

The band of reasonable responses

Once the Employer has shown that the reason for dismissal engages s.98(1), i.e. that it is a potentially fair reason for dismissal, the focus then falls upon s.98(4). This, as Lord Bridge observed in *West Midlands Co-operative Society Ltd v Tipton* [1986] IRLR 112 is “the crucial question: did the employer act reasonably or unreasonably in treating the real reason as a sufficient reason for dismissing the employee”. In other words, the test is “reasonableness”. In this chapter the general principles of the reasonableness test shall be enunciated and explored.

Firstly, it is convenient to cite the subsection in full:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer-

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

S.98(4)(a) sets out a test of reasonableness. S.98(4)(b) provides that this test is to be determined in accordance with equity and the substantial merits of the case. The authorities have provided that “equity” refers to natural justice, procedural fairness, the employee’s personal circumstances and other matters relating to common sense and common fairness. The substantial merits concerns whether the employee’s conduct or performance warranted dismissal. This covers matters such as the approach to defining gross misconduct or the devising of selection criteria for redundancy. The principles relating to equity and the substantial merits will be discussed throughout the rest of this Part. The present concern is the all embracing and underlying concept of reasonableness.

Thus the questions arises of what is the approach to determining reasonableness? The answer is the band of reasonable responses approach. The chapter shall trace its development and consider its meaning. However, before the question is addressed an important, albeit somewhat ancillary, question should first be briefly discussed – namely whether s.98(4) provides not only for a reasonableness test but in addition an equity test

Is there a reasonableness test and an equity test?

Does S.98(4) lay down two tests that must be satisfied? Firstly, a reasonableness test under s.98(4)(a) and then, secondly, an equity test under s.98(4)(b). The position of the comma followed by the word “and” at the end of s.94(4)(a) would suggest that this is the case.

A thorough consideration of the question, however, requires that the legislative history of the wording, now found at s.98(4) of the 1996 Act, be set out. As noted in Ch. 1 of this Part unfair dismissal was first prescribed for in s.24(6) of the Industrial Relations Act 1971 and was then re-enacted, with slight changes in the wording, in schedule 1 para.6(8) of the Trade Union and Labour Relations Act 1974, s.57(3) of the Employment Protection (Consolidation) Act 1978 and then, finally, s.98(4) of the ERA 1996.

Each of the sections shall now be set out with the parts that are relevant for the purposes of the present discussion highlighted.

S.24(6) of the Industrial Relations Act 1971 provided:

Subject to s.(4) or s.(5) of this section, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on *whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing*

the employee; and that question shall be determined in accordance with equity and the substantial merits of the case' [emphasis added].

This indicated that there was only a reasonableness test but that that test had to be applied in accordance with equity and the substantial merits.

Schedule 1 para.6(8) of the Trade Union and Labour Relations Act 1974 provided:

Subject to paras. (4) to (7) above, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on *whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee.* [emphasis added]

This indicated that, again, there was only a reasonableness test. Whereas s.24(6) of the 1971 Act seemed to indicate that the reasonableness test had to be applied with regard to equity and the substantial merits para.6(8) provided that they were merely matters that had to be taken into account in applying the reasonableness test.

S.57(3) of the Employment Protection Act 1978 originally provided:

Where the employer has fulfilled the requirements of subsection (1), then, subject to ss.58 to 62, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on *whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee* [emphasis added]

Just like the 1974 Act this suggested that not only was there one test, namely a reasonableness test, but that, in applying that test, equity and the substantial merits were merely matters to take into account.

S.57(3) was then amended by s.6 of the Employment Act 1980. The subsection then read:

Where the employer has fulfilled the requirements of subsection (1), then, subject to ss.58 to 62, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on *whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.* [emphasis added]

This seemed to restore the position as set out in s.24(6) of the 1971 Act – namely that there was only a reasonableness test but that test had to be applied in accordance with equity and the substantial merits.

S.57(3) was amended twice further – once on 16th October 1992 and then again on 30th August 1993. However, for present purposes those amendments were not material. The subsection continued to provide *“that question shall be determined in accordance with equity and the substantial merits of the case.”*

Next came s.98(4). What differs s.98(4) from its predecessors is the wording being broken down into two further subsections – namely s.98(4)(a) and s.98(4)(b) – and, as has been noted, the positioning of the comma and the word “and” at the end of s.98(4)(a). This, as has been said, could be construed as the introduction of a second test, namely an equity test, to be considered after the reasonableness test has been satisfied.

It now remains to be seen to what extent, if any, these changes in the wording have influenced jurisprudential development of the legislation generally and specifically in relation to the question of whether there are two separate tests – a reasonableness test and an equity test. The facts of the cases will not be set out (although they are in different contexts elsewhere in this book) as they have no particular bearing on the observations made therein relevant for the purposes of the current discussion.

The question was briefly eluded to by Lord Simon in the House of Lord's decision in *W. Devis & Sons v Atkins* [1977] AC 931 – a case under the 1974 Act. His Lordship held:

the reference to 'equity and the substantial merits of the case' merely shows that the word 'reasonably' is to be widely construed.

The EAT (Browne-Wilkinson J Presiding) in *Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR 91 – a case under s.57(3) of the 1978 Act (as amended by the 1980 Act) – rejected a submission that the subsection provides for two tests – a reasonableness test and an equity test:

The question referred to is whether the employer acted reasonably in treating his reason for dismissing as a sufficient reason. There is not in fact two elements in [s.98(4)]. There is only one question to be answered.

That question, the EAT made clear, is reasonableness. Equity and the substantial merits are not separate tests – they are merely the basis upon which the sole test of reasonableness is to be applied.

However, the EAT (Morison J Presiding) in *Everitt v British Telecommunications plc* [1999] UKEAT/399/98 – a case under s.98(4) – seemed to take a different view. They held:

It is a misconception for employers to believe that in a misconduct case all they have to do is satisfy the range of reasonable responses test. That of itself is not sufficient, because the statute requires the tribunal to take into account concepts of equity and justice. That means that even if many employers would have decided to dismiss, the dismissal of this employee might still be unfair having regard to his own personal circumstances. The danger of tribunals simply applying the "range of reasonable responses test" is that they may, thereby, fail to have regard to the other requirements of s.98(4), namely that the fairness of the decision must be judged by what is equitable "and the substantial merits of the case". A dismissal is not necessarily fair just because a reasonable employer, given the same circumstances, might have dismissed. There may be cases where the particular circumstances of the employee render the dismissal unfair.

This clearly suggested there were two tests. The band of reasonable responses test and then a test encompassing concepts of justice and equity. The band of reasonable responses test required consideration of what a reasonable employer would have done whereas the equity test applied consideration of the personal circumstances of the employee.

However, the EAT (McMullen J Presiding) in *Pudney v Network Rail Infrastructure Limited* [2006] UKEAT/0707/05 disagreed. However, it must be noted that no reference was made to *Everitt*. They rejected a submission that there were two separate tests and held:

In our judgment, the principles of equity and substantial merits are over-arching in the approach of an Employment Tribunal to the question of unfair dismissal. There is, in reality, no separation of issues.

