedurally and substantively fair to dismiss employee who employer reasonably believed had been taking part in industrial action when he tried to return to work – Observations on application of **Employment Act 2002 (Dispute Resolution) Regulations 2004** in such circumstances and the effect of **Simmons v. Hoover** [1977] ICR 61

### **Dhillon**

Tribunal entitled to find that dismissal without hearing of Claimant who was absent during the industrial action without authorisation or explanation was procedurally and substantially fair: cf. *Mathew* (above).

### **Begum**

Tribunal entitled to find dismissal of Claimant for two weeks unauthorised and unexplained absence fair despite mishandling of the procedures.

### **Sehmi**

Finding that Claimant was participating in industrial action at moment that he received letter of dismissal meant that Tribunal had no jurisdiction, notwithstanding that he had not been so participating when the letter was sent.

**THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)**

**INTRODUCTION**

1. These six appeals arise out of the Gate Gourmet industrial dispute in the summer of 2005. The background can be summarised, in bare outline, as follows. The Respondents, Gate Gourmet Ltd., to which we will refer as “the company”, had a business at Heathrow Airport preparing airline food. They had a permanent workforce of over a thousand employees, at two sites, Heathrow South and Heathrow West. The Transport and General Workers Union (“TGWU”) was the recognised union. In early August 2005 there was widespread discontent about the engagement of a large number of seasonal staff. On the morning of 10 August a number of employees at the Heathrow South site stopped work and gathered in an upstairs canteen. At about 11 a.m. all those present in the canteen were told that they were dismissed: we give more details below. Further dismissals followed later in the day, including of all those on the morning shift who had not attended for work for any reason and of any employees who did not attend for work on the afternoon shift: many of the latter were staff who had arrived for work in the car park at Heathrow South, where many of the dismissed employees were gathered, and who had not then gone on into the premises and presented themselves for work. There were further dismissals over the following days of employees who were or had been absent without leave and were believed to have been taking part in the industrial action. In the end, over 600 employees were dismissed. The dispute was resolved some weeks later by the so-called “Brighton agreement”, which provided for the re-engagement of a number of employees; but many others remained dismissed.

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2. Most of those who were dismissed presented claims for unfair dismissal in the employment tribunal. The majority of those claims were withdrawn following the Brighton agreement. As regards the remainder, a series of hearings proceeded in the Reading Employment Tribunal, all chaired by Employment Judge Hill. The history, so far as relevant for the purpose of this appeal, can be summarised as follows:

- (1) By a Judgment and Reasons sent to the parties on 13 December 2006, following a preliminary hearing in November, the Tribunal held that those employees who were present in the canteen on 10 August 2005 and also those who, without other explanation, failed to attend work as rostered on the afternoon shift that day and thereafter were taking part in unofficial industrial action within the meaning of s. 237 of the **Trade Union and Labour Relations (Consolidation) Act 1992** (as to which see para. 6 below). It followed that the employees in question were not entitled to claim for unfair dismissal; but no individual claims were decided at that point since the issue had been raised as one of principle and the Tribunal had not been asked to make any finding as to which employees fell into either category. We will refer to this as “the 2006 decision”.
- (2) Following that decision, which was not the subject of any appeal, the great majority of the remaining claims were withdrawn. Those that remained live fell into two groups. First, there were a number of employees who did not attend for work on the relevant days and were accordingly dismissed but who claimed that their absence was for reasons other than participation in the industrial action and that their dismissal was unfair. Secondly, there were three union officials – Mr Dhillon (the senior convenor), Mr Sandhu and Mr Singh – who had been present at the meeting in the canteen on 10 August but who claimed to have been there in their roles as union officials rather than by way of participation in the action.

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As regards a number of employees in the first category, the company in due course admitted unfair dismissal and remedy was determined by a decision of the Tribunal following a hearing in November 2007.

- (3) Over several days in February and March 2008 the Tribunal heard the claims of the 22 claimants in respect of whom there remained an issue as to liability. (There were initially 23, but one claimant withdrew.) The Judgment and written Reasons – “the 2008 decision” - were sent to the parties on 7 April. Six of the claimants were held to have been unfairly dismissed: one of these was the convenor, Mr Dhillon, whose case that he had attended the meeting of 10 August only in his capacity as a union official and at the invitation of the company was accepted by the Tribunal. Five claimants were held to have been participating in unofficial industrial action and accordingly to be precluded from presenting claims for unfair dismissal. The remaining eleven were found to have been fairly dismissed.

The present appeals are by six of the claimants whose claims were dismissed in the 2008 decision, either on the basis that the Tribunal had no jurisdiction or on the basis that their dismissal was fair.

3. It is clear that the litigation as a whole was very effectively and efficiently case-managed. It is convenient to observe at this stage that the construction of the Reasons - and specifically the 2008 Reasons with which we are concerned - shows the same qualities of vigour and good organisation. The Reasons dispense so far as possible with inessentials, including the now-conventional discrete recitation of the parties' submissions and of the background law (which can as often obscure as assist in the presentation of clear reasoning),

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4. All of the Appellants save Mr Sehmi were represented in the Tribunal by Mr Andrew Hogarth QC, instructed through the TGWU. He appeared for them again before us. In the Tribunal Mr Sehmi was represented by a solicitor, Mr Nathan, and his appeal is formally separate from theirs. But before us he also was represented by Mr Hogarth. The company was represented both before us and before the Tribunal by Mr John Bowers QC.

5. There is a common factual and legal background to the cases with which we are concerned, and it will be convenient to begin by setting out the statutory provisions and background law governing dismissal relating to industrial action; but the dispositive issues largely depend on the particular facts of each case and we will accordingly deal with each separately.

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## THE STATUTORY PROVISIONS AND BACKGROUND LAW

6. S. 237 (1) of the 1992 Act provides as follows:

**“An employee has no right to complain of unfair dismissal if at the time of dismissal he was taking part in an unofficial strike or other unofficial industrial action.”**

“Time of dismissal” is defined in s-s. (5) as follows:

**“(a) where the employee's contract of employment is terminated by notice, when the notice is given,**

**(b) where the employee's contract of employment is terminated without notice, when the termination takes effect, and**

**(c) where the employee is employed under a contract for a fixed term which expires without being renewed under the same contract, when that term expires ... .”**

S-s. (1A) provides for various exceptions to the operation of s-s. (1) which are immaterial for present purposes.

7. It is thus a threshold question in each of the cases with which we are concerned whether the Appellant was taking part in unofficial industrial action at the time of his or her dismissal: if they were, the Tribunal had no jurisdiction to consider the fairness of the dismissal. Three particular features of that question need to be noted for the purpose of the present appeals.

8. First, it is necessary that the action be “unofficial”. That term is defined in s-ss. (2) and (3), which provide as follows:

**“(2) A strike or other industrial action is unofficial in relation to an employee unless –**

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- (a) he is a member of a trade union and the action is authorised or endorsed by that union, or
- (b) ...
- ...
- (3) The provisions of section 20 (2) apply for the purpose of determining whether industrial action is to be taken to have been authorised or endorsed by a trade union.”

S. 20 (2), as referred to in s-s. (3), provides as follows:

**“An act shall be taken to have been authorised or endorsed by a trade union if it was done, or was authorised or endorsed –**

- (a) by any person empowered by the rules to do, authorise or endorse - acts of the kind in question, or
- (b) by the principal executive committee or the president or general secretary, or
- (c) by any other committee of the union or any other official of the union (whether employed by it or not).

“Official” is defined at s. 119 as (so far as relevant):

- “(a) an officer of the union or a branch or section of the union, or
- (b) a person elected or appointed in accordance with the rules of the union to be a representative of its members or of some of them
- ... .”

9. Secondly, the question of what constitutes participation in a strike or other industrial action can give rise to difficulties and has been considered in a number of authorities, of which the most often cited is **Coates v Modern Methods and Materials Ltd.** [1982] IRLR 318. The issues in these appeals will not require a detailed analysis of those authorities. It is enough to note two (related) points decided in **Coates**:

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- (1) The question of participation is to be judged solely by reference to what the employee actually does, or fails to do, and not by reference to his or her intention or motivation.
- (2) Unauthorised and unexplained absence from work at a time when industrial action is in progress will constitute participation. As Stephenson LJ put it (see p...777 B-C):

**“In the field of industrial action those who are not openly against it are presumably for it.”**

10. Thirdly, it is important to note that the relevant question for the purpose of s. 237 is not whether the employee was dismissed *because* he or she participated in industrial action but whether they were *doing so at the time of* their dismissal, as defined in s-s. (5). That makes it necessary to establish in each case the precise time of dismissal, which, as the facts of some of these appeals demonstrate, is not always straightforward. One problem is that there may be a time-lag between the decision to dismiss and the effective communication of that decision, typically by the delivery of a letter; but it was common ground before us that in a case of dismissal by letter without notice “time of dismissal” for the purpose of s. 237 refer, as in other contexts, to the date that the letter is actually received - see, e.g., **Brown v Southall and Knight** [1980] ICR 617 and now **Gisda Cyf v Barratt** [2009] EWCA Civ 648).

11. We are not concerned in this appeal with the situation where the employee is dismissed when, or for participating in, “non-unofficial” industrial action, which is covered by ss. 238 and 238A of the 1992 Act. The effect of s. 238A is that where such industrial action has the support of a ballot dismissal during a “protected period” will be automatically unfair. In other cases, the effect of s. 238 is that the tribunal will, as under s. 237, have no jurisdiction to entertain a

claim of unfair dismissal by an employee participating in such action, but only provided that the employer does not engage in selective dismissal or re-engagement.