Next the Court of Appeal in *Orr v Milton Keynes Council* [2011] IRLR 317 considered the matter. Aikens LJ made some observations as to the effect of the decision of the House of Lords in *Devis*:

The only specific comment on the interpretation of the 'old' format that I have found is that of Lord Simon of Glaisdale in *W. Devis & Sons v Atkins*, referred to at [38] and [46] of Moore-Bick LJ's judgment. That makes it clear that the words 'equity and the substantial merits of the case' in para. 6(8) of Sch 1 of the 1974 Act '... merely shows that the word "reasonably" is to be widely construed'. They do not import any notion of a second consideration by an ET.

He then noted the change of wording of s.98(4) and did consider the possibility of there being two separate tests:

it occurred to me that the purpose of the legislature in dividing up the section into two separate paragraphs as in the latest version of this provision was to create a different emphasis. First, the

determination of the question of whether the dismissal of an employee was fair or unfair depended on whether, in the circumstances, the employer acted reasonably or not in treating the 'real reason' for dismissing the employer as a sufficient reason for doing so. But, secondly, 'the question', i.e. that of whether the dismissal is fair or unfair, 'shall be determined in accordance with equity and the substantial merits of the case'. To my mind, that suggested that the statute required the ET to do something separate and in addition to the exercise encompassed by para. (a) of s.98(4).

However, he then went on:

I have to accept that no case in this court since the 1996 Act came into force has suggested that the change of wording or format brought with it a change of substance. No case (other than the minority view in the EAT decision referred to above) suggests that the effect of s.98(4)(b) is to direct an ET to engage in some kind of exercise beyond the determination of the question posed in s.98(4)(a), which is itself to be

He thus concluded:

Therefore I have to conclude that, subject to the view of the Supreme Court, the correct construction of s.98(4)(b) remains to the effect described by Lord Simon in *W. Devis & Sons v Atkins*.

It thus seems that the changes in the wording brought about by the different statutory provisions have had, somewhat surprisingly, no impact. That said it is perhaps difficult to see, in practical terms, what different a reasonableness test and an equity test would make from a reasonableness test to be applied in accordance with equity.

Development of the band of reasonable responses

There are two general but interconnected principles. Firstly, a dismissal is unfair if the reason for the dismissal did not fall within the band or the range of reasonable responses open to a reasonable employer. Secondly, in applying this test the Tribunal must not substitute their standards of reasonableness for that of the employer. Instead they must apply the standards of the hypothetical, reasonable employer. The genesis of these principles can be found in the Employment Appeal Tribunal's decision in *Rolls-Royce v Walpole* [1980] IRLR 343 (Hughes J Presiding). During the last three years of his employment Mr Walpole's absence rate had been in the region of 50%. Virtually all his absences were certified by a doctor as due to sickness or injury. His final absence, which was to trigger his dismissal, was caused by a hand injury sustained whilst playing rugby. His employers asked him to report back to work after seeing his doctor. He failed to do so. The Tribunal found the dismissal unfair. However, the EAT allowed the employer's appeal and found:

Frequently there is a range of reasonable responses to the conduct or capacity of an employee on the part of the employer, from and including summary dismissal downwards to a mere informal warning, which can be said to have been reasonable. It is precisely because this range of possible reasonable responses does exist in many cases that it has been laid down that it is neither for us on appeal, nor for an Industrial Tribunal on the original hearing, to substitute our views or its respective views for those of the particular employer concerned.

The reasonableness test came before the Court of Appeal in *British Leyland UK Ltd v Swift* [1981] IRLR 91. Mr Swift's employers found a road fund licence belonging to a company land rover on his vehicle. He was subsequently found guilty in the Magistrate's Court of fraudulently using the licence. Despite this Mr Swift maintained to his employers that he had lent the vehicle to a friend on the understanding that the friend would have it taxed and tested before using it. Yet when the vehicle was returned to him the tax disc was in position. Mr Swift insisted that he had no idea how it got there. The Court of Appeal was satisfied that his dismissal was fair. Whereas in *Walpole* the EAT identified the existence of the band of reasonable responses the Court of Appeal went a stage further in finding that the effect of the band is that a dismissal is only unfair if no

reasonable employer would have dismissed the employee. As Lord Denning MR explained:

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

British Leyland was followed by the Court of Session in *Gair v Bevan Harris Ltd* [1983] IRLR 368. Mr Gair's employers issued him with four warnings, during the course of his 11 years service, in respect of his poor performance. Following further failure to satisfactorily discharge his duties they dismissed him. The Tribunal found that his dismissal was unfair as a reasonable employer would have demoted rather than dismissed. The Court of Session reversed the decision on the grounds that the Tribunal, rather than apply the objective standards of the reasonable employer, had effectively asked themselves what they would have done. Lord Wheatley held that the proper application of the band of reasonable responses approach, as enunciated by Lord Denning MR in *British Leyland*, precluded the Tribunal, when assessing reasonableness, from asking "what an employer might have done". The task of Tribunal was to consider "whether what was done was within the band of reasonableness which could embrace different disposals". Therefore, his Lordship concluded, that "having regard to all the circumstances, while offering alternative employment might have been within the band, it could not be said that dismissal was outwith it".

In *Iceland Frozen Foods v Jones* [1982] IRLR 439 the EAT (Brown-Wilkinson J Presiding) analysed the authorities and sought to summarise the state of the law. Mr Jones, a night shift foreman, was responsible for locking up the warehouse and re-activating the security system. One day it was discovered that he failed to discharge these duties and that the work done during the previous night was substantially smaller than usual. He was summarily dismissed. The EAT allowed the Employer's appeal against the Tribunal's decision that the dismissal was unfair and remitted the case to a differently constituted Tribunal.

As regards the correct approach to the reasonableness test the EAT laid down the following principles:

the starting point should always be the words of [s.98(4)] themselves; (2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many (though not all) cases there is a band of reasonable responses to the employer's conduct within which one employer might reasonably take one view, another quite reasonably take another".

The EAT then went on to confirm the principle in *British Leyland* that due to the band a dismissal is only unfair if no reasonable employer would have dismissed the employee; (5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: If the dismissal falls outside the band it is unfair.

The Court of Appeal approved *Iceland* in *The County Council of Hereford and Worcester v Neale* [1986] ICR 471. Mr Neale was a music teacher. The school had a policy that prohibited invigilators from giving students information regarding their papers during the course of an exam without express approval. Contrary to this policy Mr Neale handed one of his pupils, during an exam, a note which conveyed to her the name of an edition of the works of a composer which constituted the subject matter of an exam.

This was brought to the attention of a senior teacher. Mr Neale denied that he had given the note. However, he subsequently, at a later meeting, admitted that he had done. The schools sub-committee convened a disciplinary hearing and dismissed him. There were several issues regarding the fairness of the procedure. Namely the fact that the committee was constituted for policy rather than disciplinary matters and the fact that its impartiality was brought into question by it being chaired by the same teacher who had first approached Mr Neale about the incident. Despite this the Court of Appeal upheld the Tribunal's finding that the dismissal was fair.

As for *Iceland* May LJ remarked "I agree with it and with the ultimate conclusions" that the EAT, in that case, had reached. He went on to provide an insight as to the workings of the band of reasonable responses approach. He held that it is not "permissible" for a Tribunal to set about "fixing the parameters of reasonable response to a given set of circumstances". Similarly, the Tribunal must not "develop within their minds a picture of a hypothetical employer endowed with the attributes of reasonableness". The correct approach was to ask "whether there are any attributes of reasonableness so obviously called for by the circumstances as to make it inevitable that any reasonable tribunal would be bound to include them in the picture of the reasonable employer developing in their mind's eye". In other words the hypothetical standards of the reasonable employer are not applied by reference to pre-determined concepts of how a reasonable employer would act. Rather the attributes of reasonableness of the hypothetical standard are determined and developed by reference to the particular circumstances of the case. Consequently, the procedural defects pertaining to Mr Neale's dismissal, were not in themselves determinative and thus the Tribunal was entitled to find the dismissal fair.

The band of reasonable responses test was challenged by the EAT (Morrison J Presiding) in *Haddon v Van Der Bergh Foods* [1999] IRLR 672. The employers decided to hold a supper reception to celebrate Mr Haddon's 15 years of blameless service. He was scheduled to resume work after the reception to see out the final two and a half hours of his shift. His shift operations manager told him that it was not usual for an employee to return to work after the ceremony as alcohol would be served. The reception ended later than planned with the consequence that only one and a half hours of his shift were remaining. Mr Haddon thus decided not to return to work for the balance of the shift. His failure to return to work did not have a financially detrimental effect on the Respondent's business. Nevertheless, he was summarily dismissed for disobedience.

The Tribunal found that he had been fairly dismissed. The EAT reversed their decision. In so doing they re-visited the band of reasonable responses test and concluded that it "it is not helpful because it has led tribunals into applying what amounts to a perversity test". They went on:

There is, in reality, no range or band to be considered, only whether the employer acted reasonably in invoking that sanction. Further, the band has become a band or group of employers, with an extreme end. There is a danger of Tribunals testing the fairness of the dismissal by reference to an extreme.

For the EAT the correct approach was "to apply the section without embellishment, and without using mantras so favoured by the lawyers in this field". In other words, the words of the statute were clear and required no gloss:

the right to dismiss is tempered by the right of the individual not to be unfairly dismissed and the balance between the two is to be struck by the industrial jury. We believe this balance will be best achieved by the industrial jury, the Employment Tribunals, applying the statute as it stands, no more and no less.

The EAT appeared to suggest that the focus should not be on the range of measures the employer can impose but on whether the one he did decide upon, i.e. dismissal, was reasonable:

The moment that one talks of a “range or “band” of reasonable responses one is conjuring up the possibility of extreme views at either end of the band or range. In reality, it is most unlikely in an unfair dismissal case involving misconduct that the Tribunal will need to concern itself with the question whether the deployment of each of the weapons in the employer’s disciplinary armoury would have been reasonable. Dismissal is the ultimate sanction.

Courageous though this decision was it flew in the face of the doctrine of precedent - the band of reasonable responses test having been approved by the Court of Appeal in *British Leyland* and *Neale*. Sure enough the Court of Appeal, in the joined appeals of *Post Office v Foley*, *HSBC Bank v Madden* [2000] IRLR 827 restored the orthodox approach.

Mr Foley was permitted to go home early so as to attend to a domestic problem. Yet about half an hour later an off duty manager reported having seen him in a pub. In his defence Mr Foley said he had gone there to call a taxi. The employers did not believe his explanation. Despite the fact he had never, in his years of service, incurred disciplinary sanction and despite that fact that his offence did not amount to gross misconduct, under the employer’s own disciplinary code, he was dismissed. Mr Madden was dismissed after internal investigations indicating that he had been involved in the fraudulent use of customer debit cards.

The Court of Appeal found that both dismissals were fair, disapproved *Haddon* and resurrected the band of reasonable responses. This was not because of principle or policy but purely because of precedent. In reference to *British Leyland* and *Iceland Mummery LJ* held:

Unless and until the statutory provisions are differently interpreted by the House of Lords or are amended by an Act of Parliament, that is the law which should continue to be applied for unfair dismissal.

As for *Haddon* it was “an unwarranted departure from binding authority”.

The test was authoritatively restated by the Court of Appeal in *Anglian Home Improvements limited v Kelly* [2004] EWCA Civ 901. Mr Kelly had persistently failed, contrary to the employer’s policy, to bank money on the day that he collected it.

Furthermore, despite company policy, he had recorded the money collected from clients on the company’s computer system without having banked the money. Consequently, the level of outstanding debt each week was adversely affected. This led to him falsifying records by borrowing from expected takings for the following week and recording them as takings in the current week so as to reduce the debt figure. He was dismissed for gross misconduct. The Court of Appeal reversed the decisions of the Tribunal and the EAT and found that the dismissal was fair. Mummery LJ, in reference to *British Leyland*, made it clear that band of reasonable responses was the operative test and that dismissal, in the present case, came within the band:

The members of the Tribunal are not the employers. Their personal views as to how they regard the conduct for which the employer has dismissed the employee are not the point. They must, in the process of deciding an unfair dismissal claim, take an objective position and ask themselves whether a reasonable employer would have dismissed the employee for the conduct in question. They must apply the test of the range or band of reasonable responses stated by Lord Denning.

A perversity test?

Having set out the band of reasonable responses test the question that falls for consideration is, to put it simply, what does it mean? One view is that it is in effect a test of perversity. Whilst the word “band” recognises that there are a variety of sanctions at the employer’s disposal it conjures up extreme possibilities at either end of the range. This seems to imply that dismissal can only be unfair in extreme or exceptional cases.

This view certainly seems to be supported by the decision in *Foley*. After all it concerned the dismissal of a long serving employee with an unblemished

record whose offence, according to the employer's own disciplinary rules, did not amount to gross misconduct. The perversity interpretation of the reasonable responses approach is also further supported by case law holding that reasonableness affords a wide scope to managerial discretion and severely restricts judicial capacity to interfere with it. Take for example the EAT's decision in *Saunders v Scottish National Camps Association Ltd* [1980] IRLR 174 (Lord McDonald Presiding). Mr Saunders was a homosexual and was responsible for maintenance at a children's camp. Psychiatric evidence, before the employers, concluded not only that he was no danger to young people but that heterosexuals were just as likely to pose a danger to the young. The EAT found that his dismissal was fair. Whether, they reasoned, it was true that homosexuals, including Mr Saunders, did not necessarily pose a threat to children was irrelevant. What was relevant was that an employer could reasonably think that they would:

It was argued on behalf of the appellant that the tribunal made illegitimate and misinformed use of their knowledge and experience of how a reasonable employer would react. They had assumed, it was argued, in the teeth of the evidence that homosexuals created a special risk to the young. This does less than justice to their finding which is that a considerable proportion of employers would take the view that the employment of a homosexual should be restricted, particularly when required to work in proximity and contact with children.

This deference to managerial prerogative that the band of reasonable responses imports into s.98(4) is further illustrated by the fact that the courts are unwilling, when applying reasonableness, to interfere with the economic or commercial merits behind the employer's decision to dismiss. In *Cook v Thomas Linnell & Sons Ltd* [1977] ICR 770 the EAT (Phillips J Presiding) remarked:

It is important that the operation of the legislation in relation to unfair dismissal should not impeded employers unreasonably in the efficient management of their business which must be in the interests of all.

Mr Cook was promoted to be the manager of a food depot. He had no previous experience of that side of the business and consequently his performance, despite warnings and advice, was poor. This resulted in his dismissal. Both the Tribunal and the EAT were satisfied that his dismissal was fair. The deference afforded to employers as regards the management of their business meant that "such imponderables as the quality of management...in the last resort can only be judged by those competent in the field". It was sufficient for an employer to "genuinely come to the conclusion over a period of time that a manager is incompetent".