12. It will be appreciated that, although the effect of ss. 237-238A is to take many or most cases of dismissal related to industrial action outside the jurisdiction of the employment tribunal, they do not do so in every case: in particular, they do not apply where the employee is dismissed for taking part in industrial action but only after he or she has ceased to do so. In such cases the ordinary criteria prescribed by s. 98 of the **Employment Rights Act 1996** apply. We consider the effect of those criteria in connection with the relevant individual cases below. But it is important to appreciate that s. 98A (1) also applies. Dismissals in the context of industrial action are sometimes – for reasons both practical and legal – carried out on a “shoot first and ask questions later” basis. If that occurs in a case where the tribunal retains jurisdiction, the employer will not have complied with the standard dismissal procedure prescribed in Schedule 2 to the **Employment Act 2002**. In such a case, in order to avoid the dismissal being rendered unfair by s. 98A (1), the employer will need to show that it was a case in which the “modified procedure” applies. Crucially, that procedure does not require the employer to conduct any kind of process prior to the dismissal, but he must provide a statement of his grounds after it and must afford the employee the right of appeal (see paras. 4 and 5 of Schedule 2). The circumstances attracting the operation of the modified procedure are set out in reg. 3 of the **Employment Act 2002 (Dispute Resolution) Regulations 2004** as follows:

**“... [T]he modified dismissal procedure applies in relation to a dismissal where—**

- (a) the employer dismissed the employee by reason of his conduct without notice,**
- (b) the dismissal occurred at the time the employer became aware of the conduct or immediately thereafter,**

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- (c) **the employer was entitled, in the circumstances, to dismiss the employee by reason of his conduct without notice or any payment in lieu of notice, and**
  - (d) **it was reasonable for the employer, in the circumstances, to dismiss the employee before enquiring into the circumstances in which the conduct took place,**
- ... .”

The language of (c) seems to require that, for the procedure to apply, the employee must in fact have committed misconduct justifying summary dismissal; and it follows that in a case where the employer relies on the procedure the Tribunal must make a finding of fact on that question. This is at first sight rather surprising, but as we understood it both parties were agreed that this was the position.

## **SANDHU**

### **THE FACTS AND THE TRIBUNAL’S FINDINGS**

13. Mr Sandhu was a TGWU shop steward and thus an “official” within the meaning of s. 20 of the 1992 Act. He was not due to work on the morning of 10 August. However, when it became clear that a problem was developing, he was telephoned by the management at Heathrow South and asked to come in. He arrived at about 9.30 a.m. Employees in the Equipment Processing (“EP”) department and some other employees who worked nearby were in the EP canteen, which was on the ground floor, and were refusing to go back to work. At some point thereafter – it seems rather before 10 a.m. – they began to go upstairs to a different canteen. Staff from other departments joined them, until there were about 200 present. (A few employees were there anyway because it was their break-time, but these were a small minority.) There was a great deal of noise and confusion. Different people had different ideas about why

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they were there and what was going to happen, but the Tribunal in the 2006 decision (see para. 69 of the Reasons) found that they were essentially there as a protest against the introduction of the seasonal workers. Mr Dhillon, the senior union convenor, had been called by the company. He arrived between 10.15 and 10.30 a.m. and went to the canteen, but neither he nor any other union official addressed the assembled staff. Management made attempts to disperse the assembly and warned the staff present both by oral announcements and by the distribution of flyers that if they did not leave they were liable to be summarily dismissed. The great majority remained and at about 11 a.m. they were all told that they were dismissed.

14. Mr Sandhu was among those who went upstairs to the canteen and was accordingly among those dismissed. It was, however, as we have said, his case that his presence throughout was in his role as a trade union official, called in by the company to help resolve the dispute and that that was incompatible with his being a participant. It was common ground before the Tribunal, as before us, that that was in principle a valid distinction, and it was indeed on the basis of a similar contention that Mr Dhillon's claim of unfair dismissal was upheld. But the company did not accept that Mr Sandhu could avail himself of it on the facts. It was its case that, whatever his role initially, it had changed by the time of the dismissals. In particular, it contended that he had been instrumental in getting the staff who had gathered in the EP canteen to go upstairs to the other canteen, and that that had been contrary to the instructions of management. The company relied in particular on the evidence of two managers, Mr Ballingall and Mr Snow.

15. The Tribunal's findings on that issue were as follows:

**“25 Mr Sandhu was initially involved in the EP canteen. There is a dispute between him and Mr Ballingall as to whether he led the staff**

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from the EP canteen upstairs. Both Mr Ballingall and Mr Snow say that he did. This was not a view that was challenged on behalf of Mr Sandhu.

- 26 In deciding what happened the Tribunal was split, Mr Sheldon accepting Mr Sandhu's evidence considering that he acted properly in his role as Shop Steward whereas the majority Mrs Hill and Mr Roberts considered that as the evidence from both Mr Ballingall and Mr Snow that Mr Sandhu led them upstairs was not challenged, that evidence was correct and therefore that would indicate that he was at that point participating in the action.
- 27 Whilst he was upstairs there is no doubt that Mr Sandhu did not take any active part in trying to resolve the situation as he admitted that he waited for Mr Dhillon. He did say that the staff were so angry it was impossible to persuade them to take any action.
- 28 By a majority decision (Mrs Hill and Mr Roberts), the Tribunal finds that from the moment Mr Sandhu led the employees from the EP canteen upstairs he was participating in the unofficial industrial action. He was not acting within his role as a Trade Union representative and therefore he was properly dismissed along with the other people within the canteen. As he was dismissed on the grounds of participating in unofficial industrial action, he is consequently precluded from pursuing a claim of unfair dismissal: s.237 TULR(C)A 1992.
- 29 Mr Sheldon in the minority considered that Mr Sandhu's stance was commensurate with his role as a Trade Union representative and therefore for the same reasons as Mr Dhillon he was there in that capacity and therefore to dismiss him for participating in unofficial industrial action was an unfair dismissal. However he also considered that he like Mr Dhillon would inevitably have been on the picket line as a good Trade Unionist and therefore it would be inevitable that in hours, certainly not as long as days, he would have been fairly dismissed in any event."

16. There is one technical inaccuracy in that passage, in that, as noted at para. 10 above, what matters for the purpose of s. 237 (1) is not, as the Tribunal puts it at para. 28, whether Mr Sandhu was dismissed "on the grounds of" his participation in unofficial industrial action but simply whether he was taking part in such action "at the time of" his dismissal; but Mr Hogarth accepts that nothing turns on that inaccuracy for present purposes.

17. There is, however, a more serious inaccuracy. Following the promulgation of the Judgment and Reasons Mr Sandhu sought a review of the decision in his case on the basis that the Tribunal was wrong to say at para. 26 of the Reasons that the evidence of Mr Ballingall and Mr Snow was not challenged. Employment Judge Hill refused the application without a hearing, under rule 35 (3) of the **Employment Tribunal Rules of Procedure**, on the basis that it had no reasonable prospect of success. In her decision, which was sent to the parties on 23 May 2008, she acknowledged that the Reasons were wrong in the respect alleged but she held that that made no difference to the outcome. She said this:

- “1. The application in relation to Mr Sandhu refers to the conclusion reached by the Tribunal, by a majority, that Mr Sandhu was instrumental in bringing members of the Gate Gourmet staff up from the lower canteen to the upper canteen. The Claimant’s application is based on the evidence given by Mr Sandhu that the staff were moving up to the canteen, not that he lead them up. Contrary evidence was given by the Respondent’s witnesses. The application also disputes the claim that the Respondent’s witnesses were not challenged.**
- 2. The Respondent’s response to the application for review is that they consider that there was no evidence that Mr Ballingall or Mr Snow were challenged on their evidence that Mr Sandhu led the staff from the EP canteen to the main canteen; that Mr Sandhu himself did not originally deny this allegation which was dealt with in some detail in the preliminary hearing although they accepted that he did deny the allegation in cross examination and it was not apparent that this was dealt with in any way in closing submissions.**
- 3. I have considered my own notes of the evidence. Mr Ballingall was cross examined on the point and confirmed his statement to say that Mr Sandhu told the employees to go upstairs. Further, Mr Snow in his evidence accepted that both Mr Dhillon and Mr Sandhu were present in the canteen and not dispersing staff. In all other aspects when referring to actions taken by Trade Union members Mr Snow refers only to the actions of Mr Dhillon.**
- 4. The employment Judge’s notes note that Mr Sandhu said, “If Mr Dhillon could not stop them how could I? I could not say anything to the employees, I was waiting for Mr Dhillon.” Mr Sandhu disputed taking the employees upstairs.**

**Has this application for review any reasonable prospects of success?**

- 5. Clearly paragraph 26 of the Judgment says that the evidence of Mr Ballingall and Mr Snow was not challenged. That is incorrect. The**

evidence was challenged. However, equally clearly the evidence of Mr Ballingall remains consistent with his statement and consistent with his evidence at the preliminary hearing (see paragraph 36 of the preliminary hearing judgment).

6. The majority has consistently preferred the evidence of Mr Ballingall and Mr Snow to Mr Sandhu and found as a fact that Mr Sandhu led the employees upstairs. Paragraph 26 of this judgment perhaps should have been worded that the evidence of Mr Ballingall was consistent at both hearings unlike that of Mr Sandhu. As a finding of fact however, that is clear and unambiguous. It is not altered by the way in which the challenge to Mr Ballingall's evidence is recorded. This review has no reasonable prospect of success and is rejected."

(The reference at para. 5 to "the evidence of the preliminary hearing" reflects the fact that there was evidence at the hearing in November 2006 about the question whether Mr Sandhu had led the staff upstairs from the EP canteen. We consider this at paras. 19-22 below.)

18. The Notice of Appeal insofar as it relates to Mr Sandhu contains six grounds of appeal, but they can be considered under three heads, as follows:

- (1) whether it was open to the Tribunal, in the light of the decision at the preliminary hearing in 2006, to find that Mr Sandhu led the staff upstairs from the EP canteen;
- (2) whether the error at para. 26 of the Reasons was capable of being cured by the Judge's decision on the review application;
- (3) whether it was open to the Tribunal on the evidence and findings to conclude that Mr Sandhu had participated in the industrial action.