The licence that the band of reasonable responses affords to managerial prerogative is particularly manifest in one of the "some other substantial reasons" for dismissal – namely, refusal to agree to changes in terms and conditions. In *Hollister v National Farmers' Union* [1979] IRLR 238 Mr Hollister was employed as a Group Secretary. As a part of a plan to reorganise its insurance business the employers made radical alterations in his contract of employment. Mr Hollister was not consulted and refused to accept the changes. He was dismissed. The Court of Appeal was satisfied that he had been dismissed for some other substantial reason and found that his dismissal was fair. Lord Denning MR found that it was sufficient that the employer show "there was some sound, good business reason for the re-organisation" to fulfil the requirements of reasonableness.

Hollister was followed by the EAT (Balcombe J Presiding) in *Chubb Fire Security Ltd v Harper* [1983] IRLR 311 Mr Harper refused to accept extensions in his working hours as he calculated that this would result in a substantial reduction in his remuneration. Consequently, he was dismissed. The Tribunal found that his dismissal was unfair as it was reasonable for Mr Harper to refuse to accept the proposed variation to his contract. The EAT found that the Tribunal had erred and remitted the case to the Tribunal for fresh consideration in the light of the principles they laid down. This was namely that it was "incorrect" for the Tribunal to have "concentrated their approach on

the reasonableness of Mr Harper's belief that the new contract would be disadvantageous to him." The EAT seemed to reason that s.98(4) required only consideration of whether the employer had acted reasonably and not consideration of whether the employee had acted reasonably: "*It may be perfectly reasonable for an employee to decline to work extra overtime, having regard to his family commitments. Yet from the employer's point of view, having regard to his business commitments, it may be perfectly reasonable to require an employee to work overtime.*"

An alternative approach

However, before concluding that the band of reasonable responses test is a perversity test it must be noted that the Courts, in setting out the test, have emphasized that it is not a perversity test. In *Iceland* the EAT, after having enunciated the band of reasonable responses test, held that application of the test did not "require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section...That is not the law". In *Foley Mummery LJ*, after affirming the band of reasonable responses test, went on to find:

The range of reasonable responses approach does not, however, become one of perversity nor is it rendered "unhelpful" by the fact there may be extremes.

In *Beedell v West Ferry Printers Ltd* [2000] UKEAT/135/00 the EAT (Clark J Presiding) considered the meaning of the band of reasonable responses approach and was adamant that it was not a perversity test. Mr Beedell was dismissed for fighting. It was Mr Beedell's case that his dismissal was unfair as the other employee involved in the fight, who was also dismissed, was the aggressor. Thus, it was submitted on his behalf, a reasonable employer would have issued a warning rather than dismissed him. The Tribunal found that the case was a marginal case where it would have been reasonable to dismiss and not to dismiss. Thus, applying the band of reasonable responses approach, they found the dismissal fair.

The EAT, mindful of the recent decisions of *Madden* and *Hadden*, seized this as an opportunity to consider the band of reasonable responses approach. The EAT likened the test to the test for medical negligence enunciated by McNair J in *Bolam v Friern Hospital Management Committee* [1957] AER 118:

A doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it the other way round, a doctor is not negligent, if he has acted in accordance with such a practice, merely because there is a body of opinion which takes a contrary view.

The EAT went on to opine that Lord Denning MR, in formulating the band of reasonable responses approach in *British Leyland*, "may have had regard to the *Bolam* test." Thus the EAT found:

Just as the question of a doctor's negligence will depend upon whether a reasonable body of medical practitioners would have accepted the practice which he followed, even if another body of equally reasonable practitioners would have acted differently (a band of reasonable responses), so it may be said that the question of whether an employer has acted reasonably in dismissing his employee will depend upon the range of responses of reasonable employers. Some might dismiss; others might not. It is not necessary for the applicant's complaint to succeed that the Employment Tribunal concludes that no reasonable employer would have dismissed.

Therefore, the test "is not a "perversity" test."

This approach places the focus of whether a group of reasonable employers would have dismissed as opposed to whether any reasonable employer would have dismissed. Thus, the EAT proceeded to make clear, when formulating the question in the context of dismissal for misconduct:

The *Bolam* analogy holds good...could a group of reasonable employers conclude, on the evidence before the respondent employer, that the employee was guilty of the misconduct alleged.

Therefore, for the Claimant to succeed the Tribunal need not be satisfied that no reasonable employer would have dismissed. Rather the test is whether no reasonable group of employers would have done so.

This is perhaps difficult to reconcile with the following passage from Lord Denning's speech in *British Leyland* which places the focus on the hypothetical reasonable employer as an individual rather as part of a group:

If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably have dismissed him, then the dismissal was fair.

Nonetheless, the EAT found that on the facts the Tribunal was entitled to find the dismissal fair and thus the appeal failed.

The difficulty lies in reconciling the logical consequence, i.e. that the test is a perversity test, flowing from the words used in *Iceland* - "if the dismissal falls within the band it is fair; if the dismissal falls outside the band it is unfair"- with the assertion that it is not a perversity test. This was recognised by the EAT in *Midland Bank plc v Madden* [2000] IRLR 288 (Lindsay J Presiding):

Thus precedent may be argued simultaneously to suggest that Tribunals should refer to the band test as determinative and yet that Tribunals should decline to accept what is, in our view, its logical consequence.

Perhaps this inherent contradiction in terms is resolved by seeing the test as a guideline rather than as a binding rule of law. Support for this view is hinted at in *Iceland* where the EAT implied that the band of reasonable responses may not be the operative test in some cases:

In many (*though not all*) cases where there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take on view, another might quite reasonably take another [emphasis added]

Similarly in *Foley Mummery LJ* found:

that approach [i.e. the band of reasonable responses] is not in practice required in every case. There will be cases in which there is no band or range to consider.

He went on to give two hypothetical examples. Dismissal would be the only option in the case of an employee who burns his employer's factory without good cause. On the other hand dismissing an employee for politely saying good morning would be unquestionably unfair.

If the band of reasonable responses is merely a guideline the questions that fall for consideration are what then is its scope and what then is the true test? These questions are best answered by consideration of another line of authority which rather than refer to the band of reasonable responses has stressed that the words of the section are clear and require no explanation or interpretation.

The first is the High Court's decision in *Grundy (Teddington) Ltd v G F Willis* [1976] ICR 323. The employers decided to create a new post which would absorb the duties of several employees including Mr Willis. He was selected for redundancy on the basis that another employee was better qualified for the new post. Whilst the Tribunal accepted that there was little to choose between the qualifications of Mr Willis and the other employee they nevertheless found that Mr Willis had greater experience and that thus the dismissal was unfair.

The High Court overturned their decision in preference for a finding of fair dismissal. Phillips J, quoted the words of, what is now s.98(4), and set out the approach to be adopted by Tribunals in applying it:

So, the duty of the Tribunal is to take into account the reason – if they were satisfied that it was the true reason – and all the other facts and circumstances known to the employer, and ask whether for that reason, and in those circumstances, having regard to equity and the substantial merits of the case, the employer acted reasonably in treating it as a sufficient reason for dismissing the employee. And they have, of course, to judge that in the capacity of what has been described as an “industrial jury” according to the accepted standards of industry operating at the relevant time and place.

Nevertheless, the Tribunal must not, he went on, decide “what they would have done had they been the management”

This is the error that the Tribunal, in the present case, had fallen into. Thus, he seemed to reason, the standard of reasonableness was determined by reference to the expert knowledge of the Tribunal but that that was to be applied with reference to the standards of the industry concerned rather than in accordance with what the Tribunal would have done had they been the employers. This approach, in so far as it outlaws substitution, accords with the band of reasonable responses approach but departs from it by its greater emphasis on the conduct of the actual employer, judged by reference to his particular industry, rather than that of the hypothetical, reasonable employer.

The next case is the decision of the EAT (Phillips J Presiding) in *Watling v Richardson* [1978] ICR 1049. Mr Richardson was an electrician. He was engaged to work on several contracts. He was dismissed by reason of redundancy due to the contract he had been working on coming to an end. However, about a week before the employers had taken on two other electricians to work on another contract. Both the Tribunal and the EAT found the dismissal unfair on the basis that it was unreasonable to dismiss a long serving employee, whose work had never been the subject of criticism, in preference for another who had only been employed for little over a week.

In language, that would later be echoed in *British Leyland* and *Anglian*, the EAT ruled that Tribunals should apply the standards of reasonableness of the hypothetical reasonable employer rather than their own standards of reasonableness:

the industrial tribunal, while using its own collective wisdom is to apply the standard of the reasonable employer; that is to say, the fairness or unfairness of the dismissal is to be judged not by the hunch of the particular industrial tribunal, which (though rarely) may be whimsical or eccentric, but by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would behave

Yet, the EAT went on, whilst the test may be objective it was not helpful to assert that a dismissal is only unfair if no reasonable employer would have dismissed. This was because “it can, particularly to laymen, seem to suggest an inordinately high standard”. The phrase “a dismissal is fair unless the case is one where the employer has acted in a way in which no reasonable employer would have acted” merely means, the EAT seemed to suggest, that different, but equally reasonable employers would act in different, but equally reasonable ways:

for an industrial tribunal to say that it was unfair to select A for dismissal, rather than B or C, merely because had they been the employers that is what they would have done, is to apply the test of what the particular industrial tribunal itself would have done. It is in this sense that it is said that the test is whether what has been done is something which ‘no reasonable management would have done’.

For the EAT the test was simply the plain words of s.98(4): “*The test is, and always is, that provided by [s.98(4)].*”

In finding that the applicable standard of reasonableness was the objective one of the hypothetical reasonable employer *Watling* is consistent with *British Leyland*, *Iceland* and *Anglian*. However, in suggesting that the phrase “the dismissal is only unfair if no reasonable employer would have dismissed” is not the ultimate test but simply an instruction to the Tribunal not to substitute what they would

have done for the actions taken by the employer, *Watling* seems to be at odds with *British Leyland*, *Iceland* and *Anglian*.

Yet, it is noteworthy that in *Iceland* the EAT remarked that “Industrial Tribunals would be well advised to follow the formulation of the principle in *Watling*”. Furthermore, *Watling* has never been expressly disapproved and in these circumstances it cannot be dismissed as bad law.

The band of reasonable responses was not even mentioned let alone considered by the Court of Appeal in *Bailey v BP Oil Kent Refinery Ltd* [1980] ICR 642. Mr Bailey had stated that he was sick when in fact he was on holiday. The employer’s disciplinary procedure, which had been agreed with the unions, provided, *inter alia*, that when dismissal was contemplated the employers would inform an appropriate full time union official as soon as possible. The official was unavailable and the employers implemented the procedure regardless. Subsequently Mr Bailey was dismissed. The Court of Appeal upheld the Tribunal’s finding that the dismissal was fair.

As for the correct approach to reasonableness Lawson LJ held that the wording of s.98 (4) is “clear and unambiguous” and “requires the Tribunal, which is the one which hears the evidence, not the one which hears the legal argument, to look at every aspect of the case. The employer must show that he acted fairly and reasonably – and whether he did will depend on what the employee was known, or had been proved, to have done, the circumstances in which the misconduct occurred and his behaviour when found out and asked for an explanation.” In other words, the test is simply whether the employer acted reasonably and fairly in the circumstances.

As the correct application of reasonableness depended on the circumstances it was wrong to lay down guidelines as to what amounts to reasonable conduct on the part of the employer:

Each case must depend on its own facts. In our judgement it is unwise for this Court or the Employment Appeal Tribunal to set out guidelines, and wrong to make rules and establish presumptions for Industrial Tribunals to follow or take into account.

This disapproval of guidelines and emphasis upon reasonableness being determined by reference to the particular circumstances of the case would seem to leave no room for the band of reasonable responses if, it is accepted, that it is merely a judicially created guideline. Consequently, the defects in the procedure, as regards Mr Bailey’s dismissal, did not disentitle the Tribunal from finding the dismissal fair as it was wrong to impose a guideline that failure to follow a procedure agreed with a union automatically renders a dismissal unfair.

The next case that falls for consideration is the Court of Appeal’s decision in *Kent County Council v Gilham and others* (No.2) [1985] IRLR 18. The employees were “dinner ladies” whose nationally agreed conditions of service entitled them to work for 39 weeks a year but be paid for 52. The employers unilaterally reduced their pay by paying them only for the 39 weeks they actually worked. The employees refused to accept these terms and were, as a result, dismissed. The Court of Appeal upheld the EAT’s finding that their dismissal was unfair.

Interestingly the Court made no explicit reference to the band of reasonable responses test or to *British Leyland* or *Iceland*. Despite this Griffiths LJ, just as the EAT did in *Watling*, stressed, as indeed *British Leyland* and *Iceland* had stressed, that the applicable standard of reasonableness was the standard of the reasonable employer:

A Tribunal in applying the section must not ask themselves what they would have done, but must ask themselves how a reasonable employer would have acted.

However, in a coded attack on the band of reasonable responses test, as set out in *British Leyland* and *Iceland*, Dillon LJ held:

The reported decisions contain, as it seems to me, a good deal of what I would venture to call over-sophistication as to the approach to be adopted by Industrial Tribunals to the question of

reasonableness. In my judgment it is sufficient for the Tribunal to answer directly the simple question posed by [s.98(4)]; “In all the circumstances did the employer act reasonably or unreasonably in treating the reason in the particular case as a sufficient reason for dismissing the employee?”

In other words *Gilham* appears consistent with the approach in *Watling*. The approach they provide can be set out as follows: the applicable standard of reasonableness is the objective one of the reasonable employer, in applying this standard Tribunals must be cognizant that different reasonable employers will act in different ways but ultimately the test is not whether the dismissal fell within the band of reasonable responses but whether it was reasonable in all the circumstances. It is also convenient to recall that *Iceland*, which enunciated the band of reasonable responses test, approved *Watling*. This would seem to suggest that the tests, set out in *Watling* and *Gilham*, exist alongside the band of reasonable responses test and that neither one supersedes the other. This is despite that fact that the phrase “if the dismissal falls within the band, the dismissal is unfair; if the dismissal falls outside the band it is unfair” appear, on their face, to be at odds with *Watling* and *Gilham*. Yet, given the weight that *Watling* appeared to carry with the EAT in *Iceland* it is arguable that *Iceland* simply provides that the phrase means no more than two things: (1) an instruction to the Tribunal not to substitute what it would have done for what the Employer did and (2) a reminder that different reasonable employers may act in different but reasonable ways.