(1) INCONSISTENCY WITH THE 2006 DECISION

19. Mr Hogarth's essential submission is that if, as the Tribunal found, Mr Sandhu did indeed lead the staff upstairs from the EP canteen and thereby was a participant in the industrial action it must follow that that action ceased from that point onwards to be unofficial within the meaning of s. 237 (1), because it had been authorised or endorsed by Mr Sandhu, who was a union official; yet the Tribunal's decision at the 2006 hearing was to the contrary effect. It is pleaded in the Notice of Appeal that it was "not open to the Tribunal" at the substantive hearing to make a finding which necessarily contradicted the decision at the preliminary hearing; alternatively that the finding was for the same reason perverse. The formulation that the finding was "not open" to the Tribunal evades the need for precise legal characterisation, but in his oral submissions before us Mr Hogarth nailed his colours to the mast of issue estoppel.

20. Mr Bowers' submissions in response were essentially twofold:

(1) He pointed out that there had in fact been no issue at the 2006 hearing about whether the industrial action in which the employees who were dismissed in the canteen on the morning of 10 August were participating was unofficial. It was indeed necessarily the company's case that the action was unofficial, but that did not require to be proved: it was for the claimants to assert and prove union endorsement or authorisation if they wished to rely on it. They had in fact advanced no such case, as Mr Hogarth expressly accepted before us and as is confirmed by the terms of his written submissions at the 2006 hearing. (That is indeed unsurprising: if the action had been official, the TGWU would have lost its immunity under Part V of the 1992 Act, no ballot having been held, and would thus have been potentially liable to very substantial damages.) Rather, the

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claimants' case was that they were not taking part in industrial action at all but were conducting a meeting (in accordance with a right which was said to arise under s. 188 (5A) of the 1992 Act) in order to discuss redundancy proposals which were said to be at least implicit in the engagement of seasonal staff. It was the validity of that case which was the only issue at the 2006 hearing. Accordingly, there was no relevant determination as part of the 2006 decision which could bind the parties or the Tribunal at the subsequent hearing.

- (2) In any event, he did not accept that the Tribunal's findings in relation to Mr Sandhu's role necessarily involved a finding that he had authorised or endorsed the industrial action in which the employees were taking part at the time of their dismissal. The act of "leading" the employees from the EP canteen upstairs did not necessarily amount to authorisation or endorsement by Mr Sandhu within the meaning of s. 20 because the evidence did not establish that it was done in his capacity as a union official. And even if it did, Mr Sandhu did nothing further once he reached the canteen. He, together with the other staff, simply sat there and awaited developments, including in particular the arrival of Mr Dhillon: it was indeed Mr Sandhu's own evidence that he "deferred" to Mr Dhillon and that he had no further role once he was on the scene. By the time of the dismissals, therefore, Mr Sandhu was a participant in the industrial action because (as was common ground following the preliminary hearing) the assembly itself constituted such action and he was, by remaining there when told to leave, plainly participating in it; but he was doing nothing which could be taken as endorsement or authorisation.

21. We do not accept Mr Bowers' first submission. It was a necessary part of the Tribunal's 2006 decision that the industrial action constituted by the meeting in the canteen was unofficial.

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Its judgment was, in terms, “that the persons at the canteen at the time of the issue of the dismissal notices were participating in unofficial industrial action [our underlining]”; and for the purposes of s. 237 that finding was essential. In our view it follows that, as between the same parties, the Tribunal was precluded from making any decision which was necessarily inconsistent with that finding: it would be wrong in principle that there should be any fundamental internal inconsistency in the basis of the Tribunal’s decision on the claim taken as a whole. We do not think it matters whether the claimants mounted any positive case to the contrary or how, precisely, the burden of proof under s. 237 is to be analysed. The essential principle behind issue estoppel is that the issue in question has been the subject of a decision – it is indeed, in the old classification, a branch of estoppel *per rem judicatam*. For that purpose, the route by which the Tribunal reached the decision in question is essentially immaterial. (We accept, of course, that in a case where the claimed estoppel is based on some secondary finding made by the Tribunal *en route* to the actual decision required of it, examination of the route will be essential; but this is not a case of that kind.)

22. We do, however, accept Mr Bowers’ second submission. An estoppel would only arise if there were a *necessary* inconsistency between the 2006 finding – namely that the action in which those in the canteen were participating at the moment of dismissal was not authorised or endorsed by any union official – and the findings on which the Tribunal relied in 2008 in holding that Mr Sandhu had participated in the action. We do not believe that to be the case. Mr Bowers’ point about the capacity in which Mr Sandhu was acting when he led staff up to the canteen may be debatable, but his second point seems to us to be good. It does not – necessarily – follow from the fact that Mr Sandhu may have “endorsed” the movement of some employees upstairs that official action was taking place an hour later, at the moment of dismissal. The sequence of events in the canteen could reasonably be regarded as marking a

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fresh stage in the action, which had their own character; and there would be nothing perverse in the Tribunal taking the view that what happened in the canteen was not endorsed by Mr Sandhu or any other union official.

(2) WAS IT OPEN TO THE JUDGE TO CORRECT THE ERROR IN PARA. 26 ?

23. If the error in the Reasons meant that any issue required to be addressed which the Tribunal had not previously considered, it is quite clear that that exercise could not be carried out by the Employment Judge alone: a review by the full Tribunal under rule 36 would be required. However, the effect of paras. 5 and 6 of her review decision (see para. 17 above) is that the majority had already considered the conflicts between the evidence of Mr Sandhu on the one hand and Mr Ballingall and Mr Snow on the other and both had determined, generally, that their evidence was to be preferred to his on the disputed points and had held, specifically, on the basis of all the evidence that they heard that Mr Sandhu did indeed lead the employees up to the canteen. There is no reason for us to doubt that account of the Tribunal's deliberations: indeed it is what one would expect from a reading of the Reasons. In those circumstances we can see nothing wrong with the course taken by the Judge.

(3) WAS IT OPEN TO THE TRIBUNAL TO FIND THAT MR SANDHU HAD PARTICIPATED IN THE ACTION?

24. Para. 17 of the Amended Notice of Appeal reads as follows:

**“This ground of appeal applies to the appellants, Mr S. Sandhu, and Mr H. Singh and Mr Howley.**

**17.1 The tribunal concluded that Mr Howley, Mr Sandhu and Mr Singh were in the canteen. They do not make any findings as to any form**

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**of participation other than mere presence in the canteen. There was no evidence that they participated in the events in the canteen in any active sense. The tribunal appear to have concluded that mere physical presence is sufficient to amount to participation.**

**17.2 This is an error. The appellant submits that the tribunal should have directed themselves that mere physical presence is insufficient to amount to participation in industrial action and that a degree of active involvement or association is required before it may sensibly be said that an employee is participating in industrial action.”**

25. In our view no real question of law arises here. The Tribunal’s decision was plainly legitimate, if not indeed inevitable, on its findings of primary fact. It had held in its 2006 decision (whose findings were incorporated in the 2008 decision: see para. 2 of the Reasons) that the meeting in the canteen constituted industrial action. As the majority put it at para. 72 of that decision:

**“... [What] took place in the canteen was a refusal by the workers to continue their work because they were unhappy at the arrival of the seasonal workers.”**

Those present were repeatedly asked to disperse and were (as the Tribunal expressly held) free to do so: they were warned of the consequences if they did not. In those circumstances the Tribunal concluded that all those present at the moment of dismissal were participating in the action. Given its findings of primary fact, that conclusion seems to us inescapable. Whether or not in some circumstances “mere presence” may not be enough to constitute participation in industrial action, in the present case the deliberate choice of most of the employees to go to the canteen when they should have been working and of all of them to remain there when asked to leave plainly rendered them participants.

26. It is true that, if an individual employee had attended, and remained, in the canteen in particular circumstances which gave his presence a different character, a conclusion that he was

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participating in the action would not be justified. That, as we have said, was what the Tribunal held in Mr Dhillon's case. But it was a pure question of fact whether the same conclusion should apply to Mr Sandhu. The majority found – at para. 28 – that it did not: from the time that he arrived in the canteen his position was indistinguishable from that of the other staff. We can see no basis in law for challenging that conclusion.

## CONCLUSION

27. We accordingly dismiss Mr Sandhu's appeal.

## SINGH

28. The Tribunal's findings and conclusion about Mr Singh's case are clear and succinct and it is convenient to set them out in full: -

**“30 Mr H Singh was a Trade Union representative who should have been at Hillingdon on the morning of the 10 August 2005 but attended work as he was unsure if he had permission to go. He was made aware by Mr Ballingall that the EP staff had congregated in the lower canteen. He endeavoured to get them to return to work. He told Mr Ballingall that he was unable to do so having used his best endeavours. After Mr Sandhu had gone into the EP canteen where according to Mr Ballingall he whipped up the employees to further action, Mr Singh went upstairs with Mr Sandhu and there remained within the canteen. He accepted he was present throughout the various warnings given by Mr Snow. He took no further action as he advised the members of staff that Mr Dhillon had been called.**

**31 The issue for the Tribunal to consider was whether Mr Singh remained in the canteen as an employee participating in the unofficial industrial action or was his role that of Trade Union representative. The evidence from Mr Singh himself suggested that his role had ceased to be that of a Trade Union representative as he had passed over that function to Mr Dhillon. He was therefore on the sidelines and present as an ordinary employee. As such therefore he must be considered as an ordinary employee participating in the unofficial**

**industrial action in that canteen and therefore dismissed in the same way as all the other employees.**

**32 Consequently he is in no different position from those employees and there is no jurisdiction to consider his claim of unfair dismissal under Section 237 of the TULR(C)A 1992.”**

29. The Amended Notice of Appeal makes the same challenge to that decision as it does to the decision in Mr Sandhu’s case. We reject it for the reasons given at paras. 24-26 above.