A reconciliation of the two approaches was attempted by the EAT in *Madden*:

The unintended consequence of the test becoming one of perversity will be avoided if, whenever the logic of an argument which an Employment Tribunal receives as to the band of reasonable responses comes close to amounting to an assertion that no reasonable management could have held the dismissal to have been a fair or unfair response to the reason shown, and that that, of itself, suffices to make the dismissal fair or unfair, the Tribunal pauses to remind itself of the statute

Furthermore, it is possible to find an attempt at a reconciliation of the two approaches in *Iceland* itself. The EAT recommended that “Tribunals would be well advised to follow the formulation of the principle in *Watling v Richardson* or *Rolls-Royce v Walpole*” – *Walpole* being, it will be recalled, the case where the origins of the band of reasonable responses approach can be found. This appears to confirm that the test is simply did the employer act reasonably with the reference to the band of reasonable responses serving as no more than a reminder that reasonable employers can act in different but reasonable ways.

Herein lies the difficulty as regards the current state of the law. For the EAT’s decision in *Madden* was overturned by the Court of Appeal in *Post Office v Foley*, *HSBC v Madden*. However, it should be noted that the passage cited above was not commented upon, let alone disapproved of, by the Court of Appeal. That the authority of the EAT’s approach in *Madden* is unclear is unfortunate as, it is submitted, it is the only way that the seemingly contradictory approaches of *Iceland/British Leyland* and *Watling/Gilham* can be reconciled. Furthermore, the EAT’s approach in *Madden* provides the only explanation for the assertion, in *Iceland* and *Foley*, that the band of reasonable responses test is not a test of perversity.

Similarly, *Foley’s* disapproval of *Haddon* imports unwarranted confusion into the law. It is true that in rejecting the use of the term “the band of reasonable responses” *Haddon* was wrong in the sense that the test had been approved by the Court of Appeal in *British Leyland* and *Neale* and was thus binding on the EAT and the Tribunals. However, by stressing that the true approach, in the final analysis, was the application of the ordinary meaning of the words of s.98(4) and not the band of reasonable responses *Haddon* was consistent with authority – namely the approach adopted in *Watling* and *Gilham* (for which support can be found in *Grundy* and *Bailey*). Indeed it should be noted that in *Haddon* the EAT held: “In our view the approach taken

in Gilham is to be followed". If, which is by no means clear given *Iceland's* approval of *Watling*, the effect of *Foley* is that this approach is to be regarded as bad law this is regrettable as it would remove a basis for asserting that the band of reasonable responses test is not a perversity test.

That said the decision of the Court of Appeal in *Bowater v Northwest London Hospitals NHS Trust* [2011] EWCA Civ 63 suggests that the band of reasonable responses approach does not confine the Tribunal to restricting managerial prerogative only in cases of perversity. Mrs Bowater was a nurse. She straddled an unruly and disruptive male patient in order to administer him with an injection. Whilst straddling the patient she said "it has been a few months since I've been in this position with a man underneath me." Her employers regarded this as a lewd and offensive remark. They dismissed her. The Tribunal, however, found the dismissal unfair. This was due to the following mitigating factors: (1) she had not been trained in restraint processes, (2) she had volunteered to help having finished her 12 hour shift, (3) the comment was made in stressful circumstances, (4) she directed the comment at herself – not the patient, (5) a large proportion of the population would consider the remark as humorous, (6) no member of the public was present and (7) she had a clean disciplinary record.

The EAT, however, held "a reasonable employer could have done" as the employer did. Hence they reversed the Tribunal's decision and, in so doing, gave support to the view that the band of reasonable responses approach means managerial prerogative can only be interfered with in exceptional circumstances.

However, the Court of Appeal restored the Tribunal's decision. Stanley Burnton LJ observed that "it was not and is not suggested that she was not at fault in making the remark she did." She had indeed "made a misguided and wholly inappropriate remark, intended as humorous." On the other hand "no member of the public was present" and "there was no evidence that the patient was conscious of it [i.e. the remark] having been made." Whilst it was right that "the ET, the EAT and this Court should respect...the experienced professionals who decided that summary dismissal was appropriate" his Lordship considered that, nonetheless, dismissal "was wholly unreasonable in the circumstances of this case." Similarly Longmore LJ held that "the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the ET to make its own judgment always bearing in mind that the test is whether dismissal is within the range of reasonable responses."

It is clear that the Tribunal and the Court of Appeal agreed that the dismissal was unfair due to the extent of the mitigating factors. Thus it can be said that the decision is authority for the proposition that the band of reasonable responses approach will not prevent the Tribunal from concluding that mitigating factors means no reasonable employer would have dismissed in the circumstances.

It has already been noted that one of those mitigating factors was the Tribunal's finding that a large proportion of the population would have found the remark humorous. Thus it might be tempting to extrapolate from the decision a proposition that the question of reasonableness is to be determined not so much by reference to what any reasonable employer would have done by but to how most ordinary people would consider the conduct in question. However, it is submitted that this would not be a correct reading of the decision. Stanley Burnton LJ considered and rejected a submission that the Tribunal had applied such a test. It was clear, he held, that the Tribunal had "correctly directed" itself in respect of the band of reasonable responses approach. At best, therefore, it can be said how a large proportion of the population would consider the mitigating factor may be a relevant consideration which a reasonable employer should take into account.

Similarly the decision of the Court of Appeal in *Fuller v The London Borough of Brent* [2011] EWCA Civ 267 shows the restrictions on the band of reasonable responses test. Mrs Fuller was employed as bursar in a school. She complained about the way several teachers had restrained an unruly child. She alleged they had hurt the child and

restrained him in a sexual way. The employers regarded her intervention as wholly inappropriate and thus dismissed her. The Tribunal found her dismissal unfair on the basis that no reasonable employer would have dismissed for such a one off incident. The EAT reversed their decision. The Court of Appeal, however, restored it. Mummery LJ held:

On a proper self-direction of law I accept that a reasonable ET could properly conclude that the Council's dismissal was outside the band of range of reasonable responses and was unfair

Whilst both *Bowater* and *Fuller* suggest that the band of reasonable responses approach does not confine the Tribunal's right to interfere with an employer's decision to extreme or perverse cases they should not be read as authority for the proposition that a Tribunal is bound to make a finding of unfair dismissal in similar cases. Rather what clearly emerges from both judgments is that considerable deference is to be applied to the Tribunal's discretion. Thus had the Tribunals found the dismissals unfair but, nonetheless, directed themselves correctly as regards the law it is likely the Court of Appeal would have held their decisions could not be disturbed.

The band of reasonable responses test as a guideline and not a rule of law

It has been said that support for the proposition that the band of reasonable responses approach is merely a guideline and not a rule of law can be found in certain passages both in *Iceland* and *Foley*. If this is correct the question arises as to what extent it is applicable and binding. This question is best addressed by considering the impact of the decision of the EAT (Cumming-Bruce J Presiding) in *Vickers Ltd v J Smith* [1977] IRLR 11 where the EAT suggested an approach to reasonableness which was to be superseded by the band of reasonable responses approach.