### **MATHEW**

30. Mr Mathew was employed at Heathrow West. He was a shop steward. He was due to work on the afternoon shift of 10 August. He did not do so. It was his evidence that that was because he was sent home by a (different) Mr Sandhu, a manager at Heathrow West, who said that he feared that Mr Mathew might become involved in encouraging industrial action: he said that Mr Sandhu told him to go home and wait to be called. Mr Sandhu’s evidence to the Tribunal was that nothing of the kind had occurred.

31. Mr Mathew was next due to work on 13 August and the days following. It was his evidence that he phoned the company repeatedly on 13 and 14 August to find out whether he should come in but could not get through: the Tribunal however did not accept that evidence, observing that it did not find him a credible witness. On 15 August he went to Heathrow West to present himself for work and was told that he could not come in. He understood that as a dismissal and the Tribunal held that he was entitled to do so.

32. On 18 August the company wrote to Mr Mathew recording that he had been absent without leave and had made no contact with the management; and, further, that he had been

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seen on the picket line, which it described as “a form of industrial action that is illegal”. The letter purported to dismiss him with immediate effect “for taking part in illegal industrial action”. In fact, on the Tribunal’s findings Mr Mathew had already been dismissed three days earlier; but the letter nevertheless served as a formal confirmation, and it offered a right of appeal. Mr Mathew did not receive that letter until 28 August, because he was away. By that time the deadline for an appeal had passed; but Mr Mathew did not approach the company to ask for an extension (which the Tribunal found would have been granted if sought).

33. Paras. 99-104 of the Reasons read as follows:

- “99 When was the claimant dismissed? We are satisfied that as someone who has spoken to Human Resources i.e. someone with ostensible authority to deal with employment status, as opposed to security, and been advised that he cannot come in, Mr Matthew was entitled to conclude from the behaviour of his employer his employment had terminated. However as at that point he was endeavouring to attend work, he was not at that point participating in unofficial industrial action such that he is precluded from pursuing a claim of unfair dismissal.**
- 100 The respondents argue that if there is jurisdiction to consider the claims the employer is entitled to take into account the conduct demonstrated by an employee in order to decide that for a reason as set out in Section 98(2) of the Employment Rights Act 1996 that this is gross misconduct such that an employee might be dismissed.**
- 101 It is clear from nearly all the claims before the Tribunal where subsequent letters have been sent out that the company is adopting the modified procedure of the DDP. The Tribunal is satisfied that given the very strange circumstances in which Gate Gourmet found themselves this was a reasonable approach to adopt when considering reg. 3 (2) of the Dispute Resolution Regulations 2004. The circumstances were so overwhelming and urgent that summary dismissal was required but that an appeal should be arranged.**
- 102 We are therefore satisfied that the letter shown at 701 of the 18 August in which Mr Matthew is advised formally of his dismissal complies with the modified procedure and he is offered a right of appeal.**
- 103 The letter of dismissal was sent to Mr Matthew at the last know address but for personal reasons he was not at the address and did not receive the formal notification of dismissal until the 28 August 2005 which was after the date shown for appeal. However he made no**

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**attempt whatsoever to contact the company with a view to appealing. Had he done so in a short space of time we are satisfied that Gate Gourmet would have given him the opportunity for such an appeal. There is no evidence that people who tried to appeal shortly outside the time scale were refused albeit there is evidence that those who waited some months to do so were refused.**

**104 We did not find Mr Matthew to be a credible witness. He said that he tried to ring twenty times but never got through. We have heard from a number of claimants who have also had difficulties getting through but on almost every occasion where they have persisted they have managed to get through and/or produce telephone records to show those contacts. Mr Matthew is a shop steward. He surely would know to seek advice from the Trade Union about what had happened to him on the 13 August. Mr Matthew presented as a witness who took advantage of the situation to stay at home because he was supporting the strike. He did attend for work and therefore was entitled to pursue a claim but in the circumstances the respondents had a fair reason for dismissing him because of his conduct and dealt with it in a fair manner. The dismissal is therefore fair.”**

34. The reasoning in those paragraphs is not at all points very well signposted, and on some aspects it is very compressed. But it can be analysed as follows:

- (1) The first question was whether the Tribunal’s jurisdiction was debarred by s. 237. That is addressed at para. 99, where the Tribunal holds that since Mr Mathew was dismissed when presenting himself for work (see para. 30 above) he was not at the material time taking part in industrial action, so that the Tribunal’s jurisdiction was not excluded. That seems plainly correct and there is in any event no cross-appeal.
- (2) The next question in the logical sequence is whether the dismissal was “automatically” unfair under s. 98A (1) of the 1996 Act by reason of non-compliance with the statutory dismissal procedure. The Tribunal addresses that at paras. 101-103. It holds (a) that the modified procedure applied (para. 101) and (b) that it was complied with (paras. 102-3). Element (b) is self-explanatory and not contentious. Element (a) requires the Tribunal

to have found (see para. 12 above) (i) that Mr Mathew had in fact participated in industrial action; (ii) that that participation justified summary dismissal; and (iii) that it was reasonable to dismiss him without inquiry. As to (i), there is no explicit finding to this effect; but we think it is clear from the Reasons read as a whole (esp. para. 104) that the Tribunal intended so to find, and Mr Hogarth did not argue otherwise. (It seems, however, that the finding related only to participation by non-attendance: the company adduced no evidence to support the allegation made in the letter of 18 August that Mr Mathew had attended on the picket line.) As to (ii), this too is not expressly addressed, but the Tribunal appears to have regarded it as self-evident that participation in industrial action justified summary dismissal: we consider below whether it was right to do so. As to (iii), this – i.e. the question raised by reg. 3 (d) of the 2004 Regulations – is the only point expressly addressed in para. 101. The reasoning is summary; but the basic point made is that in the circumstances of mass industrial action, which was causing enormous disruption to the company’s business and required an immediate and firm response, a general policy of dismissing everyone who was absent without leave or explanation and trying to sort out the exceptional cases of genuine non-participation by way of an appeal process was reasonable. (The company’s own contemporary explanation of why it took that course is in fact apparent from the terms of the standard letter to which we refer in Mr Sehmi’s case: see para. 58 below.)

- (3) On that basis the remaining question is whether the dismissal was unfair according to the ordinary criteria in s. 98 of the 1996 Act. There is no real discussion of this question in the Reasons. But the Tribunal does plainly state at the end of para. 104 (a) that this was a dismissal for misconduct – which must in context mean dismissal for unauthorised absence, constituting participation in industrial action – and (b) that

dismissal for that reason was fair, thus covering the essential issues raised by s. 98 (2) and s. 98 (4).

35. The grounds of Mr Mathew's appeal against that reasoning were something of a moving target. As pleaded in the Amended Notice of Appeal, they read as follows:

**“[a] The tribunal should have concluded that the statutory scheme under s. 237 and 238 of the TULRA is a complete scheme and that participation in industrial action does not amount to gross misconduct.**

**[b] Further, the tribunal appear to have lost sight of the fact that about one half of all those dismissed for taking part in industrial action were in fact re-instated.**

**[c] In order to conclude that an employee was guilty of gross misconduct the tribunal needed to make specific findings as to exactly what Mr Mathew had done, something they singularly failed to do, rather concluding that any employee participating in any industrial action was guilty of gross misconduct. If this conclusion was correct it would render otiose the provision of s.237 and 238 of TULRA.”**

In Mr Hogarth's skeleton argument the essential submission was formulated as being that “an employee taking part in a strike is not guilty of gross misconduct” – “gross misconduct” apparently being used in the sense of conduct such as would constitute a fundamental breach of contract justifying summary dismissal. Mr Hogarth recognised that that proposition was contrary to the decision in **Simmons v Hoover Ltd.** [1977] ICR 61, but he submitted that that decision must be treated as having been superseded by the effect of the industrial relations legislation of the 1980s and/or the incorporation into domestic law of art. 11 of the European Convention of Human Rights. However Mr Bowers pointed out that the essential question in the present case was not about misconduct in the contractual sense but about whether Mr Mathew's conduct in taking part in industrial action was such that dismissal was a reasonable sanction for the purpose of s. 98 of the 1996 Act; and by the time of his reply Mr Hogarth had

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accepted that there was only “one issue: was Mr Mathew’s conduct in keeping his head down for two days sufficiently serious to merit dismissal?”.

36. We agree that (subject to para. 38 below) the essential issue is not one of contract, though no doubt in most cases conduct which would justify summary dismissal would also justify dismissal for the purposes of s. 98 (4) and *vice versa*. Properly stated, the question is whether the Tribunal was entitled to find that it was within the range of reasonable responses for the company to dismiss Mr Mathew for taking part in industrial action by absenting himself without leave over two (or three) consecutive shifts. In our view the answer to that question is straightforward. We do not say that the withdrawal by an employee of his labour, even if it is in breach of contract, will necessarily and in every conceivable circumstance justify the sanction of dismissal. But in a case, such as the present, where large numbers of employees deliberately absent themselves from work, in a manner which is plainly liable to do serious damage to the employer’s business, it seems to us plain beyond argument that dismissal of those taking part in the action will be within the range of reasonable responses, even where the absence is (as in Mr Mathew’s case) not very prolonged. (If the action had the support of a ballot the position would of course be different because of the effect of s. 238A – see para. 11 above; but we are not concerned with that situation here.) Mr Hogarth did not develop the contention in the Notice of Appeal that such a conclusion was inconsistent with the statutory scheme, but for the avoidance of doubt we reject it: the fact that Parliament excluded certain types of dismissal related to industrial action from the jurisdiction of the tribunal does not imply any view on the necessary outcome of claims where jurisdiction remained.

37. That disposes of the pleaded grounds of appeal. But we should briefly mention two other points.

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38. First, although the question whether the company was, as a matter of contract, entitled summarily to dismiss Mr Mathew for participating in individual action is strictly irrelevant to the issue of fairness under s. 98, it still potentially arises in connection with the applicability of the modified procedure: see para. 12 above. We did not understand Mr Hogarth to be taking any point on this before us, or indeed to have done so before the Tribunal. But in case we misunderstood him, we should say that the facts as found by the Tribunal (see para. 33 (2) above) did indeed constitute a fundamental breach of contract on the part of Mr Mathew justifying dismissal without notice. We were wholly unpersuaded by his submission that **Simmons v Hoover** is no longer good law. There is nothing in the legislative developments since 1976 which affects the basic proposition endorsed in that case that at common law an employer is entitled summarily to dismiss an employee who refuses to work. Nor does the case-law of the ECHR (or indeed the ECJ) support the proposition that the very qualified “right to strike” which it may be said to recognise deprives employers of the right to dismiss employees participating in industrial action at least of the kind which took place in the present case.

39. Secondly, Mr Hogarth included in his skeleton argument, though he did not develop orally, a submission that in the case of an employee returning to work after (alleged) participation in industrial action it was unfair on ordinary s. 98 principles to proceed to dismissal “without any form of hearing or any examination of the circumstances”. We do not accept that there is any universal rule to that effect. It is recognised that there are circumstances – albeit no doubt exceptional – where dismissal “on the spot” may be justified: the classic example is that given by Lawton LJ in **Bailey v BP Oil (Kent Refinery) Ltd.** [1980] ICR 642, at p. 648 C-D, (approved by Lord Mackay LC in **Polkey v A. E. Dayton Services Ltd.** [1988]

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ICR 142, at pp. 156 E-F and 157 A-B). We have no difficulty in accepting that the instant dismissal of an employee in the course of overt participation in industrial action could be such a case (though the overlay of ss. 237-238A means that the question would rarely fall for decision). The present case is different because Mr Mathew was dismissed at the moment that, by presenting himself for work, he brought his participation to an end. But we do not think that that necessarily makes a decisive difference. The question whether fairness in such a case requires a hearing and possible further examination prior to dismissal is fact-sensitive. The Tribunal clearly believed that it was reasonable for the company in Mr Mathew's case to do no more than was required under the modified procedure – i.e. to dismiss summarily but offer an appeal. That might not be adequate in every case; but even if the point had been properly raised before us we doubt if we would have held that the Tribunal's conclusion was not open to it.

40. Accordingly Mr Mathew's appeal must be dismissed.

## **DHILLON**

### **THE FACTS**

41. Mrs Dhillon (who is not related to Mr Dhillon, the TGWU convenor) worked at Heathrow West. She worked normally on 10 August. She was next due to work on 12 August and the days following. She did not do so. It was her evidence that she attended on 12 August but her swipe card did not work and the security guards sent her away, and that when she returned on 13 August she was deterred from going into work by the sight of other women being sent away in evident distress. She said that on 14 August she went to the picket line in order to find her union representatives and find out what was happening. They told her that

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negotiations were going on in order to sort things out, so she stayed away from work on the assumption that all would be resolved shortly. On 18 August she was sent a letter which, like Mr Mathew's, recorded that she had been absent without leave and without contacting the company and that she had been "positively identified attending with the pickets"; it went on to dismiss her with immediate effect "for taking part in illegal industrial action". The letter offered her a right of appeal but she did not take it up.

42. Unlike in the case of Mr Mathew, the company advanced at the hearing a positive case that Mrs Dhillon had, as alleged in the dismissal letter, joined the picket line. It relied on a short statement by a Mr Bhatti, dated 17 August, that he had "personally seen and identified the following individuals absent without leave as described on the attached sheet": the sheet had an entry against Mrs Dhillon's name which simply gave a date, 11 August, and the location "near car park". Mr Bhatti did not give oral evidence at the Tribunal.

#### THE TRIBUNAL'S DECISION

43. The paragraphs of the Reasons containing the Tribunal's reasoning and conclusion in Mrs Dhillon's case read as follows:

**"151 The respondents argue in relation to Mrs Dhillon that she was not notified that she was dismissed until the 18 August 2005. The arrangements at West were that there were some security people present. They would not have prevented the claimant from attending work as the statement by Mr Bhatti that he had identified the claimant as picketing including picketing on the 11 August was not signed by him until the 17 August. The position therefore for the respondents is they deny that the claimant was turned away by security, they do not accept that her swipe card did not work as there is no evidence to support that.**

**152 She was dismissed by letter dated 18 August which identified that she had been taking part in the picket which was part of the**

**unlawful industrial action. The respondents followed the modified procedure of the DDP.**

- 153 The Tribunal was satisfied that the respondent had evidence that Mrs Dhillon was participating in the picketing. Mr Bhatti had signed a document. They were entitled to base a conclusion on that.**
- 154 In their submissions the respondents draw the Tribunal's attention to the fact that in her original claim Mrs Dhillon makes no reference to the fact that she was turned away security on the 12 August nor that her swipe card did not work. Given that this has been a constant theme for claimants in this matter the Tribunal has to have concern that the claimant has embellished her version of events specifically for this hearing.**
- 155 The Tribunal did not find her a persuasive witness. The Tribunal was advised by her Counsel that her English was adequate to give evidence without an interpreter. She went out of her way to retain the services of the interpreter who had already been discharged by the Tribunal. It was apparent from her evidence that she in fact did have a good command of English as frequently she answered the question in English prior to the interpreter having translated it.**
- 156 In the circumstances the Tribunal concluded that Mrs Dhillon was not a truthful witness. She had failed to attend work on a number of days during which time she was observed participating in the strike action. The respondents fairly dismissed her for that action using the modified procedure. She failed to appeal against the dismissal. The respondent was entitled, based on the information they had, to reach the view they did. Dismissal was within the band of reasonable responses."**

(We take this opportunity to note in passing that the point made by the Tribunal at para. 155 is one which should only with some caution be taken against a witness. It is not always sinister that a person who speaks English quite well but for whom it is not a first language should wish to have the assistance of an interpreter in court or tribunal proceedings. But it does not follow that it was wrong of the Tribunal to reach the conclusion that it did in this particular case, and a ground of appeal taking this point was dismissed at a preliminary hearing of this appeal.)

## SUBMISSIONS AND CONCLUSION

44. Mr Hogarth submitted that the Tribunal's reasoning is wholly unclear and fundamentally flawed. His basic point is that there is a mismatch between its assumption of jurisdiction and its express or implied findings of fact. It is quite clear from the terms of the passage as a whole, and in particular from para. 156 which contains its ultimate conclusion, that the Tribunal did not decide Mrs Dhillon's case on the basis of s. 237 but proceeded on the basis that it had jurisdiction to consider her claim of unfair dismissal: that is indeed confirmed by the terms of the formal judgment, which records that Mrs Dhillon was "fairly dismissed". It must logically follow that the Tribunal did not find that she was taking part in industrial action at the date of her dismissal, which the Tribunal found to be 18 August (see para. 152). Yet if that is so there are difficulties in understanding the balance of the Tribunal's reasoning. Specifically:

- (1) The first two sentences of para. 156 seem to go beyond a finding merely that the company was entitled to believe that Mrs Dhillon had taken part in industrial action and to constitute a finding by the Tribunal itself that she had done so – both by attendance on the picket line and by her non-attendance at work. The latter at least would appear to constitute ongoing participation as at 18 August.
- (2) In a "sweep-up" paragraph at the end of the Reasons, para. 206, the Tribunal said this:

**"For the avoidance of doubt, in all the cases where we have found that an employee was reasonably dismissed for gross misconduct based, inter alia, on their involvement in the industrial action, we have found that they were so participating."**

(3) The Tribunal referred at para. 152 to the company having followed the modified dismissal procedure under the 2002 Act. Since it held the dismissal to have been fair it must have believed that Mrs Dhillon had indeed committed conduct justifying summary dismissal: see para. 12 above. The passage does not expressly identify the conduct in question, but the only relevant conduct was participation in industrial action. The Tribunal's failure to address this point may have been venial since it is far from clear to us, from a careful perusal of the written submissions below, that either party addressed the Tribunal on the details of the requirements of reg. 3 (c). Nevertheless the question of the application of the statutory procedures was clearly in issue; and it was not contended before us that any point on reg. 3 should be regarded as a new point.

As regards points (2) and (3), it is true that in principle a finding that Mrs Dhillon had participated in industrial action does not mean that she was doing so as at the date of her dismissal, i.e. on 18 August. But the only forms of participation alleged were (a) her attendance on the picket line and (b) her non-attendance for work, and the latter at least was ongoing as at 18 August.

45. Mr Hogarth is plainly right that there are confusions in the Tribunal's expressed reasoning. But we do not believe that it would be right to allow the appeal simply on the basis that on the logic of its apparent reasoning the Tribunal ought to have declined jurisdiction. Any error in that regard was in Mrs Dhillon's favour. The real question is whether the confusions relied on undermine the basis on which the Tribunal actually decided the case. We do not believe that they do. The Tribunal's reasoning is undoubtedly, as Mr Bowers conceded, very compressed; but it nonetheless contains a clear and explicit decision on each of the essential

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questions, and its reasons for those decisions are in our judgment sufficiently apparent (at least when read in the light of the somewhat fuller treatment of equivalent questions elsewhere in the Reasons). We analyse the position as follows.