Mr Smith was selected for redundancy partly because his health was considered to be poorer than that of one of his colleagues. The Tribunal found the dismissal unfair on the basis that they considered that their reading of the evidence before the employers suggested that the evidence did not provide Mr Smith's health was inferior. The EAT remitted the matter as the Tribunal had, as regards their approach to the evidence concerning Mr Smith's health, effectively substituted their view for that of the employers. Having disposed of the appeal the EAT went on to consider the correct approach to s.98(4). The EAT found that the effect of the subsection was that a dismissal is only unfair if the Tribunal find the employer's decision "was so wrong that no sensible or reasonable management could have arrived at the decision at which the management arrived". On its face there would seem to be little difference between the meaning of these words and the words of Lord Denning MR in *British Leyland*, "If no reasonable employer would have dismissed him, then the dismissal was unfair," and those of the EAT in *Iceland*, "if the dismissal falls within the band the dismissal is fair: If the dismissal falls outside the band it is unfair". Despite this whilst *British Leyland* and *Iceland* have been consistently approved doubt has consistently been cast as to the authority of *Vickers*.

The first to question the scope of *Vickers* were the EAT (Bristow J Presiding) in *Jowett v Earl of Bradford (No 2)* [1977] ICR 431. Mr Jowett was selected for redundancy due to his involvement in an argument with a fellow employee in respect of a matter relating, not to work, but the union they were members of. The Tribunal found his dismissal unfair on the basis that the employers had never made it clear that such incidents could constitute the basis of a redundancy selection criteria. On appeal the employers argued that the Tribunal had erred in law in failing to consider and apply *Vickers*.

The EAT rejected this argument. The issue was determinative upon consideration "on the place of precedent in this field of jurisprudence". A case where "the courts have

to interpret the statute and say what it means” is a “binding precedent which other courts must follow and apply until a superior court says the first court got it wrong”. *Grundy* was an example of such a case in the law of unfair dismissal as it “really says no more than “Apply the plain words of the statute””. Such precedents were to be distinguished from cases where the courts give guidelines. Such cases “pose tests, or suggest methods of approach, or give guidelines which are not to be found in the plain words of the statute which need no interpretation and which are not and are not intended to be, rules of law or binding precedents”. *Vickers* was an example of such a case as its “says more than Parliament says in [s.98(4)]”. Therefore, it could not be said that failure to follow cases such as *Vickers* “amounts to error of law”. As in the present case the Tribunal had made no error of law in failing to follow *Vickers* the employer’s appeal fell to be dismissed.

Vickers again fell under the EAT’s spotlight in *Watling*. Whilst, the EAT held, the proposition in *Vickers* is “in fact, and in law...accurate enough” it can only be understood against the “background” which is the plain words of s.98(4). With this in mind *Vickers* was no more than authority for the proposition that the Tribunal, in applying s.98(4), has simply “to apply the standard of the reasonable employer.” Otherwise when *Vickers* is considered in isolation from the statute it suggests “an inordinately high standard”. In *Iceland* the EAT agreed that whilst “the statement of principle in *Vickers Ltd v Smith* is entirely accurate in law” it is, nonetheless, “capable of being misunderstood so as to require such a high degree of unreasonableness that nothing short of a perverse decision to dismiss can be held to be unfair”. The EAT then, as has been seen, went on to suggest that the band of reasonable responses approach was preferable. These passages posed difficulty for the EAT in *Madden*: “Nor does either [i.e. *Wating* and *Iceland*] explain how it could be that *Vickers* could be other than wrong in law if the test which it described is wrong.”

These passages warrant further comment. Two points emerge. Firstly, as indicated above and as noted by the EAT in *Madden*, it is hard to differentiate between the wording in *Vickers* and that in *British Leyland* and *Iceland*. Therefore, there would appear, at least on its face, little objection to the band of reasonable responses approach being regarded in the same way as the EAT in *Jowett* viewed *Vickers*: namely as a guideline and not a binding precedent which Tribunals are not required to make reference to or to apply. This would accord with the references, both in *Iceland* and *Foley*, to there being cases where the band of reasonable responses approach does not apply. The second point that emerges is that whilst, taken in isolation, there would seem to be little difference between the tests propounded in both *Vickers* and *Iceland* the EAT, in *Iceland*, in cautioning against the application of *Vickers* for fear that it could be construed as a perversity test, and in preferring the band of reasonable responses approach seemed to hold that the latter does not require an inordinately high standard of unreasonableness. Thus the inherent difficulty in understanding and applying the band of reasonable responses approach lies in its, perhaps, unfortunate, formulation as the context in which the principle has been created provides that its true meaning does not lie in the natural and ordinary meaning of its words.

Interaction between the band of reasonable responses and procedural fairness

The view that the band of reasonable responses approach is a perversity test is predicated, at least in part, on the assumption that the minimum standards expected of the hypothetical reasonable employer are low. Here it must be noted that s.98(4)(a) refers to how the employer “acted” and to his “treating” of the reason for dismissal as a sufficient reason for dismissal. The words “acted” and “treating” extend

the scope of the inquiry beyond the substantive decision to dismiss to consideration of the manner or the circumstances in which the decision was reached. Furthermore, the provision, in s.98(4)(b), that reasonableness be “determined in accordance with equity” imports a requirement that the decision be reached via fair procedures. Here the minimum standards expected of the hypothetical reasonable employer are not undemanding. He must pay heed to industrial practice requirements imposed by his own contract, his disciplinary rules, the rules of natural justice and comply with various investigative duties.

For present purposes consideration of procedural fairness will be confined to discussing how it interacts with the band of reasonable responses approach.

In *Iceland* the EAT, in a passage subsequently cited and approved by the Court of Appeal in *Neale*, held that s.98(4) did not require Tribunals, in assessing reasonableness, to pose and answer two separate questions – namely was the dismissal substantively fair and was it procedurally fair. The correct approach is to consider substantive and procedural fairness as two parts of the same question – did the employer act reasonably in all the circumstances:

The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

In *Whitbread & Co plc v Mills* [1988] IRLR 501 the EAT (Wood J Presiding) endorsed this approach but stressed that the question of reasonableness required the answering of various questions relating to procedural fairness. The facts will be outlined in the next chapter. For present purposes it is sufficient to make reference to the following passage in the judgement:

This question [i.e. the question posed by s.98(4)] must be considered as a single question, but Tribunals are always encouraged to be logical in their approach and in their reasons, and therefore they are bound in their deliberations to pose to themselves a number of subsidiary questions

In particular the EAT highlighted the importance of the questions posed by the House of Lords in *Polkey v A E Drayton Services* [1987] IRLR 503.

Their Lordships found that as a general rule failure to follow an applicable procedure, including the employer’s own or those provided by the ACAS Code of Practice, renders a dismissal unfair. The exception to this rule is when the employer acts reasonably in failing to implement the procedure. In the present case the Tribunal had erred in failing to adopt the approach and thus the matter was remitted. The facts of the case and the principles laid down by their Lordships will be discussed in greater detail in Ch. 7. For present purposes we are concerned with the interaction between the principle in *Polkey* and the band of reasonable responses approach. The Court of Appeal grappled with these questions in *Whitbread plc v Hall* [2001] EWCA Civ 268.

Mr Hall was a hotel manager. He had received several warnings relating to stock control problems. His area manager noted that the food margin on the profit and loss account was lower than expected. Mr Hall admitted to filling out the end of month food summary whilst he was on holiday which resulted on the closing stock figures being false. The area manager initiated and conducted the subsequent investigation. This culminated in a disciplinary meeting. After the meeting he was dismissed summarily. This was despite the employer’s own procedure providing that whilst failure to improve, after a warning, will usually lead to dismissal this is not necessarily always the case. His internal appeal was unsuccessful. Giving evidence before the Tribunal the area manager admitted that she had decided to dismiss Mr Hall before convening the hearing.