46. First, the Tribunal holds (see para. 156) that the company was entitled to use the modified statutory dismissal procedure. That conclusion involves the same three elements as identified in Mr Mathew's case – see para. 34 (2) above – (i) that Mrs Dhillon was participating in industrial action; (ii) that the company was entitled summarily to dismiss her for doing so; and (iii) that it was reasonable to do so without inquiry. The Amended Notice of Appeal asserts that “the statutory dismissal procedure” was not followed – see ground 14 – but it does not give any reasons for that assertion, and the point was not developed in Mr Hogarth's skeleton or oral submissions. Nevertheless, we should briefly address the issue. As regards elements (i) and (ii), the Tribunal does indeed appear to have found that Mrs Dhillon was participating in industrial action, and we have already held that doing so was in the circumstances of the present case a fundamental breach of contract justifying summary dismissal. The finding of participation is sufficiently reasoned and was in our view open to the Tribunal: if it had depended only on Mr Bhatti's note, we might have taken a different view, but it did not – it also relied on Mrs Dhillon's non-attendance at work. As regards (iii), this question is not addressed specifically in relation to Mrs Dhillon; but the Tribunal had already held in relation to Mr Mathew's case (see para. 101 quoted at para. 33 above) that “the circumstances were so overwhelming and urgent that summary dismissal was required” (subject to a right of appeal). That reasoning is plainly of general application, and it was, if anything, stronger in Mrs Dhillon's case because she had not, on the Tribunal's findings, attempted to return to work.

47. The next question is what was the reason for the dismissal. This is not contentious. The company plainly dismissed Mrs Dhillon because it believed that she had been participating in industrial action by absenting herself without authorisation or explanation.

48. The final question is whether it was reasonable for the company to have dismissed Mrs Dhillon for that reason, applying the ordinary criteria of s. 98 (4). Again, there is in fact no challenge to this aspect of the decision in the Amended Notice of Appeal – ground 14, referred to above, appears to challenge only the alleged failure to comply with the statutory minimum procedures; but the point was, at least arguably raised in Mr Hogarth’s skeleton argument, though not developed orally. We repeat our observations at para. 39, which indeed apply rather more strongly in Mrs Dhillon’s case. Mrs Dhillon had, on the Tribunal’s findings, been absent without leave following the start of the industrial action and was believed to have been seen on the picket line. She was dismissed at a time, therefore, when the company believed that it had positive evidence of her active participation in industrial action. We can see no error of law in the Tribunal’s evident conclusion that the requirements of fairness for the purpose of s. 98 (4) were satisfied by the company applying the statutory modified procedure.

49. Accordingly, we dismiss Mrs Dhillon’s appeal.

## **BEGUM**

### **THE FACTS**

50. The story of Mrs Begum’s dismissal and subsequent appeal is a complicated one. It is not necessary that we set it out in every detail. The key points are as follows:

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- (1) Mrs Begum was employed in the EP Department at Heathrow South. She was working on 10 August, but it is not suggested that she took part in the industrial action on that day.
- (2) She was not due to work again, because of a combination of lieu days, non-rostered days and annual leave, until 25 August.
- (3) She did not come into work on 26 August, which was her first day back, or thereafter. It was her case that she became ill shortly before she was due to return to work and that her daughter phoned in on the evening of 25 August to say that she would be unable to attend the following day. The company's sick pay policy allowed "self-certification" for a maximum of seven days; but Mrs Begum did not return to work on 1 September or submit a certificate.
- (4) On 5 September the company wrote to Mrs Begum suspending her for unauthorised absence and inviting her to a disciplinary meeting on 12 September. (It was evidently - and rightly - no longer following the practice of "shoot first and ask questions later" adopted in the immediate aftermath of 10 August.) A further letter was sent on 8 September enclosing a "suspension form", which (wrongly) showed her as having been absent from 12 August rather than 26 August.
- (5) It was not until 9 September that Mrs Begum sent in, by recorded delivery, a certificate from her GP signing her off work for six weeks for what was described as "low back

pain/general disability [probably a slip for debility]”. The Tribunal observed at para. 188 of the Reasons that it felt:

**“... a degree of cynicism that the medical certificate was only obtained after Mrs Begum was put on notice that she was to be disciplined for her absence.”**

- (6) The hearing fixed for 12 September was adjourned to 28 September. It is not clear exactly what information the company had at the hearing, but there is an internal document which suggests, and (reasonably) the Tribunal inferred, that it was aware that Mrs Begum had provided a sick certificate covering the period from 9 September. However, it had apparently lost the document itself, and Mrs Begum said that she would fax a copy of it following the hearing. Mrs Begum explained that her absences up to 25 August had been authorised. At the conclusion of the hearing the company said that it wished to make some further inquiries (as well, of course, as awaiting the copy of the doctor’s certificate).
- (7) It was the company’s evidence that Mrs Begum never sent the certificate of 9 September following the hearing. But the Tribunal found that she did send a copy, by fax; and it was critical of the company for persisting in its denial even when presented with clear evidence which undermined its case. It is however clear that the re-sent certificate either never reached the relevant person or, if it did so, was subsequently lost.
- (8) On 12 October the company wrote to Mrs Begum dismissing her for unauthorised absence. The letter referred to “the length of your absence and the opportunities to you to maintain proper contact with the company”. It did not specify the length of the period of absence relied on. However, the position about the period from 11–25 August had been

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explained by Mrs Begum, and an internal note from the company shows that the period in respect of which they felt they still needed an explanation was from 26 August to 8 September.

- (9) Mrs Begum appealed against the decision to dismiss her. A hearing took place on 14 December 2005. It is clear that the company did not have access to the full records relating to the period from 11 August onwards. Not only were they not able to confirm that Mrs Begum's absence for the first two weeks was authorised (something which they had previously appeared to accept), but they had managed to lose the further copy of the sick note of 9 September which Mrs Begum had sent to them by fax (see (7) above). It was agreed that the HR department would check the position and would if necessary obtain copies from Mrs Begum of any missing documents.
- (10) There was then a long, and quite unwarranted, delay on the part of the company, culminating in an invitation to Mrs Begum to attend a further meeting on 31 March 2006 "for clarification over the circumstances of your dismissal". By that time Mrs Begum had already commenced tribunal proceedings. At that meeting she again confirmed that her absence from 11–25 August was authorised and that she had been sick thereafter. She said that she had provided sick notes. The company said that they did not have them and asked her to send them again. This request was confirmed in a letter of the same date asking her to provide "annual leave forms, medical certificates and lieu day authorisation forms" by no later than 5 April.
- (11) It appears that by this time Mrs Begum had given all her relevant documents to her solicitor, O.H. Parsons & Partners. She told the company that she had asked O.H.

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Parsons to send them on. By letter dated 7 April 2006 they wrote to the company's solicitors declining, in effect, to provide any documents and saying that anything relevant would be provided in the course of disclosure in the proceedings. Mr Hogarth accepted that that was not a proper response: there had plainly been a misunderstanding between Mrs Begum and her solicitors as to the purpose of the request.

(12) On 27 April 2006 the company wrote to Mrs Begum in the following terms:

**"I write further to your appeal against dismissal.**

**At your disciplinary hearing and your subsequent appeal against dismissal on the 14 December 2005 you gave an account of your absence from the 11 August up to 10 October, including a period of annual leave and six weeks of sickness absence. However since you have been unable to provide medical certificates for your sickness absence the company dismissed you for being absent without leave.**

**At your appeal hearing, you maintained that you had in fact sent in all of your medical certificates. However, investigations following your appeal showed that you had not provided medical certificates. Further there is no record of holiday leave having been approved. Shortly after the appeal hearing, attempts were made by HR by telephone to contact you to request re-submission of sick certificates. However, the telephone numbers on record turned out to be incorrect.**

**You were then contacted later on and a further appeal meeting was set up for 31 March 2006 which you attended. You confirmed that you would provide evidence of sickness absence and holiday forms. On the 31 March 2006 you were written to again to inform you that the necessary evidence had to be submitted by 5 April.**

**Despite the passage of time and repeated requests/attempts to obtain evidence to substantiate your long periods of absence, you have still not provided any evidence to explain your absence.**

**In the circumstances, I have no alternative but to conclude that over the relevant periods, you were absent without leave and therefore guilty of gross misconduct.**

**In the circumstances of the events of the 10/11 August 2005 and subsequently, I cannot rule out the possibility that you have been taking parting in industrial action.**

**For these reasons, I see no grounds to overturn your dismissal and the company's decision must therefore stand."**

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(13) Shortly afterwards O.H. Parsons realised, belatedly, what had happened. On 10 May 2006 they sent the company a copy of the GP's certificate dated 9 September 2005. But by this time the company was not prepared to consider matters further. It should be noted that the photocopy of the certificate supplied on that occasion has a manuscript note (not, we think, added by O. H. Parsons) claiming that the effect of the certificate is to confirm that Mrs Begum had been sick since 26 August. That is wrong. The certificate does not purport to be retrospective.

51. Although we have, with the assistance of the Tribunal's findings and the explanations of counsel, been able to construct a (we hope) reasonably clear narrative, we should record that the position was very much less clear at the hearing. The company provided some disclosure but continued to be unable to find contemporary documents which it must once have had. Mrs Begum did not help matters by not producing most of the documents which were essential to her case until the start of the hearing – and a copy of the medical certificate of 9 September as faxed (and certification for later periods) was not produced until the day that she was due to give evidence. No-one comes well out of this story. The failings on the part of the company are the more reprehensible, since it should have had reliable systems for filing documents; but allowance must no doubt be made for the enormous disruption caused by the industrial action and its aftermath.

#### THE TRIBUNAL'S REASONS

52. The Tribunal set out the facts, essentially as we have done. Its conclusion and the reasons for it appear at paras. 187-190 as follows:

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- “187 The Tribunal has considered the time frame for the absences involved. There is no self-certification completed for the period from the 25 August 2005 although it appears to be accepted by Mr Ballingall that Mrs Begum’s daughter did ring in to say she was sick. On the basis that self-certification is for seven days that would expire on the 1 September. On Mrs Begum’s own evidence she is absent without leave for a period of eight days, namely the 1-9 September. She had tried to argue that she has a backdated certificate from her doctor but there is nothing to support that. It runs from the 9 September for six weeks and that six weeks goes forward.**
- 188 The Tribunal also notes with a degree of cynicism that the medical certificate was only obtained after Mrs Begum was put on notice that she was to be disciplined for her absence.**
- 189 The Tribunal is satisfied that given the circumstances of the enormous number of absences that were unauthorised during the time of the unofficial industrial action, it was not unreasonable for the employer in those circumstances to conclude Mrs Begum was absent without leave and she then sought to cover this up by her sickness explanation.**
- 190 The respondents have not covered themselves in glory in the way they have dealt with the matter particularly in defending the indefensible in relation to the fax number and quite clearly having mislaid documents. However they did give Mrs Begum every opportunity at each hearing to send in documentation. They admitted not having the documentation and asked her to provide it again which she did not. Her endeavour to do so was impeded by her Solicitors but that in our view ultimately made no difference as the respondents were entitled to dismiss her in the circumstances they did and therefore her dismissal is fair.”**

## SUBMISSIONS AND CONCLUSION

53. Mr Hogarth’s submission was, in essence, that it cannot have been reasonable for the company to reach the conclusion identified in para. 189 of the Reasons when the only basis for that conclusion was the absence of medical evidence which Mrs Begum had twice supplied and which the company had twice lost; and accordingly that the Tribunal’s finding of reasonableness was perverse. Mr Bowers responds that, unimpressive though aspects of the company’s handling of the matter no doubt were, that is ultimately a red herring. The fact was that Mrs Begum had never supplied, and was not in a position to supply, any objective evidence that she was prevented by sickness from working in the period between 26 August and 8

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September: even if the company had never lost the certificate of 9 September, it would not have helped her because it did not cover that period.

54. In our view the Tribunal was entitled to hold that the company had acted reasonably in dismissing Mrs Begum. It is important to focus first on the original decision dated 18 October 2005. Because it is not known when the certificate was lost, it is not clear whether the person taking the decision had had sight of the certificate of 9 September as faxed by Mrs Begum; but the point is not crucial since it appears from the internal document referred to at para. 50 (6) above that the company was at that point aware both (a) that Mrs Begum's absence from 11-25 August was authorised and (b) that she had a certificate for the period from 9 September. Accordingly the reason for that original dismissal decision must have focused on Mrs Begum's absence in the period between 26 August and 8 September. Whether a dismissal for that reason was, in the circumstances of Mrs Begum's case, within the range of reasonable responses was quintessentially a matter for the Tribunal as an industrial jury. We cannot say that its decision was perverse. It was well aware, and appropriately critical, of the company's failings; but it was entitled not to regard those as determinative of the issue of fairness. Its decision may seem stern, but it was clear from the evidence before the Tribunal that the company had a serious problem of absence without leave (even apart from the special circumstances of August/September 2005) and that in consequence its absence policy was, and was known to be, strict. The Employment Tribunal was well placed to judge whether the policy, and its application in this particular case, was unreasonably strict.

55. If the Tribunal was entitled to hold that the company's original decision to dismiss was reasonable, we do not believe that it was obliged to hold that the fairness of the dismissal overall was vitiated by the handling of the appeal procedure. It is of course bad that the

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company was unable to lay its hands on the relevant documents at either the original appeal hearing or the subsequent “clarification” hearing; but it acted appropriately by asking Mrs Begum to supply those documents, and we cannot see that it was unreasonable to uphold the original decision when, having been clearly warned of their importance, she failed to produce them. And of course, as Mr Bowers observes, even if they had been produced they would not have covered the initial two weeks of her unauthorised absence.

56. We accordingly dismiss Mrs Begum’s appeal.

## **SEHMI**

### **THE FACTS**

57. Mr Sehmi was employed at Heathrow South. He was a TGWU shop steward. On 27 July 2005 the company authorised him to take unpaid leave of absence (to attend a funeral in India) from 2-12 August, so that his first day back would be 13 August. Accordingly Mr Sehmi was not at work on 10 August, the day that the industrial action started. Notwithstanding his absence, he was sent a letter dated 10 August purporting “to confirm that you were dismissed at approximately 11:00 hours this morning for participating in un-balloted industrial action”. After dealing with various formal matters, the letter concluded:

**“As you were not on the company premises when the industrial action was taking place, the company will allow you the right to appeal against your dismissal. If you wish to appeal, you should do so within 7 days of the date of this letter.”**

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The reference to Mr Sehmi not being on the company premises when the industrial action was taking place is a little difficult to reconcile with the statement that he was dismissed at 11 a.m, but nothing turns on this for present purposes: the letter of 10 August was clearly in standard form and produced in haste.

58. The company sought to explain its position in a further letter sent on 12 August. This read:

**“I refer to my letter of 10<sup>th</sup> August. I now write to explain the circumstances surrounding your dismissal and to explain how you should exercise your right of appeal and be re-instated.**

**As you may be aware, employees at GGHS took part in industrial action on 10<sup>th</sup> August. No ballot over the action took place and so it was unlawful. Despite warnings to those on shift participating in the action to return to normal working, the action continued. In the circumstances, the company was given no alternative but to dismiss all those taking part.**

**A number of employees, including yourself, were absent from work for a variety of reasons. In the interests of fairness to all, however, it could not be assumed that those absent were not also taking part in the action. You will understand that it was difficult to contact each and every person away from work. Every effort was made to do so. With the exception of those who we were able to contact by telephone, and from whom we obtained confirmation that they were not taking part in the action, all those absent from shift (for whatever reason) were summarily dismissed together with the others.**

**You may appeal against your dismissal only if you did not take part in the industrial action on the 10<sup>th</sup> August. There is no need to go through a formal appeal procedure. If you sign and date the attached declaration and return it to HR, you will be re-instated with immediate effect. You will be contacted by your department, when you are next requested on shift. In that event, your dismissal will in no way affect your pay or continuous employment with the company. Further, the dismissal will not form part of your employment record.**

**I look forward to hearing from you as a matter of some urgency.”**

The declaration which Mr Sehmi was invited to sign read:

**“I confirm that I did not, in any way, take part in the industrial action referred to in the attached letter and which took place on Wednesday 10 August 2005.”**

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Mr Sehmi did not get that letter straightaway since he had recently moved house (without notifying the company of his new address), but the Tribunal found that he received it on 18 August.

59. It was Mr Sehmi's case before the Tribunal that he duly attended for work on his first day back, 13 August, but was turned away by three managers. On 15 August he wrote to the company to complain. His letter, which was received on 19 August, said:

**“With due respect I want to complain that on 13 Aug. 05 I was not allowed to get in the company as I was coming back to work after my holidays. Mr Kuldip Johan, Mr Jaz [Oghara], EP Manager and Mr Chris [Johal] GM was there and they took my ID as well.**

**I explained them that I am not striker but they said we had wrote you a letter. I said I could not find any letter. Then they said give us time, we will call you in and interview you. Next day I ring up EP office. Mr Sharma talk to me and he passed phone to Mr Kuldip Johan. He again said “give me time I will let you know”. On 12 Aug. 05 at 9 pm approx. I left message on no 6140 EP phone that I am coming early shift if there is any change please let me know. But what is surprising me is what is my fault? Why was I stopped.**

**Even today I am hanging. If I am sack then OK. There is one end way.**

**Could you please let me know or arrange a meeting to discuss the matter.**

**I shall be thankful to you.”**

60. When he wrote that letter (which was not received by the company until 19 August) Mr Sehmi had not of course received the company's two letters. When, however, he did so, on 18 August, he wrote a letter dated 19 August in the following terms:

**“Please accept this letter as my official appeal request against the decision to dismiss me from my employment at Gate Gourmet.**

**At my appeal, I shall be represented by Mr Oliver Richardson, Transport and General Workers Union. May I please request that you liaise with him for a suitable date and time.”**

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Unfortunately his signature was illegible and the address which he gave, being his new address, could not be recognised by the company. Accordingly it had no idea who had sent it and could not take any action on it. (We should say that this particular point was not made in argument before us; but it seems clear from the face of the documents.)

61. It was accepted by Mr Sehmi that following his return from India he attended on several occasions on the picket line. The Tribunal found as follows:

- “196 Mr Sehmi accepts that he attended the picket line. He said that he went to wait on the picket line as he was waiting for Mr Snow to call him and he stayed with his colleagues. He further agreed that he used to go to the picket line to get information.**
- 197 The implication of Mr Sehmi’s acknowledgement of his attending on a regular basis at the picket line is that he was participating in the industrial action at that time it was more than just a passing exchange of words. He was associating himself with the picket line.”**

Those paragraphs contain no finding about dates, though it might be reasonable to assume that the attendance in question first occurred within a day or two of Mr Sehmi’s return, since it would be then that he most needed to know what was going on – and all the more so if, as he claimed, he had been turned away from work on 13 August. (Mr Bowers told us that his instructing solicitors’ note of the evidence shows that Mr Sehmi accepted that he attended every other day, including “certainly” on the 13<sup>th</sup> and “perhaps” on the 15<sup>th</sup>; but Mr Hogarth, not having appeared for Mr Sehmi below, was not in a position to confirm that.)

62. Although the company did not respond to Mr Sehmi’s letter of 19 August (see para. 60 above), since it did not know who it was from, it did on 30 August reply to his letter of 15 August (see para. 59) in the following terms:

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**“I refer to your letter received on 19 August 2005.**

**I note that you were on unpaid leave from 2 to 12 August 2005 and that you reported for duty on 13 August 2005. There is some doubt as to whether you received our letters of 10 or 12 August 2005 concerning the industrial action that took place on 10 August 2005. I see that you have changed address.**

**Your letter however, does not make clear whether or not you took part in industrial action that took place on 10 August 2005 and I attach a further copy of the declaration that you are asked to sign and return it immediately, if you did not take part.**

**It will not be possible for us to consider reinstatement until it is clear whether you took part in the industrial action on 10 August. Importantly, whilst you reported for duty on 13 August you have also been observed taking part in picketing near GGHS. There is therefore reason to believe that you have been taking part in picketing in support of un-balloted industrial action at times when you should have been at work.**

**In the circumstances, your dismissal must stand pending an appeal hearing, should we wish to appeal against your dismissal. At the meeting, you may be accompanied by a union representative or work colleague (provided they have not been dismissed for taking part in illegal industrial action). As you are a union representative, I suggest that you arrange to be accompanied by a full time union official.”**

The attached form was the same as that sent with the company's earlier letter of 12 August. On this occasion Mr Sehmi completed the form promptly and returned it to the company on 1 September. He did not, however, respond to the implied invitation to lodge an appeal, presumably because he believed that he had already done so (see para. 60 above).