The Court of Appeal upheld the Tribunal’s finding that the dismissal was unfair. Hale LJ (as she was then) approved the Tribunal’s finding that the employers “had reasonable grounds” for their “genuine belief” in respect of Mr Hall’s conduct. She went on to find that the effect of *Polkey* was that there is “a procedural as well as a substantive element in the band of reasonable responses open to employer faced with such

misconduct". In these circumstances it was irrelevant that Mr Hall's misconduct may have been serious and that he had admitted as much. This did not release the employers from their procedural responsibilities. Thus the case provides that the band of reasonable responses approach, in so far as it lays down that the standard of reasonableness is that of the hypothetical reasonable employer, applies to the procedures the employers follows as well as to the substantive decision to dismiss. The case further provides that this minimum standard is not necessarily undemanding as a procedural flaw can render a dismissal unfair even when the employer has a genuine and reasonable belief in respect of the circumstances giving rise to the decision to dismiss.

The scope of the band of reasonable responses approach

The band of reasonable responses approach does not just apply to the substantive merits and procedural fairness. It also applies to matters relating to the reasonableness of the employer's state of mind. In misconduct and capability cases the employer is not required to actually prove the factual basis of the decision to dismiss. In capability cases it is sufficient that he genuinely and reasonably believes that the employee is incapable (see Lord Denning MR's judgement in *Alidair Ltd v Taylor* [1978] IRLR 82 – discussed in Ch. 10). Similarly, in misconduct cases the employer does not have to prove that the employer was actually guilty of the misconduct for which he was dismissed. It suffices that he genuinely and reasonably believed this to be the case and, in forming this belief, carried out as much investigation as was reasonable in all the circumstances (see the decision of the EAT (Arnold J Presiding) in *British Home Stores v Burchell* [1978] IRLR 379 – discussed in Ch. 7).

In *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 the Court of Appeal, in reference to *Burchell*, held that the band of reasonable response approach is the applicable approach to determining reasonableness. Mr Hitt worked in the bakery near the health and beauty aisle. One of Mr Hitt's colleagues reported that a box of razor blades she had hidden, in the aisle, had gone missing. They were discovered in Mr Hitt's locker. He claimed that they must have been planted. It was established that the bakery manager had keys to his locker. However, the manager claimed that he had remained in the bakery throughout his shift. It was noted that Mr Hitt had gone to the beauty aisle during his shift and thus had the opportunity to take the razor blades. The Court of Appeal was satisfied that the dismissal was fair and that the procedure in question, namely the employer's investigation, was fair.

Mummery LJ made it clear that the band of reasonable responses test is the test to be applied in respect both of procedural fairness, under *Polkey*, and investigative procedures, under *Burchell*:

the range of reasonable responses approach applies to the conduct of the investigations, in order to determine whether they are reasonable in all the circumstances, as much as it applies to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason

The matter has yet to be authoritatively determined in respect of the application of the principle in *Alidair*. However, it is submitted that it would be surprising if the same approach did not apply. Furthermore, support for this proposition can be found in the following words of the EAT in *Cook v Thomas Linnell & Sons Ltd* [1977] ICR 770, cited above, which clearly elude to the objective standards of the reasonable employer: "*such imponderables as the quality of management...in the last resort can only be judged by those competent in the field*".

The apparent effect of *Hitt* is that the employer, in failing to implement or fully comply with the applicable procedure or carry out a fuller investigation, will only act unreasonably if the failure to implement or fully comply with the procedure or

investigation fell outside the band of reasonable responses open to the reasonable employer. Similarly, *Hitt* also provides that the employer's belief is only unreasonable if no reasonable employer in the circumstances could have formed the same belief.

However, this brings us back to and underlines the uncertainty in the law posed by the seemingly conflicting approaches in *Watling/Gilham* and *British Leyland/Iceland*. If *Watling/Gilham* are good law and, for reasons already discussed above, it is repeated that it cannot be easily concluded that they are not, then the test for procedural fairness is simply did the employer reasonably take the view that failure to adopt the procedure would have been futile. Here the band of reasonable responses is not dispensed with but serves as no more than a reminder that different reasonable employers might have responded in different ways. *Hitt* makes it unclear whether this is the correct approach in respect of procedural fairness.

Since *Hitt* the authorities have persistently stressed the all embracing nature and scope of the band of reasonable responses approach. It applies as regards the reasonableness of the employer's approach to the appraisal of the evidence that led him to dismiss (*Porter v Oakbank School* [2004] ScotCS 70 – discussed in Ch. 7). It applies to the employer's duty to disclose the evidence he relies upon to the employee (*Surrey County Council v Henderson* [2005] UKEAT/0326/05 – discussed in Ch. 8). It applies to the reasonableness of the employer's findings of primary fact (*ASDA Stores Limited v Malyn* [2001] ALL ER (D) 419 – discussed in Ch. 10). It applies to the question of whether the employer acted reasonably in categorising the employee's conduct as gross misconduct (*London Borough of Hillingdon v Thomas* [2002] UKEAT/1317/01 – discussed in Ch. 10). In brief every question that s.98(4) gives rise to is resolved in accordance with the band of reasonable responses approach.

Reasonableness and the ACAS Arbitration Scheme (Great Britain) Order 2004

The ACAS Arbitration Scheme (Great Britain) Order 2004 suggests that the band of reasonable responses test is not the correct approach at all. The order provides an alternative means of resolving complaints of unfair dismissal. Rather than cross swords before an Employment Tribunal the parties can agree to have the matter determined by an Independent ACAS arbitrator. Para.17 of the order provides: "*In deciding whether the dismissal was fair or unfair, the arbitrator shall: (i) have regard to general principles of fairness and good conduct in employment relations (including, for example, principles referred to in any relevant ACAS "Disciplinary and Grievance Procedures" Code of Practice or "Discipline and Grievances at Work" handbook instead of applying legal tests or rules (e.g. court decisions or legislation); (ii) apply EC law. The arbitrator shall not determine the case by substituting what he or she would have done for the actions taken by the Employer*".

In so far as it provides that the Arbitrator shall not substitute what he or she would have done for the actions taken by the employer the paragraph is consistent with the jurisprudence on s.98(4). However, its explicit instruction to the Arbitrator not to apply legal tests or rules contained in case law makes it clear that the Arbitrator must not adopt the band of reasonable responses approach. Instead the issue of fairness is to be resolved by reference to ordinary principles of fairness, good conduct in employment relations and, in applying these principles, particular weight is to be attached to the ACAS Code of Practice. As the order is enacted by Parliament it is arguable that it provides a valuable insight into how Parliament intended the reasonableness test, contained in s.98(4), to be applied. Nevertheless, the impact that the order has on the construction of s.98(4) remains to be tested.

Conclusions

The reasonableness test is unclear. It is unclear to what extent the band of reasonable responses test is the operative test or merely a guideline. It is unclear to what extent, if indeed at all, Tribunals should apply the ordinary meaning of the words of s.98(4) without reference to the band of reasonable responses. It is equally unclear to what extent the requirements of procedural fairness impact on the band of reasonable responses. The remainder of our consideration of unfair dismissal, under s.98(4), shall be concerned with the application of the principles of reasonableness, outlined in this chapter, in the more specific contexts of the different potentially fair reasons for dismissal and the employer's various procedural duties. However, before this is done it is convenient to set out when the both reason for and the reasonableness of the dismissal are determined.