63. Mr Sehmi heard nothing further from the company. That was not surprising from its point of view, since although it had received the form confirming that Mr Sehmi had not been taking part in the industrial action on 10 August it was not conscious of having received any request for an appeal. But obviously it troubled Mr Sehmi. On 15 September he wrote stating again that he had taken no part in any industrial action and saying that he was “still waiting for your call”. He said, however, that he was about to leave for India and would not be returning until 16 November. He said that communications to him in this country would not be

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forwarded but that he would try to give the company a mobile number in India “if you will like to talk to me”. On his return from India two months later Mr Sehmi wrote two further letters reiterating his case and asking what was happening: the first letter appears to be undated but was received by the company on 5 December 2005, and the second was dated 18 January 2006. The company replied to the second of those letters on 10 March 2006 saying that Mr Sehmi had been offered the chance to appeal by its letter of 30 August 2005 but that he had not exercised that right at the time and was now out of time to do so.

### THE TRIBUNAL’S REASONS

64. We have to say that the reasoning in the section of the Reasons dealing with Mr Sehmi’s case is not very clear, and the Tribunal subsequently held a review hearing which led to a further judgment in which its reasoning was to some extent amplified (although the result was not changed). In these circumstances it will not be useful to set out the passage from the original Reasons *in extenso*. It will be most helpful to analyse the Tribunal’s reasoning by reference to the issues which it had to decide. We do so as follows.

65. A crucial preliminary question which the Tribunal was obliged to decide was the effective date of Mr Sehmi’s dismissal. The original Reasons contain no conclusion on this point, but in the Reasons given following the review the Tribunal confirmed, as might have been inferred from the findings of fact first time round, that it regarded Mr Sehmi as having been dismissed on the date that he received the company’s letters of 10 and 12 August, which it found to be 18 August.

66. The next question is what was the principal reason for that dismissal. The Tribunal's finding was that the reason was misconduct in the form of unauthorised absence.

67. The next question is whether dismissal for that reason was reasonable applying the criteria in s.98 (4) of the 1996 Act. That required, in the particular circumstances of this case, a decision whether, as he claimed, Mr Sehmi had attended for work on 13 August and been turned away: if he had, the company could not reasonably complain of his subsequent absence. However, the Tribunal rejected Mr Sehmi's account of what happened on that day. It reviewed and commented on the relevant evidence at paras. 191-2, 194 and 198 of the Reasons; and in its concluding paragraph, para. 204, it said this:

**“The respondent was entitled to conclude that his absence was misconduct. There is no evidence to support Mr Sehmi's version of events. None of the 3 respondent witnesses have any recollection of seeing him on the relevant day in the circumstances he describes. The only HR representative on duty on that day sent away only one employee, who unlike Mr Sehmi, wore a turban. We therefore find that the dismissal is fair as it was conducted via a fair procedure and there was a proper basis for the respondents to conclude in the manner they did.”**

Although that passage is topped and tailed by references to what it was reasonable for the company to conclude it seems clear from the middle three sentences that the Tribunal intended also to find as a fact that Mr Sehmi's account of having attended for work on 13 August was false; and that is confirmed by a statement at the beginning of para. 198 that the Tribunal had to decide “who was telling the truth – was it Mr Sehmi or was it the three Respondents' witnesses?”. Such a finding was indeed necessary, since the company could not in fairness have relied on a belief that he had not attended and been turned away when, if he had, that would necessarily have been known to it. (The final sentence refers back to earlier findings made by the Tribunal, to which we will refer below, as regards the procedure followed.)

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68. A further question (though not necessarily a determinative one) is whether Mr Sehmi's had "merely" absented himself or had overtly associated himself in the industrial action. Although, as we have seen, the Tribunal's conclusion in para. 204 refers only to "absence", it had previously held that his attendance on the picket line constituted association with the ongoing industrial action: see para. 197 of the Reasons set out at para. 61 above. It can safely be inferred – not simply from the background evidence relating to the case generally but specifically from the letter to Mr Sehmi of 30 August – that if that attendance had been known about at the material time it would have been an important factor in the company's decision to dismiss; but it was certainly not known about when the letters of 10 and 12 August were written (because it had not yet occurred), and it is unclear whether (if this be relevant) it was known about by the date that those letters were received, namely 18 August.

69. Against that background, it was still necessary for the Tribunal to decide whether it was reasonable for the company to dismiss Mr Sehmi for the reason found. That depends partly on the gravity of the misconduct and partly on whether a fair procedure had been followed. So far as the former is concerned, this is not expressly addressed by the Tribunal. As for the latter, there was of course no procedure of any kind prior to the dispatch of the letters of 10 and 12 August, or indeed prior to their receipt. The only "procedural" element was the offer of an appeal. The Tribunal does not discuss whether this approach was consistent with the statutory dismissal procedures – i.e., in effect whether this was a case attracting the modified procedure under Schedule 2 – or with ordinary fairness; although it can no doubt be inferred that it believed that it was, for the same reasons as we have identified in the case of Mr Mathew and Mrs Dhillon. What it did say about the question of procedure was as follows:

**“202 Whilst the Tribunal does not consider this is the ideal way to conduct a disciplinary process we are satisfied that the respondents**

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went through all the hoops that they needed to for Mr Sehmi. Having followed the process of dismissing him following the telephone call as they did with all other employees they offered him the right of appeal as they did with all other such employees. However the respondent made it clear that his right to an appeal was dependent on his signing the declaration that he was not participating in the action on 10 August 2005. That declaration was not acceptable to the respondent for reasons they explained in their letter of 30 August. This meant there was fresh information to be considered after the appeal letter of the 19 August, which should be the subject of an appeal.

203 The letter from Mr Sehmi of the 15 September is not a request for an appeal. It is a letter of information only. He does not therefore take up the respondent's offer of an appeal. The respondents have complied with their procedure in offering him such. It is not unreasonable for them to say an appeal request some three months later is out of time. Indeed where the Tribunal has found that the respondents have delayed that length of time before instituting any formal disciplinary proceedings we have found that it is an unfair dismissal. Both employees and employers have obligations as regards any contract of employment. We must be even handed in how we view such a substantial delay."

70. Nowhere in the Reasons relating to Mr Sehmi's case is any consideration given to the question of jurisdiction. The Tribunal simply assumes that it has jurisdiction and proceeds to consider the issue of fairness.

## SUBMISSIONS AND CONCLUSION

71. In Mr Sehmi's case there is a cross-appeal by the company, claiming that the Tribunal should have declined jurisdiction. It is logical to take this first. The company contends that, given the Tribunal's findings summarised at paras. 61 and 67 above, it was obliged to find that Mr Sehmi was taking part in industrial action at the time of his dismissal and that accordingly its jurisdiction was ousted by s. 237 (1). The Tribunal had found that Mr Sehmi had not attended for work on 13 August (a finding which is not challenged in the Amended Notice of

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Appeal) or thereafter and, further, that he had attended on the picket line (a finding which – subject to the issue of dates - is also only faintly challenged, if at all, in the Amended Notice of Appeal). Those facts inevitably meant, as the company had contended below, that he was participating in industrial action at time of his dismissal on 18 August.

72. Mr Hogarth had no effective answer to that contention, and we can see none. It is true that there was no finding by the Tribunal as to the dates of Mr Sehmi's attendances on the picket line (though, as we have said, it is very likely that they started before 18 August); but even if these attendances are ignored altogether the plain fact is that Mr Sehmi was on the Tribunal's findings voluntarily absent from work, without any authorisation or explanation, from 13-18 August, at the height of the industrial action. In those circumstances – given the effect of the authorities identified at para. 9 above – a conclusion that Mr Sehmi was participating in the action seems inevitable. It is true that by his letter of 15 August Mr Sehmi sought to dissociate himself from the strike, but that letter was not received until after his dismissal took effect, and might in any event have been ineffective to do so given the Tribunal's rejection of the principal assertions in it.

73. Accordingly we must allow the cross-appeal and hold that the Tribunal had no jurisdiction to entertain Mr Sehmi's claim. The effect of that decision is that the appeal also should be dismissed, though on a different basis from that adopted by the Tribunal.

74. In those circumstances it is unnecessary that we consider the criticisms of the Tribunal's decision on the issue of unfairness. We need only observe that we would have seen great difficulty in finding the dismissal either procedurally or substantively fair, given that the company's decision to dismiss was taken on an evidently wholly mistaken basis: it believed that

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Mr Sehmi had been absent from work without authority or explanation on 10 August, whereas in fact he was on authorised leave in India. Mr Sehmi was in a fundamentally different position from Mr Mathew or Mrs Dhillon, whose dismissals were triggered by real unauthorised absences. The points made by the Tribunal about the appeal procedure simply do not arise if there was no basis for the initial dismissal. To that extent, it is a piece of bad luck for Mr Sehmi that the delay in the dismissal letter reaching him (albeit through his own failure to give the company his new address) meant that s. 237 (1) had effect in his case when it would not otherwise have done so. But that consideration is tempered by the fact that he did in fact, on the Tribunal's findings, take part in industrial action following his return and that if the company had not made its initial mistake and had instead sought to dismiss him at that point he would have been no better off.

## **CONCLUSION**

75. We dismiss the appeals in all six cases. In the case of Mr Sehmi we allow the cross-appeal and hold that the Tribunal had no jurisdiction to consider his claim.